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OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

In the High Court of South Africa
(Western Cape Division, Cape Town)

High Court Ref: Case No: 161/2021
Magistrate Serial Number: 07/21
Case Number: SHC171/2020

In the matter between:

THE STATE

And

C[….] A[….]

Delivered electronically: 26 May 2021

JUDGMENT

LEKHULENI AJ

INTRODUCTION

[1] This case comes before me by way of review in terms of section 85 of the Child Justice Act (*"the CJA"*) read with Chapter 30 of the Criminal Procedure Act 51

of 1977 (*"the CPA"*). The accused was 17 years old at the time of the commission of the offence and was 18 years at the time of sentencing. He was convicted on the 09 April 2021 by the Regional Court sitting at Wynberg on a charge of Robbery with Aggravating circumstances. He was legally represented in the court a quo and his conviction followed a plea and sentence agreement in terms of section 105A of the CPA. The court a quo subsequently sentenced him to 5 (five) years imprisonment on condition that he is not convicted of robbery aggravating, robbery or attempted robbery during the period of suspension. In terms of section 103(1)(g) of the Firearms Control Act 60 of 2000, the court deemed the accused unfit to possess a Firearm. This matter is subject to automatic review in terms of the provisions of section 85 of the CJA. Essentially, this court is enjoined to consider whether the proceedings before the court below appear to be in accordance with justice.

[2] The record of proceedings from the court a quo was placed before me on the 05 May 2021. Having perused the record on 06 May 2021, I formed the opinion that the conviction of the accused was in accordance with justice. However, I was concerned with the manner in which the sentence was couched or formulated. I was also concerned with a number of procedural irregularities during the plea and sentence proceedings that the trial court committed which in my view, where not so gross to vitiate the proceedings.

FACTUAL MATRIX

[3] The State alleged that upon or about 19 April 2020 and at or near Baviaanskloof Houtbay, Western Cape the accused did unlawfully and intentionally assault Amanda Bhe by threatening her with a knife and did there with force take

from her a Samsung cellphone valued at R1200, her property or property in her lawful possession. The accused pleaded guilty to the charge in terms of a plea and sentence agreement. In terms of subsection 105A(5) the CPA, the contents of the agreement was disclosed to the court and the substantial facts of the agreement were read into the record.

[4] The facts gleaned from the plea and sentence agreement are that on the 19 April 2020 and at Houtbay, the accused was walking with his friend and they saw the complainant, a young African lady walking alone in Baviaanskloof. The accused ran towards the complainant and demanded that she hand over her cellphone to him. The accused's friend took out a knife and approached the complainant from the back and pointed the knife at the complainant. The complainant noticed the accused's friend standing behind her with the knife and out of fear she handed the cellphone to the accused. After they got the cellphone from the complainant, the accused and his friend ran away. The accused and his friend subsequently sold the cellphone and used the proceeds thereof to buy drugs. The accused admitted that he was acting in concert with his friend when they robbed the complainant. On 13 June 2020 the complainant was driving with the police in their car and she pointed the accused to the police and they arrested him. As a mitigating factor, the trial court was informed that the accused repaid the complainant the sum of R1500 as a replacement value for the phone they robbed her.

[5] On being questioned by the court in terms of subsection 105A (6) whether he admitted the terms of the agreement, the accused confirmed the contents of his statement which was read into the record. The accused was subsequently convicted

as charged. The Probation Officer Ms Mhlahlo compiled a pre-sentence report for the court and alluded to the fact that the accused was a first offender. The Probation Officer recommended that the court should impose a wholly suspended sentence in terms of section 297(1)(b) of the CPA read with section 78 of the CJA. Indeed, in terms of the plea and sentence agreement, the court imposed a sentence of five years' imprisonment which was suspended on usual conditions.

APPLICABLE LEGAL PRINCIPLES AND ANALYSIS

[6] As discussed above, there were a number of irregularities that were observed by this court on the record. For instance, before the accused was required to plead, the prosecutor was obliged under subsection 105A(4)(a) of the CPA to inform the court that an agreement contemplated in subsection (1) was entered into. Pursuant to that information, the court was enjoined to confirm with the accused if indeed such an agreement had been entered into. In this case, the accused appeared and the prosecutor proceeded to put the charge to the accused without informing the court that there was a plea and sentence agreement concluded. The accused was also not asked to confirm whether such an agreement was entered into when the proceedings commenced.

