IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

High Court Case No: R278/2023
Magistrates Case No: G2380/2023
Magistrates Serial No: REVIEW 21/23

In the matter between:

THE STATE

and

SAZI SAMKELO NGCOBO

Date Delivered: 20 October 2023

REVIEW JUDGMENT

NICHOLSON AJ: (P. C. BEZUIDENHOUT J concurring)

[1] This is a special review that found its way to this court in light of the learned senior magistrate of the Pietermaritzburg Magistrates' Court conducting judicial quality assurance, where they identified this matter for submission to this court for special review in terms of s 304(4) of the Criminal Procedure Act 51 of 1977 ("the CPA").

Brief background

[2] It appears from the record that on or about 26 April 2017, a protection order was granted where in terms of s 17 of the Domestic Violence Act 116 of 1998, the accused was directed:

'not to swear, insult, threaten or intimidate the applicant Nokuthula Ngcobo not to damage any of the applicant's property, not to drive or have any contact with any of the applicant's vehicles.'

[3] It is instructive that it appears common cause from the record that the protection order was duly served on the accused and remained in force.

[4] On or about 19 March 2023, the accused contravened the protection order when he retrieved the applicant's phone and threw it to the ground causing damage to the phone and further, took the applicant's car without her consent.

[5] It further appears from the record that the accused was duly arrested and charged and, after various appearances before the Pietermaritzburg Magistrate Court, on 17 August 2023, the accused, having completed a plea and sentencing agreement in terms of s 105A of the CPA, pleaded guilty and sentenced as follows:

'……three (3) years imprisonment, which is wholly suspended for a period of five (5) years, on condition that:-

1) The accused is not convicted of contravention of s 17 of the Domestic Violence Act 116 of 1998 committed during the period of suspension.

2) The accused adheres to the terms and conditions of s 276(1)(h) of the Criminal Procedure Act 51 of 1977.

3) The accused is ordered to undergo twelve (12) months correctional supervision, which shall include the following terms and measures:

(a) House arrest at the place and during the times determined by the correctional supervision officer for the full duration of the correctional supervision;

(b) Unremunerated community service in connection with the function of the State or community serving institution to be designated by the correctional supervision officer at Pietermaritzburg, during times determined by the correctional supervision officer, for sixteen (16) hours for every month for the full duration of correctional supervision;

(c) Submission to and proper attendance by the accused of the following treatment/rehabilitation programmes at the places and times arranged by the correctional supervision officer, for which costs may be recovered from the accused:

i) orientation programme;

ii) life skill programme;

iii) anger management programme;

(d) submission to the monitoring by correctional supervision officer in order to realise the objectives of the sentence.

4) The accused is ordered to:

1. report to the correctional supervision officer at room 2 – 57 in the Magistrate's Court Building, Otto Street, Pietermaritzburg, on 18 August 2023 at 09h00;
2. refrain from abusing alcohol and using any drugs except on prescription by a registered medical practitioner during the duration of the correctional supervision;
3. comply with all reasonable instructions given by the correctional supervision officer;
4. notify the responsible correctional supervision officer of any change of the accused's residential or work address.'

Legislative Framework

[6] It is trite that s 105A of the CPA makes provision for the accused and prosecutor to agree to a sentence prior to pleading guilty provided the presiding officer is in agreement with the sentence. Section 105A also requires the public prosecutor to consult widely with the investigating officer and the complainant. In that regard, s 105A(1) reads:

'*(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 section 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 section 297(1)*(b)*; and

(dd) if applicable, an award for compensation as contemplated in section 300.

(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–

(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, and

(iii) after affording the complainant or his or her representative, where it is reasonable to do so and taking into account the nature of and circumstances relating to the offence and the interests of the complainant, the opportunity to make representations to the prosecutor regarding–

(aa) the contents of the agreement; and

(bb) the inclusion in the agreement of a condition relating to compensation or the rendering to the complainant of some specific benefit or service in lieu of compensation for damage or pecuniary loss.'

[7] On the charge sheet dated 17 August 2023, an entry was made by the learned magistrate dealing with the matter which reads:

'Mr Mbhense the matter is on the roll for plea in terms of s 112(2) read with s 105A'

[8] Section 112 read as follows;

'**Plea of guilty**

(1) …

(2) If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1)*(b)*, convict the accused on the strength of such statement and sentence him as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement.'

[9] It is apparent that when reading s 112(2) and s 105A, that these two sections are not meant to be read together. Section 112(2) deals with where an accused tenders a plea of guilty in writing before the court, which covers all the elements of the crime, on which the presiding officer may (this is not always necessary) question the accused to satisfy themselves that the accused is guilty of the purported crime, where after a sentence will be imposed at the discretion of the presiding officer.[1]

[1] See generally the commentary for s 112(2) in S Terblanche *DuToit: Commentary on the Criminal Procedure Act* (Revision Service 70, 31 January 2023) at ch17-p24 onwards.

Section 105A deals with an agreement between the accused and the prosecutor where the accused agrees to plead guilty to the offence (or to an offence for which he may be found guilty based on the charge) and agrees to a lesser sentence, in lieu of going to trial. Essential to s 105A proceedings is that the accused must be represented.[2]

[10] The learned senior magistrate brought to my attention the case of *S v Solomons*,[3] the court observed:

'In the plea bargaining process a number of parties are involved. They are, in addition to the immediate parties, namely, the prosecutor and the accused, also the complainant and the investigating officer who are consulted in the process. Where the presiding officer is of the opinion that the sentencing agreement is not just, before convicting the accused, he is obliged to inform the immediate parties to such agreement what sentence he regards as just. The purpose of making such information known is to enable the parties to make an informed choice whether to abide by the plea bargaining process or to resile therefrom. The failure on the part of the presiding officer to do so, in my view, constituted non-compliance with the peremptory provisions of s 105A(9)*(a)*.'

[11] Upon perusal of the record, the following is apparent:

(a) There is no authority furnished to the court confirming authorisation of the prosecutor concerned to enter into the plea and sentencing agreement;

(b) The complainant was not consulted at all.

(c) The agreement was not confirmed by the accused prior to conviction and sentence.

(d) There is no consideration given as to whether the sentence is just.

[12] In the premises, taking into account the wording of the CPA as well as the comments in *Solomon*, I am of the view that the conviction and sentence is not in accordance with justice.

Order

[13] In the result, I make the following order:

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[2] See generally the commentary for s 105A in S Terblanche *DuToit: Commentary on the Criminal Procedure Act* (Revision Service 70, 31 January 2023) at ch15-p6 onwards.

[3] *S v Solomons* 2005 (2) SACR 432 (C) para 11.

1. The conviction and sentence of Sazi Samkelo Ngcobo under Case No. G2380/23 of the Pietermaritzburg Magistrate's Court dated 17 August 2023 is reviewed and set aside.
2. The matter is remitted to the Magistrate's Court for hearing *de novo* before another presiding officer at the discretion of the Director of Public Prosecutions, KwaZulu-Natal or her delegate.

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W NICHOLSON AJ

I agree

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P C BEZUIDENHOUT J