



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

[Reportable]

Review case no.: 279/2021

Regional Court case no.: RCA06/2021

In the matter between:

The State

And

Phatulani Phaphamani Manise

The accused

Review judgment delivered on 30 November 2021

JUDGMENT

Pangarker AJ (Henney J concurring)

Introduction

1. The Regional Magistrate, Khayelitsha referred this matter on special review to the High Court in terms of section 304 (4) of the Criminal Procedure Act 51 of 1977

(the CPA) on the ground that she had in error imposed a sentence of seven years' direct imprisonment pursuant to a plea and sentence agreement in terms of section 105A of the CPA. In her covering letter motivating the request for a special review, the magistrate explains that after finalisation of the matter and on returning to her office, she realised the error in respect of the sentence imposed. She had intended imposing a sentence in terms of section 276(1)(i) and realised that in terms of section 276A(2)(b), the sentence agreed upon and imposed exceeded the fixed period of five years' imprisonment allowed by section 276A(2)(b) of the CPA.

2. The magistrate requests that the sentence be set aside and the matter be referred back to her for purposes of imposing a just sentence in terms of section 105A(9) of the CPA.

Plea and sentence proceedings in the Court a quo

3. The accused was charged with contravening the provisions of section 55 read with Chapters 2, 3, 4, sections 1, 56 to 61, 71(1), (2) and (6) of the Criminal Law Amendment Act (Sexual Offences and Related Matters) Act 32 of 2007 read with sections 92(2) and 94 of the CPA. The State alleged that on 6 May 2020 at Khayelitsha, the accused unlawfully and intentionally attempted to commit a sexual offence by placing his penis between the buttocks of the minor victim with the intention of penetrating the victim anally, after pulling down the victim's pants.

4. The accused was at all times legally represented during the proceedings in the Regional Court. The State advocate was authorized in terms of section 105A(1)(a) to negotiate and conclude the agreement on behalf of the State and pursuant to such negotiations, the parties concluded the plea and sentence agreement (*Exhibit A*) in terms of section 105A. On 22 April 2021, the State advocate informed the magistrate that an agreement was concluded and that there was compliance with section 105A(1)(b) of the CPA. The record reflects that on the magistrate's enquiry, the accused confirmed that he had entered into the agreement with the State. The magistrate declared that she was satisfied that the provisions of

section 105A(1)(b) were met. Thereafter the charge was put to the accused, he indicated that he understood the charge and pleaded guilty thereto.

5. The accused's legal representative read Part A (*The Preamble*) and thereafter Part B (*Plea of guilty and admissions*) of the agreement into the record. As to the allegations in terms of the charge sheet, the accused admitted that he is the uncle of the minor victim and on the day, he was watching television from his bed while the victim was sleeping next to him. He then proceeded to remove his nephew's pyjama pants and placed his penis between his nephew's buttocks with the intention of committing an act of anal sexual penetration. His nephew awoke, jumped from the bed and ran to report the incident to a family member. The accused admitted that he acted unlawfully, knew at all relevant times that his actions were wrongful and that he could be punished by law.

6. At this stage of the proceedings, the magistrate invoked section 105A(6)(i), (ii) and (iii) and ascertained from the accused whether he confirmed the terms of the agreement and admissions made, whether he admitted the facts as alleged by the State and whether he admitted that he concluded the agreement freely and voluntarily, and in his sound and sober senses without any undue influence. The accused confirmed all of the above, where after the magistrate proceeded to convict him as charged.

7. The record reflects that the proceedings continued with the legal representative reading Part C (*the agreement in respect of a just sentence*) into the record. The sentence agreed upon between the parties was seven years' direct imprisonment in terms of section 276(1)(i) of the CPA, which is the sentence imposed by the magistrate at the conclusion of the matter. The accused was also declared to be unfit to possess a firearm and his personal details were included into the Sexual Offences Register in terms of section 50 of Act 32 of 2007.

Section 105A(6)(a) questioning of the accused

8. Before addressing the special request by the magistrate, the proceedings referred to above require scrutiny and comment. In my view, the proceedings were

characterised by irregularities which the magistrate unfortunately does not address in her covering letter.

9. The first irregularity relates to the magistrate's questioning of the accused in terms of section 105A(6)(a). From the record it is evident that her questions to the accused in terms of this sub-section occurred after the legal representative had read the *Preamble* and the *Guilty plea and admissions* (Parts A and B of the agreement) into the record. The second irregularity is that the magistrate, after conducting the sub-section (6) questioning referred to above, then proceeded to make findings as to the accused's guilt and thus convicted him as charged. I do not intend addressing the procedure which is to be followed where a plea of not guilty is recorded and where the Court questions the accused in terms of section 105A(7)(b) as it is not relevant to the consideration of this review.

10. In addressing the procedural irregularities which occurred in the Court *a quo*, I turn to section 105A 6(a), 7(a) and 8 which state as follows:

(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.

_____ (b) ...

(c) ...

(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.

(b) ...

(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.

(the underlined parts are my emphasis)

11. Wallis JA in Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) in addressing interpretation of documents including legislation, stated that “*consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision occurs; the apparent purpose to which it is directed and the material known to those responsible for its production.*” (par 18). Applying the ordinary rules of grammar and syntax then to section 105A, it is evident that the questioning of an accused in terms of sub-section (6)(a) must occur only after the entire plea and sentence agreement has been disclosed in Court.

12. Section 105A(6)(a) does not in any way, allow for a piece-meal disclosure of the agreement as adopted by the parties and the magistrate in this matter as I set out above. I am confident that had the legislature intended such piecemeal proceedings, it would have couched section 105A(6)(a) in words to the effect that “*after the plea of guilty and admissions have been disclosed, the court shall question the accused...*” or in such similar terms.

13. Thus, the premature questioning of the accused as reflected on page 9 of the Court *a quo*’s record, was incorrect and irregular, as it occurred at a time when the disclosure of the entire plea and sentence agreement had not yet been concluded. If there remains any doubt on this aspect – and there should not be on a proper reading of sub-section (6)(a) - then sub-sections (7)(a) and (8) would certainly dispel such doubt.

The conviction

14. The incorrect procedure adopted by the magistrate as described above then perpetuated a further irregularity in the proceedings, in that she convicted the accused prior to the disclosure of the entire agreement and in disregard of section 105A(7)(a) and (8). Sub-section (7) requires of the magistrate:

- 14.1 to satisfy herself that the accused admits the allegations in the charge(s);
- 14.2 to be satisfied that the accused is guilty of the offence in respect of which the parties concluded the agreement;
- 14.3 thereafter, to consider the sentence agreement (Part C); and,
- 14.4 to act in accordance with a judicial discretion afforded in sub-section (7)(b) in order to make the determinations as required in sub-section (7)(a).

15. Section 105A(7)(a) does not vest the magistrate with any authority to make a finding or pronouncement of the accused's guilt and to convict him after the plea and admissions have been disclosed. If that were the case, the sub-section would have clearly stated so. The language is clear and unambiguous, and couched in peremptory terms that "the court shall proceed to consider the sentence agreement" after the Court has satisfied itself that the accused admits the allegations in the charge and is guilty of the offence. To paraphrase, sub-section (7)(a) requires of the magistrate to satisfy herself of the accused's guilt but without pronouncing a conviction and once she has satisfied herself, to then proceed to consider the sentence agreement.

16. I must further add that the section 105A procedure does not follow the usual plea procedure in the CPA, where the questioning of an unrepresented accused in terms of section 112(1)(b) and the consideration of the section 112(2) statement are followed by the Court pronouncing the conviction of the accused. In this regard, I fully align myself with the remarks and findings of Lekhuleni AJ (Henney J concurring) in the recent review decision in S v A [2021] ZAWCHC 104, a matter where the Court *a quo*, as in this matter, pronounced a conviction after questioning

an accused in terms of sub-section (6)(a). At paragraph 10 of the aforementioned judgment, Lekhuleni AJ stated as follows:

‘[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 underlined parts are my emphasis)

17. Turning to section 105A(8), its provisions and the procedure it envisages may be broken down into various stages:

- 17.1 firstly, the Court must satisfy itself that the sentence agreement is just;
- 17.2 secondly, the Court shall inform the State and defence that it is satisfied that the sentence agreement is just;
- 17.3 thirdly, the Court shall convict the accused of the offence(s) charged; and
- 17.4 fourthly, the Court sentences the accused in accordance with the sentence agreement.

