



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
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IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case number: CA&R 38/2023
Date received: 24 August 2023

In the matter of:-

THE STATE

Applicant

and

JAMES POKOLA

Respondent

CORAM: MAMOSEBO J ET STANTON J

JUDGMENT ON SPECIAL REVIEW

Stanton J

INTRODUCTION:-

- [1] This matter was sent on review in terms of section 302(1)(a) of the Criminal Procedure Act, Act 51 of 1977 (“the CPA”) by Mrs R Terblanché, the Acting Chief Magistrate, Kimberley, with a request that this Court should consider whether the proceedings were conducted in accordance with justice. The Acting Chief Magistrate’s referral, in the first instance, pertained to the procedure followed pursuant to the plea and sentencing agreement in terms of section 105A of the CPA and secondly, the condition imposed in respect of the sentence.
- [2] The accused appeared in the Kimberley Magistrates Court on two charges, namely: Count 1 – Fraud, read with the provisions of section 51(2) of the Criminal Law Amendment Act, Act 105 of 1997 and Count 2 – Contravention of section 49(1)(a) of the Immigration Act, Act 13 of 2002 (“the Immigration Act”).
- [3] The State and the accused entered into a plea and sentencing agreement as contemplated in section 105A of the CPA. In terms of the said agreement, the accused agreed to plead guilty to the two offences set out above and that he would be sentenced in respect of Count 1 to pay a fine of R3,000.00 or nine months’ imprisonment, wholly suspended for a period of five years. In respect of Count 2, the accused agreed that he would be sentenced to pay a fine of R2,000.00 or six months’ imprisonment, wholly suspended for a period of three years.
- [4] The matter came before Magistrate Mbetane who convicted the accused on counts 1 and 2. The record reflects that thereafter the Magistrate enquired from Mr Mzuzu, the accused’s legal representative, whether he retains a discretion on the sentences to

be imposed. Mr Mzuzu confirmed that he did, on condition that if the sentence to be imposed is in excess of the agreed sentence in the plea and sentencing agreement, the accused must be informed and granted the opportunity to withdraw from the plea and sentencing agreement. The record furthermore reflects that the Magistrate agreed to meet with Mr Mzuzu and the prosecutor in chambers. Thereafter the court adjourned the proceedings for approximately an hour. After the adjournment, the proceedings resumed and without any further intervening steps, the Magistrate proceeded to deliver a judgment on sentence.

[5] The accused was then sentenced in respect of both Counts 1 and 2, which the Magistrate took together for purposes of sentencing, to one year imprisonment, wholly suspended for a period of five years, on condition that the accused is not convicted of fraud committed during the period of suspension.

[6] It is not reflected on the record what transpired in chambers or who were present during the discussions. The following remarks by the Magistrate, subsequent to adjournment are, however, on record:-

“The honourable Mr Mzuzu being your representative, represented you well. I fully trust him as I just consulted with him before I pronounce what I am going to be saying...” and “I am giving you only one year imprisonment. There is no fine. [Speaking vernacular] informed then that you do not have funds to pay.”

[7] The process and sequence to be followed is illustrated by the provisions of sub-sections 105A(7)(a), 105A(8) and 105A(9)(a) to 105A(9)(d) of the CPA, which read as follows:

“105A(7)(a) If the court is satisfied that the accused admits the allegations in the charge and that he or she is guilty of the offence in respect of which the agreement was entered into, the court shall proceed to consider the sentence agreement.

105A(8) *If the court is satisfied that the sentence agreement is just, the court shall inform the prosecutor and the accused that the court is so satisfied, whereupon the court shall convict the accused of the offence charged and sentence the accused in accordance with the sentence agreement.*

105A(9)(a) *If the court is of the opinion that the sentence agreement is unjust, the court shall inform the prosecutor and the accused of the sentence which it considers just.*

105A(9)(b) *Upon being informed of the sentence which the court considers just, the prosecutor and the accused may -*

- (i) *abide by the agreement with reference to the charge and inform the court that, subject to the right to lead evidence and to present argument relevant to sentencing, the court may proceed with the imposition of sentence; or*
- (ii) *withdraw from the agreement."*