[7] The court had to satisfy itself before the accused could plead whether the prosecutor had complied with the requirements of subsections 105A(4)(a) namely, whether the prosecutor had consulted with the investigating officer with due regard to at least the nature of the offence and the personal circumstance of the accused and with the complainant. The court only inquired from the

prosecutor if he complied with this provision long after the accused had pleaded and after the agreement was long read into the record. The record also shows that after the accused pleaded, the defense attorney proceeded to read into the record the factual admissions of the accused. She did not read or deal with part C of the agreement which dealt with the mitigating and aggravating factors as well as the agreed sentence.

[8] It must be stressed that subsection 105A(4)(a) is peremptory and is also aimed at protecting an accused person against entering blindly and unthinkingly into a plea and sentence agreement. In *State v Nel* (A352/07) [2008] ZAGPHC 43 (28 January 2008) at para 4, Moshidi J, held that section 105A stood on its own and excluded the usual plea arrangements between an accused and the State. The learned justice observed that the prosecution and the courts must strictly comply with the provisions in the section and that a court of appeal will be loath to interfere if the provisions have been complied with unless there are glaring or ascertainable gross irregularities or a violation of the accused's constitutional rights to a fair trial.

[9] The record also reveal that the court below questioned the accused if he admitted the substantial facts read into the record by his legal presentative and the accused confirmed. After questioning the accused in terms of subsection 105A(6)(a), the court was satisfied that the accused admitted all the allegations in the charge and instead of proceeding to consider the sentence agreement in terms of section 105A (7), the court proceeded to convict the accused and then inquired if the accused had previous convictions. The accused did not have previous convictions and the court sentenced the accused in terms of the agreed sentence.

[10] In my view, the provisions of subsections 105A(7)(a) and (8) have to be read together. Once the court is satisfied that the accused admits the allegations levelled against him and that he is guilty of the offence, the court must proceed to consider the sentence agreement in terms of section 105A(7). In contrast to section 112(1)(b) and 112(2) of the CPA, subsection 105A(7) does not require the court to immediately convict the accused after the court is satisfied that the accused admits all the elements in the charge. The court must first consider the sentence agreement before it can convict and sentence the accused. For the sake of completeness, section 105A(7)(a) provides as follows:

> '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.' (the emphasis is mine)

[11] In my view, this subsection is aimed at ensuring that the accused has not pleaded guilty to a charge that he does not understand, or facts that do not disclose the offence charged. Once the court is satisfied that the accused understands the nature and implications of the agreement, the court must consider whether the sentence agreed upon is just. It is not expected at this stage of the proceedings for the court to convict the accused. The court must proceed to consider the sentence agreement without having formally convicted the accused. See *Du Toit et al Commentary on the Criminal Procedure Act* at 15 – 20D. The formal conviction of the accused can only follow where the court is satisfied that the sentence agreement is just in terms of subsection 105A(8) or where the court is on account of the provisions of section 105A(9)(c) is at liberty to impose the sentence which it considers just. See *Du Toit et al Commentary on the Criminal Procedure Act* at 15 –

20E. More importantly, the provisions of subsections 105A(8) and 9(c) are preemptory. (See *S v Knight* 2017 (2) SACR 583 (GP) para 10. In other words, the consideration of sentence must take place before the conviction of the accused.

[12] In considering the sentence agreement in terms of subsection 105A (7), the court may hear submissions in aggravation and mitigation of sentence. The court is further enjoined to consider the triad in determining whether the sentence is just or not. The court may receive such evidence as it thinks fit in order to inform itself that the sentence agreed upon is just and appropriate in terms of section 274 of the CPA. In cases where the Criminal Law Amendment Act 105 of 1997 is applicable in respect of prescribed minimum sentences, the court would have to consider if there are any substantial and compelling circumstances envisaged in section 51(3) of that Act. The determination whether the sentence is *just* essentially remains a matter of judicial discretion which is to be exercised with due regard to all the facts of the case and all relevant principles of sentencing before the court can convict the accused in terms of subsection 105A(8).

