

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case No: 81/2019

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

GLEN DIPHAPHANG MOKOENA

Applicant

and

THE STATE

Respondent

DELIVERED ON: 23 MAY 2022

JUDGMENT BY: C REINDERS, ADJP

APPLICATION FOR LEAVE TO APPEAL

[1] INTRODUCTION:

This is an application for leave to appeal against the sentence imposed by Murray AJ on 18 November 2019 in terms of a s105A¹ plea-and- sentence agreement (“the plea agreement”). Such leave is sought to the full bench of this Division.

[2] In terms of s 316(1)(b) of the CPA the application for leave to appeal must have been filed within 14 days after the passing of sentence. *In casu* the application was filed on 26 April 2021, just over 17 months out of time. The application for leave

¹ Section 105A of the Criminal Procedure Act 51 of 1977 (the CPA).

to appeal is consequently accompanied by an application for condonation for the late filing of the aforementioned application for leave to appeal. The respondent opposes the condonation application and the application for leave to appeal.

[3] It was agreed that the application(s) would be adjudicated on heads of arguments to be filed by the parties on dates as specified. I am indebted to the legal representatives of both parties for their able heads of arguments. An administrative oversight regrettably caused this application to be dealt with later than was anticipated, but same can by no means be attributed to counsel.

[4] **THE SUMMARISED FACTS:**

4.1 The applicant was arraigned on two counts of murder and one count of robbery with aggravating circumstances, all three counts read with the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997 as amended (hereafter Act 105 of 1997). According to the indictment he stood accused of the said counts together with two co-accused. He enjoyed legal representation throughout the proceedings.

4.2 As mentioned, applicant entered into a formal sentence agreement with the state. His conviction and sentences are resultant of this agreement, and having been convicted on all three charges to which he pleaded guilty, he was sentenced to imprisonment for 30 years in respect of each of the two counts of murder, and 15 years' imprisonment on the count of robbery with aggravating circumstances. The sentences on counts 2 and 3 were ordered to run concurrently with the sentence on count 1, rendering an effective sentence of 30 years imprisonment.

[5] **THE s105A PLEA AGREEMENT:**

5.1 In the plea agreement² the applicant admitted the following facts:

² Para [7].

“1.1 That on or about 30 September 2018 to 1 October 2018 he acted in common purpose with his erstwhile co-accused as mentioned above, by unlawfully and intentionally killing N [....] R [....] G [....], the deceased in count 1;

1.2 That on or about 30 September to 1 October he acted in common purpose with his erstwhile co-accused as mentioned above, by unlawfully and intentionally killing S [....] A [....] T [....], the deceased in Count 2;

1.3 That the facts and findings of the post-mortem reports recorded by dr Daniel Francois Humphris, attached hereto as annexures E and F are true and correct.

1.4 That the cause of death of the deceased in Count 1 and 2 are correctly recorded as:

“ HAEMORRHAGIC SHOCK AND STAB WOUND NECK”

That the Accused are guilty of the offence of robbery with aggravating circumstances as they unlawfully and intentionally assaulted the deceased with the intend (*sic*) to induce their submission and did there and with the intent to steal take the items listed in the indictment (Annexure C).”

5.2 Under the heading “Personal Circumstances of the Accused” the following was recorded³:

The applicant was 30 years old when he committed the offences, and 32 years old at the time of sentencing. He is married, and has three minor children, two sons respectively 12 and 2 years old and a girl of 5 years old. At the time of the commissioning of the offences applicant was employed with the South African Police Services as a constable in Welkom from 2011 to 2018. He passed grade 12 in 2005. He has no previous convictions and stated that he is remorseful.

³ Para [8].

5.3 The mitigating circumstances are recorded as follows⁴:

After his arrest he played open cards with the members of the SAPS and confessed to a magistrate. He pleaded guilty to the charges and was prepared to testify against his co-accused who denied their involvement in the commission of the crimes. He was remorseful and had been in custody since his arrest on 1 October 2018 awaiting trial.

5.4 The aggravating circumstances as they appear from the record were:

That the offences committed were of a violent and dangerous nature prevalent in the Republic of South Africa. The deceased in counts 1 and 2 were attacked, robbed and killed in the safety of their home and the applicant was well known to both the deceased.

5.5 The parties agreed on the following substantial and compelling circumstances as warranting a deviation from the prescribed minimum sentences, to wit life imprisonment in respect of all three charges:

- “a) Accused pleads guilty to all charges and made a confession after his arrest;
- b) Accused did not waste the court's time and played open cards;
- c) Accused is remorseful, which is indicative of his rehabilitation prospects;
- d) Accused has been in custody since his arrest on 01 October 2018 awaiting trial;
- e) Accused is prepared to testify against his co-perpetrator-accused no 4 Thabiso Sthabi Makha and assist the State.”

[6] **THE GROUNDS FOR LEAVE TO APPEAL**

⁴ Para [9]

The notice for leave to appeal can be summarised as follows:

6.1 The applicant was not advised about the provisions of to Act 105 of 1997 prior to his plea and by neglecting to inform the applicant personally of these provisions, the court acted irregularly.