18. The conviction and sentence of an accused in terms of sub-section (8) occur consecutively but it is part of one process. In this matter, the pronouncement of the conviction following upon the accused’s questioning in terms of sub-section (6)(a) and prior to the provisions of sub-sections (7)(a) and (8) having been complied with, was irregular.

The effect of the procedural irregularities

19. The question which follows is whether, in the circumstances of this matter, the procedural irregularities which occurred in the Court *a quo* and described above, vitiate the proceedings to such an extent that the conviction should be set aside? Section 304(4) of the CPA allows for special review circumstances in criminal proceedings where it is brought to this Court's attention that proceedings were not in accordance with justice.

20. The irregularities which I highlight in the preceding paragraphs are of a procedural nature and are not, to my mind, fatal as they do not impair the legal validity of the conviction. I say this for several reasons: the Court *a quo*'s record reflects that the accused was legally represented throughout the proceedings; the State advocate was duly authorized to conclude the plea and sentence agreement on behalf of the State; the accused confirmed concluding the agreement; the magistrate found that there was indeed compliance with sub-section (1)(b); the accused signed the agreement, admitted all the allegations in terms of the charge and did so freely and voluntarily and in his sound and sober senses and without any undue influence.(see S v A par 14)

21. Following on from the preceding paragraph, I am therefore satisfied that the accused's conviction was in accordance with justice. In addition, it would surely not be in the interests of justice to set aside the conviction due to procedural irregularities as it would have the result that a minor child, the victim of the sexual offence perpetrated by the accused, would have to possibly face further secondary trauma as a result of un-concluded proceedings.

The sentence imposed by the Court *a quo*

22. This brings me to the matter of the sentence imposed in terms of the section 105A agreement. Section 276(1)(i) must be read with section 276A(2)(b) of the CPA which limits the sentence to a fixed period of five years' imprisonment. In the circumstances of this matter, the sentence of seven years' imprisonment in terms of section 276(1)(i) agreed to by the parties and imposed by the magistrate, exceeded the punitive jurisdiction allowed by section 276A(2)(b).

23. Section 298 of the CPA provides for the amendment of a wrong sentence passed by mistake, before or immediately after it is recorded. Du Toit *et al* in *Commentary on the Criminal Procedure Act* states, with reference to the authorities cited in the commentary on section 298, that a *wrong sentence* refers to '*an incompetent or irregular sentence or a sentence which bears no relation to the merits of the case or which contains a technical mistake*', and also includes '*a sentence which does not accord with the real intention of the court*' (Revision Service 65, 2020 ch28-p61). Hiemstra CJ in *S v Moabi* 1979 (2) SA 648 (B) at 648H held that *by mistake* means a '*misunderstanding or an inadvertency resulting in an order not intended, or also a wrong calculation*'. Furthermore, section 298 requires that the amendment of the sentence should occur *before or immediately after it is recorded*: this usually entails that the amendment may be effected within a reasonable time after the sentence was recorded, given the circumstances of the matter and without delay (see also S Terblanche *A Guide to Sentencing in South Africa Third Edition* (2016) 467-8). The amendment must take place in the presence of the accused.

24. Having regard to the above discussion, it is evident that once she passed the sentence, the magistrate was *functus officio* (*S v Mainga* 2020 (1) SACR 666 GJ at par 30). Secondly, it is apparent from the magistrate's covering letter that she intended imposing the sentence of seven years' imprisonment in terms of section 276(1)(i) and as agreed between the parties in their plea and sentence agreement and that she realised the mistake shortly after the sentence was passed. Thirdly, as the magistrate clearly had the intention of imposing a sentence of seven years' imprisonment in terms of section 276(1)(i) which is not sanctioned by section 276A(2)(b) of the CPA, it follows that the sentence was wrong as it was an

incompetent and irregular sentence which the magistrate passed: the intention to impose such a sentence nullifies any suggestion of a '*misunderstanding or an inadvertency*' (*Moabi* 648H). In the circumstances, therefore, the sentence imposed by the magistrate may not be amended in terms of section 298 of the CPA (*S v Moabi* 648H-649A; see also *S v Ndwendwe*, an unreported judgment of the Free State Division, Bloemfontien case number R156/2017 delivered on 26 October 2017 par 15-16).

