THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

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STATUS Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Jansen v The State (20043/14 & 229/14) [2015] ZASCA 151 (2 October 2015)

The Supreme Court of Appeal (SCA) today handed down judgment in a criminal appeal regarding plea and sentence agreements concluded in terms of s 105A of the Criminal Procedure Act 51 of 1977 (the Act).

Ms Denise Cindy-Lee Jansen (Ms Jansen) and Mr Marco Rudolf Barnard (Mr Barnard) the first and second appellants respectively, who had lived together as husband and wife entered into a plea and sentence agreement in terms of which they pleaded guilty to charges of: murder, child abuse (Ms Jansen) and culpable homicide (Mr Barnard). These charges related to numerous incidents of child abuse and assaults on Ms Jansen's two minor children and for causing the death of one of them.

In terms of the agreement presented at the trial, Ms Jansen agreed to be sentenced to 18 years' imprisonment for murder and 3 years' imprisonment for two counts of charges of child abuse to be served concurrently for an effective imprisonment term of 18 years; whilst Mr Barnard agreed to be sentenced to 12 years' imprisonment for culpable homicide, two years of which were suspended for a period of 5 years on condition that he is not found guilty of committing an offence in which violence is an element during the period of suspension – for an effective imprisonment term of ten years.

The trial court (Webster J of the Gauteng Division of the High Court, Pretoria) imposed different sentences to those agreed to by the appellants and State in the plea and sentence agreement without advising the parties that the agreed sentence was unjust as contemplated in s 105A of the Act. The appellants applied for leave to appeal against sentence and the State requested the court to reserve the question of law – whether it is permissible for the trial court to impose sentences differing from those proposed in the plea and sentence agreement without informing the prosecution and defence if the court was of the view that the proposed sentence is unjust in terms of s 105A(9)*(a)* of the Act.

On appeal, it was contended that the trial judge inter alia failed to inform the parties that he considered the sentence to be unjust and neglected to afford them the opportunity to exercise their options in terms of s 105A(9)*(a)-(b)* of the Act.

The SCA held the trial court must first consider the agreed sentence prior to convicting an accused person and that this process entails an examination of the indictment, the accused's right to be presumed innocent, and the right to remain silent and not to give self-incriminatory evidence – all of which are constitutional rights that afford the accused the right to withdraw from the agreement should he or she wish to do so without any adverse inference or finding against him or her. The Court held that it is also the duty of the trial court to satisfy itself that there was compliance with the requirements of s 105A(1)*(a)* of the Act.

The SCA further held that where a court is not satisfied about the justness of the sentence subsec (9)*(b)*(i) of the Act triggers in. However before invoking the provisions of this subsection, the parties must first be afforded an opportunity to withdraw from the agreements. If both parties decide to abide by the agreement despite being advised by the trial court that it intends imposing a different sentence to the one agreed upon, then the court will be at large to impose a sentence which it considers just. As soon as the trial judge formed the view that the sentences proposed in the plea agreement were unjust, he should have so informed the parties at the outset of the trial. This would have afforded them an opportunity to consider their options, importantly whether they wished to withdraw from or continue with the agreement. This is especially so because after convicting them, there is nothing that they could do save to appeal the decision. The SCA found that the appellants were thus denied their fundamental right to be heard.

The SCA held that The provisions of s 105A(6)*(a)* of the Act are clear and peremptory. Only a trial court can determine whether or not an accused admits the correctness of the charge and any allegations contained therein. For these reasons, the matter should be remitted to the trial court for hearing afresh before another judge.

The SCA accordingly set aside that convictions and sentences imposed by the trial court and remitted that matter to the Gauteng Division of the High Court, Pretoria for a trial afresh.

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