



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**
(Coram: Le Grange ADJP et Henney, J)

High Court Ref No: 247/24
Case No: GSH (5)81/2023
Magistrate's Serial No: 1/2024

In the matter between:

THE STATE

Vs

BRANDON MATTHEWS

SPECIAL REVIEW JUDGMENT: 11 DECEMBER 2024

HENNEY, J

Introduction

[1] This is a special review in terms of the provisions of section 304(4) of the Criminal Procedure Act 51 of 1977 ("the CPA").

[2] The matter was sent on special review by the Acting Regional Magistrate of Parow Regional Court and her reasons for the referral are the following:

"1. On the 12th of June 2024. I convicted and sentenced the accused, Mr Brandon Matthews, in terms of a Plea and Sentence Agreement entered into in terms of Section 105A of the Criminal Procedure Act 51 of 1977. The accused was facing two (2) counts which are the following:

Count 1: Assault with intent to do grievous bodily harm

Count 2: Robbery

2. In Count 1, he was sentenced to three (3) years imprisonment. In Count 2 he was sentenced to three (3) years imprisonment, of which one (1) year is suspended on the condition that accused is not convicted of Robbery or attempted Robbery, committed during the period of suspension.

3. Due to an oversight on my part, I omitted to pronounce the period of suspension, which is five (5) years. I only saw it after two (2) day of the passing of the sentence.

4. My sentence in Count 2 should read as follows:

Accused is sentenced to three (3) years imprisonment, of which one (1) year is suspended for a PERIOD OF FIVE (5) YEARS, on the condition that accused is not convicted of Robbery or Attempted Robbery, committed during the period of suspension."

[3] The plea and sentencing agreement were signed by the accused. The omission also appears to be contained in the plea and sentencing agreement.

[4] The accused it seems, was either unaware or failed to observe that the proposed sentence that was suspended did not contain a period of suspension.

[5] The Magistrate by having failed to observe the omission went ahead and imposed the sentence both recorded on the J15 and also on page 12 of the transcribed record as it was recorded erroneously in the plea and sentence agreement.

[6] From this, it is evident that she did not exercise an independent mind by firstly, as she ought to have in terms of section 105A (7) of the CPA to satisfy herself that it was a just sentence and secondly, whether the sentence that she imposed was properly formulated as required in terms of the CPA.

[7] The mistake or error was not only that of the Magistrate but of all the parties involved in the drafting of the plea and sentence agreement and it seems that the Magistrate merely rubberstamped without applying her mind to whether it was a sentence she in law could impose.

[8] In the plea and sentence agreement it seems that due to a mistake or omission, there was never as part of the agreement on sentence an agreement as to the period within which the sentence had to be suspended. It therefore seems that the accused was not made aware that the sentence either had to be suspended for a period or to a specific period of suspension. It goes without saying that a suspended sentence imposed without a period within which that sentence is suspended is not only impractical but also an incompetent sentence and not compliant with the provisions of section 297(1)(b) of the CPA.

[9] It is important to give effect to the rehabilitative and deterrent aspects of punishment for a sentencing court to clearly spell out not only the conditions but also the terms under which a term of imprisonment is suspended. In *S v Scheepers*¹ the following is said about the important purpose of a suspended sentence at [11]
“The purpose of a suspended sentence is to spare the offender the rigours and

¹ 2006(1) SACR 72(SCA)

humiliation of prison; but the risk that the suspended sentence will be brought into effect is designed to operate as a deterrent. That deterrent purpose was spilt on sand when the appellant committed these two thefts.”

An accused person when a suspended sentence is imposed must be made aware for how long that sentence will “hang over him”.²

[10] The question to consider is whether this court in terms of the provisions of section 304(4) of the CPA can correct the sentence in circumstances where all the parties were in agreement with the proposed sentence albeit an incompetent one. Is it therefore open to this court to correct an erroneous sentence that was agreed to as set out in the plea and sentence agreement between the parties?

[11] The period or conditions of suspension cannot be included ex post facto after a sentence has been imposed without the knowledge of an accused where an accused agreed prior to the proceedings on the terms of the sentence in a plea and sentence agreement. Like in this particular case, where a suspended sentence forms part of a plea and sentence agreement the accused had to be made aware during the plea and sentence negotiations what the period would be within which the sentence would be suspended before agreeing thereto.

[12] It would have been a different case where the Magistrate entirely had control over the sentencing proceedings which followed after a plea of guilty in terms of section 112(1)(b) or 112(2) of the CPA or being sentenced after being convicted after a trial. In such a case the Magistrate could ask for an alteration of the sentence because the sentence fell entirely within his or her discretion. Or as has happened in *S v PM 2022 (1) SACR 412 (WCC)* where the agreed sentence in terms of section 276(1)(i) of the CPA exceeded the prescribed period of 5 years, where there was an agreement that the accused would be sentenced to 7 years imprisonment in terms of section 276(1)(i) where it was obvious that the agreed sentence could not have been imposed, because it exceeded the maximum number of years which a court could impose. The court on review however reduced the sentence for it to fall within the

² Persadh v R 1944 NPD 357 at 358

number of years imprisonment a court could impose. In such a case, the alteration of the sentence did not prejudice the accused and in the interest of justice the sentence was altered.

[13] The court on review severed the sentence portion of the agreement from the plea portion because the agreed sentence was prejudicial to the accused and consequently amended it to a lesser sentence. In *S v Boumpoutou 2022 (2) SACR 594 (WCC)* the agreed sentence in the plea and sentence agreement was a fine of R4000 or eight months imprisonment for a contravention of section 49(15) (b)(iv) of the Immigration Act 13 of 2002.

