

# **UNIVERSITY OF THE WESTERN CAPE**

## **FACULTY OF LAW**

**An evaluation of the benefit of Plea and sentence agreements to  
an unrepresented accused.**

**Research Paper submitted in partial fulfilment of the  
requirements for the award of the LLM degree.**



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## KEYWORDS

Guilty plea

Section 112(2)

Informal agreements

Reasonableness

Rights against self-discrimination

Rights to a fair trial

Section 105 plea-bargain

Unrepresented accused



## LIST OF ACRONYMS AND ABBREVIATIONS

<b>ACHPR</b>	African Charter on Human and Peoples' Rights.
<b>CPA</b>	Criminal Procedure Act
<b>DPP</b>	Director of Public Prosecutions
<b>ICCPR</b>	International Convention on Civil and Political Rights.
<b>NDPP</b>	National Director of Public Prosecutions
<b>NPA</b>	National Prosecuting Authority
<b>PSAs</b>	Plea and Sentence Agreements
<b>The Guidelines</b>	Guidelines for prosecutors relating to Plea and Sentence Agreements



## DECLARATION

I, **Andre P. Botman**, declare that '**An evaluation of the benefit of Plea and sentence agreements to an unrepresented accused**' is my own work and that it has not been submitted before for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Signed: \_\_\_\_\_ Andre P. Botman

November 2016

Signed: \_\_\_\_\_ Prof. Jamil Mujuzi



November 2016

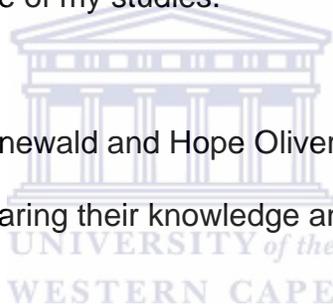
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## **DEDICATION**

To my parents, Frank and Petronella for their continued support and belief in my potential. I am forever grateful.

To my wife Charmain Botman, and my sons Elijah and Malakai for their sacrifice in enabling me to achieve this noble goal.

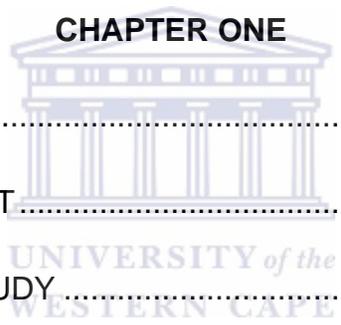


## TABLE OF CONTENTS

KEYWORDS .....	ii
LIST OF ACRONYMS AND ABBREVIATIONS .....	iii
DECLARATION .....	iv
ACKNOWLEDGMENTS .....	v
DEDICATION.....	vi
ABSTRACT.....	x
TABLE OF CONTENTS.....	vii

### CHAPTER ONE

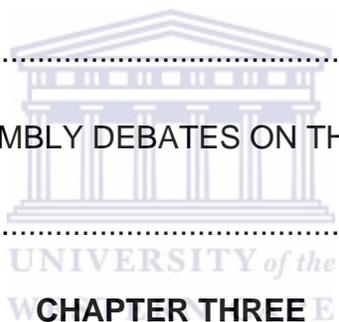
1. INTRODUCTION.....	1
2. PROBLEM STATEMENT.....	8
3. PURPOSE OF THE STUDY.....	10
4. RESEARCH QUESTION.....	11
5. RESEARCH METHODOLOGY .....	11
6. PROPOSED STRUCTURE.....	11



## CHAPTER TWO

### HISTORY OF PLEA-BARGAINING IN SOUTH AFRICA

2.1 INTRODUCTION.....	13
2.2 PLEA-BARGAINING; CONCEPT AND CHARACTERISTICS.....	13
2.3 HISTORY OF PLEA-BARGAINING UNDER COMMON LAW .....	16
2.4 POSITION OF PLEA-BARGAINING BEFORE 2001.....	21
2.5 POSITION AFTER 2001 .....	33
2.5.1 EVALUATION OF THE SALC REPORT ON PLEA AND SENTENCE AGREEMENTS.....	33
2.5.2 NATIONAL ASSEMBLY DEBATES ON THE AMENDMENT BILLS ..	39
2.6 CONCLUSION .....	41



### CHAPTER THREE

### THE PRACTICE OF PLEA AND SENTENCE AGREEMENTS

IN SOUTH AFRICA.....	42
3.1 INTRODUCTION.....	42
3.2 REQUIREMENTS UNDER THE CRIMINAL PROCEDURE ACT .....	42
3.3 REQUIREMENTS UNDER THE NPA DIRECTIVES.....	51
3.4 ANALYSIS OF CASE LAW .....	55
3.5 CONCLUSION .....	63

## CHAPTER FOUR

### THE EXPERIENCES OF PLEA AND SENTENCE AGREEMENTS IN OTHER JURISDICTIONS

4.1 INTRODUCTION.....	64
4.2 POSITION IN AUSTRALIA.....	64
4.2.1 LAW APPLICABLE.....	65
4.2.2 DECISIONS BY COURTS.....	66
4.2.3 CONCLUSION ON AUSTRALIA.....	70
4.3 POSITION IN CANADA.....	71
4.3.1 LAW APPLICABLE.....	72
4.3.2 DECISIONS BY COURTS.....	76
4.3.3 CONCLUSION ON CANADA.....	80
4.4 CONCLUSION.....	80

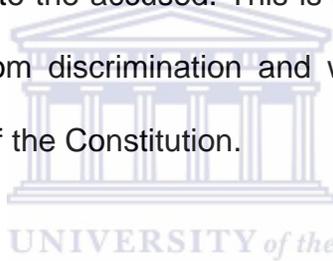
## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

5.1 GENERAL CONCLUSION.....	82
5.2 JUSTIFICATION FOR REFORM.....	84
5.3 WORKING FRAMEWORK.....	87
BIBLIOGRAPHY.....	92

## ABSTRACT

Section 105A of the Criminal Procedure Act is unconstitutional with regard to its failure to extend benefits to an unrepresented accused. Unlike a represented accused, an unrepresented accused cannot benefit from section 105A. The only recourse available to him or her is to enter a plea of guilty under section 112 of the Criminal Procedure Act. This plea of guilty does not offer him the benefits under section 105A. This causes the section to operate unfairly against the unrepresented accused based on his/her failure to secure legal representation. This continued operation of section 105A infringes on the rights of an accused by not affording this protection to the accused. This is in terms of a right to equality before the law, freedom from discrimination and what constitutes a justifiable limitation under section 36 of the Constitution.



South Africa has ratified or acceded to international and regional treaties which require, inter alia that the right to equality before the law is respected. This requires a model framework to be put in place to ensure that unrepresented accused can benefit from section 105A.

An evaluation of the viability of adding the unrepresented accused to the protection under section 105A is done. This is informed by experiences from other jurisdictions, which aid the need for reform.

## CHAPTER ONE

### 1. INTRODUCTION

There is no universal definition for 'plea-bargaining' in the administration of criminal justice, as the word 'bargain' is often seen as inflammatory, misleading and not descriptive.<sup>1</sup> 'Plea-bargaining' is defined as the act of negotiating and concluding agreements in criminal proceedings. Steyn defines plea-bargaining as a practice of relinquishing the right to go to trial in exchange for a reduction in the charge and/ or sentence.<sup>2</sup> The essence of the practice is to provide an alternative to dispute resolution while at the same time striking a balance between ensuring that the convicted person is punished for the offence committed and ensuring timely disposal of cases. It must be noted, however, that there is no standard definition of plea-bargaining used among academics and practitioners and as such, the term differs in meaning depending on the context within which it is used.<sup>3</sup> A narrow interpretation connotes an accused's trade-off of a promise to

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<sup>1</sup> Bekker PM 'American plea-bargaining in statutory form in South Africa' (2001) 24 *CILSA* 310 310; See Shin HJ 'Do lesser pleas pay?' (1973) 1 *Journal of Criminal Justice* 27 27.

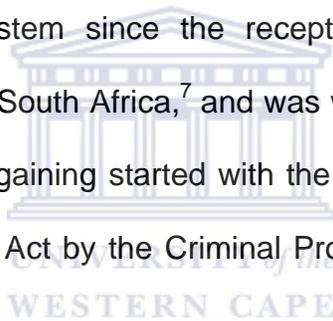
<sup>2</sup> Steyn E 'Plea-bargaining in South Africa: current concerns and future prospects' (2007) 2 *SALJ* 206 208.

<sup>3</sup> Guidorizzi DD 'Should we really "ban" plea-bargaining: The core concerns of plea-bargaining critics'(2014) Available at <http://www.law.emory.edu/ELJ/volumes/spg98/guido.htm> 1 accessed on 10 February 2016.

plead guilty, and waiver of the rights to a trial for the prosecutor's promise to receive a particular sentence.<sup>4</sup>

Scott & Stuntz state that plea-bargaining also means a situation where an accused gives up his right to a fair trial<sup>5</sup> in exchange for favourable treatment from the state prosecutor.<sup>6</sup>

From the above discussion, it is clear that plea-bargaining may exist without a legal regulatory framework. Plea-bargaining as a practice was evident in South Africa's criminal justice system since the reception of the English criminal procedure (common law) in South Africa,<sup>7</sup> and was widely acknowledged in case law.<sup>8</sup> Regulation of plea-bargaining started with the introduction of section 105A into the Criminal Procedure Act by the Criminal Procedure Second Amendment



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<sup>4</sup> Bekker (2001) 311-12.

<sup>5</sup> Scott RE & Stuntz JW 'Plea Bargaining as a contract' (1992)101 *Yale Law Journal* 1909 1921.

<sup>6</sup> Scott & Stuntz (1992) 1922.

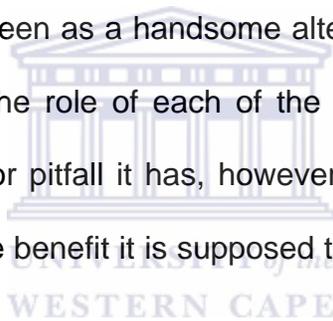
<sup>7</sup> Geldenhuys T & Joubert J *Criminal procedure handbook* (1994) 13-14.

<sup>8</sup> See *North Western Dense Concrete CC and Another v Director of Public Prosecutions (Western Cape)* 1999 (2) SACR 669 (C) generally.

Act.<sup>9</sup> Plea-bargaining was thus codified as plea and sentence agreements under section 105A of the Criminal Procedure Act.<sup>10</sup>

The South African Law Reform Commission encompassed most of these various definitions to aid it in arriving at a workable framework for statutory plea-bargaining.<sup>11</sup>

Plea and Sentence agreements were introduced in South African law to complement the informal plea-bargain system, because of the various advantages it offered to the prosecution, the accused, the victim and the complainant.<sup>12</sup> It has been seen as a handsome alternative to lengthy and costly criminal trials.<sup>13</sup> It clarified the role of each of the parties involved in the plea-bargain process.<sup>14</sup> The major pitfall it has, however, is the failure to benefit the unrepresented accused. The benefit it is supposed to offer to the accused is self-



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<sup>9</sup> Criminal Procedure Second Amendment Act 62 of 2001; see the South African Law Commission (Project 73) *Report on Simplification of Criminal Procedure: Sentence Agreements* (2002) para 5.1. See also Steyn E(2007) 206; See Van de Merwe CJ & Du Plesis JE *Introduction to the law of South Africa* (2004) 524.

<sup>10</sup> The Criminal Procedure Act 55 of 1977 as amended by the Criminal Procedure Second Amendment Act 62 of 2001.

<sup>11</sup> South African Law Commission (Project 73) *Report on Simplification of Criminal Procedure: Sentence Agreements* (2002).

<sup>12</sup> Du Toit S & Snyman E 'Plea-bargaining in South Africa: the need for a formalized trial run' (2001) 26-3 *Journal for Juridical Science* 144 144, Steyn E 'Plea-bargaining in South Africa: current concerns and future prospects' (2007) 2 *SALJ* 206 generally.

<sup>13</sup> Du Toit & Snyman (2001) 144.

<sup>14</sup> Du Toit & Snyman (2001) 144.

defeating as far as its implementation is only extended to the represented accused. Section 105A provides as follows:

‘(1) (a) 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 ...  
(2) ....’

The wording of the section clearly shows that unless an accused is represented, he may not benefit from the provisions of section 105A of the Criminal Procedure Act. Under section 105A, there is input into the Plea and Sentence Agreement from the prosecution and the accused. The court plays a neutral role and is obliged to ensure that the agreement is entered into freely and fairly after due consultation with the police, the accused and the victim.<sup>15</sup> The accused stands to benefit by receiving a just sentence, which he or she is aware of in the course of making the Plea and Sentence Agreement.<sup>16</sup> It is rather unfortunate that it is only a represented accused that may be able to enter into the Plea and Sentence Agreements under section 105A. The only recourse an unrepresented accused may take is to enter a plea of guilty under section 112 of the Criminal Procedure Act. The plea under section 112 is limited in scope to a term of imprisonment or a given fine.<sup>17</sup> The rationale of limiting section 105A to the unrepresented accused is to avoid overzealous prosecutors and courts from using their power and offices to obtain a plea of guilty. All the decisions that have been handed down by courts

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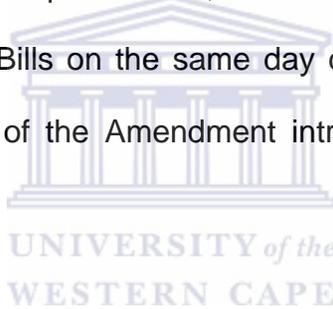
<sup>15</sup> The Act 55 of 1977, s 105A (1) b generally.

<sup>16</sup> See s 105A.

<sup>17</sup> See s 112(1)a of the Act 55 of 1977; Du Toit & Snyman (2001) 145.

show that it is only the represented accused that have benefited from Plea and Sentence Agreements.<sup>18</sup> Based on the above introduction, it is imperative to place the problem statement into perspective.

In the course of the National Assembly Debates on the Criminal Procedure (first and second) Amendment Bills,<sup>19</sup> the Members of Parliament argued that an accused had a right to a fair trial and that Parliament had to avoid falling into the trap of moving towards a situation in which the accused did not receive a fair trial.<sup>20</sup> The aim of the amendments was to eliminate delays in criminal trials, simplify certain cumbersome procedures,<sup>21</sup> and fight crime.<sup>22</sup> The National Assembly that debated six Bills on the same day did not, however, spend any time discussing the details of the Amendment introducing Plea and Sentence Agreements.<sup>23</sup>



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<sup>18</sup> *North Western Dense Concrete CC v DPP (WC) 1999 (2) SACR 669, R v Sebeko 1956 (4) SA 619, S v Armugga 2005(2) SACR 259, S v Bopape 1966(1) SA 145, S v E 1995 (2) SALR 547, S v Marlon De Goede [2012] ZAWCHC 200, S v Sassin [2003] 4 All SA 506 (NC), S v Seabi 2003(1) SACR 620, S v Solomon 2005 (2) SACR 432, S v Taylor 2006(1) SACR 51, Jansen v The State [2015] ZASCA 151.*

<sup>19</sup> The Hansards on Session III of the First Parliament; 15<sup>th</sup> January to 7 November 1996.

<sup>20</sup> See Hansards on Session III, 4972- 4973; by Chairperson; Mr. D. Makoena.

<sup>21</sup> See Hansards on Session III, 4977.

<sup>22</sup> See Hansards on Session III, 4983.

