THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case Nos: 20043/2014 & 229/2014

In the matter between:

DENISE CINDY-LEE JANSEN **FIRST APPELLANT**

MARCO RUDOLF BARNARD **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Jansen v The State* (20043/14 & 229/14) [2015] ZASCA 151 (2 October 2015)

Coram: Maya DP, Theron and Mathopo JJA

Heard: **9 September 2015**

Delivered: **2 October 2015**

Summary: Criminal Procedure ─ Plea and sentence agreements in terms of s 105A of the Criminal Procedure Act 51 of 1977 ─ trial court erred in imposing a sentence contrary to that contained in the plea agreements without advising the State and the accused that it was of the opinion that the proposed sentence was unjust as contemplated in s 105A(9) of the Act.

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ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Webster J sitting as court of first instance):

1. The appeal is upheld.

2. The convictions and sentences are set aside.

3. The matter is remitted to the Gauteng Division of the High Court, Pretoria for trial *de novo* before another judge.

JUDGMENT

Mathopo JA (Maya DP and Theron JA concurring):

[1] The question for determination in this appeal is whether a trial court may deviate from a plea and sentence agreement presented to it in terms of s 105A of the Criminal Procedure Act 51 of 1977 (the Act), without advising the parties that it was of the opinion that the proposed sentence is unjust.

[2] In the Gauteng Division of the High Court, Pretoria (Webster J), the first appellant, Ms Denise Cindy-Lee Jansen (Ms Jansen), pleaded guilty to charges of murder and child abuse in terms of s 305(3)(A) read with ss 1 and 305(6) of the Children's Act 38 of 2005, the Children's Act (child abuse or neglect). The second appellant, Mr Marco Rudolf Barnard (Mr Barnard), pleaded guilty to culpable homicide. These pleas were in terms of their plea and sentence agreements concluded with the State (the agreements). Attached to the agreements were the plea explanations which fully set out the factual and legal bases of the said pleas. Other documents forming part of the agreements were

the post mortem report and relevant information relating to the appellants' mitigating and aggravating factors.

[3] It is necessary to briefly set out the relevant background, which was undisputed, leading to the charges being preferred against the appellants. On 4 March 2014 the appellants, who lived together as husband and wife and were legally represented, were arraigned in the high court, inter alia, on the charges mentioned above. They were alleged to have assaulted Ms Jansen's two minor children from a previous relationship, five year old A. J. (deceased) and his older brother S. E., on numerous occasions, and subsequently causing A.'s death. The assaults were, inter alia, committed by hitting the children with various objects including a belt, wooden stick, by burning them with cigarettes. They were also alleged to have failed to provide them with proper food and medical care. The deceased had also been locked indoors for prolonged periods.

[4] In terms of the agreement, Ms Jansen agreed to be sentenced to 18 years' imprisonment for count 1 (murder) and 3 years' imprisonment in respect of count 2 (child abuse). The sentences would be served concurrently with the result that she would serve an effective sentence of 18 years' imprisonment. Barnard agreed to be sentenced to 12 years' imprisonment for culpable homicide, conditionally suspended for five years.

[5] At the beginning of the trial, the prosecutor, acting in terms of s 105A(4)*(a)*,[1] informed the judge that the State and the defence had concluded plea and sentence agreements. The prosecutor advised the court that the formal requirements placed upon the State in terms of the Act, had been complied with. These requirements included consultation with the investigating officer and the

[1] Section 105A(4)*(a)* reads:
'The prosecutor shall, before the accused is required to plead, inform the court that an agreement contemplated in subsection (1) has been entered into and the court shall then─
(i) Require the accused to confirm that such an agreement has been entered into; and
(ii) Satisfy itself that the requirements of subsection (1)*(b)*(i) and (iii) have been complied with.'

family of the deceased and the protection of the appellants' constitutional rights to a fair trial. In particular, he advised the court that the appellants' rights to remain silent, to be presumed innocent and not give incriminating evidence were safeguarded.

[6] The prosecutor then read the contents of the agreements into the record. Thereafter, the charges were put to each appellant. The prosecutor explained to the court that four of the charges against the first appellant were being withdrawn with the result that she was only facing the charges of murder and child abuse. The court was advised that the State only intended proceeding with the charge of child abuse against the second appellant. The court then put questions to the appellants in order to ascertain whether they understood the charges against them and the contents of the agreements and that they had entered into the agreements freely and voluntarily. After confirming their pleas, the trial judge handed down a brief judgment in terms of which he convicted the appellants in accordance with the agreements.

[7] Counsel for the State and the appellants addressed the court in respect of sentence. They both submitted that the sentences proposed in the agreements were just and urged the court to impose such sentences. It appears from the record that the judge indicated he needed time to consider an appropriate sentence as 'this is a very serious offence and one which has resulted in the loss of a very young life'. The matter was adjourned, at the instance of the judge, to 6 March 2014.

