REPORTABLE

THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

High Court Ref. No: 121151

Magistrate's Court Case No: 656/11

Magistrate's Serial No: 4/2012

Regional Court Case No: WS 38/11

In the matters between:

THE STATE

and

MARLON DE GOEDE

Coram:	**SAVAGE, AJ et HENNEY, J**
Judgment:	**SAVAGE, AJ**
Date of hearing:	**NONE**
Date of Judgment:	**30 NOVEMBER 2012**

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REVIEW JUDGMENT DELIVERED ON 30 NOVEMBER 2012

SAVAGE AJ

[1] Two matters currently serve before this court both involving the same accused.

[2] The first matter, under magistrate's court case number 656/11, was referred to this court by way of special review from the magistrate's court at Wolseley in terms of section 304 of Act 51 of 1997. In this matter the 18-year old accused was convicted on 20 March 2012 of the theft of two Blue Stratos sprays with a value of R41,90. On 17 May 2012, following his conviction the accused was committed to a treatment centre established in terms of the provisions of the Prevention and Treatment of Drug Dependency Act 20 of 1992 and was placed under the supervision of a probation officer for a period of 2 years.

[3] The committal of the accused to a treatment centre would ordinarily have been subject to automatic review in terms of section 302 of Act 51 of 1997, read with section 25 of Act 20 of 1992. The magistrate however sent the matter on special review to this court given that effect could not be given to the order in case number 656/11 as a result of the sentence imposed on 10 September 2012 on the accused by the regional court at Wolseley in case number WS38/11.

[4] This court, after having received the first matter, case number 656/11, on special review and having been made aware of the accused's conviction and sentence in the second matter, case number WS38/11, elected to deal with the second matter in accordance with section 304(4) which provides that –

'If in any case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section.'

[5] Given that the proceedings in which the sentence was imposed in the second matter were brought to the attention of this court as opposed to the matter being raised by the accused, this matter is distinguishable from *S v Taylor* 2006 (1) SACR 51 in which a review referred by an accused was permitted in terms of the inherent power of the Constitutional Court, Supreme Court of Appeal and High Court in terms of section 173 of the Constitution "*to protect and regulate their own process, and to develop the common law, taking into account the interests of justice*". The fact that the accused was legally represented and had entered into a plea and sentence agreement with the state does not preclude the provisions of section 304(4) from finding application given that the matter was brought to the notice of this court in the circumstances contemplated in the section.

[6] For this reason, the record of proceedings in the second matter was requested from the regional court at Wolseley. From the record it is apparent that the accused entered into a plea and sentence agreement on 10 September 2012 in respect of a charge of robbery with aggravating circumstances committed prior to the commission of the theft in the first matter, case number 656/11. In this agreement the accused consented to his conviction on one count of robbery with aggravating circumstances during the course of which he assaulted Mr Abraham Coetzee and stole food to the value of R298,45 using a belt and a screwdriver. Consequently, the accused was convicted by the regional court of robbery with aggravating circumstances and was sentenced to an effective five years imprisonment.

[7] Section 105A(2)(b) requires that the agreement be in writing and that it '*state fully the terms of the agreement, the substantial facts of the matter, all other facts relevant to the sentence agreement and any admissions made by the accused*'. In terms of section 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.*'

[8] The plea and sentence agreement signed recorded that the accused had no previous convictions despite the fact that the accused had been convicted in the first matter prior to signature of the agreement. The agreement also made no reference of the fact that the accused had following his conviction in case number 656/11 been committed to a treatment centre for treatment for drug dependency in accordance with the provisions of section 296(1). In the circumstances, given that this fact was not placed before the regional court magistrate it was not considered by the magistrate as a relevant fact in determining whether the sentence agreed to by the parties was just.

[9] Furthermore, whilst the date of commission of the offence in the first matter post-dated the date of commission of the offence in the second matter, a conviction for a crime committed after the crime for which the accused stands to be sentenced in the second matter is indicative of the character of the accused and can therefore be taken into account. (See *R v Zonele & others* 1959 (3) SA 319 (A)). This is in spite of the fact that this conviction is not a previous conviction 'in the true sense of the word' (*S v Qwabe* 2007 (2) SACR 411 (T) at 413d). The relevance of this earlier conviction is that for the court to satisfy itself in accordance with section 105A(8) that the sentence agreement is just, all other facts relevant to the sentence agreement must be stated in such agreement in order to enable the court to apply its mind appropriately to the issue. The earlier conviction of the accused and his committal to a treatment centre, although not strictly a previous conviction given the date of commission of

the offence, constitutes a fact relevant to the sentence agreement in the second matter in that the committal to a treatment centre in the first matter could not be implemented given the subsequent sentence imposed by the regional court. It follows that the practical effect of omitting mention of the prior sentence was that all facts relevant to the sentence agreement were not placed before the magistrate, as a consequence of which the magistrate lacked the relevant material before her to consider whether the sentence agreement was in the circumstances just.