105A(9)(c) *If the prosecutor and the accused abide by the agreement as contemplated in paragraph (b)(i), the court shall convict the accused of the offence charged and impose the sentence which it considers just.*

105A(9)(d) *If the prosecutor or the accused withdraws from the agreement as contemplated in paragraph (b)(ii), the trial shall start de novo before another presiding officer: Provided that the accused may waive his or her right to be tried by another presiding officer."*

[8] The purpose of the plea and sentencing agreement contemplated by section 105A of the CPA has been succinctly stated by Gamble J in the matter of **S v Phillips**¹ as follows:

"The purpose of the plea-bargaining process therefore is not only to enable the state to dispose of a criminal prosecution speedily and without incurring the expense and the delay of a trial, but to provide the accused person with a guarantee that the sentence bargained for will be imposed. This is because, in terms of the provisions of s 105A(9)(b)(ii), the accused (or, for that matter the state) is permitted to withdraw from the agreement if the court is not prepared to sanction the sentence which the parties have agreed to." (references omitted)

¹[2018 \(1\) SACR 284](#) (WCC) at para [41].

[9] The above sub-sections of section 105A illustrate that it is only after the guilt of the accused has been established and an agreed sentence is accepted, or failing such acceptance by the trial court, that both the accused and the state agree to be bound by the court's assessment of an appropriate sentence that a conviction and sentence can follow.

[10] The Court in the **Assegai v S**² explained:-

“The agreement on the plea and the sentence is a package deal and the sentence part of such package deal can only be departed from on due and proper compliance with the provisions of sub-section 105A(9), which in essence requires the buy-in of both the accused and the state if the sentence part of the package deal is to be departed from.

Clearly then, when a plea and sentence agreement contemplated in section 105A of the CPA is relied upon a conviction cannot take place without the simultaneous imposition of the agreed sentence. If the relevant court considers the agreed sentence to be unjust the court must follow the provisions of sub-section 105A(9), which in essence allows both the state and the accused to resile from the agreement or exercise informed consent to be bound by the court's assessment of what is a just sentence.”

[11] The trial court first convicted the accused on the strength of his plea and admissions. Thereafter it adjourned and proceeded to give a judgment on sentence without following the process stipulated in section 105A(9) of the CPA. On a perusal of the record, the Magistrate failed to:-

11.1 Advise the prosecutor or the accused that it considered the agreed sentence unjust;

11.2 Advise the prosecutor or the accused what it considered to be a just sentence; and

²(K/S 7/2020) [2023] ZANHC 2 (20 January 2023) at paragraphs 12 – 13.

11.3 Afford the prosecutor or the accused the opportunity to withdraw from the agreement so that the trial can be commenced *de novo* before a different presiding officer.

[12] Because of this irregularity, it cannot be said that the proceedings were in accordance with justice. The magistrate, as a creature of statute, is duty bound to follow all the procedural requirements of section 105A, which includes section 105A(9)(a).

[13] The Full Court in the matter of ***S v Leshaba, S v Mahlangu and S v Mamele***³ stated that it is inadvisable to take certain offences together for sentencing if the offences are separate, different and independent offences. The ratio being that “*sight will then not be lost of the relative importance of each of the convictions*”. In *casu*, the suspension of the imposed sentence does not include the second count of contravening section 49(1)(a) of the Immigration Act. In my view, this omission does not render the process unjust, but it stands to be corrected.

[14] The appropriate remedy in the circumstances is to nullify the proceedings and to set the conviction and sentence aside.

[15] In the result, the following order is made:

1. The conviction and sentence imposed by the magistrate on 18 May 2023 is reviewed and set aside; and

2. The Registrar of this Court is directed to furnish a copy of this judgment to Mrs R Terblanché, the Acting Chief Magistrate and the Judicial Head: Administrative Region (Northern Cape) for her records.

³ 1968 (4) SA 576 (T) at page 583H-584D.

STANTON, J
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

I agree.

MAMOSEBO, J
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION