THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 191/2019

In the matter between:

MOAMOGOE, OFENTSE LOFENTSE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Moamogoe v The State* (191/2019) [2020] ZASCA 106 (18 September 2020)

Coram: SALDULKER, MBHA, VAN DER MERWE and SCHIPPERS JJA and MABINDLA-BOQWANA AJA

Heard: The parties agreed that the appeal may be disposed of without the hearing of oral argument in terms of s 19*(a)* of the Superior Courts Act 10 of 2013.

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date for hand-down is deemed to be 18 day of September 2020.

Summary: Criminal law and procedure – appeal against sentence imposed in terms of a plea and sentence agreement in terms of s 105A of the Criminal Procedure Act 51 of 1977 – whether plea and sentence agreement correctly reflected what had been agreed – can in the circumstances only properly be challenged in a review application and not on appeal – appeal dismissed.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Borchers J sitting as court of first instance):

The appeal is dismissed.

JUDGMENT

Saldulker JA (Mbha, Van Der Merwe and Schippers JJA and Mabindla-Boqwana AJA concurring):

[1] The appellant, Mr Ofentse Lofentse Moamogoe, was indicted in the Gauteng Division of the High Court, Johannesburg (the high court) on the following charges: two counts of robbery with aggravating circumstances (counts 1 and 2), both read with s 51(2) of the Criminal Law Amendment Act 105 of 1997 (the Act); one count of murder (count 3), as read with s 51(1) of the Act; one count of unlawful possession of a firearm (count 4); and one count of unlawful possession of ammunition (count 5).

[2] On 14 November 2011, the appellant entered into a comprehensive plea and sentence agreement (plea agreement) with the State in terms of s 105A(1) of the Criminal Procedure Act 51 of 1977 (the CPA).[1] The plea agreement recorded, inter

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[1] Section 105A of the CPA provides as follows:

'**105A. Plea and sentence agreements**

(1) *(a)* A prosecutor authorised thereto in writing by the National Director of Public Prosecutions and an accused who is legally represented may, before the accused pleads to the charge brought against him or her, negotiate and enter into an agreement in respect of –

(i) a plea of guilty by the accused to the offence charged or to an offence of which he or she may be convicted on the charge; and

(ii) if the accused is convicted of the offence to which he or she has agreed to plead guilty –

(aa) a just sentence to be imposed by the court; or

(bb) the postponement of the passing of sentence in terms of s 297(1)*(a)*; or

(cc) a just sentence to be imposed by the court, of which the operation of the whole or any part thereof is to be suspended in terms of s 297(1)*(b)*; and

. . . .

(b) The prosecutor may enter into an agreement contemplated in paragraph *(a)* –

(i) after consultation with the person charged with the investigation of the case;

(ii) with due regard to at least the –

alia, that the Deputy Director of Public Prosecutions of the high court (the DPP), and the appellant, who was represented by an attorney and counsel, had negotiated and entered into the plea agreement, which involved a plea of guilty to be tendered by the appellant in respect of certain offences of which he may be convicted based on the charges, as well as the just sentences for such offences to be imposed by the high court. The plea agreement was signed by the appellant, his counsel and the DPP.

[3] In terms of the plea agreement, the appellant pleaded guilty on counts 2 and 3. The agreed sentence was recorded as follows:

'22.1 Counts 2 and 3 are taken together for the purpose of sentence. The [appellant] is sentenced to 25 years' imprisonment of which 5 years' imprisonment is suspended for 5 years on the following conditions:

22.1.1 That the [appellant] is not found guilty of murder or robbery or any attempt to commit robbery or murder within the period of suspension; and

22.1.2 That the [appellant] testify as a state witness in the criminal matter of his co-perpetrators under case number….

22.2 *It is agreed that 10 years of the remaining 20 years' imprisonment will run concurrently with the 10 years' imprisonment imposed by the Regional Court, Randburg on 12 July 2011 as is provided for in Section 280(2) of the Criminal Procedure Act, 51 of 1977;*

22.3 *The effective sentence agreed to is therefore 10 years' imprisonment.'* (My emphasis.)

[4] The matter came before Borchers J. During the proceedings the appellant was asked to confirm the terms of the plea agreement, which he did. The transcript of the court proceedings reads as follows:

'Court: Mr Moamogoe you have no doubt been through the document which you have just signed where there were changes is that correct?

(aa) nature of and circumstances relating to the offence;
(bb) personal circumstances of the accused;
(cc) previous convictions of the accused, if any; and
(dd) interests of the community. . . .

. . . .

(6) *(a)* After the contents of the agreement have been disclosed, the court shall question the accused to ascertain 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.'

[Appellant]: Yes your lady.
Court: Do you confirm the terms of this agreement and the admissions that you have made in it?
[Appellant]: Yes M'Lady.
Court: Do you admit the allegations to the charge that you have just had read to you and to which you pleaded guilty?
[Appellant]: Yes M'Lady.'

[5] Thereafter, Borchers J convicted and sentenced the appellant in accordance with the terms of the plea agreement as follows:
'Counts 2 and 3, are taken together for the purposes of sentence. You are sentenced to 25 years' imprisonment, of which five years' imprisonment is suspended for five years on the following conditions:

1. *That you are not found guilty of murder or robbery or any attempt to commit murder or robbery committed within the period of suspension, namely five years; and*
2. *That you testify as a state witness in the criminal matters in which your co-perpetrators are to be charged.*

I note that it is agreed that ten years of the effective 20 years' imprisonment will run concurrently with the ten years' imprisonment imposed in another matter by the Regional Court Randburg on 12 July 2011, as provided for in section 280(2) of the Criminal Procedure Act, and I note further that the effective sentence of imprisonment in this case today is thus one of ten years' imprisonment.' (My emphasis.)

