



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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Review No: 62/2019

In the matter between:

THE STATE

And

BYRON WESSELS

CORAM: LOUBSER, J *et* MOENG, AJ

JUDGMENT: MOENG, AJ

DELIVERED ON: 23 MAY 2019

[1] This is an automatic review in terms of section 302 of the Criminal Procedure Act, 51 of 1977 (the CPA). The accused was convicted and sentenced in the Magistrates' Court Bloemfontein on one count

of contravention of section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 - possession or the use of drugs. He was sentenced to two years imprisonment which was wholly suspended on specified conditions and in addition, 36 months correctional supervision. The conviction and sentence followed on a plea and sentence agreement in terms of section 105A of the CPA.

- [2] The record was placed before me to determine whether the proceedings were in accordance with justice. It transpired from the written plea and sentence agreement that the accused was unrepresented when he entered into the said agreement with the prosecution. I resultantly enquired from the magistrate if it is permissible in law for an unrepresented accused to enter into such an agreement.
- [3] In his response, the magistrate conceded that the written section 105A agreement reflects that the accused was unrepresented when the agreement was concluded. He however indicated that the accused was legally represented when the section 105A negotiations were initiated and his attorney only withdrew after such negotiations had already begun but before the charge was put to the accused. The magistrate further indicated that he finalised the matter on the premise that the agreement was negotiated and entered into whilst the accused was represented and he did not believe that the accused will suffer any prejudice.
- [4] The typed record of the proceedings, indeed as correctly pointed out by the magistrate, reveals that the accused was legally represented

from the date of his first appearance until 18 March 2019 when his attorney withdrew. The record reflects that on 25 February 2019 the prosecutor informed the court that the legal representative for the accused and the state were in section 105A negotiations and the case was postponed to 18 March 2019 for the results of such negotiations. On the latter date the legal representative for the accused withdrew as attorney of record and the case was postponed to the following day for plea as the digital recording machine was out of order.

- [5] The transcribed record reflects that on the next day, 19 March 2019, the magistrate again explained to the accused his rights to legal representation and he elected to conduct his own defence. The following exchange then took place between the magistrate and the accused:

'COURT: You have sat with the senior prosecutor? You were legally represented at that time when you negotiated and you still are happy with what is contained in there?

ACCUSED: Yes I am happy with what is contained in I [*sic*], the matter sir'

Let me pause to mention that a literal analysis of this question reveals that the accused simply affirmed that he is happy with what is contained in the agreement and he does not confirm that he was legally represented at the time of the negotiations. The relevance of this response will become clear later hereunder.

- [6] Paragraph 4 of the plea and sentence agreement which was signed by the Senior Prosecutor and the accused reads as follows:

'The Senior Public Prosecutor and the accused, who is unrepresented, have negotiated and entered into the agreement in respect of a plea of guilty by the accused to the offence of which he may be convicted on the charge as well as a sentence to be imposed by this Honourable Court' (My emphasis)

Page 8 lines 5 to 7 of the transcribed record also reflects that the prosecutor informed the court that the accused and the Senior Prosecutor entered into a plea and sentence agreement and the contents thereof were read into the record. No mention is therefore made of the involvement of the attorney in such negotiations.

[7] Section 105A (1) (a) of the CPA provides as follows:

'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...' (My emphasis)

Subsection (2)(c), in addition, provides that such an agreement shall be in writing and shall at least be signed by the prosecutor, the accused and his or her legal representative.

[8] In his response, the magistrate states that the agreement was negotiated and entered into whilst the accused was represented. The section 105A negotiations were, ex facie the record, initiated and had begun while the accused was legally represented. The case was resultantly postponed for the outcome of such negotiations.

