



**IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]**

Case no: A257/2024

In the matter between:

BEIPING ZHANG

Appellant

and

THE STATE

Respondent

**JUDGMENT DELIVERED (VIA EMAIL) ON 12 DECEMBER 2024
(BAIL APPEAL)**

SHER J:

1. This is an appeal against the judgment and order which was handed down by the magistrate of Cape Town on 21 August 2024, in terms of which the bail which had been granted to the appellant a year earlier, on 3 August 2023, was cancelled. The parties agreed that the matter could be determined on the basis of written submissions which they filed on 21 and 26 November 2024, without the need for oral argument.
2. The circumstances which gave rise to the decision of the magistrate are briefly as follows. The appellant was arrested on 26 July 2023 in West Beach,

Bloubergstrand on charges of contravening the Marine Living Resources Act 18 of 1998 ('the MLRA') and the regulations which were promulgated thereunder. Together with four others who were arrested with him, he is currently awaiting trial on 4 charges. These concern the alleged unlawful acquisition and possession of 7855 units of dried and wet abalone with a combined value of approximately R2.89 million, and the unlawful operation of an abalone processing plant.

3. At the appellant's first appearance on 28 July 2023 the matter was remanded to 3 August 2023 for further investigation. On 3 August 2023 the prosecutor informed the magistrate that some 3 months earlier, on 29 May 2023, the appellant had pleaded guilty in the regional court of Gqeberha to similar offences involving abalone, which had been committed in July 2021. In fact, the appellant had been convicted not only of contravening the MLRA but also of the offence of 'money-laundering', in terms of the provisions of the Prevention of Organised Crime Act 121 of 1998 ('POCA'). On each of the two charges the appellant was sentenced to 2 years imprisonment which was suspended for 5 years, on condition that he was not again found guilty of contravening the relevant provisions of the MLRA and POCA, during the period of suspension.
4. Notwithstanding these circumstances and even though the prosecutor noted that although the appellant was in possession of a passport issued by the Republic of China his status in the country was unclear, he did not oppose the appellant's release on bail. After the appellant's legal representative 'confirmed' (sic) that he was entitled to be in the country, the magistrate duly set bail in an amount of R 100 000. As part of his bail conditions the appellant was required to surrender his passport and to report twice weekly to his local police station.
5. Eight months later, on 9 April 2024, and whilst he was on bail, the appellant was arrested again, this time in Durbanville, on charges of contravening the MLRA. On 24 April 2024 he entered into a plea and sentence agreement in the regional court of Bellville, in terms of s 105A of the Criminal Procedure Act

51 of 1977 ('the CPA'), whereby he pleaded guilty to charges of contravening ss 44(2) and 18(1) of the MLRA, by illegally receiving and processing 10 121 units of wet and dried abalone, for which he had unlawfully operated a processing plant. It is notable that the value of the abalone was not set out in the plea and sentence agreement. It clearly should have been, as it impacted on the seriousness of the offence and was a factor which the court needed to be apprised of for it to determine whether the sentence which had been agreed was an appropriate one. In his affidavit in this matter the investigating officer placed a value of R3.5 million on it. In the absence of any reference to the value of the abalone in the agreement it does not appear that, in concluding it on behalf of the state, the regional court control prosecutor took any, or proper, account of it.

6. Notwithstanding his previous conviction and the suspended sentence which had been imposed on him less than a year earlier, the appellant managed to persuade the prosecutor to agree to the imposition of another, wholly suspended sentence of imprisonment, this time of 5 years, in respect of each charge. It seems that the prosecutor agreed to this because he likewise did not have due and proper regard for the previous conviction and the sentence which was imposed, as it was not even listed in the agreement as an aggravating factor relevant to the imposition of sentence. Bizarrely, it was noted, in para 1 of section E of the agreement, as one of the *mitigating* factors, that the appellant had 'a previous conviction for a similar offence', but the particulars thereof were not set out. Thus, it appears the prosecutor either concluded the plea and sentence agreement hastily, without properly ascertaining what the particulars of the appellant's previous conviction and the sentence which was imposed in respect of it were, or he concluded the agreement well-knowing what they were but failed to ensure that they were disclosed to the court in the agreement, as they should have been. The previous conviction and the sentence which was imposed were also factors which impacted materially on the imposition of an appropriate sentence. As the magistrate in this matter rightly commented in passing, given the appellant's record and the quantity and value of the abalone, the sentence which was agreed upon was, on the face of it, wholly inappropriate.