[6] Subsequent to his conviction and sentence, the appellant applied for leave to appeal against sentence. In his affidavit in support of the application, the appellant exhibited a clear understanding that he had been sentenced by the high court to ten years' imprisonment in addition to the ten year sentence imposed by the regional court. He declared that the sentence in accordance with the plea agreement was as follows:
'Counts 2 and 3 were taken together for the purpose of sentence. I was sentenced to 25 years['] imprisonment of which 5 years were suspended.
I had been previous[ly] sentenced to 10 years on another matter. 10 years from the 20 years was ordered to run concurrently with the previous 10 year sentence.
My effective sentence was therefore 10 years['] imprisonment. (The Plea Agreement is annexed to the application).'

He continued to say that 'the 20 years I was given was too harsh and induces a sense of shock.' He submitted that a sentence of ten years' imprisonment that runs concurrently with the regional court sentence would be just.

[7] On 24 August 2017, Du Plessis AJ heard and dismissed the application. Aggrieved, the appellant successfully petitioned this Court for special leave to appeal against the sentence.

[8] In his affidavit in support of the application for special leave to appeal to this Court, the appellant changed tack. He alleged, for the first time, that the plea agreement did not accurately reflect the verbal agreement between him and the State. Both the application and the written argument before us were limited to this point. The affidavit stated inter alia, the following:

'**Plea agreement negotiations**

7.1 The [appellant] was legally represented during the 105A plea negotiations.

7.2 . . .

7.3 The Sentence was explained as follows to the [appellant] first by Legal Counsel and then in person by the Prosecution:

7.3.1 He would receive a 25 year sentence for the two counts he plead guilty to as per the plea agreement.

7.3.3 That the sentence would be structured in such a way that 15 years of the 25 years would be suspended and the 10 years remaining would run concurrently with a previous sentence of 10 years. Meaning that the [appellant's] total direct imprisonment for the current matter and the previous matter would be 10 years imprisonment.

7.3.4 The Prosecution specifically even told him that based on the agreement he would be [eligible] for parole in 2016.

What brought about this appeal?

7.1 The [appellant] laboured under the impression that he had been sentenced as was verbally explained to him during the plea negotiations. He did not understand the legal wording on the 105A plea agreement.

7.2 It was only when he inquired with the prison authorities about his parole date that he was shocked to learn that his sentence was actually 10 years direct imprisonment, plus 10 years for a previous case. Meaning that he had an effective sentence of 20 years.

7.3 This meant that what the [appellant] was specifically verbally told in the plea agreement negotiations was different from what was eventually put down on the 105A plea agreement placed before the court.

Proof that the 105A plea agreement [was] an error and did not represent the oral agreement during the plea negotiations.

9.1 Firstly the [appellant] was specifically told in person by the prosecution that the effect of 105A plea agreement would be that the 10 years from this case and the 10 years from my previous case would run concurrently. Meaning that my effective total sentence would be 10 years. The prosecution further told me that I would be [eligible] for parole in 2016. This version was not contested by the Respondent during the leave to appeal application.

9.2 Secondly, during the appeal hearing the Honourable Justice Du Plessis, questioned the Prosecution. (The same prosecutor who conducted the plea negotiations and represented the State during the trial was present at the leave to appeal application).

9.2.1 The prosecution during these questions indicated that they were also under the impression that the sentences ran concurrently and that the [appellant] was to serve a total of 10 years' direct imprisonment for both cases.'

[9] The fundamental question is whether the issue thus raised by the appellant can be dealt with in this appeal or whether the appellant should have brought a review application. In my view, for the reasons that follow, this question must be answered in the negative.

[10] The terms of the plea agreement are clear and were confirmed by the appellant before Borchers J. What the appellant sought to raise in this Court, namely that the plea agreement did not correctly record what had been agreed in respect of sentence, is a matter extraneous to the record. It is trite that an appeal is decided on the record of the proceedings in the lower court. In the absence of an application to adduce further evidence on appeal, this Court is bound by the record. The only possible remedy for the appellant would have been to launch an application for review, setting out these allegations on affidavit, so that the State could have dealt with them under oath. Even

though, prima facie, the belated allegations of the appellant appear to be tenuous, this Court should not deal with them on appeal.[2]

[11] It is, therefore, not possible for this Court to deal with the issue raised by the appellant on appeal, and for these reasons the appeal must be dismissed.

[13] I accordingly make the following order:
The appeal is dismissed.

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H K SALDULKER
JUDGE OF APPEAL

[2] There is authority for the proposition that a plea and sentence agreement under s 105A of the CPA excludes an appeal. In *S v De Koker* 2010 (2) SACR 196 (WCC) it was held that the process under s 105A settles the *lis* between the State and the accused once and for all. However, a contrary view was taken in *S v Armugga and Others* 2005 (2) SACR 259 (N). It is however inappropriate to decide this issue without the benefit of oral argument and we refrain from doing so.

APPEARANCES

For appellant:	W A Karam
Instructed by:	Legal Aid SA, Johannesburg
	Legal Aid SA, Bloemfontein
For respondent:	L Ngodwana
Instructed by:	Director of Public Prosecutions, Johannesburg
	Director of Public Prosecutions, Bloemfontein.