[10] In *S v Sassin and others* [2003] 4 All SA 506 (NC), Majiedt J stated –

> '*It is significant that the legislature has deemed it fit to use the word "just" in respect of the sentence and not the word "appropriate". Du Toit et al, Commentary on the Criminal Procedure Act, express the view (at 15–19) that, in considering whether a proposed sentence is "just" a sentencing court retains its judicial discretion in sentencing, albeit in fettered form. The authors submit that a sentencing court has to exercise its discretion to determine whether the sentence is an appropriate sentence and not whether it is the most appropriate one (ibid). Put differently, a sentencing court is not called upon to agree with the proposed sentence; all it need to consider is whether the sentence is an appropriate one considering the facts and circumstances of the case and taking into account the needs and interests of society in general and the victims in particular, counterbalanced by the personal circumstances of the accused.*'

[11] The test as to whether the proceedings in which a sentence was imposed were just does not focus only on whether the proceedings were technically sound but also whether their practical effect was just. If not, the reviewing court will intervene (*S v Mahlangu* 2000 (2) SACR 210 (T) 211e). The determination as to whether a sentence agreement is just will therefore depend upon the circumstances of each case being directly related to the unique facts of a matter.

[12] The mandatory provisions contained in section 105A provide protection to the accused person who has, by virtue of entering into a plea and sentence agreement, waived his or her rights in terms of section 35(3) of the Constitution to a public trial before an ordinary court and to be presumed innocent in return for agreeing to both plea and sentence. Consequently adherence to the provisions of section 105A provides an appropriate check and balance against the abuse of the plea bargain process in the context of the waiver of the accused's constitutional rights. It follows therefore that where section 105A has not been complied with, the proceedings are susceptible to review (see *S v Solomons* 2005 (2) SACR 432 (C)).

[13] This does not imply that any failure to comply with section 105A in all its intricacies must necessarily result in a successful review. The success or otherwise of a review under section 304 is dependent on the unique facts

placed before a court. Whether proceedings are susceptible to review requires a court to apply its mind to these unique facts within the context of the prevailing statutory provisions. Accordingly, where a sentence agreement does not contain reference to a prior conviction it does not necessarily follow that the sentence agreement is not just. As was stated by Msimang J in *S v Armugga* 2005 (2) SACR 259 at 265 a-d in the context of a plea bargain, '*assumptions are made and mistakes are bound to happen*' but that –

> '*Provided that a party is found to have acted freely and voluntarily, in his or her sound and sober senses and without having been unduly influenced when concluding a plea bargaining agreement, the fact that the assumptions turn out to be false, does not entitle such a party to resile from the agreement.*'

[14] In the circumstances of this matter the presiding regional court magistrate did not have all relevant facts placed before her in order to enable her to determine whether the sentence agreement was a just one. This is so given that the magistrate was unaware that the effect of the sentence agreement was that the prior committal of the accused by the magistrate's court to a treatment centre was not capable of being implemented. It follows therefore that in the absence of all relevant factors being placed before the magistrate, the conviction and sentence in this matter is susceptible to review.

[15] The plea and sentence agreement did not comply with the provisions of section 105A(2)(b) insofar as the magistrate did not have all facts relevant to the sentence agreement before her. As a consequence the magistrate was not able to satisfy herself that the sentence agreement was just. It follows therefore that the conviction and sentence of the accused by the regional court at Wolseley under case number WS 38/11 should be set aside.

[16] In the result, I propose that –

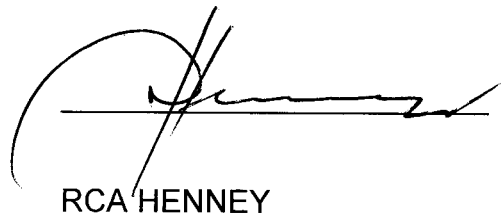
1. The conviction and sentence of the accused imposed by the regional court at Wolseley under case number WS 38/11 is set aside and the matter is referred back to the court *a quo*. The Director of Public Prosecutions may elect to reinstitute proceedings against the accused afresh under case number WS38/11.

2. In terms of the provisions of section 302 of Act 51 of 1997, the proceedings in case number 656/11 are determined to be in accordance with justice and the order of committal of the accused to a treatment centre is to be implemented with immediate effect.

KM SAVAGE

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered



RCA HENNEY

JUDGE OF THE HIGH COURT