6.2 Applicant was blindly led by his attorney and the investigating officer to enter into the plea bargain as the sentence of 30 years' imprisonment on counts 1 and 2 was not explained to him by his previous attorney of record. He was couched by his previous attorney to confirm the contents of the agreement and confirm further that he entered into the said agreement freely and voluntarily without any influence.

6.3 The sentence imposed on counts 1 and 2 of 30 years' imprisonment is shockingly inappropriate and out of proportion with the totality of the accepted facts in mitigation.

6.4 The court erred in sentencing by:

- not giving proper consideration to the personal circumstances of the applicant;
- not giving enough weight to the fact that the applicant was a first offender and immature;
- overemphasising the interests of the community and the seriousness of the crime;
- not giving due consideration to the element of mercy and gave the element of retribution way too much weight;
- not giving due consideration on the fact that the applicant was relatively young and had spent a considerable period in custody awaiting trial;

6.5 Although the court correctly deviated or departed from the prescribed minimum sentence of life in respect of counts 1, the court erred in not

informing the applicant of the provisions of Act 105 of 1997 regarding the fact that applicant could, if found guilty, be sentenced to life imprisonment.

6.6 Applicant however admits “that despite this, it appears that the agreement that was entered into between parties, complied with all of the requirements as set out in s105A.”

[7] **THE RECORD**

7.1 From a perusal of the record of the proceedings before Murray AJ, it is evident that the entire contents of the agreement was read into the record.

7.2 The record also reveals that the learned judge, before asking the applicant to plead, requested of the applicant the following:

COURT: Mr Mokoena do you confirm that such a plea and sentence agreement has been concluded between yourself and the state

ACCUSED: Yes M’Lady

COURT: Do you confirm that you entered into this agreement voluntarily of your own free will and without undue influence?

ACCUSED: Correct so M’Lady.⁵

And later:

COURT: And you re-confirm that all these admissions and the agreements were made freely, voluntarily while you were in your sober senses and that you admitted all of this without any undue influence?

ACCUSED: I do confirm M’Lady.⁶

⁵ Record: p1/20 – p2/2.

⁶ Record: p8/21-25.

7.3 The record reflects that the trial judge gave a short judgment on conviction confirming her satisfaction that the appellant according to the agreement admitted all the elements of the three offences he was charged with, finding him guilty on all the charges. Hereafter she proceeded in sentencing the applicant. She alluded to the fact that appellant had made common cause with his co-accused to kill and rob the two deceased, adding that “killing someone to rob them of their possession in the safety of their homes is a very serious offence. What makes it worse is that these two people were related to you and well known to you. That you are a police officer who is supposed to protect people, not kill and rob them.” She stressed that “violence has become prevalent and pandemic in the area of the court’s jurisdiction, the community looks to the courts to defend it by punishing such offences appropriately and preventing others from committing such crimes.” The trial judge stated that the court has to ensure that whatever sentence is being imposed would be proportional and justifiable in view of the circumstances. “You have [indistinct] to your deeds by making a confession and furthermore by not pleading guilty. You have shown that you are remorseful...” Finally, the trial judge concluded that she had considered all the factors stated in the agreement (including the mitigating and aggravating circumstances), and the sentence agreed to are appropriate and just.

[7] **THE APPLICATION FOR CONDONATION:**

7.1 I was called upon to adjudicate the condonation application as well as the questions whether leave to appeal should be granted, and if so, to which court.

7.2 The principles in respect of the granting or refusal of condonation have crystalized over the years. As a point of departure it has been confirmed in ***Grootboom v National Prosecuting Authority and Another*** 2014 (2) SA 68 (CC) that condonation is not a mere formality and is not to be had for the mere asking. At para [23] it was held that:

“A party seeking condonation must make out a case entitling it to the court’s indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court’s directions. Of great significance, the explanation must be reasonable enough to excuse the default.”

Moreover, the standard for considering an application for condonation is the interest of justice.

“However, the concept “interests of justice” is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: **the nature of the relief sought**; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and **the prospects of success**. It is crucial to reiterate that both *Brummer* and *Van Wyk* emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. **The particular circumstances of each case will determine which of these factors are relevant.**” (at para [22]) (own emphasis added)

7.4 In support of his application for condonation for the late service and filing of this application the applicant deposed to an affidavit explaining the reasons for the lateness in filing an application for leave to appeal. According to him from the onset, it has always been his intention to file an application for leave to appeal against his sentence as the trial court erred in imposing the sentence of 30 years’ imprisonment. Since he was in custody from 1 October 2018 he earned no income and thus he could not raise sufficient funds to instruct his attorney to proceed in bringing an application. Although he had knowledge of his right to appeal, his erstwhile attorney failed to advise him about the time frame of 14 days to bring such an application. His family eventually managed during March 2021 to raise funds to instruct his current attorney when he became aware of the prescribed statutory time period. He

attempted to lodge an application for leave to appeal without the assistance of an attorney on 5 February 2020. It should be noted that the said attempt did not include as a ground applicant's averred misconduct.