7. Sections 105A(1)b(ii)(aa)-(dd) of the CPA provide that a prosecutor may only enter into a plea and sentence agreement if he/she has had due regard 'at least'(sic), for the well-known triad of factors which the court considers when it imposes sentence i.e. not only the accused's personal circumstances but also the nature and circumstances pertaining to the offence and the accused's previous convictions, as well as the interests of the community.
8. A prosecutor who is authorised to conclude a plea and sentence agreement in a serious matter such as this one, which involves the rapacious depletion of our endangered marine and wildlife resources, must give due and proper consideration to all the factors which are listed in the section and should not merely pay the proverbial lip service to them.
9. In terms of directives 4 and 8 of the directives which were issued by the National Director of Public Prosecutions on 22 October 2010, prosecutors negotiating a plea and sentence agreement are not meant 'to bargain away' a sentence of imprisonment for a non-custodial sentence, as appears to have occurred in this matter, and negotiations for such an agreement are not to be finalized unless the accused's record of previous convictions has first been obtained. The latter requirement is obviously there to ensure that before concluding an agreement the state is properly apprised of the accused's criminal record, so that it is given due weight by the prosecutor when considering what an appropriate sentence to agree to would be. Although s 105A does not expressly require that the particulars of an accused's previous convictions and the sentences which were imposed in respect thereof should be set out in a plea and sentence agreement, to safeguard against abuses in this regard such a requirement is surely implicit.
10. Sections 105A(1)(a)(i) and (ii)(aa) empower an authorized prosecutor not only to negotiate and enter into an agreement in respect of a plea of guilty to an offence with which an accused has been charged, but also a 'just' sentence which is to be imposed by the court in respect thereof. The section therefore imposes a duty on a prosecutor to ensure, as best as they are able to, that

they do not enter into a plea and sentence agreement which is clearly 'unjust' i.e. one which is not fair and appropriate, having regard not only for the accused's circumstances and aim of negotiating the lightest sentence possible, but also taking into account the nature and seriousness of the offence and the accused's record of previous convictions, and the interests of the community, which, in matters involving the poaching and depletion of our endangered marine and wildlife species rightly demands the imposition of firm punishments, especially for serial offenders whose actions are motivated by commercial greed and gain.

11. In terms of ss 105A(4)(a)(ii) and 105A(5) the court before whom a plea and sentence agreement is placed must be satisfied that it complies with the requirements of both subsection (1)(b)(i) i.e. that the prosecutor has consulted the investigating officer before concluding the agreement, and subsection (1)(b)(iii) i.e. that the prosecutor has *inter alia* taken the nature and circumstances relating to the offence and the interests of the complainant (which in this case is the community, as represented by the state), into account, after allowing the accused to make representations, before it accepts the agreement and requires the accused to enter a plea in accordance therewith, and before it proceeds to allow the terms of the agreement to be entered into the record and the accused to confirm the contents thereof. If the court is not satisfied that there has been due and proper compliance by the prosecutor with the duties which are imposed on them by subsections (1)(b)(i) and (iii), it may not proceed with the agreement as it stands and is required to inform the prosecutor of its difficulties, and afford the prosecutor and the accused an opportunity to rectify the non-compliance.
12. Unless the particulars and circumstances pertaining to an accused's previous convictions are set out in the plea and sentence agreement, the court will not be in a position to determine whether the prosecutor has complied with their statutory duties and it will not be in a position to determine whether the sentence which has been agreed upon is a 'just' one i.e. one that does justice to the triad of factors to which regard must be had. Unlike in conventional criminal trial proceedings, where the question of an appropriate sentence only

arises if, and when, an accused has been convicted, in proceedings in terms of s 105A if, after considering the contents of the plea and sentence agreement the court is satisfied that the accused has properly admitted the elements of the charge(s) and that he/she is accordingly guilty of the offence(s) in respect of which the agreement was entered into, it must proceed to consider the sentence which has been agreed upon,¹ and only once and if, it is satisfied that the sentence is 'just' and has informed the parties of this, does it proceed to convict the accused and sentence him/her in accordance with the agreement, in a single, combined judicial act.² If the court is of the view that the agreed sentence is 'unjust' it must inform the parties thereof and of the sentence which it considers to be 'just' i.e. the sentence which it considers to be fair and appropriate having regard for the triad of factors the court is required to take into account.³ In such a case the parties have the choice of either abiding by the agreement in respect of the conviction and allowing the court to impose an appropriate sentence, after evidence and argument in respect thereof has been presented, or they may resile from the agreement, in which case the trial must start *de novo* before another presiding officer.⁴ In the circumstances, given the structure of the provisions of s 105A it is vital that when a court is presented with a plea and sentence agreement its contents are such that the court is properly placed in possession of all the relevant facts and circumstances it is required to have regard for, not only in relation to the charges and the accused's plea in respect thereof, but also in relation to the sentence which the parties have asked it to impose. The plea and sentence agreement which was put before the regional court of Bellville was deficient in this regard.