[9] The record does however not reflect what the outcome of such negotiations was and whether the agreement was concluded while

the accused was legally represented. From what is contained in the record, we simply do not know what was negotiated while the accused was represented and what led to the withdrawal of the attorney. In the absence of any such indication, one can in my view not conclude that he was so represented when the agreement was concluded. The subsection requires both the negotiations and the conclusion of the agreement to be undertaken while the accused is legally represented. Even if it is accepted that negotiations were undertaken while he was represented, there is no indication on the record that the agreement was concluded while he was so represented.

[10] In contrast, the written agreement reflects that the Senior Public Prosecutor and the accused, who was unrepresented, negotiated and concluded the agreement. The agreement was likewise not signed by the attorney as required by subsection (2)(c). This therefore signifies that the legal representative was not involved in the conclusion of the agreement. It is therefore clear, *ex facie* the written agreement, that the accused was not legally represented when he negotiated and entered into the agreement.

[11] The provisions of section 105A and specifically subsection (2)(c) are clearly peremptory and requires exact compliance. The magistrate contends that the accused was not prejudiced as he enjoyed legal representation before he pleaded. By entering into plea bargaining with the prosecution, the accused person waives a number of his rights. As was stated in **S v De Goede** (121151) [2012] ZAWCHC 200 (30 November 2012) at [12]:

The mandatory provisions contained in section 105A provide protection to the accused person who has, by virtue of entering into a plea and sentence agreement, waived his or her rights in terms of section 35(3) of the Constitution to a public trial before an ordinary court and to be presumed innocent in return for agreeing to both plea and sentence. Consequently adherence to the provisions of section 105A provides an appropriate check and balance against the abuse of the plea bargain process in the context of the waiver of the accused's constitutional rights.

[12] The need for legal representation during the conclusion of the agreement cannot be understated. Only a prosecutor, who has been authorised thereto in writing by the National Director of Public Prosecutions, may enter into such negotiations and conclude such agreement. Such prosecutor will according to the directives issued by the National Director of Public Prosecutions and in practice be of considerable experience and seniority. The stakes are therefore clearly high and as such a prosecutor will logically have greater bargaining powers than the accused. An unrepresented accused will admittedly find him or herself at an unequal negotiating position, hence legal representation is of paramount importance. The requirement for legal representation is therefore, in my view, aimed at parity between the negotiating parties. This unequal bargaining power is in my view where the potential prejudice is grounded.

[13] The purported lack of prejudice referred to by the magistrate may also be established on the ground that all the accused constitutional rights in terms of section 35 were explained to him during the section 105A proceedings. The court is however admittedly not involved in the negotiations and will not be privy to what factors are considered

during the negotiations. It is of importance to note that the requirement for legal representation is specifically provided for during the conclusion of the agreement phase and not during the plea and sentencing phase.

- [14] De Villiers 2004 *De Jure* 244 at page 25, referring to the views of some international scholars, highlights some of the risks and disadvantages associated with plea bargaining, specifically during the negotiation phase. He highlights that 'plea bargains circumvent the standards of proof and due process of the criminal justice system'. He further asserts that an accused may be coerced into waiving his constitutional rights to receive a lesser sentence. He contends that to an extent these procedural safeguards are our main assurance of equal protection before the law.
- [15] De Villiers further highlights the risk that an innocent accused may plead guilty and accept a lesser sentence rather than taking the risk of a harsher sentence, if convicted when contesting the charges. The prospect of going to jail becomes so intimidating that an accused will agree to almost anything if the negotiated agreement guarantees that he will not serve time in jail. All these factors therefore make it imperative for an accused to have legal representation during the conclusion of the agreement.
- [16] I am therefore satisfied that the conclusion of the agreement by the accused, without the assistance of a legal representative, was fatal and amounted to an irregularity. The proceedings were accordingly not in accordance with justice.

[17] In the result I propose to make the following order:

1. The conviction and sentence are set aside;
2. The case is remitted to the court a quo for the trial to start de novo before another magistrate.

L.B.J. MOENG, AJ

I concur and it is so ordered.

PJ LOUBSER, J