IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: A731/2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED

01/08/17
DATE

SIGNATURE

In the matter between:

JOHN BERTIE KNIGHT Applicant

and

THE STATE Respondent

JUDGMENT

Bagwa J

Section 105A Criminal Procedure Act 51 of 1977 – Failure to pronounce a conviction prior to sentence – failure to hand into Court proof of authorisation by NDPP to conclude a section 105A agreement.

Summary

The appellant was sentenced to life imprisonment in terms of a section 105A agreement with the Regional Court prosecutor on five counts of kidnapping, raping and assaulting a 13 year old child. The trial court had proceeded to sentence the appellant to life imprisonment with all five counts being taken as one for the purposes of sentence.

Held, that the trial court had failed to comply with the provisions of section 105A (8) of Act 51 of 1977.

Held, that the proceedings be referred back to the trial court for a consideration de novo.

Annotations:

Reported Cases

S v Solomons 2005 (2) SACR 432 (c)

Unreported Cases

Northern Cape High Court, S v Sassin and Others case no. 84/02

Statues

Criminal Procedure Act 51 of 1977

[1] The appellant was arraigned before the Regional Magistrate's Court, Klerksdorp on five charges of kidnapping, two counts of rape, sexual assault and assault with intent to do grievous bodily harm.

[2] The appellant and the State entered into a plea and sentencing agreement in terms of section 105A of Act 51 of 1977 in which they agreed that the appellant was pleading guilty to the five counts mentioned (**supra**).

[3] It was further agreed that all the counts would be taken together for purposes of sentence and that the appellant be sentenced to life imprisonment and that he be declared unfit to possess a firearm.

[4] The appellant was indeed sentenced to life imprisonment in terms of the agreement on 30 July 2015.

[5] The appellant has an automatic right of appeal in terms of section 10 of the Judicial Matters Amendment Act 42 of 2013.

Grounds of Appeal

[6] The appellant submits that there was non-compliance with the provisions of section 105A (1)(a)in the process that culminated in his sentence. Section 105A provides:

"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...."

[7] In support of this ground of appeal the appellant makes reference to the judgment of the **Northern Cape High Court, S v Sassin and Others** case no. 84/02 delivered by Madjiedt J (as he then was) at par 10 in which he said:

"*In order to comply with the requirements stipulated in section 105A (1)(a) Mr De Nysscchen handed up to me at the commencement of the hearing a certificate wherefrom it appears that he has been duly authorised to negotiate and enter into a plea agreement with the accused. In my view such proof of authority is an essential prerequisite for a plea agreement under section 105A – It was therefore correctly pleaded on record at the very outset of the proceedings.*"

[8] The appellant submits that **in casu**, no proof was provided by the prosecutor that he was duly authorised by the National Director of Public Prosecutions to enter into or negotiate a plea and sentencing agreement nor did he inform the Court that he had such authorisation and that the plea and sentencing agreement ought to be regarded as a nullity.

[9] The appellant's further ground is that the court **a quo** failed to comply with section 105A (8) of the Act. Section 105A (8) provides:

"*If the Court is satisfied that the sentencing agreement is just, the Court shall inform the prosecutor and the accused that the Court is satisfied, whereupon the Court shall convict the accused of the offence charged and sentence the accused in accordance with the sentence agreement.*"

[10] The appellant submits that the section is peremptory and that the record shows that the court **a quo** did not convict the appellant for the offences to which he had pleaded guilty.

[11] The final ground of appeal is against sentence to the effect that the sentence of life imprisonment is shockingly harsh and inappropriate and that the Court erred in not finding substantial and compelling circumstances. The appellant submits that the court **a quo** ought to have put more weight on the fact that the appellant was a first offender and that he had pleaded guilty.

Discussion

[12] The respondent makes two important concessions regarding the submissions by the appellant, namely, that no authority by the National Director was mentioned in the plea agreement and secondly that a perusal of the transcribed record does not reflect a pronouncement of a "*guilty*" verdict.

[13] The respondent goes on to submit that despite the non-submission of proof of authority by the National Director, the agreement is still valid in terms of the general authority issued by the NDPP on 20 July 2011 in terms of section 105 (1)(a) in terms of which authority was granted to any Regional Court Prosecutor to enter into such an agreement provided the agreement was negotiated and concluded in consultation with his or her superior.

[14] The respondent further submits that the Regional Prosecutor and the superior were therefore duly authorised to enter into the agreement and that they merely omitted to refer to the authority in the agreement. The respondent further submits that such omission can be rectified by submission of further evidence in that regard. What is significant however is that until this matter was heard on appeal, no such affidavits had been filed.