13. In my view, *prima facie* the conclusion by the regional court control prosecutor of a plea and sentence agreement whereby it was agreed that the appellant, who was a serial, countrywide offender, was to receive yet another suspended sentence for the unlawful receipt and processing of a large quantity of illegally harvested abalone (worth millions of Rands), a wildlife resource which has

¹ Section 105A(7)(a).

² Section 105A(8).

³ Section 105A(9)(a).

⁴ Section 105A(9)(b)(i) and (ii).

been practically poached to extinction in this country, which by the accused's own admission was destined to be exported for commercial gain, without due and proper regard for the value of the abalone and the appellant's criminal record for similar offences, constituted a dereliction of duty. Consequently, the matter must be referred to the Director of Public Prosecutions for an investigation to be held into the circumstances under which the agreement was concluded by the prosecutor concerned. I note that a confiscation order of R250 000 was included in the agreed sentence, but given the value of the abalone it hardly served to convert an inappropriate sentence to one which constituted sufficient and appropriate punishment for the serious, repeat offences to which the appellant had pleaded guilty, and the fact that the appellant had brazenly breached the terms of the suspended sentence of imprisonment which had been imposed on him, less than a year earlier.

14. Even after the imposition of the sentence in April 2024 the appellant's run of good fortune continued unabated. On 6 June 2024 he managed, somehow, to persuade the magistrate of Gqeberha not to put the suspended sentence of imprisonment which had been imposed by the regional court the previous year, into operation, notwithstanding that he had breached the terms thereof only 11 months later in April 2024, by committing a similar offence in Cape Town, involving over 10 000 units of abalone. Instead, the magistrate elected to re-suspend the sentence for a further period of 5 years. Once again, how the appellant was able to get away with this defies comprehension and requires investigation by the Director of Public Prosecutions. In this regard it is not apparent whether the circumstances of the appellant's conviction and sentence in April 2024 were properly brought to the attention of the magistrate by the state, or whether the court provided the parties with an opportunity to address it, as page 2 of annexure B of the record of proceedings has a line drawn through it. The page contains *pro forma* paragraphs (5-9), which make provision for the court to inform the accused of the nature of the application and his rights, and for the accused to indicate whether he wishes to make any submissions or tender any evidence, and for the state to indicate whether it wishes to make submissions. If either party elects to make submissions, there is space for these to be noted. Not only were the paragraphs of this page of

the annexure left blank, but they were crossed out. Despite this, at para 10 of the annexure the magistrate indicated that 'good and sufficient reasons' existed as to why the sentence should not be put into operation, although what these were was not disclosed.

15. It is not surprising and somewhat relieving then that, in the light of these circumstances the state made application to the magistrate, in the current proceedings, that the appellant's bail be withdrawn. In support of the application the state tendered an affidavit by the investigating officer in which he set out details of the appellant's previous convictions and pointed out that, after his conviction in May 2023 he had effectively again committed similar offences on 2 occasions: the first on 26 July 2023, some 2 months after the conviction and imposition of the suspended sentence in Gqeberha, for which he was arrested in this matter in Bloubergstrand on the charges he is currently facing; and then again in April this year when he was arrested in Durbanville for similar offences, to which he pleaded guilty in the regional court in Bellville. The investigating officer expressed the view that if the appellant were to be allowed to remain on bail he would continue to commit such offences.
16. The state also tendered an affidavit which was made in terms of s 212(1)(a) of the CPA, by an immigration control officer in the Department of Home Affairs, who was required to verify the appellant's status in the country as a foreign national. The officer ascertained that the appellant entered the country on 10 December 2020 on a visa which expired on 21 January 2021, from which date he has been in the country illegally. In terms of s 49(1)(a) of the Immigration Act 13 of 2002 the appellant's continued residence in SA after the expiry of his visa constitutes a criminal offence for which he is liable to imprisonment for a period of up to 2 years. In his affidavit the investigating officer expressed the view that, given these circumstances, he had reason to believe that unless the appellant's bail was withdrawn he was likely to abscond before the proceedings in this matter could be concluded.

17. It is notable that in the affidavit which the appellant filed in response to the application he did not deal with the averment that, after he was released on bail, he had twice committed similar offences, and he simply averred that he had duly complied with his bail conditions. He also did not refute the statement by the immigration control officer that he was in the country illegally since January 2021, when his visa expired. Although he alleged that his passport, which was in the possession of the police, was valid until 2031-2032, and that it contained a 'valid' visa for him to be in the country until 15 February 2024, he said that he had applied for another visa on 8 February 2024 and was awaiting the outcome thereof. His application for a further visa clearly did not serve to convert his unlawful status in the country to a lawful one. On his own version he has been in the country illegally since at least 15 February 2024.