[13] Once the court is satisfied that the agreed sentence is just, the court must inform the accused and the prosecutor that the sentence is just and must formally *convict and sentence* the accused in terms of the agreement. Notably, the conviction and the sentence must be done simultaneously in terms of 105A (8). For the sake of brevity, section 105A (8) provides as follows:

> '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, <u>whereupon the court shall convict the accused of the offence charged and sentence the accused in accordance with the sentence agreement.' (the emphasis is mine)</u>

[14] As discussed above, the court a quo did not follow the provisions of section 105A(7) and (8) correctly. It is trite that not all irregularities are fatal and would lead to setting aside of proceedings. It cannot be said that there was a failure of justice in this matter. In my view, the irregularities highlighted above did not vitiate the legality of the proceedings. The accused was legally represented by an attorney. The accused admitted to all the factual elements of the charge. He also confirmed that he pleaded guilty freely and voluntarily and without being unduly influenced. He signed the agreement. The prosecutor and the accused's attorney also signed the agreement. In my opinion, there was substantial compliance with the provision of section 105A. In *S v Ndlovu* 1998 (1) SACR 599 (W) at 601, it was stated that dealing with automatic review proceedings does not require the judge to certify that the proceedings are in accordance with law but in accordance with justice. I am of the view that the conviction of the accused was in accordance with justice.

[15] However, the sentence imposed by the court a quo was not properly formulated. In his response to a query by this court, the presiding magistrate conceded that it was an oversight on his part not to check the wording of the sentence agreement as it was compiled by the state. He requested this court to amend it accordingly. The sentence imposed by the court a quo reads as follows:

> *"The accused is sentenced to five years' direct imprisonment which is wholly suspended for five years on condition that the accused is not convicted of robbery aggravating, robbery or attempted robbery during the period of suspension."*

[16] A sentence imposed by the court can be suspended in whole or in part in terms of section 297(1)(b) of the CPA. The primary aim of a suspended sentence

with negative conditions is to deter the offender from committing similar offences. See *S v Rosscoe* 1990 (2) SACR 125 (W) at 129 A-C. In *S v Koko* 2006 (1) SACR 15 (C) at 21, Van Reenen J, found that the purpose of suspending the whole or any part of a sentence is twofold: The first is to avoid a repetition in the future of a criminal conduct of which an accused has been found guilty and the second is to obviate the deleterious consequences that direct imprisonment may have. The condition that attached to suspension has to be reasonably feasible. It must be made clear to an accused that his conduct during the entire period of suspension is decisive and that a conviction after the period suspension in respect of the specified crimes committed during the period of suspension, will trigger imposition of the suspended portion of the sentence. In other words, the condition of sentence must be precisely formulated in such a way that they do not cause future unfairness or injustice. *S v Titus* 1996 (1) SACR 540 (C). In *S v Bennet; S v Joordaan; Sv Gabriels* 2004 (2) SACR 156 (C) at 161A, Bozalek J held that the conditions of suspension should have some relation to the crime, should be stated with precision and be reasonable.

[17] From the discussion of the authorities above, it is abundantly clear that the conditions of suspension should be worded in such a way that it is the commission of the particular offence that can trigger or precipitate implementation of the order. The condition should clearly stipulate that the accused should not be convicted of a particular offence ‘committed’ during the period of suspension. In this case, the court omitted to include the word ‘committed’ during the period of suspension in its sentence judgment. In my view, this omission is likely to cause prejudice and injustice to the accused in the future if it is not corrected. It is further my considered

view that the addition of the word ‘committed’ during the period of suspension will restrain the accused by means of the threat of implementation of the suspended sentence, from committing robbery, aggravated or attempted robbery during the five years’ period of suspension.

ORDER

[18] In the result, I would propose the following order:

18.1 The sentence imposed by the trial court is hereby corrected to read as follows:

> “The accused is sentenced to five years’ direct imprisonment which is wholly suspended for five years on condition that he accused is not convicted of robbery aggravating, robbery or attempted robbery committed during the period of suspension.”

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LEKHULENI AJ

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered:

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HENNEY J

JUDGE OF THE HIGH COURT