<sup>23</sup> The six bills were; the International Cooperation in Criminal Matters Bill, the Proceeds of Crime Bill, the Extradition Amendment Bill, the Criminal Procedure

Bekker appreciates the central importance of plea-bargaining in the administration of criminal justice and reiterates that there is a lot of divergence and confusion on what it constitutes.<sup>24</sup> He states that the use of the word 'bargain' connotes inflammatory and misleading remarks, and it should be understood to mean plea negotiations.<sup>25</sup> He explains the meaning of plea-bargaining in terms of the concessions,<sup>26</sup> sentence bargains,<sup>27</sup> and charge bargains<sup>28</sup> by the prosecution and the accused. He reiterates the need for the recommendation by the South Africa Law Reform Commission to regulate plea-bargaining in South Africa. Bekker however, does not offer a discussion on whether the regulation should incorporate benefits for both the represented and unrepresented accused.



Before the enactment of the Criminal Procedure Second Amendment Act, Du Toit and Synman<sup>29</sup> stated that plea-bargaining is a handsome alternative to lengthy and costly criminal trials, offering a number of advantages to an overburdened court system.<sup>30</sup> This alternative is self –defeating in terms of quick disposal of cases because it is only available to the represented accused.

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Amendment Bill, the Criminal Procedure Second Amendment Bill and the Divorce Amendment Bill.

<sup>24</sup> Bekker (2001) 310.

<sup>25</sup> Bekker (2001) 311.

<sup>26</sup> Bekker (2001) 312.

<sup>27</sup> Bekker (2001) 313.

<sup>28</sup> Bekker (2001) 314.

<sup>29</sup> Du Toit & Snyman (2001) 144.

<sup>30</sup> Du Toit & Snyman (2001) 144.

According to Du Toit and Synman, it is a practice where an accused exchanges a plea of guilty for a concession by the court or the prosecution.<sup>31</sup>

Rodgers conducted research after the introduction of section 105A into the Criminal Procedure Act and acknowledges that despite the regulation of Plea and Sentence Agreements, two independent systems of negotiated justice exist in South African criminal procedure, namely, statutory negotiated justice and informal negotiated justice.<sup>32</sup> She defines and analyses these systems, and demonstrates the manner in which they co-exist.<sup>33</sup> However, she does not address the issue of the unrepresented accused and how he or she may benefit from the system.



Steyn states that the greatest challenge facing the concept of plea-bargaining is that it carries with it an inherent risk that accused are not equally treated and hence that there is no equal protection before the law.<sup>34</sup> She acknowledges that section 105A provides for the state and the accused's legal representative to enter into a plea and sentence agreement.<sup>35</sup> She states further that by

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<sup>31</sup> Du Toit & Snyman (2001) 144.

<sup>32</sup> Rodgers MB 'The development and operation of negotiated justice in the South African Criminal justice system' (2010) 23 *SAJCJ* 239 239; see also South African Law Commission (Project 73) *Report on Simplification of Criminal Procedure: Sentence Agreements* (2002) para 5.7.

<sup>33</sup> Rodgers (2010) 239.

<sup>34</sup> Steyn (2007) 217.

<sup>35</sup> Steyn (2007) 218.

implication, all of those who are without legal representation would be excluded from the benefits of the procedure and as a result, plea-bargaining is a process that will only benefit the rich.<sup>36</sup> Most of the accused who appear in the lower courts are indigent and cannot afford representation,<sup>37</sup> and accordingly the process provides no benefit for them despite the fact that ideally, they would be the main beneficiaries of a plea bargain. It is in doubt that section 105A will survive constitutional scrutiny in the years to come.<sup>38</sup> It is based on this notion that the researcher carries out this study.

## 2. PROBLEM STATEMENT

The continued exclusion of unrepresented accused from enjoying the benefits with regard to the application of section 105A is a violation of s 9 of the Constitution.<sup>39</sup> The section provides that:

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.<sup>40</sup>

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.<sup>41</sup>

It is evident from the section that first, equality before the law is not determined by one's standing with regard to his or her ability to afford legal representation.

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<sup>36</sup> Steyn (2007) 218.

<sup>37</sup> Steyn (2007) 218.

<sup>38</sup> Steyn (2007) 218.

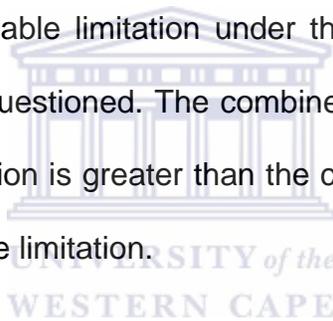
<sup>39</sup> Constitution Act 108 of 1996.

<sup>40</sup> See s 9(1).

<sup>41</sup> See s 9(2).

Secondly, the State has a duty in subsec 2, to use legislative and other measures to ensure that everyone enjoys equality before the law. It must be noted that the section differentiates between accused people with regard to their ability to have legal representation. This differentiation is not rationally connected to the legitimate governmental objective of quick disposal of cases.<sup>42</sup>

The recourse the unrepresented accused has is to plead guilty under section 112 of the Criminal Procedure Act. This section does not offer the same benefits like section 105A. The exclusion of an unrepresented accused from the application of section 105A is not a justifiable limitation under the Constitution,<sup>43</sup> because its unconstitutionality may be questioned. The combined effect of the factors of this right and the effect of limitation is greater than the combined effect of the factors that may be advanced for the limitation.



Statistics show that more accused persons plead under section 112 than section 105A of the Criminal Procedure Act.<sup>44</sup> The NPA Report for 2014/15 states that 1760 Plea and Sentence agreements, which only involved represented accused,

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<sup>42</sup> See South African Law Commission (Project 73) *Report on Simplification of Criminal Procedure: Sentence Agreements* (2002). See also *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC), *Prinsloo v Van der Linde and Another* 1997 (6) BCLR 759 (CC) and *Harksen v Lane NO and Others* 1997 (11) BCLR 1489 (CC).

<sup>43</sup> See s 36 of the Constitution 1996.

<sup>44</sup> The Annual Report of the National Director of Public Prosecutions 2014/15 39 available at [www.npa.gov.za](http://www.npa.gov.za) (accessed 4 February 2016)

representing 13% of the total workload for the office of the National Directorate of Public Prosecutions, were arrived at. This positively impacted on disposal of cases by the prosecution and courts.<sup>45</sup> These numbers would greatly increase if the unrepresented accused were allowed to proceed under section 105A.

South Africa also has international obligations relating to the observance of the rights of accused and has to that effect ratified a number of international treaties.<sup>46</sup> According to section 39(2) of the Constitution, international law forms part of the applicable law in South Africa as it has to be upheld.

### **3. PURPOSE OF THE STUDY**

The unrepresented accused does not benefit from the provisions of section 105A of the Criminal Procedure Act. No scholars have not dealt with this issue in South Africa. The purpose of the study is fourfold:

1. To examine the constitutionality of the section 105A in relation to unrepresented accused.
2. To examine the drafting history of section 105A of the Criminal Procedure Act.
3. To examine the practical aspects of the Plea and Sentence Agreement in South Africa.

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<sup>45</sup> Annual Report 39.

<sup>46</sup> International Covenant of Civil and Political Rights (ICCPR), 999 UNTS 171, ratified 10 December 1998; African Charter on Human and Peoples' Rights (The African Charter), 1520 UNTS 217, ratified 9 July 1996.

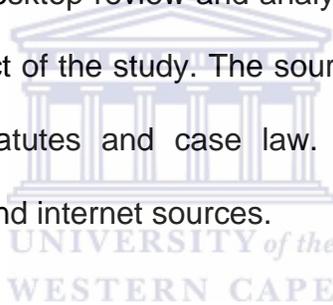
4. To make recommendations for reform to Plea and Sentence Agreements for the unrepresented accused.

#### **4. RESEARCH QUESTION**

The central research question of this study is whether the exclusion of the unrepresented from benefiting from section 105A of the Criminal Procedure Act is constitutional.

#### **5. RESEARCH METHODOLOGY**

The research is based on desktop review and analysis of literature and case law that is relevant to the subject of the study. The sources relied on in the research paper includes relevant statutes and case law. Secondary sources include textbooks, journal articles, and internet sources.



#### **6. PROPOSED STRUCTURE**

Chapter 1 of the research paper provides an introduction, problem statement, purposes of the study, research questions and arguments, and the research methods. Chapter 2 discusses the history of section 105A of the Criminal Procedure Act,<sup>47</sup> and gives a review of Plea and Sentence agreements. In chapter 3, the researcher gives a comparative analysis of plea-bargaining in Canada, New Zealand, and the United States of America. The analysis discusses how these jurisdictions deal with the unrepresented accused in Plea and Sentence agreements in practice. Chapter 4 discusses how courts have

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<sup>47</sup> Act 55 of 1977.

dealt with the issue of the unrepresented accused. Chapter 5 offers a conclusion and recommendations to the research topic.



## CHAPTER TWO

### HISTORY OF PLEA-BARGAINING IN SOUTH AFRICA

#### 2.1 INTRODUCTION

The previous chapter introduced the study. This chapter examines the history of plea-bargaining in South Africa before and after 2001, when s. 105A was introduced in the CPA.

Isakov and van Zyl Smit state that in South Africa, a professional body of prosecutors has the power to prosecute, and control negotiations over charges prior to trial without the consent or approval of the judge.<sup>1</sup> Accordingly, the prosecutor may at any stage before trial, accept such reduced pleas as he or she thinks fit.<sup>2</sup>

#### 2.2 PLEA-BARGAINING; CONCEPT AND CHARACTERISTICS

While most authors state that there is no universal definition of plea-bargaining, the various modes of understanding it as a concept differ from place to place.<sup>3</sup> The term 'bargain' is looked at with negative connotations, which do not reflect the literal meaning of the term. Black's Law Dictionary defines plea-bargain as

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<sup>1</sup> Isakov NM & van Zyl Smit D 'The Decision on How to Plead: A Study of Plea Negotiation in Supreme Court Criminal Matters'(1986)SACC 10 10.

<sup>2</sup> *S v Ngubane* 1985 3 SA 677 (A), *S v Mlangeni* 1976 1 SA 528 (T), *S v Cordanzo* 1975 1 SA 635 (T).

<sup>3</sup> Bekker (2001) 310.

'An agreement set up between the plaintiff and the defendant to come to a resolution about a case without ever taking it to trial.'<sup>4</sup>

This definition connotes an agreement between two parties about a case. It fails to recognise the requirement for other stakeholders in the process like the investigating officers, the victim, and the public. When this definition relates to justice, it implies two instances. The first instance is that justice is sold as a lower value for an accused offer of a plea of guilty. The second instance is that justice is offered at the right value at the expense of an accused's offer of a plea of guilty. This definition does not convey an idea of a compromise or a settlement of a case.<sup>5</sup> It rather connotes a vague understanding of the term, which seems best understood when described, instead of defined.<sup>6</sup>

On this note, it is safer describing plea-bargaining as a concept rather than defining it. Plea-bargaining can be described as the process of negotiating and concluding agreements in criminal proceedings. It can be a process, which involves a practice of relinquishing the right to go to trial in exchange for a reduction in the charge and/ or sentence.<sup>7</sup> The essence of this process is to provide an alternative logical solution to a dispute while at the same time striking a balance between the punishment of the offence committed and ensuring timely

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<sup>4</sup> Blacks Law Online Dictionary available at <http://thelawdictionary.org/plea-bargaining/>(accessed 9 March 2016).

<sup>5</sup> Bekker (2001) 310.

<sup>6</sup> Bekker (2001) 310. See also Shin HJ 'Do lesser pleas pay: accommodation in the sentencing and parole processes' 1973 (1) *Journal of Criminal Justice* 27-42.

<sup>7</sup> Steyn (2007) 208, Clarke (1999) 137.

disposal of cases. A narrow interpretation of plea-bargaining connotes an accused's trade-off of a promise to plead guilty, and a waiver of some rights at a trial in return for the prosecutor's promise to give some concessions.<sup>8</sup> These rights include the right to be presumed innocent,<sup>9</sup> to remain silent,<sup>10</sup> and not to testify during the proceedings,<sup>11</sup> and a right not to be compelled to give self-incriminating evidence.<sup>12</sup>

A wider interpretation connotes a process whereby an accused gives up his right to trial in exchange for favourable treatment from the prosecutor.<sup>13</sup> It also refers to a process through which an accused agrees to plead guilty in exchange for some benefits,<sup>14</sup> grant of certain concessions if the accused pleads guilty, or grant of inducements in exchange for a defendant's cooperation in not fully contesting the charges against him.<sup>15</sup> The narrow and wide interpretations offer the key characteristics instructive to the description of plea-bargaining.

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<sup>8</sup> Bekker (2001) 311-12.

<sup>9</sup> Section 35(3) (h) of the Constitution of South Africa.

<sup>10</sup> Section 35(3) (h).

<sup>11</sup> Section 35(3) (i).

<sup>12</sup> Section 35(3) (j).

<sup>13</sup> Bekker (2001) 312.

<sup>14</sup> Bekker (2001) 312.

<sup>15</sup> Wayne R, La Fave & Jerold HI *Criminal Procedure* 2ed (1992) para 21.1.

### 2.3 HISTORY OF PLEA-BARGAINING UNDER COMMON LAW

Although plea-bargaining has origins in common law from England, it was not provided for by statute. The English case of *R v Turner*<sup>16</sup> provided the courts a chance to decide whether plea-bargaining could be recognised as a formal practice in England. It is relevant to South Africa because it is an informal practice of plea-bargaining which is not formally recognised. In *Turner*, the accused was charged with theft and pleaded not guilty. In the course of the prosecution's case, his barrister advised him to plead guilty and receive a noncustodial sentence.<sup>17</sup> The barrister told him that if he persisted in pleading not guilty, there was a risk that he would be imprisoned.<sup>18</sup> Turner eventually took his barrister's advice after getting the indication that the latter had discussed the matter in private with the trial judge.<sup>19</sup> Turner was fined but appealed against conviction on the ground that his plea had been involuntary because of the pressure exerted by his counsel and because he had believed that counsel had been expressing the view of the judge.<sup>20</sup> The English Court of Appeal laid down a principle to the effect that a judicial officer should never indicate the type of sentence he will impose on an accused because he intends to plead guilty. Any indication of this nature meant that a judicial officer's participation in any plea bargain of any kind would be a thrust of his office' full force and majesty to induce

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<sup>16</sup> *R v Turner* [1970] 2 All ER 281 at 285.

<sup>17</sup> Page 285.

<sup>18</sup> Page 285.

<sup>19</sup> Page 285.

<sup>20</sup> Page 285.

the accused to yield his trial.<sup>21</sup> It was against this background and the reluctance by the judicial system to regulate plea-bargaining that there was little research in plea-bargaining in England.<sup>22</sup>

In 1975, Baldwin & McConville carried out a study about plea-bargaining, following the status of criminal cases in the Birmingham Crown Court.<sup>23</sup> It was established that despite the official stand of the courts on plea-bargaining, many of the cases that were anticipated to be tried by jury ended suddenly with the accused pleading guilty. It was established further that the accused tended to change their minds abruptly, only deciding to plead guilty minutes before their cases were due to begin in court. Baldwin and McConville state that because the cases of this kind were so common, they decided to ask accused the reasons for this apparent change.<sup>24</sup> It soon emerged from the interviews conducted that the picture of plea-bargaining as traditionally accepted in England was largely mythical and that informal plea negotiation was common and all accused were exposed to a variety of pressures which were calculated to induce them to plead guilty.<sup>25</sup> Although there was no highly organised system of plea-bargaining in England, many accused seemed to have been involved in the process that

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<sup>21</sup> Page 285. See also Steyn E (2007) 209, see *Elksnis v Gilligan* 356F Supp 244, 254(S.D.N.Y.1966; per WentfieldJ 256F Supp at 255).

<sup>22</sup> Baldwin J & McConville M 'Plea-bargaining and Plea Negotiation in England' (1978-1979)13 *Law & Society Review* 287 291.

<sup>23</sup> Baldwin & McConville (1978 -79) 291.

<sup>24</sup> Baldwin & McConville (1978 -79) 291.

<sup>25</sup> Baldwin & McConville (1978 -79) 291.

resembled plea-bargaining.<sup>26</sup> This study was an indication that plea-bargaining was a mode of practice in the English criminal justice system and its true dimensions were beginning to emerge, despite the open criticism by the appellate courts.<sup>27</sup>

In 1978, the English Court of Appeal still pronounced itself on plea-bargaining as an improper concept to be developed in England.<sup>28</sup> The basis of this mode of operation was to protect the judicial officer's discretion in sentencing.<sup>29</sup> The limited development of plea-bargaining was also due to the fact that the English judge played a very dominant role in the trial system, it would be incorrect to add to him the powers to prevail on an accused to enter a plea of guilt.<sup>30</sup>

The principles in *Turner* were applied consistently by the appellate courts, despite the realities of the existence of the plea-bargaining system in magistrates' courts. It was not until 1993 when the Report of the Royal Commission on Criminal Justice<sup>31</sup> obtained comments from many witnesses from the bar and the judiciary on the need for a review of the plea-bargaining system. The judiciary overwhelmingly supported the view that position of *Turner* had to be

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<sup>26</sup> Baldwin & McConville (1978 -79) 293.

<sup>27</sup> Baldwin & McConville (1978 -79) 305.

<sup>28</sup> Baldwin & McConville (1978 -79) 305.

<sup>29</sup> Baldwin & McConville (1978-1979) 289.

<sup>30</sup> Baldwin & McConville (1978-1979) 289.

<sup>31</sup> By Viscount Runciman of Doxford, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/271971/2263.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/271971/2263.pdf) (last accessed 18 May 2016).

modified to embrace the practical contemporary position about the use of plea-bargaining.<sup>32</sup> The witnesses supported the view that at the request of a defence counsel on instructions of the defendant, the defence counsel should approach the judges for an indication of the highest possible sentence in case the defendant pleaded guilty.<sup>33</sup> The proposed recommendations included the procedure, which had to be initiated by, and for the sole benefit of, the defence.<sup>34</sup> In addition, the judge was not duty bound to indicate the highest possible sentence if he or she felt that it was not appropriate in the circumstances.<sup>35</sup> These recommendations were later reiterated in the White Paper where the Crown Prosecution Service welcomed an arrangement where the defendant could seek an advance indication of sentence they would get if they pleaded guilty.<sup>36</sup> These recommendations paved a way for the gradual change in the courts' perception of plea-bargaining in England. The recommendations started getting statutory recognition. In the Criminal Justice Act<sup>37</sup> an accused was at liberty to request for an indication of the sentence; in cases where the summary trial was suitable, he could ascertain whether, it would be a; custodial or a non-custodial sentence in case he pleaded

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<sup>32</sup> See para 50.

<sup>33</sup> See para 50.

<sup>34</sup> See para 51.

<sup>35</sup> See para 52.

<sup>36</sup> 'Justice for All' White Paper by the Criminal Justice Agencies and partners, July 2002, para 4.42 available at <https://www.cps.gov.uk/publications/docs/jfawhitepaper.pdf> (last accessed 18 May 2016)

<sup>37</sup> Chapter 44, Laws of England.

guilty.<sup>38</sup> This was an indication that the absolute prohibition against the indication of the sentence was no longer operational and that the way of dealing with an indication of the sentence, was no longer the same when *Turner* was decided.<sup>39</sup> In addition, plea-bargaining was also provided for in the Powers of Criminal Courts (Sentencing) Act 2000,<sup>40</sup> which provided that the judicial officer had a discretion not to impose a custodial sentence unless it was justified by the facts.<sup>41</sup>

In 2005, the Supreme Court revisited these principles in *R v Goodyear*.<sup>42</sup> In *Goodyear*, the appellant appealed against sentence following his plea of guilty to an offence of corruption. At a meeting in chambers with his counsel before the trial had begun, and in response to a request for a sentence indication, the judge stated that his was not a custody case.<sup>43</sup> A subsequent pre-sentence report concluded that a custodial sentence was inappropriate. Following his guilty plea, the judge sentenced *Goodyear* to six months' imprisonment suspended for two years and a fine.<sup>44</sup> *Goodyear* submitted that, in light of the judge's earlier indication, he could not have been satisfied that the offence was so serious that only a custodial sentence could be justified and a suspended sentence was

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<sup>38</sup> The Criminal Justice Act 2003, schedule 3; para 6.

<sup>39</sup> *R v Goodyear* 2005 (WLR) para 47.

<sup>40</sup> Chapter 6 Laws of England, 2000.

<sup>41</sup> See s. 79 (2) (a) and ( b)

<sup>42</sup> *Goodyear* para 55.

<sup>43</sup> See para 1-40.

<sup>44</sup> See para 1-40.

inappropriate because there was nothing exceptional about the circumstances of the case.<sup>45</sup>

The Court held that a judge should not give an advance indication of sentence unless one is sought by the accused and retains unfettered discretion to refuse to give one.<sup>46</sup> In addition, the court added that the defendant has to initiate the plea bargain process of seeking an indication of the sentence in case he wishes to forego his right to trial.<sup>47</sup> Where an accused was represented, his attorney would only seek an indication with written authority signed by his client that he wishes to do so.<sup>48</sup>

#### **2.4 POSITION OF PLEA-BARGAINING BEFORE 2001**

Before 2001, South Africa had the informal plea-bargaining system, which was not regulated. Studies show that pre-trial plea negotiations persisted at all levels of South African criminal courts, particularly among more experienced practitioners.<sup>49</sup> This practice went on, notwithstanding the fact that it had neither been formally sanctioned nor taught in law school trial advocacy courses.<sup>50</sup> The persistence of this practice showed that South Africa, like other comparable legal

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<sup>45</sup> See para 1-40.

<sup>46</sup> *Goodyear* para 57.

<sup>47</sup> *Goodyear* paras 53 and 63.

<sup>48</sup> *Goodyear* para 64.

<sup>49</sup> Clarke CT 'Message in a bottle for unknowing defenders: strategic plea negotiations persist in South African criminal courts' (1999) 32 *Comparative and International Law Journal of South Africa* 141- 168 168.

<sup>50</sup> Clarke (1999) 168.

systems, had abandoned strict adherence to accusatorial principles and informally, opted for an evolutionary system.<sup>51</sup> This evolutionary system accommodated more accepted principles like informal dialogue outside courts and participation by non-lawyers and making concessions.<sup>52</sup> Such initiatives by South Africa were able to address common problems of case disposal, rising crime rates, overcrowded prisons, and growing disconnections between the criminal courts and the communities they intend to serve.<sup>53</sup>

Due to lack of legal clarity and the use of unregulated plea-bargaining, South Africa embraced both the inquisitorial and the accusatorial system as a way of guaranteeing a fair trial within a reasonable, and cost-effective framework.<sup>54</sup> The accusatorial system was the system that envisioned prosecutors and defense lawyers facing off each other in a courtroom before a judge or a jury who then decided the guilt or innocence of a criminal defendant.<sup>55</sup> The accusatorial system of England had been incorporated by the early 19<sup>th</sup> century, into South African law and was evident in public law.<sup>56</sup> Public law, particularly criminal law was

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<sup>51</sup> Clarke (1999)147.

<sup>52</sup> Clarke (1999)147.

<sup>53</sup> Clarke (1999)146-148.

<sup>54</sup> Harms LCT 'Demystification of the inquisitorial system' (2011) 14(5) PER/PELJ 1  
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<sup>55</sup> Clarke (1999)146.

<sup>56</sup> Geldenhuys T & Joubert JJ (eds) *Criminal procedure handbook* (1994) 13-14; see also Dugard 'Introduction to Criminal Procedure' in *South African Criminal Law and Procedure* (1977) 1-56.

influenced by the continental European system's structure and content.<sup>57</sup> It is clear that the judicial officer would focus more on procedural justice.<sup>58</sup>

The inquisitorial system was more participatory and involved the consistent participation of the judge, the assessors, and the attorneys.<sup>59</sup> Under the inquisitorial system, a judicial officer had the mandate to conduct a full inquiry of the witnesses, whereby he controlled the pace of the proceedings, called witnesses, and established the scope of the inquiry.<sup>60</sup> This system was more evident in private law, which was grounded in Roman Dutch Law.<sup>61</sup> As a result, the judicial officer, rather than the attorneys, controlled the main investigation into the facts after the police had referred the case to Court.<sup>62</sup> The attorneys' courtroom roles were limited to proposing additional questions for the judicial officer to ask. It is clear that the judicial officer would focus more on substantive justice.<sup>63</sup> A narrative style of testimony is used at trial rather than the cross-examination technique used in adversarial trials.<sup>64</sup>

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<sup>57</sup> Dennis D & Hugh C 'Law and social practice: an introduction' in Hugh Corder (ed) *Essays on law and social practice in South Africa* (1988) 15.

<sup>58</sup> Clarke (1999)148.

<sup>59</sup> Clarke (1999)146.

<sup>60</sup> Clarke (1999)148.

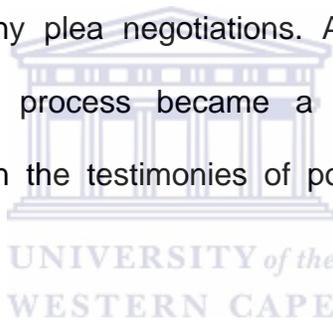
<sup>61</sup> Dennis & Hugh (1988) 15.

<sup>62</sup> *S v Rudman, S v Johnson, S v Xaso, Xaso v Van Wyk No and Another* 1989 3 SA 368, 378 (ECD), affirmed in 1992 1 SA 343 (AD).

<sup>63</sup> Clarke (1999)148.

<sup>64</sup> Clarke (1999)148.

Out of the two systems, developed a hybrid system of prosecution, which embraced the accusatorial and inquisitorial system of prosecution. The jury trial system was abolished in 1969 in the South African criminal courts.<sup>65</sup> As a result, the magistrates in the district and regional courts hear cases without using the jury system. This system embraced the use of assessors, chosen at the full discretion of the judge to assist in decision-making. The police, on the other hand, played a critical role in the investigation, preparation of cases for trial, hold dockets or dossiers, deliver cases to a prosecutor, who would then decide the appropriate charges and the appropriate court to hear the case.<sup>66</sup> This mode of policing heavily affected any plea negotiations. As a result, the role of the detectives in the pre-trial process became a crucial link, because plea negotiations were based on the testimonies of potential witnesses who were usually the police.<sup>67</sup>



Various categories of plea-bargaining were evident in South Africa. A scrutiny of these categories would shed light on the chronological flow of events leading to the introduction of section 105A in the Criminal Procedure Act. The first category is charge bargaining. Charge bargaining would occur when the defence attorney plea- negotiated serious cases such as murder down to a charge of culpable homicide after they had investigated a case and developed a strategy for

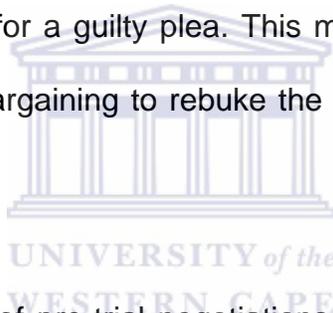
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<sup>65</sup> Clarke (1999)150.

<sup>66</sup> Clarke (1999)150.

<sup>67</sup> Clarke (1999)151.

negotiation and for trial.<sup>68</sup> For instance, if the evidence on a charge of an assault with intent to do grievous bodily harm did not provide for the offence of assault with intent to do grievous harm, but common assault, the case would be plea negotiated down to the competent verdict of common assault.<sup>69</sup> Good defence lawyers could also negotiate cases where accused were charged with culpable homicide, but the evidence did not prove culpable homicide to other offences such as assault with intent to do grievous harm, robbery, common assault or public violence.<sup>70</sup> The defence attorney took the advantage that the Directorate of Public Prosecutions (DPP) exercises wide discretion in plea negotiations to impose a fine in exchange for a guilty plea. This motivated the High Court in a case that involved a plea-bargaining to rebuke the DPP for plea negotiating too leniently.<sup>71</sup>



The second main category of pre-trial negotiations in South African courts was the use of recorded pre-trial agreements. These would end up in the recording of a plea of guilty by the accused.<sup>72</sup> Once an accused has agreed to plead guilty, the defence lawyer would write up the facts upon which he had pleaded guilty as

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<sup>68</sup> Clarke (1999)161.

<sup>69</sup> Act 55 of 1977 s 266.

<sup>70</sup> See s 259(d).

<sup>71</sup> *S v Blank* 1995 SACR 62, 70-71

<sup>72</sup> Act 55 of 1977 s 112(1)(b), which provides that a court will question an accused who pleads guilty to determine if the plea is voluntary and whether the accused freely admits to committing all the elements of the crime.

required by the Criminal Procedure Act.<sup>73</sup> The written facts would explain the accused's plea and the basis upon which the court would find him guilty. The advantage of pleading guilty was that the attorney would provide the court with a version of the facts admitting guilt while explaining some of the most harmful facts. Bekker suggested that sentence could not be predicted directly from a section 112(2) statement because defence attorneys used of this chance to keep damning facts from the knowledge of the court and as a result justified the imposition of a lesser sentence than would have been the case had the judge had all the facts at his disposal.<sup>74</sup> However, that there are limits on the extent to which an attorney can dilute or omit from the written version of the facts. There is a formal procedural safeguard enforceable by the judiciary. When the presiding magistrate or judge asks the prosecutor whether he or she is satisfied with the facts as set forth in the plea, a prosecutor can object to the diluted version of the facts.<sup>75</sup>

The third category was the use of sentence agreements under section 297(1) (b) of the Criminal Procedure Act.<sup>76</sup> Results of some pre-trial negotiations indicate

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<sup>73</sup> Act 55 of 1977 s 112.

<sup>74</sup> Bekker (2001)221.

<sup>75</sup> Clarke (1999)162.

<sup>76</sup> Section 297(1) (b) of the Criminal Procedure Act provides that:

'Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion—

that when an accused pleaded guilty to specific charges and an informal agreement had been arrived at, he or she would be sentenced to a non-custodial programme such as correctional supervision as part of a suspended sentence.<sup>77</sup>

The major benefit of a correctional supervision plea agreement was that the accused could continue to work, support a family, and seek medical or psychological treatment if necessary. It was offered based on an accused's circumstances under which the offence was committed. The disadvantage with pre-trial negotiations under section 297 was that these types of sentencing agreements were not binding on the sentencing magistrate or judge.

The last category was the use of plea agreement under section 112. This section provides for two instances under which a plea of guilty may be entered. Section 112(1) a provides for the first instance and provides that

'Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea –

(a) the presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette*, convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only ...<sup>78</sup>

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(b) pass sentence but order the operation of the whole or any part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph (a) (i) which the court may specify in the order, ...'

<sup>77</sup> Act 55 of 1977 s 297.

<sup>78</sup> See section 112 (1) a.

If an accused is to enter a plea of guilty as required under this section, first, the prosecutor had to accept the plea. Secondly, the judicial officer has to form the opinion that the offence does not require punishment by way of imprisonment or option of a fine to a given amount of 1500 Rand.<sup>79</sup> The disadvantage with this section is that the accused has to first plead guilty before, first, the prosecution exercises its discretion to accept the plea and secondly, before the court forms an opinion on the nature of sentence to impose. While this may not seem to be a problem in itself, the section does not offer the accused any mode of participation in the process that determines the sentence handed down to him or her. The plea of guilty entered upon a summary plea under section 112(1) (a) leads to the conviction on minor offences. This is an indication that offences that are felonies may not be subjected to section 112 (1) (a).<sup>80</sup> The accused's only role is to plead guilty, and the court is guided by the seriousness of the offence to determine the sentence.<sup>81</sup> The court may also consider the prescribed minimum sentence of the offence.<sup>82</sup>

In contrast to section 112 (1) a, serious offences under summary procedure may be subjected to the procedure under section 112 (1) b. This section provides that:

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<sup>79</sup> Government Notice No. R.239 in Government Gazette 24393, dated 14 February 2003.

<sup>80</sup> Government Gazette 19435 of 30 October 1998 sets a limit of a fine that does not exceed R 1500.

<sup>81</sup> *S v Phundula* 1978 (4) SA 885 (T) 859.

<sup>82</sup> *S v Mkhafu* 1978 (1) SA 665.

'the presiding judge, regional magistrate or magistrate shall, if he or she is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette*, or if requested thereto by the prosecutor, question the accused with the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence and impose any competent sentence.'

This subsection, like the preceding one, does not give the accused person any other role in the summary procedure other than pleading guilty. Its point of departure is in the fact that it deals with serious offences, which require the presiding judicial officer to pass a just sentence, without an option of a fine. However, this section has a little semblance with PSAs. First, it requires the presiding judicial officer to question the accused as to commission of each of the elements of the offence. While this may be taken to be an abuse of the plea taking process, it offers protection to an unrepresented accused in instances where he was coerced to plead guilty.<sup>83</sup> However, it does not offer the accused with the opportunity to have an input in proposing the sentence he would prefer.

The third instance of plea of guilty is provided for in section 112(2). It states:

'If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1)(b), convict the accused on the strength of such statement and sentence him as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement.'<sup>84</sup>

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<sup>83</sup> *S v Nyambe* 1978 (1) SA 311 (NC) 312. *S V Naidoo* 1989 (2) SA 114 (a) 121F.

<sup>84</sup> See section 112 (2).

Just like the earlier instance, this instance also involves an accused handing in a written statement, which specifies the facts he pleads guilty to. This section allows the court to question the accused on the contents of the statement to satisfy itself that the accused committed the offence. Although the procedure of questioning the accused helps in satisfying the court that the accused committed the offence, the section offers little input from the accused in a situation that involves a possible limitation to his liberty.

There was growing dissidence on whether plea bargains were binding on court. Though there was no hard and fast rule on the binding nature of the plea bargains, the courts stated that plea bargains were binding on courts. In *State v Ngubane*,<sup>85</sup> the accused who was charged with murder, pleaded guilty to culpable homicide. This was because of plea negotiations with the prosecutor. Despite the plea negotiations, the accused was convicted of murder with extenuating circumstances.<sup>86</sup> On appeal, the Court held that the lower court erred in adjudicating on the charge of murder because upon reading sections 112 and 113 of the Criminal Procedure Act meant that after the accused has pleaded guilty,

'the prosecutor limits the ambit of the *lis* between the state and the accused in accordance with the accused's plea .... that the *lis* is restricted by the acceptance of the plea appears from sections 112 and 113. The proceedings under the

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<sup>85</sup> *State v Ngubane* 1985 3 SA 677(A).

<sup>86</sup> *Ngubane* 677.

former are restricted to the offence "to which he has pleaded guilty" and the latter must be read within that frame.<sup>87</sup>

This is an indication that where the court is informed that a plea negotiation has taken place, as in the case of *Ngubane*, then the plea agreement is binding on the court. At the time of passing this judgment, section 105A was not in existence. This case illustrated the growing requirement to provide statutory regulation of plea and sentence agreements.

In *North Western Dense Concrete CC v Director of Public Prosecutions (Western Cape)*,<sup>88</sup> the applicant and the prosecution entered into a plea agreement, where the prosecution agreed to withdraw the charges against the applicant.<sup>89</sup> Subsequently, when a third party applied for certificate *nolle prosequi* from the respondent, the respondent reinstated the charges against the applicant. The applicants applied to a High Court for an order interdicting the respondent from proceeding with the prosecution.<sup>90</sup> The Court had to decide whether plea-bargaining was an integral part of the law of criminal procedure and, if it was, whether it could and/or should interfere with the decision of the respondent to reinstate the charges against the applicants. The court held that plea-bargaining is an example of the DPP's discretion and cloth of authority to decline to prosecute an individual on certain charges, even when a prima facie case has

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<sup>87</sup> *Ngubane* 683.

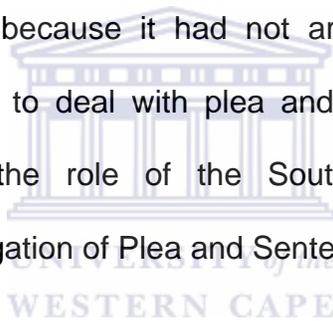
<sup>88</sup> *North Western Dense Concrete CC v Director of Public Prosecutions (Western Cape)* 1999 (2) SACR 669 at 681.

<sup>89</sup> At p. 670.

<sup>90</sup> At p. 670.

been made out.<sup>91</sup> The court hastened to add that if the DPP attempts to renege on a Plea and Sentence Agreement not to prosecute an individual, entered into by his authorized officers and the accused, courts would not allow him to do so. Dictates of justice move the courts to interfere with the prosecutory discretion and cloth of authority, to stay proceedings.<sup>92</sup>

These two cases illustrate the judicial recognition of plea-bargaining before section 105A was introduced in the Criminal Procedure Act. They show that plea-bargaining was informally recognised and used despite the fact that it was not yet regulated by statute.<sup>93</sup> The critical situation of the unrepresented accused was not adequately addressed because it had not arisen, as there was no any statutory provision in place to deal with plea and sentence agreements. The section below examines the role of the South Africa Law Commission (Commission) in the promulgation of Plea and Sentence Agreements.



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<sup>91</sup> See p. 681; see also *Gullingham v Attorney General* 1909 TS572; *R v Sebeko* 1956 (4) SA 619; *S v Bopape* 1966(1) SA 145, *S v E* 1995 (2) SALR 547.

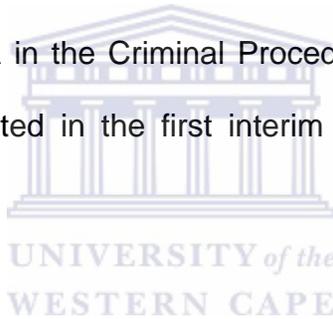
<sup>92</sup> *North Western Dense Concrete CC* at 681.

<sup>93</sup> Trichardt & Krull 'A confession for a concession' (1987) *Tydskrifvir Hedendaagse Romeins-Hollandse Reg* 428.

## 2.5 POSITION AFTER 2001

### 2.5.1 EVALUATION OF THE SALC REPORT ON PLEA AND SENTENCE AGREEMENTS

The South African Law Commission Act established the Commission<sup>94</sup> and its mandate is to make proposals on laws in the Republic of South Africa. In 1989, the initial investigations into the possibility of simplifying the criminal procedure to get rid of provisions that led to abuse and unnecessary delays in the process were started. This marked the beginning of the investigations by the Commission, which culminated into the final recommendations for the introduction of section 105A in the Criminal Procedure Act.<sup>95</sup> The investigations of the Commission culminated in the first interim report and the second final report.



In the first report, the Commission recommended that the statutory provision should be made for plea negotiations and conclusion of plea agreements with a simple procedure.<sup>96</sup> The report provided for a draft section, which provided:

'106A. Plea discussions and plea agreements.

(1) The prosecutor and the accused or his legal representative may hold discussions with a view to reaching an agreement acceptable to both parties in respect of plea proceedings and the disposal of the case.

(2) Any agreement reached between the parties shall be reduced to writing and shall state fully the terms of the agreement and any admissions made and shall

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<sup>94</sup> South African Law Commission Act 19 of 1973.

<sup>95</sup> South African Law Commission (Project 73) *Report on Simplification of Criminal Procedure: Sentence Agreements* (2002) paras 1.1, 1.8.

<sup>96</sup> See para 4.1, p. 47.

be signed by the prosecutor, the accused, the legal representative and the interpreter, as the case may be.

(3) The contents of such an agreement shall be proved by the mere production thereof by both parties: Provided that in the case of an agreement concluded with an accused who is not legally represented the court shall satisfy itself that the accused understands the contents thereof and entered into the agreement voluntarily and without improper influence.

(4) The judicial officer before whom criminal proceedings are pending shall not participate in the discussions contemplated in subsection (1): Provided that he may, before an agreement is reached, be approached by the parties in open court or in chambers regarding the contents of such discussions and he may inform the parties in general terms of the possible advantages of discussions, possible sentencing options or the acceptability of a proposed agreement.

(5) The judicial officer shall before the accused is required to plead in open court or if he has already pleaded before judgment is given, be informed that plea discussions are being conducted or are to be conducted or that the parties have reached a plea agreement as contemplated in subsection (1).

(6) If after discussions the parties have concluded a plea agreement and the court has been informed as contemplated in subsection (3), the court shall enter such fact upon the record and order that the contents of the agreement be disclosed in open court: Provided that if the court is for any reason of the opinion that the accused cannot be convicted of the offence with which he is charged or of the offence in respect of which an agreement was reached and to which he pleaded guilty or that the agreement is in conflict with the provisions of section 25 of the Constitution of the Republic of South Africa or with justice, the court shall record a plea of not guilty in respect of such a charge and order that the trial proceed.

(7) No evidence of a plea agreement or of admissions contained therein or of statements relating to such agreement shall be admissible as proof of guilt or credibility in subsequent criminal proceedings.'

In subsection 1 of the proposed section, the prosecutor, the accused, or his counsel were at liberty to hold discussions with a view of entering plea negotiations and disposing of the case. It was not a requirement that the accused needed to be represented before he could enter into a plea agreement. It was evident in subsection 3 that the proposed section provided a yardstick for ensuring that the unrepresented accused entered into the contract freely and voluntarily. While the proposed law ensured that the courts did not take part in the negotiations, as noted in subsection 4, it was silent on sentence agreements

In the evaluation of its first interim report, the Commission was of the opinion that the practice of plea-bargaining in South Africa could make an important contribution to the acceleration of the criminal justice process. It was of the view that statutory measures could be provided to improve the effectiveness of the system of criminal law.<sup>97</sup> Although the Commission was of the view that the practice should be statutorily recognised such that criminal proceedings could be accelerated,<sup>98</sup> the Portfolio Committee on Justice (PCJ) requested the Commission to establish the practicability of the plea-bargaining procedure with regard to the unique South African circumstances. This was because the Commission was of the opinion that the unrepresented accused had to benefit from the plea negotiations because its comparative study of other jurisdictions did not give adequate insight into the criminal justice system of South Africa.<sup>99</sup> This assessment was done because of the limited authority of the prosecution to make concessions favourable to the accused in respect of the sentence to be imposed by the court. This limited authority, in the view of the PCJ, would affect the ability of the prosecution to conclude Plea and Sentence Agreements.<sup>100</sup>

In its second Report, the Commission attended to the concerns of the PCJ. It stated that it would be hard to assess the impact of the plea agreements because

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<sup>97</sup> Para 4.3.

<sup>98</sup> Para 4.4.

<sup>99</sup> Para 4.6.

<sup>100</sup> Para 4.6.

they had not been tested.<sup>101</sup> The study of South Africa's situation established that plea and sentence negotiations were alive and perform an important part in its criminal justice system.<sup>102</sup> The second report ushered in the introduction of sentence agreements. The basis for the introduction was because the Commission was of the opinion that while the Criminal Procedure Act gave a wide discretion to the prosecution to conclude plea agreements,<sup>103</sup> it did not cover sentence agreements.<sup>104</sup> In addition, the Commission made a distinction between sentence agreements. The first type was one where the prosecution, in exchange for a plea of guilty, undertakes to submit to the court a proposed sentence or agrees not to oppose the sentence proposed by the accused.<sup>105</sup> The second type was where the accused agrees with the state to plead guilty provided an agreed sentence is imposed.<sup>106</sup> It is with regard to the second agreement that the Commission formed the opinion, that law should regulate Plea and Sentence Agreements.<sup>107</sup>

The second Report provided for a draft, which included the plea and sentence agreement. It provided thus:

'111A. (1) (a) The prosecutor and an accused, or his or her legal adviser, may before the accused pleads to the charge, enter into an agreement in respect of

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<sup>101</sup> Para 4.7.

<sup>102</sup> Para 4.7.

<sup>103</sup> Para 4.7.

<sup>104</sup> Para 4.7.

<sup>105</sup> Para 4.16.

<sup>106</sup> Para 4.17.

<sup>107</sup> Para 4.12.

- (i) a plea of guilty by the accused to the offence charged or to an offence of which he or she may be convicted on the charge; and
  - (ii) an appropriate sentence to be imposed by the court if the accused is convicted of the offence to which he or she intends to plead guilty.
- (b) ...’.

Subsection 7 of the proposed section provided that:

‘Where an accused has been convicted in terms of subsection (6) (a), the presiding judge, regional magistrate or magistrate shall consider the sentence agreed upon in the agreement and if he or she is

- (a) satisfied that such sentence is an appropriate sentence, impose that sentence;
- (b) of the view that he or she would have imposed a lesser sentence than the sentence agreed upon in the agreement, impose the lesser sentence; or
- (c) of the view that the offence requires a heavier sentence than the sentence agreed upon in the agreement, he or she shall inform the accused of such heavier sentence he or she considers to be appropriate.’

Subsection 1 of the proposed section provided for the possibility of an accused, or his counsel to conclude a plea and sentence agreement. This provision as it was, enabled the accused to enter into the plea and sentence agreement, regardless of the presence of a legal representative. The section, unlike the first proposal in the First Report, did not provide for a mode of ensuring that the accused had voluntarily and freely entered the plea and sentence agreement. In addition, the proposed subsection provided a more elaborate position for the court with regard to its duties and obligations. The court was not to take part in the plea and sentence negotiations. It, however, had a duty to inquire into the correctness of the agreement from the accused,<sup>108</sup> and that it was entered in freely without undue influence.<sup>109</sup> The court was empowered to disregard the sentence if it was not appropriate in the circumstances and to ensure that the

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<sup>108</sup> Subsec 5.

<sup>109</sup> Subsec 5.

victim's submissions had been taken into consideration while sentencing an accused.<sup>110</sup>

The second draft Bill also received various comments from various stakeholders. The Judges of the High Court from Durban were of the opinion that although what was intended to be introduced would be appropriate in a first world situation, it would not augur well for South Africa.<sup>111</sup> They asked the Commission to exercise caution in including the scenario enabling the ability to enter agreements with unrepresented accused.<sup>112</sup> They added that where the bulk of criminal cases took place in the lower courts, it would be difficult for the accused who were not represented to enter into such agreements.<sup>113</sup> Another potential recommendation was that the Bill should provide for plea agreements as well because the basis of the agreement was the nature of plea taken by the accused. It was, therefore, problematic to sever the plea from the sentence agreement, yet the plea formed an integral part of the subsequent sentence agreement.<sup>114</sup>

The Commission recommended that the National Director of Public Prosecutions consider issuing Directives to prosecutors, concerning plea negotiations.<sup>115</sup> This

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<sup>110</sup> Para 4.12.

<sup>111</sup> Para 6.6.

<sup>112</sup> Para 6.6.

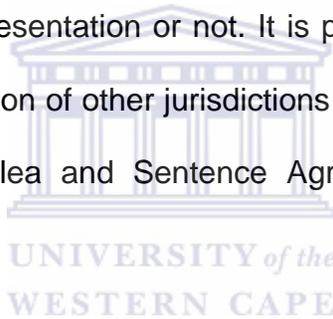
<sup>113</sup> Para 6.6.

<sup>114</sup> Para 6.65.

<sup>115</sup> Para 8.1.

would ensure transparency and accountability in the negotiation of plea and sentence agreements, and that the rights and dignity of accused are respected.<sup>116</sup> The Commission noted the need to give prosecutors guidance, regarding their obligations when entering charge negotiations with unrepresented accused.<sup>117</sup>

The final recommendation to the National Assembly required that the DPP be mandated to issue directives, which would be relied on, by the prosecutor, and the accused or his legal practitioner. This was an indication that the Commission ensured that the Bill would be of benefit to all accused who wanted to use it, whether they had legal representation or not. It is possible that the comparative study done by the Commission of other jurisdictions that allow the unrepresented accused to benefit from Plea and Sentence Agreements contributed to the amendment.<sup>118</sup>



## **2.5.2 NATIONAL ASSEMBLY DEBATES ON THE AMENDMENT BILLS**

In the course of the National Debates on the Criminal Procedure (first and second) Amendment Bills,<sup>119</sup> Members of Parliament argued that an accused had a right to a fair trial and that Parliament had to avoid falling into the trap of moving towards a situation in which the accused did not receive a fair trial.<sup>120</sup> The

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<sup>116</sup> Para 8.1.

<sup>117</sup> Para 8.1 (f).

<sup>118</sup> Pp. 29 and 33.

<sup>119</sup> The Hansards on Session III of the First Parliament; 15<sup>th</sup> January to 7 November 1996.

<sup>120</sup> Pp. 4972- 4973; by Chairperson; Mr. D. Makoena.

aim of the amendments was to eliminate delays in criminal trials, simplify certain cumbersome procedures,<sup>121</sup> and fight crime.<sup>122</sup>

In the course of the second reading, the Minister of Justice and Constitutional Development advanced three reasons that informed the exclusion of unrepresented accused from PSAs.<sup>123</sup> First, that it was not prudent for the unrepresented accused to appear in Court without legal representation, yet the Constitution provided for it. This position did not reflect the format of receiving legal aid. Secondly, the Minister stated that the exclusion saved the unrepresented accused from the imbalance in the negotiating process between him and the prosecutors.<sup>124</sup> This position would only hold after the section had been tried on a pilot basis in a given jurisdiction. Thirdly, the exclusion was used to protect the integrity of the PSA to avoid unnecessary litigation.<sup>125</sup> While the exclusion of the unrepresented accused from the section would save the Courts from unnecessary litigation, it was premature to perceive this outcome before testing the law.<sup>126</sup>

Section 105A was introduced into the Criminal Procedure Act, with wording that was different from the original final text from the Commission. It is also not clear from the debates why that the amendment was not discussed. It is not clear

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<sup>121</sup> P. 4977.

<sup>122</sup> P. 4983.

<sup>123</sup> The Hansards on Session III of the First Parliament; 2 November 2001, 7467.

<sup>124</sup> P. 7466.

<sup>125</sup> P. 7467.

<sup>126</sup> P. 7467.

under which circumstances the wording changed. It was clear, however, that the final text did not allow the unrepresented accused to invoke section 105A. The section reads as follows:

'105A. Plea and sentence agreements

- (1) (a) 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.....'

## **2.6 CONCLUSION**

This chapter has evaluated the concept and characteristics of plea-bargaining, and looked the history of plea-bargaining in England. Thereafter, the chapter has looked at the position of plea-bargaining in South Africa before and after 2001. Both phases have looked at the characteristics of the informal plea-bargaining system, and the the formal plea and sentence agreements. An evaluation of the current position shows that, although the earlier drafts indicated that an unrepresented accused could benefit, this position was not reflected in the in the final text. There is need to review the requirements of section 105A, the guidelines from the NPA and review the actual case law practice since the introduction of the section in the Criminal Procedure Act.

**CHAPTER THREE**  
**THE PRACTICE OF PLEA AND SENTENCE AGREEMENTS**  
**IN SOUTH AFRICA**

**3.1 INTRODUCTION**

The previous chapter offered an examination of the history of plea-bargaining in England and how it was subsequently reformed to deal with instances of plea-bargaining in courts, within a given framework. The chapter also examined the position of plea-bargaining in South Africa before it was provided for in the Criminal Procedure Act. The chapter evaluated the work of the Commission, on the drafting of the PSAs. The final text, as passed by National Assembly requires that an accused should be represented if he or she seeks to use section 105A. This chapter reviews the requirements of section 105A, the guidelines from the NPA and case law in its application of the section 105A in practice. The chapter adopts the argument that the jurisprudence on PSAs shows an ability of the prosecution and court to successfully ensure that PSAs are adequately concluded.

**3.2 REQUIREMENTS UNDER THE CRIMINAL PROCEDURE ACT**

As noted earlier, PSAs are provided for under section 105A of the Criminal Procedure Act. The section is quite voluminous and parts of it shall be reproduced in various sections of the chapter as the need arises. Section 105A (1) (a) provides that;

### **'105A. Plea and sentence agreements**

(1) (a) 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-

(i) a plea of guilty by the accused to the offence charged or to an offence of which he or she may be convicted on the charge; and

(ii) if the accused is convicted of the offence to which he or she has agreed to plead guilty-

(aa) a just sentence to be imposed by the court; or

(bb) the postponement of the passing of sentence in terms of section 297(1)(a); or

(cc) a just sentence to be imposed by the court, of which the operation of the whole or any part thereof is to be suspended in terms of section 297(1)(b); and

(dd) if applicable, an award for compensation as contemplated in section 300.'

### **3.2.1 Representation of the accused**

From the above reading, the accused must be legally represented. The wording of this subsection does not allow an unrepresented accused to benefit from PSAs. This forms the basis for any agreement that may be entered into under section 105A. The unrepresented accused has the option to plead guilty under section 112. He is not, however, able to benefit in the determination of his sentence, like his counterparts in section 105A. While it may be argued that this stance protects the unrepresented accused from undue influence from an overzealous state prosecutor and the subsequent possibility of a plea bargain by the accused for fear of a harsher sentence, the benefits under section 105A far outweigh the only option available to the represented accused. Although the requirement for legal representation ensures that the system of plea-bargaining is fair to accused, the guidelines offer checks, which involve disciplinary action on unscrupulous prosecutors. This chapter seeks to show that the legal representation of an accused is not a subsequent condition to avoiding a travesty

of justice where a plea of guilty is involved. The keys aspect of negotiating a PSA lies in the upholding of the constitutional ideals of a fair trial.<sup>1</sup>

The accused's representative is not, however, a rubber-stamp to be used as a prosecutor's means to an end. He is expected to be relevant in the entire process, and help the Court as an officer of Court to arrive at a just decision. As an officer of Court, he has to evaluate the options available to his client, which include the client's career, evaluating the strengths of the case including the likelihood of a conviction and the attendant consequences against the weaknesses of the evidence. The legal representative is expected to consider any antecedents of his client and the kind of publicity the trial would have on him.<sup>2</sup> The judicial system has officers who may help the unrepresented accused appreciate the consequences and benefits of negotiating a plea and sentence agreement.

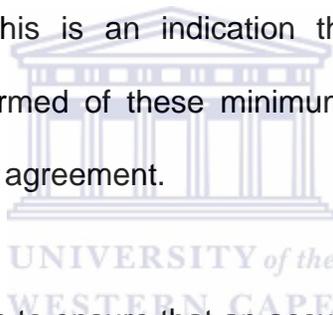
It must be noted that section 105A has a number of minimum benefits it offers an accused. The first minimum benefit that this section offers to an accused is that the agreement is made before the accused pleads to the charge or charges

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<sup>1</sup> See *S v Seabi* 2003 (1) SACR 620; where Court held that although there is no requirement for an accused person who enters a plea of guilty to be asked as to whether he does so freely and voluntarily, it is desirable in keeping the constitutional ideals of ensuring a fair trial. PSAs affect an accused's right to a fair trial, like the right to silence, because he or she has to confirm to the court that he has entered the agreement freely and fairly.

<sup>2</sup> Du Toit & Snyman (2001) 193.

brought against him.<sup>3</sup> The accused knows beforehand, what he is going to receive if he is to undertake the agreement. Secondly, the agreement is not limited to the plea only; it extends to the sentence as well.<sup>4</sup> Thirdly, the sentence imposed has to be just in the opinion of the court,<sup>5</sup> the passing of the sentence may be postponed,<sup>6</sup> suspended in whole or in part,<sup>7</sup> or may include an award for compensation.<sup>8</sup> Fourthly, it is a term of the agreement that there should be an express provision stating that the accused has been informed of his rights to be presumed innocent until proved guilty beyond reasonable doubt;<sup>9</sup> to remain silent and not to testify during the proceedings, and not to be compelled to give self-incriminating evidence.<sup>10</sup> This is an indication that in situations where the accused has not been informed of these minimum rights, he can contest his voluntariness in entering the agreement.



Another check by the section to ensure that an accused is not compelled to enter a PSA involuntarily is the requirement for a certificate by the interpreter showing that the accused understood the contents of the negotiations through an interpreter.<sup>11</sup> The law obliges the court not to take part in the negotiations.<sup>12</sup> This

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<sup>3</sup> Section 105A(1) of the Criminal Procedure Act.

<sup>4</sup> Section 105A (1)a(i) and (ii).

<sup>5</sup> Section 105A (1)a(ii) aa.

<sup>6</sup> Section 105A (1)a(ii) bb.

<sup>7</sup> Section 105A (1)a(ii) cc.

<sup>8</sup> Section 105A (1)a(ii) dd.

<sup>9</sup> Section 105A (2) a (i).

<sup>10</sup> Section 105A (2) a (iii).

<sup>11</sup> Section 105A (2) d.

provision guards against a judicial officer using his office's full force and majesty to induce the accused to yield his trial.<sup>13</sup>

The benefits elucidated above, in comparison, are not provided for where an accused decides to plead guilty under section 112 of the Criminal Procedure Act. Consider a hypothetical of an accused who decides to plead guilty under section 112 of the Criminal Procedure Act, because he cannot plead guilty under section 105A due to lack of legal representation; the following unfortunate obstacles await him or her. First, he has to enter the plea of guilty before any concessions by Court or the prosecution are given. Secondly, the prosecutor has to accept the plea, a discretion that is used after the accused has entered the plea of guilty and its attendant consequences. The section provides that:

'112. Plea of guilty

- a. Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea – ....<sup>14</sup>

The section does not stand to offer anything in terms of benefits to the accused until he has entered the plea, and it has been accepted by the prosecutor.

Secondly, the court takes part in setting the appropriate punishment, in the exercise of its discretion. After the accused has pleaded guilty and the prosecution has accepted plea, the section further provides further that

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<sup>12</sup> Section 105A (3).

<sup>13</sup> Esther S 'Plea-bargaining in South Africa: current concerns and future prospects' (2007) 2 *SALJ* 206 -245 209.

<sup>14</sup> Section 112 (1) of the Criminal Procedure Code Act 55 of 1977.

‘....

(a) the presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette*, convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only and

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- (i) impose any competent sentence, other than imprisonment or any other form of detention without the option of a fine or a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette*; or
- (ii) deal with the accused otherwise in accordance with law;<sup>15</sup>

Although the section sets the yardstick for the punishment to be offered, the fact that the Court has a hand in it may lead to actual and implied bias. The intricacy of actual and perceived bias are avoided under section 105A, save for purposes of determining that a sentence agreed on by the accused and the prosecutor is just.<sup>16</sup> In addition, section 112 does not provide for sentence agreements. The presiding judicial officer has the discretion to determine the punishment.<sup>17</sup>

### **3.2.2 Obligations of the prosecutor**

The prosecutor is enjoined to consult with the investigating officer concerning the nature and circumstances of the case, previous convictions of the accused, interest of the community, and personal circumstances of the accused.<sup>18</sup> This consultation may be dispensed with only if it will in the view of the prosecutor cause delay to the proceedings to the extent of substantial prejudice to the prosecution, accused, the victim and the administration of justice. In practice

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<sup>15</sup> Section 112(1) a.

<sup>16</sup> Section 105A (7.)

<sup>17</sup> Section 112 generally.

<sup>18</sup> Section 105A (1)b(i)- (ii).

confirmation of consultation of the Investigating Officer is got through his or her affidavits, indicating that he or she he or she is satisfied with the plea agreement and proposed sentence.<sup>19</sup> The best practice should be to ensure that the consultation is more rigorous where it involves an unrepresented accused, to ensure that justice is seen to be done.

In addition, the requirement for the prosecutor to consult with the victim before the PSA is entered into,<sup>20</sup> acts as a check in itself where the accused is not represented. The fact that the prosecutor has to take into consideration the nature, circumstances and the interests of the complainant involves the need to act impartially without forcing the weight of his office into negotiating the PSA against the wishes of the unrepresented accused. In practice confirmation of consultation with the victims is also got through affidavits, showing satisfaction with the PSA.<sup>21</sup>

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<sup>19</sup> *S v Sassin* para 11.1.

<sup>20</sup> Section 105A (1)b(iii).

<sup>21</sup> *S v Sassin* para 11.2.

### 3.2.3 Obligation of the Court

The consensus is that judicial officers should not participate in the pre-trial negotiations that lead the accused to plead guilty as the only logical conclusion.<sup>22</sup>

If the court is satisfied as to the contents of the agreement, it shall require the accused to plead to the charge<sup>23</sup> and confirm that he agreed to plead guilty<sup>24</sup> and that the agreement was entered into freely and voluntarily.<sup>25</sup>

If the court is satisfied that the accused admits the allegations and he is guilty, the court shall go ahead to consider the sentence agreement<sup>26</sup> and after inquiring into the antecedents of the accused, shall go ahead and convict the accused of the offence charged and sentence the accused in accordance with the sentence agreement.<sup>27</sup> If the offence however is referred to in the Criminal Law Amendment Act 105 of 1997 or has a minimum sentence attached to it by the law, the court shall have due regard to the said law before it passes sentence. In the researcher's view, this requirement does not defeat the purpose of pleading guilty under section 105A since an accused would not be subjected to the minimum sentence on his plea of guilt, provided he can prove substantial and compelling circumstances. Courts have applied a broad understanding of

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<sup>22</sup> Albert WA 'The Trial Judge's Role in Plea-bargaining' (1976) 76, No. 7  
*Columbia Law Review* 1 1.

<sup>23</sup> Section 105A (5).

<sup>24</sup> Section 105A (5) (i).

<sup>25</sup> Section 105A (5) (ii).

<sup>26</sup> Section 105A (5) (iii).

<sup>27</sup> Section 105A (7) (c).

substantial and compelling circumstances to include the age of the victim, the plea of guilt, acquiescence of both the investigating officer and the victims to the PSA, cooperation of the accused with investigating authorities and the accused's initiation of a PSA.<sup>28</sup>

In cases where the PSA does not comply with the contents of section 105A, the Court shall record a plea of not guilty<sup>29</sup> and the case shall be tried de novo before another judicial officer.<sup>30</sup> If the Court finds the sentence in the PSA to be unjust, it informs the parties of what constitutes a just sentence; the parties may abide by the judicial officer's view of a just sentence or withdraw the PSA<sup>31</sup> and the case shall be heard de novo.<sup>32</sup> In *S v Sassin*,<sup>33</sup> Majiedt J illustrated the meaning of 'just' by alluding to the deliberate intention of the legislature to adopt the use of a word 'just' as opposed to 'appropriate'. In other words, in the exercise of its discretion, a sentencing Court was at liberty to depart from the proposed sentence and impose a just sentence.<sup>34</sup> The Court's role of ensuring that the PSA is within the bounds of section 105A means that in the exercise of its neutral duty, it can adequately guard the unrepresented accused against abuses of the section to his or her detriment.

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<sup>28</sup> *S v Malgas* [2011] ZAWCHC 452, *S v Sassin* para 16 – 18.

<sup>29</sup> Section 105A (6) (b).

<sup>30</sup> Section 105A (6) (c).

<sup>31</sup> Section 105A (9) (a)-(d).

<sup>32</sup> Section 105A (10).

<sup>33</sup> *S v Sassin*.

<sup>34</sup> *S v Sassin* 506.

### 3.3 REQUIREMENTS UNDER THE NPA DIRECTIVES

The directives or guidelines (hereafter referred to as guidelines) for prosecutors on the use of section 105A were issued in accordance with the Criminal Procedure Act.<sup>35</sup> These guidelines offer a framework within which a prosecutor may conclude a PSA. They serve three purposes. Firstly, they prescribe the procedures to be followed in the application of section 105A.<sup>36</sup> Secondly, they ensure that adequate disciplinary steps are taken against a prosecutor who fails to comply with any directive,<sup>37</sup> and thirdly they ensure that records and statistics relating to the implementation and application of section 105A are kept by the NPA. These three purposes ensure accountability by the prosecutor to the victims, accused, the police, the court, and the NPA as an institution. The guidelines deal with modes of getting authorisation to conclude a PSA. The authorisation may be general or specific depending on the circumstances of each case. It is the view of the researcher that guidelines are self-integrated and self-sustaining to enable a prosecutor to conclude a PSA with an accused without legal representation.

General authorisations in the guidelines relate to the requirement for consultation depending on the designation of the prosecutor in terms of hierarchy. An

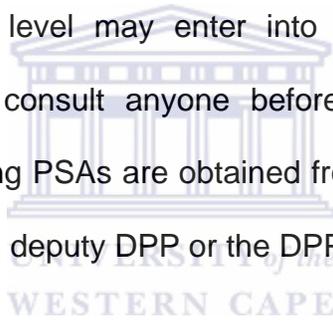
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<sup>35</sup> Section 105A(11) of Criminal Procedure Act.

<sup>36</sup> Section 105A(11)b(i) and (ii).

<sup>37</sup> Section 105A(11)b(iii).

authorized prosecutor and represented accused may enter a PSA.<sup>38</sup> It is the practice of courts to obtain a copy of the authorisation of the relevant prosecutor on Court record from the very outset of the proceedings.<sup>39</sup> A district Court prosecutor on a salary scale of LP4 or a higher level may enter into PSAs. However, a Court prosecutor on a salary scale of LP4 has to consult his immediate superior.<sup>40</sup> A regional court prosecutor on a salary scale of LP6 or a higher level may enter into PSAs in matters before the Regional Court. However, a Regional Court Prosecutor on a salary scale of LP6 has to consult his immediate superior.<sup>41</sup> The third group entails a senior state advocate on a salary scale of LP9 or a higher level may enter into PSAs. However, unlike his compatriots, he need not consult anyone before entering PSAs.<sup>42</sup> General authorisations before entering PSAs are obtained from the relevant senior public prosecutor, chief prosecutor, deputy DPP or the DPP in particular instances.<sup>43</sup>



In addition to the requirement for general authorisations, there are particular circumstances that may require specific authorisation. A prosecutor shall be required to obtain authorisation from the DPP personally, if the accused has a

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<sup>38</sup> Guidelines for prosecutors relating to plea and sentence agreements; Issued 12<sup>th</sup> July 2011 by the National Director of Public Prosecutions; guideline 3.

<sup>39</sup> Per Majiedt J in *S v Sassin* [2003] 4 All SA 506 (NC), para 10 see note 69 guideline 10 which requires that a copy of the specific guidelines to be attached to the plea agreements.

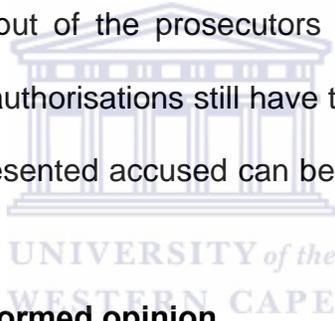
<sup>40</sup> Guideline 3(a).

<sup>41</sup> Guideline 3(b).

<sup>42</sup> Guideline 3(c).

<sup>43</sup> Schedule C to the Guidelines.

high social or public standing in society,<sup>44</sup> if the offence was committed in circumstances that attract public attention,<sup>45</sup> if the accused is a prosecutor, judicial officer or law enforcement officer,<sup>46</sup> if the offence was motivated by racial, ethnical or religious intolerance, or if the accused has a sexual orientation<sup>47</sup> and whether the accused has a relevant previous conviction.<sup>48</sup> If the initial instruction to prosecute was done by the DPP, section 105A can only be applied after specific authorisation from the DPP.<sup>49</sup> If the PSA requires a deviation from the minimum sentences, it is only a Deputy DPP or a DPP that may authorize it.<sup>50</sup> It is clear from the above discussion that the authorisation deals with controls and quality assurance of the input of the prosecutors in terms of supervision and accountability. Since these authorisations still have the effect of regulating PSAs, it is possible that an unrepresented accused can benefit if the prosecutors follow them to the letter.



### **3.3.1 Accused's informed opinion**

As noted earlier, the content of section 105A requires that the court establishes that the accused is informed of his right to be presumed innocent, the right to remain silent throughout the trial and a right not to be compelled to incriminate

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<sup>44</sup> Guideline 6(a).

<sup>45</sup> Guideline 6 (b).

<sup>46</sup> Guideline 6 (c).

<sup>47</sup> Guideline 6 (d).

<sup>48</sup> Guideline 6 (e).

<sup>49</sup> Guideline 8.

<sup>50</sup> Guideline 9.

him or herself at the trial.<sup>51</sup> The major question, which arises, is if the accused reneges on the PSA, whether the contents of the agreement may be used against him at the subsequent trial. If he enters a plea of not guilty, the trial starts de novo. The evidence that is on record cannot be used against him, and he cannot negotiate another plea bargain.<sup>52</sup>

The agreement should state in the terms of the agreement, the substantial facts relevant to the sentence agreement.<sup>53</sup> The need for emphasis cannot be understated and Savage AJ reiterated this principle in *S v Marlon De Goede*.<sup>54</sup>

The facts were that after the applicant had been convicted on the basis of a PSA that was executed before the Regional Court,<sup>55</sup> he applied for review of the decision of the regional magistrate on grounds that the sentence was not in accordance with justice in so far as he did not have the substantive facts relevant to the sentence agreement. In setting aside the PSA, the court held the PSA did not comply with the provisions of section 105A (2) (b) because the magistrate did not have all facts relevant to the sentence agreement before her, and consequently, she was not able to satisfy herself that the sentence agreement was just.<sup>56</sup> This is an indication to judicial officers to scrutinize the agreements before they decide whether to rely on them.

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<sup>51</sup> Section 105A (2)a.

<sup>52</sup> *S v Sassin* [2003] 4 All SA 506 (NC)

<sup>53</sup> Section 105A (2)b.

<sup>54</sup> *S v Marlon De Goede* [2012] ZAWCHC 200; at para 7.

<sup>55</sup> *S v Marlon De Goede* in reference to the lower court's decision.

<sup>56</sup> *S v Marlon De Goede* para 15.

The agreement has to be signed by the prosecutor, the accused, and his or her legal representative.<sup>57</sup> This court's role is to ensure that section 105A is adhered to from the time the pre-trial procedure of negotiating starts, to the Court process up to conviction and sentence. This assurance upholds the accused's voluntariness in making an informed decision; since the court does not infer the voluntariness; but digs into it in establishing compliance with section 105A. In *S v Solomons*,<sup>58</sup> the Court held that the magistrate's failure to adhere to the contents of 105A was grossly irregular. The accused's failure to admit to relevant facts, failure to admit to voluntariness and freeness in entering the PSA and the magistrate's failure to indicate a just sentence after indicating the sentence in the agreement as unjust were grave irregularities. This can be distinguished from *S v Taylor*<sup>59</sup> where a magistrate adhered to the procedure in section 105A and even indicated a just sentence to the accused after he had indicated that the sentence in the sentence agreement was unjust.

### **3.4 ANALYSIS OF CASE LAW**

As noted in the analysis of the statutory provisions, the law does not allow the unrepresented accused to benefit from section 105A. The subsequent section, therefore, analyses decisions handed down by courts involving PSA and evaluates the principles laid out. The section develops an argument that the

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<sup>57</sup> Criminal Procedure Act 51 of 1977 at section 105A (2)c.

<sup>58</sup> 2005 (2) SACR 432.

<sup>59</sup> 2006(1) SACR 51.

principles laid out can be adequately used in a case involving an unrepresented accused and the PSA would still be successful. These cases are chosen, because there are no decided cases where PSAs have been executed by unrepresented accused. The researcher looks at the rationale in the cases that involve represented accused and shows that the decisions handed down relate to obligations of the courts and the prosecution to a greater part than the accused. These cases illustrate that once the accused has appreciated the nature of the PSA and given consent in its execution, the greater obligations are on the prosecution and the courts to ensure that the process is free from bias and other reasons that would place the execution of the PSA into disrepute.

In *North West Dense Concrete CC and another v DPP (WC)*,<sup>60</sup> after execution of a plea-bargain, the DPP reneged on the bargain and the accused was prosecuted. The Appellate Court underscored that the DPP was possessed with the discretion and authority to decline to prosecute an accused, even when there was a *prima facie* case.<sup>61</sup> The issue was whether the Court would interfere with this decision-making of the DPP.<sup>62</sup> The Court held that it was appropriate for it to interfere in the decision-making of the DPP if justice dictated that it should do so.<sup>63</sup> The Court, therefore, held that the DPP could not renege on his part of the

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<sup>60</sup> 1999 (2) SACR 669(C).

<sup>61</sup> *North West Dense* 681.

<sup>62</sup> *North West Dense* 681.

<sup>63</sup> *North West Dense* 681.

bargain in the plea bargain.<sup>64</sup> This ruling was based on the need to uphold the requirement that the system of justice requires that the prosecutor remains scrupulously fair in his or her dealings with accused.<sup>65</sup> This case was decided before the introduction of section 105A in the Criminal Procedure Act. The decision underpinned fairness and accountability on the part of the prosecutor as the cornerstone to a successful plea bargain.

In *S v Sassin & others*,<sup>66</sup> the accused had run a pyramid scheme from January 1997 until December 1998<sup>67</sup> and appeared in court on various charges of fraud.<sup>68</sup> The Court laid emphasis on two points. First, the need of proof to court of the prosecutor's ability to negotiate a PSA.<sup>69</sup> Secondly that the proposed sentence would be just in the circumstances.<sup>70</sup> The Court was of the view that a just sentence required weighing up the circumstances of the accused, the offence and the needs of society or victims against each other within the confines of the PSA.<sup>71</sup> This case highlights the need for the prosecutor to follow the guidelines to ensure that the PSA is not riddled with bias, undue influence or lack of accountability. This is a matter that hinges more on the office of the prosecutor

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<sup>64</sup> *North West Dense* 683.

<sup>65</sup> *North West Dense* 682.

<sup>66</sup> [2003] 4 All SA 506 (NC).

<sup>67</sup> *Sassin* para 3.

<sup>68</sup> *Sassin* para 4 to 8.

<sup>69</sup> *Sassin* para 10.

<sup>70</sup> *Sassin* para 15.7.

<sup>71</sup> *Sassin* para 15.7.

and not the accused. This is a clear indication that an accused should be in a position to negotiate a PSA if the prosecutor upholds his duties and obligations under section 105A and the guidelines from the DPP.

In *S v Armugga and others*,<sup>72</sup> the accused appeared in court on charges of crimes of conspiracy to fraud and fraud and before the commencement of the proceedings, negotiated PSAs with the prosecutor. Regarding the sentence, the magistrate sentenced each accused in accordance with his or her agreement, which sentence, as already indicated, incorporated a component of a term of imprisonment with alternative payment of a fine, payment of which was deferred.<sup>73</sup> The accused appealed to set aside the verdict. The court held that where the party has acted freely and voluntarily, in his or her sound and sober senses and without undue influence in the conclusion of a plea-bargaining agreement, the fact that the assumptions turn out to be false, does not entitle such a party to turn from the agreement.<sup>74</sup> While this holding justifies the need for representation on the part of the accused, it underpins assumptions by the accused and his legal representative that are not reflected in the agreement. If these assumptions may exist in the presence of a legal representative, it requires that the agreement should have sufficient clarity in terms to avoid harbouring assumptions. This is something that can be done in well-defined bounds of PSAs involving the unrepresented accused.

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<sup>72</sup> 2005 (2) SACR 259

<sup>73</sup> *Armugga* 261.

<sup>74</sup> *Armugga* 265c.

In *S v Solomons*,<sup>75</sup> the matter was sent on special review on the ground of the non-compliance by the magistrate with the provisions of s 105A(9) of the Criminal Procedure Act. The prosecution and accused had entered into a PSA and, when they had presented their agreement to the magistrate, he indicated that he considered the sentence agreed upon not to be just and then proceeded to impose a different sentence.<sup>76</sup> The Court noted that the record of the proceedings did not disclose what sentence the presiding officer regarded as just before convicting the accused and imposing the sentence.<sup>77</sup> The Court noted that the accused was convicted in terms of his plea of guilty and the plea explanation as set out in the plea agreement and not the sentence agreement.<sup>78</sup> Although the judicial officer noted that the sentence agreed upon was not an appropriate one, he then proceeded to impose the sentence which he regarded as just.<sup>79</sup> The PSA was set aside. It must be noted that the setting aside of the judgment was not because of lack of legal representation because it was not possible to enter a PSA by the accused without a legal representative. It was because of the Court's failure to follow the required procedure in recording the PSA. This leads to the conclusion that an accused may ably negotiate the PSA once he is given chance. The court would perform its neutral role of scrutinising the entire PSA to ensure that it conforms to the requirements of section 105A. Therefore, in *S v*

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<sup>75</sup> 2005 (2) SACR 432 (C).

<sup>76</sup> *Solomons* 433.

<sup>77</sup> *Solomons* para 10.

<sup>78</sup> *Solomons* para 10.

<sup>79</sup> *Solomons* para 10.

*Taylor*,<sup>80</sup> the presiding officer followed the procedure laid out in section 105A; the High Court on review declined to set aside the PSA.

In *S v Salie*,<sup>81</sup> four people were charged with robbery with aggravating circumstances. One of them, the accused in the instant matter, concluded a plea and sentence agreement in terms of which he pleaded guilty as charged and was sentenced to four years' imprisonment.<sup>82</sup> His three accomplices were tried separately, convicted, and each sentenced to eight years' imprisonment. The three accomplices appealed and their sentences were reduced to four-year sentences.<sup>83</sup> The magistrate who had presided at the trial of the three accomplices then sought to initiate a review of the trial of the accused on the basis that his conviction and sentence had arisen from the same facts and circumstances, and that therefore he was also entitled to the benefit of a less serious conviction and, potentially, of a lesser sentence than that imposed under the plea and sentence agreement.<sup>84</sup> Three questions thus arose for determination: first, whether the magistrate had *locus standi* to initiate the proposed review; secondly, whether the proceedings culminating in the plea and sentence agreement were reviewable in principle; and, thirdly, if so, whether there was any basis upon which to interfere with those proceedings.<sup>85</sup> The

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<sup>80</sup> 2006(1) SACR 51(C).

<sup>81</sup> *Salie* 2007 (1) SACR 55 (C)

<sup>82</sup> *Salie* 56.

<sup>83</sup> *Salie* 56.

<sup>84</sup> *Salie* 56.