An assessment

18. In her judgment the magistrate found that, given that the appellant had committed similar offences in April this year whilst he was on bail in this matter, there was a real likelihood that if his bail was not withdrawn he would continue to commit such offences. She was accordingly of the view that it was necessary, in the interests of justice, that he be committed to prison pending the outcome of the current proceedings.
19. In terms of s 68(1) of the CPA a court before which a charge is pending in respect of which an accused has been granted bail, may cancel such bail and order that the accused be committed to prison until the conclusion of the proceedings, if it is satisfied from information which has been placed before it on oath, of the existence of one or more of the various grounds which are set out in the section. These include that the accused is about to evade justice or abscond,⁵ has interfered or threatened to interfere with witnesses,⁶ has defeated or attempted to defeat the ends of justice⁷ or poses a threat to the

⁵ Section 68(1)(a).

⁶ Section 68(1)(b).

⁷ Section 68(1)(c).

safety of the public or a complainant,⁸ or further evidence has since become available, or factors have arisen, which might have affected the decision to grant bail had they been known at the time,⁹ or it is otherwise in the interests of justice to cancel the accused's bail.¹⁰

20. As the cancellation of bail has been held to be tantamount to a refusal of bail, it is appealable,¹¹ but, in terms of s 65(4) of the CPA this Court may only set aside a magistrate's decision in this regard if it is convinced that it was wrong. In my view, the magistrate's decision was anything but wrong. As is evident, the appellant is a serial offender who has no respect for the law. As the magistrate pointed out with reference to the decision in *Sewela*¹² the fact that the appellant committed a similar offence whilst he was on bail awaiting trial in this matter suggests that he has a propensity to commit such offences and will continue to do so, and he is disrespectful of the law and the legal system. To allow the appellant to remain on bail in such circumstances would clearly not be in the interests of justice, and would be inimical thereto, as it would undermine the criminal justice system and constitute an abuse of the right to be released on bail pending trial. It would erode what little confidence the public has in the justice system and the assurance which the public deserves that bail will not be granted to those who keep committing offences, whilst they are awaiting trial.
21. Notwithstanding the extraordinary run of good fortune which the appellant has had up to now, it must surely have come to an end, and given his record and the fact that he has already twice received the benefit of a suspended sentence the chance that, in the event of a conviction in the current matter, he will be lucky for a third time, is remote, and he is likely to receive a lengthy sentence of imprisonment. Consequently, I share the investigating officer's concern that, if he were to have remained on bail, he was likely to have

⁸ Section 68(1)(d).

⁹ Section 68(1)(f).

¹⁰ Section 68(1)(g).

¹¹ *S v Nqumashe* 2001 (2) SACR 310 (NC) para 14; *S v Porrit* 2018 (2) SACR 274 (GJ) para 9; *Ntsasa v S* [2023] ZAFSHC 218 paras 4-5

¹² *Sewela v S* [2010] ZASCA 159 para 11.

absconded at an appropriate moment, thereby evading justice. For this reason too the magistrate was correct in withdrawing his bail.

22. In the result, I make the following order:

22.1 The appeal is dismissed.

22.2 The matter is referred to the Director of Public Prosecutions for investigation into:

22.2.1 the circumstances under and in terms of which the regional court control prosecutor of the regional court Bellville concluded a plea and sentence agreement with the appellant in case number RC4/65/2024 on 24 April 2024, and whether in doing so the regional court control prosecutor breached or failed to have due and proper regard for the provisions of sections 105A(1)(b)(ii)(aa)-(dd) of the Criminal Procedure Act 51 of 1977 and/or directives 4 and 8 of the directives which were issued by the National Director of Public Prosecutions on 22 October 2010; and

22.2.2 the circumstances under which the suspended sentence of imprisonment which was imposed by the regional court of Gqeberha in case number RCPE112/2022 was re-suspended by the magistrate of Gqeberha, and whether particulars of the appellant's previous conviction and sentence in the Bellville regional court under case number RC4/65/2024, including particulars pertaining to the quantity and value of the abalone involved, and a copy of the plea and sentence agreement, were disclosed by the prosecutor to the magistrate of Gqeberha.

22.3 For the purpose of giving effect to paragraphs 22.2.1-22.2.2 the state advocate who submitted heads of argument on behalf of the state shall ensure that a copy of this judgment is delivered to the Director of Public Prosecutions.

M SHER
Judge of the High Court
(Digital signature)

Appearances:

Appellant's counsel: Adv R Mckernan

Appellant's attorney; Du Plessis & Associates (Gordon's Bay)

Respondent's counsel: Adv S Rubin

Director of Public Prosecutions, Cape Town