[8] On 6 March 2014, the court delivered its judgment on sentence. In this judgment the court had regard to the nature of the offences, stating that these crimes would 'shock society'. The court also noted the purpose of sentence and that 'the court has to determine what the appropriate sentence is'. The court

expressed the view that it 'is as a rule not bound by' pleas and sentence agreements and:

'In determining an appropriate sentence the court has to take into account . . . the personal circumstances of the accused. The court must take into account the gravity of the sentence and interests of society. The court is of the considered view that the agreed sentence will be considered as being extremely light by the majority of the members of society.'

[9] Contrary to the sentences proposed in the agreements the trial court imposed the following sentences on Ms Jansen:

Counts 1 and 2 were taken together for purposes of sentence. She was sentenced to fifteen (15) years imprisonment of which three (3) years are suspended for a period of five (5) years on condition that she is not convicted of a crime of which violence is an element.

Mr Barnard was sentenced to fifteen (15) years imprisonment of which three (3) years were suspended for a period of five (5) years on condition that he is not convicted of a crime of which violence is an element.

[10] The sentences imposed by the trial judge differed materially from those proposed by the parties. Ms Jansen would receive an effective six years' imprisonment less than what was proposed. On the other hand, Mr Barnard would receive an effective sentence of two years' imprisonment more than what was proposed in the agreement.

[11] Dissatisfied with this, the appellants applied for leave to appeal from the trial judge. The State also applied for the reservation of a question of law in terms of s 319 of the Act in the following terms:

'Was it permissible for the trial court, in dealing with a section 105A of Act 51 of 1997 plea and sentence agreement, to proceed to impose sentences differing from the sentences proposed by the prosecution and the defence in the written agreement, without informing the prosecution and the defence that the court is of the view that the proposed sentence is unjust as contemplated in section 105A(9)*(a)* of Act 51 of 1997.'

[12] The trial judge granted leave to appeal to this court and reserved the question of law for decision on appeal. The present appeal is in essence confined to the question of law thus reserved.

[13] Before us it was contended on behalf of both sides that the trial court committed a number of fundamental irregularities. He failed to comply with the provisions of s 105A(9)*(a)* by not informing the parties that he was of the view that the sentence agreements were unjust, and neglected to inform them of the sentences which he considered just.

[14] Counsel for the State submitted that the trial court should first have determined whether the sentences they proposed were just before convicting the appellants. Failure to do so, so it was argued, resulted in the parties not being able to exercise their options in terms of s 105A(9)*(b)*.

[15] The parties differed only in respect of the remedy which this court should grant. The State contended that we have enough material before us to impose sentence. It was argued, inter alia, that the appellants would be prejudiced if the matter starts *de novo* whilst the appellants sought a remittal of the matter to the trial court to afford them an opportunity to commence proceedings *de novo*.

[16] The purpose of the plea bargaining process is to afford the parties, in advance, an opportunity to make an informed decision regarding whether to agree to and abide by the agreement. This process entails consultation with all the people involved in the offence, the accused, the complainant, the victim and stakeholders which the prosecution deem relevant for the proper determination of the sentence. Evidently, once plea negotiations are entered into and, in the spirit of transparency, the accused will make his defence known to the State which will, in turn, make available the contents of its dockets to the accused. In that way both parties will have a fair idea of each other’s case. The negotiations

are conducted in the spirit of give and take the accused will make certain concessions and if the State is satisfied with his explanation, it will then accept the negotiated plea on the basis of the available facts. There is no doubt that a properly negotiated plea will yield a result which is transparent to all the stakeholders and one that is in the interests of justice.

[17] It is in the interests of justice that the plea bargaining mechanism contemplated in s 105A(1) should be encouraged. See *S v Esterhuizen & others*.[2] In *S v Saasin & others*[3] Majiedt J had occasion to pronounce on the purpose of this legislation. He said:

'This particular provision has as its objective victim participation in the plea bargaining process. To my mind this is an absolutely essential cog in the machinery of plea bargaining and plea agreements ─ it lends legitimacy and credibility to the process. As Du Toit *et al*, Commentary on the Criminal Procedure Act, correctly observe at 15-11, it not only accommodates the personal interests of the victim, but also serves the broader interests of the criminal justice system and society. The following view expressed by Bekker in 1996 CILSA 168 at 209 is apposite:

"The other interests advanced by giving the victim a right to participate in the plea bargain are society's interests. Society benefits from victim participation in plea bargains in two ways. The first is that according to the victim the right to participate will result in more information being provided to the decision-maker. The second benefit which accrues to society from victim participation in plea bargains is that it promotes the effective functioning of the criminal justice system. The theory is that if victims are not consulted regarding the plea bargain and so feel irrelevant and alienated, they will not cooperate in reporting and prosecuting a crime. As a result, the system, which is dependent on them, functions less effectively. Therefore, making victims feel their contribution is critical, regardless of its actual value, will motivate the victim to continue to report crime and cooperate in its investigation and prosecution."