<sup>85</sup> *Salie* 56.

questions that arose had nothing to do with the quality of representation the four accused had. They related to how the Courts would ensure fairness of the process in the circumstances. The first and second questions are beyond the scope of this study and reference is made to the third question. The Court held that the PSA entered into by the accused had been concluded in accordance with the law and that the accused, on proper legal advice, had intended to and did indeed plead guilty to robbery with aggravating circumstances.<sup>86</sup> The Court went on to appreciate the advice offered to the accused by his attorney in the negotiation of the PSA.<sup>87</sup> This strengthened the principle that a PSA will not be set aside once it is negotiated and agreed upon by the parties.<sup>88</sup>

In *Jansen and another v The State*,<sup>89</sup> the appellants were arraigned before the High Court on charges of murder and child abuse.<sup>90</sup> A PSA was concluded and in terms of the sentence, it was agreed that Jansen agreed to be sentenced to 18 years' imprisonment on count 1 (murder) and 3 years' imprisonment in respect of count 2 (child abuse). The sentences would be served concurrently with the result that she would serve an effective sentence of 18 years' imprisonment. The second accused agreed to a sentence of 12 years' imprisonment for culpable homicide, conditionally suspended for five years. Contrary to the sentences proposed in the agreements the first appellant was sentenced to fifteen (15)

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<sup>86</sup> Pg. 61, para 15.

<sup>87</sup> Para 15.

<sup>88</sup> See *S v De Koker* 2010 (2) SACR 196.

<sup>89</sup> [2015] ZASCA 151

<sup>90</sup> Pg 152, para 2.

years imprisonment of which three (3) years are suspended for a period of five (5) years on condition that she is not convicted of a crime of which violence is an element. The second accused was sentenced to fifteen (15) years imprisonment of which three (3) years were suspended for a period of five (5) years on condition that he is not convicted of a crime of which violence is an element.<sup>91</sup> The effect of the sentences proposed by the trial judge differed materially from those proposed by the parties and consequently, the first appellant received an effective six years' imprisonment less than what was proposed.<sup>92</sup> On the other hand, the second accused received an effective sentence of two years' imprisonment more than what was proposed in the agreement.

The Supreme Court of Appeal held that where the Court seeks to change the sentence agreed on in the PSA, it must inform the prosecutor and the accused of the sentence that it considers just. Upon being informed of the sentence which the court considers just, both parties may decide to abide by the agreement subject to the right to lead evidence and to present arguments relevant to sentencing or withdraw from the agreement.<sup>93</sup> This case enhanced the duty of the Court in evaluating the PSA and ensuring that the accused and the prosecutor were offered the options available to enable them to make an informed decision.

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<sup>91</sup> Para 9.

<sup>92</sup> Para 10..

<sup>93</sup> Para 19, see also *S v Solomons* 2005 (2) SACR 432 (C) para 11

### 3.5 CONCLUSION

The statutory requirements place a duty on the prosecution to ensure that the PSAs are negotiated with sufficient clarity and with no actual or implied duress or bias. This duty can be performed by the prosecutor, even in instances where the accused has no representation. The analysis of case law shows that courts are keen to ensure the prosecutor does not deviate from duly negotiated plea bargains or PSAs and that the court performs its role of scrutinising the agreement to ensure that they conform to section 105A. These principles do protect an accused even when he has no legal representation. There is no need to assume that the unrepresented accused is not protected in instances of negotiations of PSAs. The decided cases show that section 105A requires the prosecution and court to be clear headed in dealing with PSAs, to avoid all instances of bias or abuse of the process. The same requirements may be extended to an unrepresented accused. Having established the ability of the negotiation of PSAs even where the accused is not legally represented, there is a need to have a comparative study of other jurisdictions to establish how they deal with PSAs that are governed by statute.

**CHAPTER FOUR**  
**THE EXPERIENCES OF PLEA AND SENTENCE AGREEMENTS IN**  
**OTHER JURISDICTIONS**

**4.1 INTRODUCTION**

This chapter evaluates the law applicable in other jurisdictions with regard to plea agreements. The chapter evaluates the position in Australia and Canada. The reason the two countries are chosen is because their plea-bargaining systems of these countries provide a framework on how to deal with the unrepresented accused. The chapter examines the law applicable, and how the courts have dealt with the issue of plea agreements where the accused is unrepresented. The chapter presents the argument that other jurisdictions provide a framework within which an accused may enjoy the benefits of plea negotiations. In this chapter, the terms 'defence' and 'accused', 'State' and 'Crown'; 'crown counsel' and 'prosecutor'; 'plea-bargaining' and 'plea negotiations' will be used interchangeably.

**4.2 POSITION IN AUSTRALIA**

In Australia, plea-bargaining refers to the informal process by which a prosecuting authority and the accused with or without defence counsel negotiate the charge(s) on which the prosecution will proceed, and/or concessions that may be made by the prosecution in relation to sentencing.<sup>1</sup> The purpose of the

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<sup>1</sup> Asher F 'Fortunately we in Victoria are not in that UK situation" Australian and United Kingdom Legal Perspectives on Plea-bargaining Reform' (2011) 16 *Deakin Law Review* 361, 371.

plea-bargaining process is to agree on the facts on which sentencing should proceed and to arrive at a mutually acceptable agreement according to which the accused will plead guilty.<sup>2</sup> Just like in Canada (as will be discussed shortly), plea negotiations in Australia are part of a structured case conferencing system managed by a court, despite the fact that they involve informal discussions and correspondence between the prosecution and accused, and the court plays no role in the process.<sup>3</sup> By their nature, plea negotiations can occur at any time before the charges are brought against an accused, but before judgment is pronounced by the trial court.

#### 4.2.1 LAW APPLICABLE

There is no specific law that deals with plea-bargaining. There are principles instituted by the office of the DPP to ensure that the plea negotiations operate within a given framework. The Statement of Prosecution Policy and Guidelines<sup>4</sup> offers guidance on how to deal with an unrepresented accused. The Guideline provides

'(a) prosecutor must not advise an unrepresented accused on legal issues or the general conduct of the defence. In the event that there is evidence that the prosecutor intends leading that is arguably inadmissible this should be raised with the Trial Judge prior to the evidence being called. All materials and witness

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<sup>2</sup> Asher (2011) 371.

<sup>3</sup> Mathias B *Plea-bargaining and agreements in the criminal process: A comparison between Australia, England and Germany* (2009) Hamburg: Verlag GmbH, 14.

<sup>4</sup> Director of Public Prosecutions South Australia Statement of Prosecution Policy & Guidelines October 2014 available at <http://www.dpp.sa.gov.au/wp-content/uploads/2015/03/DPP-Prosecution-and-Policy-Guidelines.pdf>, last accessed 18 July 2016.

statements must be provided in the usual manner and the accused should acknowledge receipt in writing. Telephone communications should be kept to a minimum and recorded in writing immediately. All oral communications should be witnessed by a third party and noted. The notes should be kept on the file or with the brief. In the event of a trial, the witnesses should be advised that the accused is unrepresented and advised of the procedures that will be adopted in the Court'.

The above guideline by implication, recognises that an unrepresented accused may benefit from a plea agreement under the DPP Guidelines. It requires that a prosecutor exercises due care when dealing with an unrepresented accused and that all communication should as a matter of principle, be reduced to writing. This is an indication that in case the accused is not satisfied with the process, the prosecutor may not be in a position to obtain a guilty verdict from the accused.

#### **4.2.2 DECISIONS BY COURTS**

The Australian decisions on plea negotiations have enhanced the requirement that an accused person should exercise his free will, regardless of the existence of legal advice and any other pressures that may be instructive of affecting his decision to enter a plea of guilt. They have also created buffers to protect an accused in instance where third parties may compel him to plead guilty.

In *R v Pugh*,<sup>5</sup> the accused appealed to the Supreme Court of Criminal Appeal to set aside a conviction that arose out of a plea bargain. The applicants' grounds of appeal were that, his counsel offered him imprudent and inappropriate advised.<sup>6</sup> Secondly, that his plea was not attributed to a conscience of guilt, but rather because of an indication provided by the court. The appellant based his appeal

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<sup>5</sup> [2005] SASC 427.

<sup>6</sup> Para 13A.

on an earlier decision of *Wilkes v R*.<sup>7</sup> The Supreme Criminal Court of Appeal held that that instances where a plea of guilty was entered in haste, involving a counsel's error of judgment, without proper reflection by the court. This was ground for allowing an appeal.<sup>8</sup> The counsel for Purgh, stated that the imprudence of the conduct of his earlier counsel was evident in the circumstances under which the plea of guilty entered, the appellant's claims of innocence which raise a question about his guilt. The Court relied on an earlier decision of *King v Forde*,<sup>9</sup> to state that once a plea of guilty had been recorded, the court would only entertain an appeal if the

Appellant:

'did not appreciate the nature of the charge or did not intend to admit he was guilty of it, or that upon the admitted facts he could not in law have been convicted of the offence charged'.<sup>10</sup>

This is an indication that the courts require that an accused person exercises utmost liberty in the exercise of his freewill to plead guilty. This decision creates a duty on the accused to weigh the prospects of his success and expected sentence on his personal terms, because he cannot claim that he was influenced by counsel, or use the judge's indication as a backing. While this position seems to defeat the purpose of pleas of guilt, it shows that the mere existence of legal advice is not enough for an accused to enter a plea of guilt.

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<sup>7</sup> [2001] NSWSCCA 97.

<sup>8</sup> Para 49.

<sup>9</sup> [1923] 2 KB 400.

<sup>10</sup> P. 403

The Australian Court courts have been keen on requiring that an accused person to plead to the facts that lead to the plea of guilt. In *Meissner v The Queen*,<sup>11</sup> the High Court stated that while an accused may plead guilty because of other reasons other than guilt, like avoidance of worry, inconvenience, expense; or publicity.<sup>12</sup> The entry of a plea of guilty based on these grounds constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside. The only ground for setting aside this decision would hinge on the existence of an injustice.<sup>13</sup> In this case, the appellant had been improperly influenced to plead guilty to a making a false declaration. The High Court a principle that acted as a buffer to protect the accused persons in processes leading up to plea taking. The Court stated that If there is conduct that has the tendency to induce a person to plead guilty when that person would have pleaded not guilty had he or she exercised a free choice in his or her own interests, this conduct amounts to an attempt to pervert the course of justice.<sup>14</sup>

Although from time to time, in pretrial direction hearings, judges may make comments designed to encourage one or both of the parties to reconsider their position, the judge has no role in plea negotiations.<sup>15</sup> This was explained by Justices Dawson and McHugh in *Maxwell v The Queen*.<sup>16</sup> The decision whether

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<sup>11</sup> (1005) 184 CLR 132

<sup>12</sup> P 157.

<sup>13</sup> P 157.

<sup>14</sup> *Regina v Toney* (1993) 1 WLR 364 at 370, *Regina v Kellett* (1976) QB 372.

<sup>15</sup> *Maxwell v The Queen* (1996) 184 CLR 501, 513.

<sup>16</sup> *Maxwell* 513.

to charge a lesser offence, or to accept a plea of guilty to a lesser offence than that charged, is for the prosecution and does not require the approval of the court. Indeed, the court would seldom have the knowledge of the strengths and weaknesses of the case on each side, which is necessary for the proper exercise of such a function. The role of the prosecution in this respect, as in many others, 'is such that it cannot be shared with the trial judge without placing in jeopardy the essential independence of that office in the adversary system.'<sup>17</sup>

The High Court has made it clear that it is the State's responsibility to decide which charges to proceed with and that it is the judge's role to determine an appropriate sentence based on the facts presented to the court. In discussing the 'plea bargain' process, the Court said that any understanding with regard to evidence, sentencing by the counsel and the accused does not bind the judge in determining the sentence, other than in the practical sense that the judge may be limited to the agreed summary of facts presented.<sup>18</sup> This case provided a duty placed on the courts to ensure that the sentences handed down are just in the circumstances. This case also shows that the yardstick for a just decision is not the fact that the accused pleaded guilty, but that the facts and circumstances require the sentence given. This decision requires the accused to make an informed decision. The accused should make the informed decision after the prosecution has advised the former on his or her his rights.

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<sup>17</sup> *Maxwell* 515.

<sup>18</sup> *GAS v The Queen* (2004) 217 *Canadian Law Reports* 198, 211.

### **4.2.3 CONCLUSION ON AUSTRALIA**

Although Australia lacks legislative provisions that deal with evidence obtained through human rights violations, it relies on principles laid down by the Directorate of Public Prosecutions and the Courts. The principles of the Directorate of Public Prosecutions specifically place a duty on the prosecutors to take care in dealing with the accused. The principles from the courts suggest that the courts should remain neutral in dealing with plea negotiations, and exercise discretion in passing sentences that are just in the circumstances of every case.

It places the accused freewill above the existence of legal counsel, or indications from a judge about the nature of sentence. An accused has to make a value decision after weighing his alternatives. A prudent exercise of this duty enables an accused to enter a plea negotiation, even in instances with representation.

It follows that any kind of pressure exerted on an accused person to compel him/her to enter a plea of guilty can be taken to be a perversion of justice and the perpetrator may be charged. This principle protects an unrepresented accused from zealous prosecutors.

### 4.3 POSITION IN CANADA

In Canada, the judicial system is shifting from the use of the term 'plea bargain' to 'resolution discussions'.<sup>19</sup> The attempts to have statutory recognition of plea-bargaining have evolved over the last 30 years.<sup>20</sup> For purposes of consistency, this study uses the terms 'plea-bargaining', 'plea negotiations', and 'plea and sentence agreements' interchangeably. Otherwise, plea-bargaining is used to describe a broad range of behaviours that may occur among actors in the criminal court system.<sup>21</sup> The actors who may engage in the practice include the police and the State.<sup>22</sup> The engagements that they undertake range from simple discussions, through negotiations to concrete agreements that are perceived to be binding on the parties.<sup>23</sup> The purpose of plea-bargaining is to arrive at an agreement by the accused to plead guilty in return for the prosecutor's agreeing to take or refrain from taking a particular course of action.<sup>24</sup> While the binding

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<sup>19</sup> See Piccinato MP 'Plea-bargaining' available at <https://perma.cc/7JWC-ZLHT> (accessed 4 June 2016).

<sup>20</sup> Department of Justice: Victim participation in the Plea Negotiation Process in Canada, available at [http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr02\\_5/p3\\_2.html](http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr02_5/p3_2.html) last accessed 4 May 2016.

<sup>21</sup> Griffiths CT & Verdun–Jones SN *Canadian Criminal Justice* (1994) 2ed Toronto: Harcourt Brace & Company 317.

<sup>22</sup> Griffiths & Verdun–Jones (1994) 317.

<sup>23</sup> Griffiths & Verdun–Jones (1994) 317.

<sup>24</sup> Cohen & Doob 'Public attitudes to plea-bargaining' (1990) 32 *Criminal Law Quarterly* 85 109.

nature of these agreements may be subject to confirmation by Court, there is no limit of what cases may be subjected to the practice.<sup>25</sup>

#### 4.3.1 LAW APPLICABLE

The Canadian Criminal Code<sup>26</sup> contains no provisions, which explicitly deal with plea negotiations between the prosecution and the accused or his or her representative. It provides

‘Subject to subsection (2), on application by the prosecutor or the accused or on its own motion, the court, or a judge of the court, before which, or the judge, provincial court judge or justice before whom, any proceedings are to be held may order that a conference between the prosecutor and the accused or counsel for the accused, to be presided over by the court, judge, provincial court judge or justice, be held prior to the proceedings to consider the matters that promote a fair and expeditious hearing, would be better decided before the start of the proceedings, and other similar matters, and to make arrangements for decisions on those matters.’<sup>27</sup>

The inference from this section is that either the prosecutor or the accused or the court may initiate a pre-trial meeting for discussing prospects of ensuring that the case is disposed of expeditiously. This is an indication that despite the lack of a specific provision, the general provision may suffice. A pre-trial judge is appointed to handle the conference and in the event that the case proceeds to trial, he is disqualified from trying it.<sup>28</sup> Despite the existence of this general provision, the specific context of plea-bargaining remained unclear due to lack of clarity. Another section that embraces plea-bargaining provides that

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<sup>25</sup> Carol AB, Bruno F, David H, Paul M, Jenny M & Renee P, ‘A comparative look at plea-bargaining in Australia, Canada, England, New Zealand, and the United States’ (2015) 57 *William and Mary Law Review* 1147, 1168.