7.5 I considered the applicant's exposition of his failure to timeously apply for leave to appeal. There is no explanation tendered as to why the applicant did not utilise the services of Legal Aid. Be it as it may, I am however willing to accept in favour of the applicant that the explanation on face value seems reasonable. Having said that, I am not convinced that condonation should be granted as the applicant's chances of success on the merits on the papers before me is puny. I say so for the following reasons:

7.5.1 It is applicant's case on the papers that he was blindly led by his attorney and the investigating officer to enter into the plea bargain as the sentence of 30 years' imprisonment on counts 1 and 2 was not explained to him by his previous attorney of record. Moreover, he was couched by his previous attorney (thus the attorney of record who represented him during the settlement negotiations) to confirm the contents of the agreement and confirm further that he entered into the said agreement freely and voluntary without any influence.

In ***S v Moamogoe***⁷ in a full bench unanimous decision per Saldulker JA the following was held in respect of an allegation by the appellant that the s105A plea-and-sentence agreement did not accurately reflect the verbal agreement between him and the state:

"The terms of the plea agreement are clear and were confirmed by the appellant before Borchers J. What the appellant sought to raise in this court, namely that the plea agreement did not correctly record what had been agreed in respect of sentence, is a matter extraneous to the record. It is trite that an appeal is decided on the record of the proceedings in the lower court. In the

⁷ 2021 (1) SACR 121 (SCA) at par [10].

absence of an application to adduce further evidence on appeal, this court is bound by the record. **The only possible remedy for the appellant would have been to launch an application for review, setting out these allegations on affidavit, so that the state could have dealt with them under oath.** Even though, prima facie, the belated allegations of the appellant appear to be tenuous, this court should not deal with them on appeal.”

There is no application for a special entry on the record in terms of s 317 of the CPA and the mere allegation in the notice of application for leave to appeal that applicant was misled, has no value.

7.5.2 The applicant avers that the court committed an irregularity by not having informed him “personally” of the provisions of Act 105 of 1997 and that the sentence of 30 years was shockingly inappropriate. These grounds raise the question whether an appeal does lie against a plea-and-sentence agreement (put differently, whether an appeal is excluded against a plea-and-sentence agreement).

The court in **Moamogoe** referred to the different views held in **S v De Koker 2010 (2) SACR 196 (WCC)** at 204i–205a that “by following the process created by s105A, the appellant settled the *lis* between the State and him once and for all. (at 205i - 20a)

and the contrary view taken in **S v Armugga and Others 2005 (2) SACR 259 (N)** that “it had always been contemplated that the right of appeal in s105A agreements would be a limited one and that relief would be granted only in exceptional circumstances” (at 264f)

The Supreme Court of Appeal held that it was inappropriate for that court to decide this issue without the benefit of oral argument. For the same reason as the court in **Moamogoe**, I shall likewise refrain from deciding on this issue.

[8] I might mention in passing that even if I should have aligned myself with the view in ***Armugga*** that an appeal does lie against an averred irregularity by the trial court in a plea-and-sentence agreement, I might have had difficulty in deciding in favour of the appellant. I say so for the following reasons: it is common cause that applicant does not dispute that the plea agreement that was entered into between parties complied with all of the requirements as set out in s105A. There is no provision in either the wording of s105A of the CPA nor the Directives issued by the National Director Public Prosecutions⁸ for the presiding officer in a plea agreement, to inform an accused of these provisions. In any event, the appellant was not sentenced to the prescribed minimum sentence, imprisonment for life, but to the deviated 30 years' imprisonment and did he not suffer any prejudice.

Moreover, upon a prospectus of the papers before me it is clear that the trial judge thoroughly considered the content of the plea-and-sentence agreement. Annexed to the agreement is the confession that applicant made before the magistrate on 2 October 2010. The content thereof paints a grim picture of the fate that befell the two deceased. On his own version under oath the applicant and his co-accused all throughout adjusted their devious plan of murdering his aunt to fulfil their end result. After an attempt to strangle her was unsuccessful, and after applicant's cousin phoned him (the applicant) to inform about his shocking finding but that his (the cousin's) mother was still alive, the plan was merely adjusted. This resulted in the two deceased's to be stabbed with knives, causing their deaths as described in the post mortem reports. All along the applicant, a police officer who was supposed to protect not only the public but even more so his own beloveds, was conniving to see through his devious and despicable plans.

[9] **CONCLUSION:**

In my view adjudicating the matter on the record as it appears from the proceedings before Murray AJ, there is no prospect of success on appeal and it would serve no purpose to then grant the application for condonation.

⁸ DIRECTIVES IN TERMS OF SECTION 105A OF THE CRIMINAL PROCEDURE ACT, 1977 (ACT 51 1977) as amended, issued on 14 March 2022.

[10] I therefore make the following order:

The application for condonation of the late service and filing of the notice of appeal is dismissed.

C. REINDERS, J

On behalf of the applicant:

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On behalf of the respondent:

Adv M Strauss
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