[14] It later emerged after the sentence imposed in terms of the plea and sentence agreement was not a competent sentence, the court could have imposed in terms of the Immigration Act. The only prescribed sentence was a term of imprisonment due to the fact that the entire agreed sentence had to be set aside, the court was of the view that it would be unfair only to alter the sentencing component of the agreement. This would have led to a gross unfairness, because the accused would not have agreed to enter into a plea and sentencing agreement if he was not aware that the only prescribed sentence was one of imprisonment. The facts in this case, however, is distinguishable from the facts in *Boumpoutou*, and does not justify an entire setting aside of the plea and sentencing proceedings which led to the conviction of sentence. If the proceedings leading to the conviction was not tainted in a substantial manner by the defect in the sentencing proceedings which if corrected or amended on review would lead to the imposition of an entirely different sentence to the one agreed upon which may lead to the prejudice of the accused. The sentence portion may be altered on review. The review court in my view has such wide powers. The provisions of section 105A makes provision for a court especially 105A(7), (8) and (9) and gives the court the power provided that the parties agree thereto to address the parties after consideration of the agreed sentence, to propose a different sentence agreed upon. In this case the Magistrate court failed to comply with these provisions. The provisions of section 105A provides that a court should do the following:

- 1) Consider whether the sentence agreement is just;

- 2) If the sentence agreement is not just, the court shall inform the prosecutor and the accused of the sentence it considers just.

[15] In this particular case, the agreement to plead guilty on the second charge was based on the fact that a suspended sentence would be imposed. The mere fact that there was an omission with regards to the period of suspension even without the accused knowing about it, could not have affected his decision to plead guilty.

Given the fact that but for the omission of the period of suspension, the sentence would have been competent and appropriate. The defect can be remedied by severing the sentencing proceedings by setting it aside and to refer it back to the Magistrate to reconsider the sentence.

[16] Having said that, given the nature of a plea and sentence agreement, where an accused has to understand and be aware of the terms and conditions of the sentence agreed upon, especially in the case of a suspended sentence, this is not such a case where a court on review could ordinarily correct an omission as explained above in terms of section 304(4) read with section 304(2) (c)(ii), (ii) or (iv)³ as requested by the Magistrate. Especially, in circumstances where an accused person albeit erroneously did not agree in a plea and sentence agreement to a determined period of suspension. It cannot be changed afterwards. This will be prejudicial to an accused.

[17] In this particular case, had the Magistrate considered the agreement she would have been alive to this omission, and she could have asked the parties to correct it, from the record however it clearly seems that she slavishly followed what was agreed to without applying her mind and failed to consider the sentence agreement as required by law.

³ (ii) confirm, reduce, alter or set aside the sentence or any order of the magistrate's court;
(iii) set aside or correct the proceedings of the magistrate's court;
(iv) generally give such judgment or impose such sentence or make such order as the magistrate's court ought to have given, imposed or made on any matter which was before it at the trial of the case in question; or

[18] Magistrates are implored not to merely rubber stamp such plea and sentence agreements but has to satisfy themselves that not only that the sentence is just, but also that it is a competent one. This is provided for in terms of section 105A (7) (a) and (8) that states: ss (7)(a) *“If a 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.*

And ss 8 states: *“If the court is satisfied that the sentence agreement is just, the court shall inform the prosecutor that the court is so satisfied, whereupon the court shall convict the accused of the sentence the accused in accordance with the sentence agreement.”*

[19] In *Commentary on the Criminal Procedure Act – Du Toit, De Jager, Paizes, Skeen and Van Der Merwe*, the learned authors in their commentary on these provisions state at 15-20D; Service Issue 20, 2023 that ... *“[T]he parties ... by using a sentence agreement -subtly usurp the court’s sentencing function. On the contrary, it seems that both the prosecution and defence should make every effort to ensure that the sentence agreement is – from a juridical perspective viable and realistic for the purposes of s 105A(8).*

[20] Prosecutors and legal representatives by the nature and functions they fulfil in a criminal trial in most cases do not have the necessary training and experience in formulating and imposing sentencing orders, therefore rest a duty on presiding officers to carefully scrutinise plea and sentencing agreements in order to ensure that it complies with the law. This the Magistrate failed to do by not applying the provisions of section 105A(7)(a) of the CPA. In doing so, she committed a gross irregularity which led her to impose an incompetent sentence. The sentence imposed was therefore a nullity and falls to be set aside.

[21] More and more cases of this nature are being sent on special review, where sentences that were agreed upon, in a plea and sentence agreement seems not to be properly formulated or to be an incompetent sentence. After the finalization of a

case, the trial court becomes *functus officio* notwithstanding this, I think it would be in the interest of justice if a Magistrate before sending a matter on review, inform the parties that the matter would be sent on review, and how the Magistrate proposes how the matter should be dealt with on review.

[22] For all of these reasons, this court cannot therefore exercise its powers to alter the sentence as requested by the Magistrate. The proper course of action would be for this court to set aside the sentence and refer the matter back to the magistrate to apply the provision of section 105A(7)(a) of the CPA.

[23] In the result, I would make the following order:

- 1) That the sentence imposed by the Magistrate is set aside;
- 2) That the matter is referred back to the Magistrate to apply the provisions of section 105A(7)(a) and deal with the question of sentence afresh which includes giving the parties the opportunity to correct the omission in the agreement.

R.C.A. Henney
Judge of the High Court

I agree.

A. Le Grange
**Acting Deputy Judge President of
the High Court**