Affording victims a say in the plea bargaining process furthermore enhances transparency and lends credence to the adage that justice must manifestly be seen to be done.'

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[2] *S v Esterhuizen & others* 2005 (1) SACR 490 (T).
[3] *S v Saasin & others* [2003] ZANCHC 44 para 11.4.

[18] Where a court is of the opinion that the sentence is unjust, ss 9*(a)* and *(b)* of the Act are triggered. The provision of s 105A(9)*(a)-(d)* of the Act read as follows:

'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.

(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.

(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.

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

[19] Under this provision the parties have an election. The court must first inform the prosecutor and the accused of the sentence that it considers just. Upon being informed of the sentence which the court considers just, both parties may decide to abide by the agreement subject to the right to lead evidence and to present argument relevant to sentencing or withdraw from the agreement. If both parties decide to abide by the agreement after being advised by the trial court that it intends imposing a different sentence to the one agreed upon, the court will be at large to impose a sentence which it considers just. In that event the parties cannot then complain that they have been prejudiced because they would have been given adequate notice. As soon as the trial judge formed the view that the sentences proposed in the plea agreements were unjust, he should have so informed the parties and also of the sentence he considered just, at the outset of the trial. This would have afforded them an opportunity to consider their options. This is especially so because after convicting them, there

is nothing that they could do save to appeal the decision. They were thus denied the option of making an informed choice.

[20] This approach is clearly contrary to the objectives of the Act. In *S v Solomons*[4] para 11, Moosa J held as follows:

'The purpose of making such information known is to enable the parties to make an informed choice whether to abide by the plea-bargaining process or to resile therefrom. The failure on the part of the presiding officer to do so, in my view, constituted non-compliance with the peremptory provisions of subsection 105A(9)*(a).*'

For all the abovementioned reasons the appeal must be upheld and the answer to the question of law is that the high court was wrong as indicated above.

[21] The question that I now turn to, as mentioned in para 15 above, is whether the above misdirection constituted vitiating irregularity warranting that this court should set aside the proceedings and order a retrial or implement the original agreement between the parties. Counsel for the State urged us to follow the latter course. He submitted that a retrial would prejudice the appellants as they would lose their privileges as sentenced prisoners. Furthermore, that the family of the deceased would also be prejudiced because they would have to attend the new proceedings. In the alternative he argued that since the appellants are only attacking the sentences imposed, this court can invoke the provisions of s 322(1) of the Act[5] and substitute the order of the high court on appeal for the plea and sentence agreements. I do not agree.

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[4] *S v Solomons* 2005 (2) SACR 432 (C) para 11.

[5] It provides:

'**322 Powers of court of appeal**

(1) In the case of an appeal against a conviction or of any question of law reserved, the court of appeal may-

(a) allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice; or

(b) give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial; or

(c) make such other order as justice may require: Provided that, notwithstanding that the court of appeal is of opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect.'

[22] The provisions of s 105A(6)*(a)* of the Act are clear and peremptory. The section states that the court shall question the accused to establish whether:

'(i) he or she confirms the terms of the agreement and the admissions made by him or her in the agreement;

(ii) with reference to the alleged facts of the case, he or she admits the allegations in the charge to which he or she has agreed to plead guilty; and

(iii) the agreement was entered into freely and voluntarily in his or her sound and sober senses and without having been unduly influenced.'

A trial court is best suited to determine whether or not an accused admits the correctness of the charge and any allegations contained therein. This process includes ensuring that the accused understands the charge he is facing and that he entered into the agreement freely and voluntarily whilst in his sound and sober senses. This obviously necessitates the leading of evidence which cannot be done by the appellate court. Accordingly the submission that remitting the matter to the high court will cause delay and prejudice to the appellants and family members cannot prevail. The matter should be remitted to the trial court *de novo* before another presiding officer.

[23] I therefore make the following order:

1. The appeal is upheld.
2. The convictions and sentences are set aside.
3. The matter is remitted to the Gauteng Division of the High Court, Pretoria for trial *de novo* before another judge.

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R S Mathopo
Judge of Appeal

Appearances

For Appellant:	L A van Wyk
	Instructed by:
	Combrink Kgatshe Inc, Rustenburg
	Symington & De Kok, Bloemfontein
For Respondent:	P W Coetzer
	Instructed by:
	Director of Public Prosecutions, Pretoria
	Director of Public Prosecutions, Bloemfontein