25. The magistrate, in my view, acted correctly by sending the matter on special review in terms of section 304(4) of the CPA as she was not at liberty to rectify nor amend the sentence in terms of section 298. In the circumstances, the corrective procedure which this Court is allowed to apply in terms of section 304(4) read with section 302(4)(c)(ii) of the CPA should be granted and the incompetent and irregular sentence should be set aside with the result that the matter be remitted back to the regional magistrate to consider a just sentence. It is unnecessary, in my estimation, to deal with a discussion regarding a just sentence as that would fall within the purview of proceedings in terms of section 105A (9) and is a matter for the Court *a quo*.

Closing remarks

26. The matter requires a final comment. As Moosa J (Dlodlo J concurring) aptly stated in *S v Solomons* [2005] ZAWCHC 45 at paragraph 7:

'The plea-bargaining regime is a fundamental departure from the adversarial system of our criminal law. On the one hand, the State agrees to compound the offence and on the other hand, the accused waives several of his/her Constitutional rights afforded to him/her in a trial. The legislature deemed it necessary to make the provisions of Section 105A peremptory and strict compliance therewith is accordingly a prerequisite. The court ought to ensure that the formal and substantial requirements of the plea-bargaining regime are strictly complied with.'

(see also *S v Knight* 2017 (2) SACR 583 (GP) par 10; *S v De Goede* [2012] ZAWCHC 2020 par 12)

It is evident from the authorities cited above that there must be strict compliance with the provisions of section 105A of the CPA. Unfortunately, this is a matter where the problem regarding the sentence arose as a result of the parties' agreeing to an incompetent and irregular sentence not sanctioned by the CPA.

27. Similar to a civil settlement agreement where the terms agreed upon between the parties thereto must be lawful and not contrary to public policy, so too the negotiating representatives of the State and defence should ensure that their sentence agreement falls within the punitive jurisdiction of the Court. The competency of the agreed sentence is one of the aspects which should form part of the magistrate's ultimate determination whether the sentence agreement is indeed a just sentence. Unfortunately, due to heavy court rolls and the need to finalise matters expeditiously, too often the reality in the lower Courts is that although the plea bargaining negotiations are sometimes protracted, the actual conclusion of the agreements is done hastily and at times without due diligence and checks. The consequence thereof resulted, as seen in this matter, in an incompetent sentence.

28. Section 105A(3) makes it clear that the Court plays no role in the parties' negotiations. Again, I draw a parallel to a civil settlement agreement where the Court has no part in the settlement negotiations and the conclusion of the parties' settlement agreement. Thus, the magistrate who would preside in the section 105A proceedings must not be privy to the parties' agreement prior to its disclosure in terms of sub-section (5) in the plea and sentence proceedings in Court.

29. In closing, the fact that I find that the procedural irregularities related to section 105A(6), (7) and (8) do not vitiate the conviction in this matter, must in no way be construed as giving a 'green light' to role players in plea bargaining

proceedings to adopt a procedure and approach to section 105A which was never intended by the legislature. In my view, it is the responsibility of the parties concluding the agreement to ensure, prior to the commencement of the Court proceedings, that all the requirements of section 105A which involve and impact upon them, are fulfilled. Finally, the third role player is the Court, which has a duty to ensure that it follows the peremptory provisions of section 105A which, as illustrated above, clearly and unequivocally set out the steps which are to be followed during the plea and sentence proceedings.

Order

30. In the result, I would propose the following order:

30.1 The conviction of the accused shall stand.

30.2 In terms of the provisions of section 304(4) read with section 302(4)(c)(ii) of the Criminal Procedure Act 51 of 1977, the sentence imposed on 22 April 2021 which reads *“in terms of s276(1)(i) of Act 51 of 1977 accused sentenced to 7 (seven) years direct imprisonment”*, is set aside.

30.3 The matter is remitted back to the Regional Magistrate, Khayelitsha to consider sentencing proceedings in terms of section 105A(9) of the Criminal Procedure Act 51 of 1977.

M PANGARKER

Acting Judge of the High Court

I agree and it is so ordered.

R C A HENNEY

Judge of the High Court