[15] As matters presently stand, the record shows that even that directive, in the absence of it being mentioned during the proceedings in the court **a quo**, was not observed. The record further shows that the court **a quo** did not convict the appellant as required by section 105A (8) of the Act.

Duty of Court to Keep a Proper Record

[16] The proceedings before the court **a quo** were recorded mechanically and that record has been reproduced. The effect thereof is that the omissions referred to above are common cause and not in dispute. In **S v Solomons** 2005 (2) SACR 432 (c) at [5] Moosa J said:

"*The plea bargaining process is governed by extraordinary procedure and, where the record is taken down in longhand, it is essential that it be recorded fully, carefully and properly. Each step taken and each decision made in such process must be clearly recorded. The object is to avoid any dispute, whether on appeal, review or otherwise, as to what transpired in the proceedings. With all its limitations, the Court will review these proceedings on the basis of the record submitted as supplemented by the affidavit and the notes.*"

Directions by the National Director of Public Prosecutions

[17] Section 105A (11)(a) provides:

"*The National Director of Public Prosecutions, in consultation with the Minister, shall issue directives regarding all matters which are reasonably necessary or expedient to be prescribed in order to achieve the objects of this section and any directive so issued shall be observed in the application of this section.*"

In the commentary to section 105A (11)(a): Commentary on the Criminal Procedure Act by Etienne Du Toit et al p 15 – 22 the following is stated:

"*All directives 'shall be observed in the application' of section 105A (sub-section (11)(a)). It is submitted that the wording in section 105A (11)(a) ('any directive so issued shall be observed') creates the real possibility that the non-observance of a directive (or, at least, a material directive) by a prosecutor should result in a fatal irregularity rendering a conviction and sentence based on the plea and sentence agreement null and void despite the fact that all the other provisions of section 105A had been complied with and despite the fact that a court – convinced of the guilt of the accused (section 105A (7)(a)) and the fairness of the sentence (section 105A (8)) – had convicted and sentenced the accused in accordance with the agreement.*"

[18] This case presents a worst case scenario in that the court **a quo** failed to pronounce on the 'conviction' of the appellant. This was a fatal irregularity in that without a conviction, there can be no sentence. The manner in which the court **a quo** proceeded was simply not in accordance with the law.

[19] The respondent seeks to mitigate the trial court's omission by submitting that section 105A (8) only prescribes that the accused must be convicted (which he was) and not how the verdict ought to be recorded.

[20] The submission by the respondent is incorrect and not sustainable in that it ignores the fact that the provisions of section 105A (8) are peremptory.

[21] The comments of the National Director of public Prosecutions in which his directive dated 14 March 2002 (paras [1] and [2]) referred to at page 15 – 24 by Du Toit et al is instructive where he says:

> "*[1] The procedure enacted in section 105A does not supplant the standard procedure for pleas of guilty in terms of section 112 of the Act. The established practice of accepting initial pleas of guilty on the basis of bona fide consensus reached, remains applicable. Section 105A is a complimentary disposal mechanism.*
>
> *[2] Section 105A is to be utilised for those matters of some substance, the disposal of which will actually serve the purpose of decongesting or reducing the court rolls without sacrificing the demands of justice and/or the public interest.*"

[22] It is trite that in terms of section 112 (1)(b) and section 112 (2) of the Criminal Procedure Act that a court, if satisfied that an accused is guilty of an offence to which he has pleaded guilty must convict the accused on his or her plea of guilty and thereafter impose a competent sentence.

[23] The respondent's attempt to find refuge in the recordal of the case details in the J15 form which constitutes the face of the case record does not, in my view, cure the inescapable fact, which is admitted by the respondent, that the record does not contain a recordal of a conviction of the appellant.

[24] In the circumstances I propose that the following order be made.

24.1 The appeal succeeds.

24.2 The sentence handed down by the Regional Magistrate Court, Klerksdorp on 30 July 2015 is set aside.

24.3 The proceedings are referred back to the trial court for consideration de novo.

It is so ordered.

S. A. M. BAQWA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree.

M. A. HAWYES
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Heard on:	31 July 2017
Delivered on:	31 July 2017
For the Applicant:	Mr H. Steynberg (Attorney with right of appearance)
Instructed by:	Legal Aid
For the First Respondent:	Advocate A. J. Fourie
Instructed by:	The Director of Public Prosecutions, Pretoria