<sup>26</sup> Revised Statutes of Canada (RSC) 1985, c. C-46.

<sup>27</sup> See s. 625.1

<sup>28</sup> Piccinato (2016) 1 1.

'Notwithstanding any other provision of this Act, where an accused or defendant pleads not guilty of the offence charged but guilty of any other offence arising out of the same transaction, whether or not it is an included offence, the court may, with the consent of the prosecutor, accept that plea of guilty and, if the plea is accepted, the court shall find the accused or defendant not guilty of the offence charged and find him guilty of the offence in respect of which the plea of guilty was accepted and enter those findings in the record of the court.'<sup>29</sup>

This section is synonymous with South Africa's plea of guilty,<sup>30</sup> which embraces instances in which the accused may offer to plead guilty to a lesser offence. The distinction with the South Africa's section on a plea of guilty is that the Canadian approach may allow an accused invoke section 625.1 in the pre-trial conference in consideration of returning a plea of guilt. Although the Law Reform Commission initially had the view that plea-bargaining was something for which a decent criminal justice system had no place to accommodate,<sup>31</sup> this changed when it even recommended that the practice becomes more open and accountable.<sup>32</sup> At about the same time, the Canadian Sentencing Commission<sup>33</sup> made guidelines, which recommended that plea-bargaining should be recognised as a legitimate practice and subjected to judicial scrutiny and control. It recommended that the appropriate federal and provincial authorities formulate and attempt to enforce guidelines respecting the ethics of plea-bargaining.<sup>34</sup> Furthermore, it recommended that there should be a mechanism whereby the

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<sup>29</sup> Revised Statutes of Canada (RSC) 1985, c. C-46, s. 606.4.

<sup>30</sup> Criminal Procedure Act 55 of 1979, s. 112 (SA).

<sup>31</sup> Law Reform Working Paper, 1975, 14.

<sup>32</sup> Law Reform Working Paper, 1989, 8.

<sup>33</sup> Canadian Sentencing Commission, 1987, 428.

<sup>34</sup> Item 13.8.

Crown prosecutor would be required to justify in court a plea bargain agreement reached by the parties.<sup>35</sup> After an investigation of the practice in 1989, the Canadian Law Commission recommended that the procedure be regulated by legislation.

The recommendations by the Sentencing Commission of Canada contain detailed guidelines and directives, which are to be complied with before an agreement may be accepted. These include a guideline that states:

'If the accused has legal representation, the prosecutor must negotiate with the legal representative, and if the accused is unrepresented the prosecutor must comply with specific rules such as informing the accused of the advantages of legal representation'.<sup>36</sup>

Although these recommendations have not been passed into law, the proposals have subsequently led to the issuance of guidelines under the Director of Public Prosecutions Act.<sup>37</sup> With regard to the unrepresented accused, the guidelines require that plea or sentence negotiations with an unrepresented accused should be done with extreme caution. First, the Crown Counsel (Prosecutor) may inform an unrepresented accused of the Crown's initial position on sentence in the event of a guilty plea, but may not advise the accused on whether or not to accept the Crown's offer.<sup>38</sup> Any discussions on the plea and sentence may only proceed

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<sup>35</sup> Item 13.9.

<sup>36</sup> Sentencing Commission's Recommendations, Guideline C, available at [http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr02\\_5/p3\\_2.html](http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr02_5/p3_2.html) last accessed 4 May 2016.

<sup>37</sup> Director of Public Prosecutions Act Statutes of Canada (S.C.) 2006, c. 9, s. 121.

<sup>38</sup> Public Prosecution Service of Canada Deskbook, section 3.7, para 3.1.

after the prosecutor has satisfied himself that the accused is acting voluntarily.<sup>39</sup> In addition, the Crown must not take advantage of the fact that the accused is unrepresented by counsel.<sup>40</sup>

In a bid to uphold the right to a fair trial, the prosecutor has to inform the accused of his right to retain counsel and where appropriate advise the accused of the prospects of legal aid.<sup>41</sup> In case the prosecutor establishes that there are concerns about the accused's understanding or ability to understand the extent of his or her jeopardy and the right to counsel, he has to take additional steps and encourage the accused to consult with counsel.<sup>42</sup> In the event that the accused declines to retain counsel, as a matter of prudence, the prosecutor should arrange for a third person to be present as a witness during discussions.<sup>43</sup> The prosecutor is encouraged to maintain a detailed record of all discussions.<sup>44</sup> If the case may be disposed of in accordance with the negotiated plea or sentence agreement, the prosecutor should inform the trial court about the existence of the agreement, that the accused was encouraged to retain counsel but declined to do so.<sup>45</sup> With regard to sentence discussions, the prosecutor may engage in

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<sup>39</sup> Para 3.1.

<sup>40</sup> Para 3.1.

<sup>41</sup> Para 3.1.

<sup>42</sup> Para 3.1.

<sup>43</sup> Para 3.1.

<sup>44</sup> Para 3.1.

<sup>45</sup> Para 3.1.

sentence negotiations where the accused is willing to acknowledge guilt unequivocally; after giving voluntary and informed consent.<sup>46</sup>

#### 4.3.2 DECISIONS BY COURTS

The courts have handed down decisions, which have upheld the notion that an unrepresented accused can benefit from plea-bargaining under the guidelines laid out by the DPP Act. With regard to the court's role, the courts have condemned any active role that is played by the trial judge. In *R v Rajaeefard*,<sup>47</sup> the accused was charged with assaulting his wife. The prosecutor sought to proceed by way of summary conviction.<sup>48</sup> The accused was unable to obtain legal aid, and a law student appeared before the court to adjourn the case to another date. On his own initiative, the judge conducted a pre-trial discussion with the prosecutor and the student who represented the accused.<sup>49</sup> He told the student that the accused could expect a suspended sentence and probation if he pleaded guilty but that if he were convicted following a trial he would receive a 10 to 15 day jail term.<sup>50</sup> The student conveyed this information to the accused, who then pleaded guilty. The accused then sought to appeal on grounds that his plea of guilty was not voluntary.<sup>51</sup> The summary conviction appeal court judge refused to admit the new evidence and dismissed the appeal. The accused appealed.

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<sup>46</sup> Para 3.4. See also *R v Nevin* (2006) 245 NSR (2d) 52, 210 CCC (3d) 81.

<sup>47</sup> *R. v Rajaeefard* 1996 CanLII 404 (ON CA) available at <http://canlii.ca/t/6j70>, last accessed 18 July 2016.

<sup>48</sup> Public Prosecution Service of Canada Deskbook, section 3.7, para 3.4.

<sup>49</sup> Para 3.4.

<sup>50</sup> Para 3.4.

<sup>51</sup> Para 3.4.

On appeal, the Court of Appeal of Ontario held that the trial judge's conduct improperly pressured the appellant to plead guilty, and the guilty plea was not freely and voluntarily given. Secondly, that among other factors, the accused always maintained that he was not guilty and he intended to plead not guilty and that it was the trial judge who initiated and took an active role in the meeting.<sup>52</sup> While the decision does not reflect the principles of the DPP, it, however, shows the requirement that the Court should not play any active role in situations where the accused is making decisions that concern a plea of guilt.

With regard to sentence bargaining, the Court has laid down a number of conditions, which the accused should know before making an informed decision. In *Attorney General of Canada v Roy*,<sup>53</sup> the State appealed against a sentence of a fine of \$150, following the accused's plea of guilt. The sentence was imposed after the prosecutor had suggested it to court.<sup>54</sup> On appeal, the state sought a fine of \$500 instead on the basis that its suggestion at trial was made by mistake and the sentence was inadequate. The presiding judge pronounced a number of principles concerning plea-bargaining, first, that plea-bargaining is not to be regarded with favour. Secondly, in the imposition of sentence the court, whether in the first instance or on appeal, is not bound by the suggestions made by the

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<sup>52</sup> Para 3.4. See also *R v Wood* (1975), 26 CCC (2d) 100 at 108 (AB SC); *R v Dubien* (1982), 67 CCC (2d) 341 at 346 - 7 (ON CA); *R v White* (1982), 39 Nfld and PEIR 196 (NL CA).

<sup>53</sup> *Attorney General of Canada v Roy* 18. CRNS 89 (Quebec, QB 1972).

<sup>54</sup> *Roy* 89.

prosecutor. Thirdly, where there has been a plea of guilty and prosecutor recommends a sentence, a court, before accepting a plea, should satisfy itself that the accused fully understands what his fate is, in the discretion of the judge, and that the latter is not bound by the suggestions or opinions of the prosecutor. These principles were instrumental in ensuring that the neutral position of the Court prevails. This case indicates that in plea negotiations, it's not majorly about the input of the accused, but the duty of the prosecution and the court to ensure that the accused receives a sentence after the court and the prosecutor have with clarity and care performed their duties as required by plea negotiations.

In *The Queen v Neil*,<sup>55</sup> the accused was charged with possession of cocaine. Because of plea negotiations, the prosecution stayed the prosecutions on the first charge, and the accused pleaded guilty to the second charge.<sup>56</sup> The accused was represented at the initial stages of the plea negotiations, but opted to represent himself in the sentencing stages.<sup>57</sup> The accused indicated to court that he intended to plead guilty to the second charge and that he understood the consequences.<sup>58</sup> After he was convicted, he appealed on grounds that the trial judge did not inquire into his antecedents and whether he would be able to enter into the negotiations.<sup>59</sup> The second ground of appeal was that the judge failed to direct or advise the accused as a self-represented litigant. The court declined to

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<sup>55</sup> 2015 MBCA 75.

<sup>56</sup> Para 1.

<sup>57</sup> Para 2.

<sup>58</sup> Para 2.

<sup>59</sup> Para 3.

allow the appeal because, he agreed to plead guilty on the second count in exchange for staying the first count.<sup>60</sup> This judgment was synonymous with earlier decision in *R v Sinclair*,<sup>61</sup> that stated that if the Conditional Sentence Order that was agreed on was clear on the face of it, the courts would be reluctant to deviate from it.<sup>62</sup> This position was in line with the Australian jurisprudence that upheld a plea tendered with an accused full understanding. This position is a reflection of the South African position where they uphold plea negotiation arrangements to the extent of interfering with the discretion of the prosecution, if the later seeks to disregard the agreement.<sup>63</sup>

With regard to the presence of unrepresented accused persons, the courts have stated that the strictness of the rules that govern plea negotiations is relaxed.

*R v Trodden and another*,<sup>64</sup> the Supreme Court of Justice stated that in instances where it is faced with an unrepresented accused in court, it is not bound by the same strictness in negotiations, because the latter is not an an equal footing in bargaining.<sup>65</sup> This is an indication that if the judge finds that the proposed sentence is not fair in the circumstances, he modifies it to what he deems fair in the circumstances. While this is a welcome development, other pertinent issues such as the yardstick for this fairness in exercise of judicial discretion. While the

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<sup>60</sup> Para 9 – 12.

<sup>61</sup> 2004 MBCA 48 AT 184.

<sup>62</sup> *R v P Ashe* (1995) 100 ManR (2d) 61 (CA), *R V Broekaert* (2003) MBCA 16.

<sup>63</sup> *North West Dense*.

<sup>64</sup> [2008] 3 CTC 72.

<sup>65</sup> Para 18.

courts may look at every case according to its facts, they are reluctant to allow appeals on pleas of guilt because the unrepresented accused did not have counsel.<sup>66</sup> *Trodden* strikes a balance between upholding plea negotiations and ensuring that the unrepresented accused's position is not manipulated.

### **4.3.3 CONCLUSION ON CANADA**

The developments in the need to embrace plea negotiations in Canada started in 1975. Before this period, there was no support for plea-bargaining and plea negotiations were seen as undesirable incidents in the criminal justice system. The situation changed when the stakeholders in the criminal justice system started changing their earlier position. These developments over time have included input from the Canadian Law Reform Commission, Sentencing Commission of Canada, and the Directorate of Public Prosecutions. The courts have also been very instrumental in developing principles that govern the prosecutors and the courts in dealing with unrepresented accused. While Canada lacks a legislative provision, the principles passed by the DPP are sufficient to ensure that both the represented and unrepresented accused benefit from plea negotiations.

### **4.4 CONCLUSION**

While the two jurisdictions lack statutory provisions that specifically deal with sentencing, their prosecutory agencies have developed principles that aid the prosecutors in dealing with unrepresented accused in instances of plea bargains. They have also developed principles that govern the judiciary in dealing with

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<sup>66</sup> *Regina v RT* [1992] OJ 1914.

instances of pleas of guilty from unrepresented accused. The principles that have been developed by the two jurisdictions are synonymous with the principles that the NDPP uses to govern plea and sentence agreements. There the lack of a legal provision is of no legal effect as far as the stakeholders are in a position to use due diligence and care in dealing with pleas of guilt from accused. On the basis of this, there is a need to draw up a working framework to deal with the practice of ensuring that the unrepresented accused stands to benefit from section 105A of the Criminal Procedure Act.



## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### 5.1 GENERAL CONCLUSION

The system of plea-bargaining before the introduction of section 105A in the Criminal Procedure Act involved the informal agreements between the accused and the prosecution on how to handle a case. The parties would then inform the court of the concessions that they had arrived at. With the introduction of section 105A, the accused may benefit from the agreement, if he is legally represented. The final text of section 105A is a departure from the initial text that was evident in the second report of the South Africa Law Commission,<sup>1</sup> because it provided that an unrepresented accused might benefit from plea and sentence agreements.



The statutory requirements under section 105A and the guidelines issued by the NPA place a duty on the prosecution to use clarity, and avoid duress or undue influence on the accused. This obligation has been upheld in case law and the courts have a corresponding duty to ensure that the PSAs that have been negotiated are upheld. The courts have also been keen to ensure that they do not take part in the agreements and that their role is to guarantee that the PSAs that are in line with section 105A are upheld. An analysis of the cases has

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<sup>1</sup> South African Law Commission Project 73 Simplification of Criminal Procedure (Sentence Agreements), May 2001 available at [http://www.justice.gov.za/salrc/reports/r\\_prj73\\_sntagree\\_2001may.pdf](http://www.justice.gov.za/salrc/reports/r_prj73_sntagree_2001may.pdf) (accessed 16 August 2016).

shown that the prosecution and the court have a major role to play to ensure that the accused does not enter into a PSA against his wishes. It, therefore, follows that an accused is in a position to benefit from the PSA regardless of his ability to have legal representation.

The study has evaluated the position of the law in Australia and Canada, and it has been established that the two countries have a mode of dealing with plea-bargaining, where the accused may benefit, regardless of the absence of legal representation. In Australia, the parties to plea negotiations use principles that have been laid down by the Directorate of Public Prosecutions and the courts. While the Directorate of Public Prosecutions requires the prosecutors to take care in dealing with an unrepresented accused, the courts are enjoined to remain neutral in dealing with plea negotiations, and exercise a discretion in passing sentences that are just in the circumstances of every case. Canada, like Australia, uses principles that have been passed by the Directorate of Public Prosecutions to ensure that both the represented and unrepresented accused benefit from plea negotiations. The position in the two jurisdictions is similar to South Africa's, in so far as the NPA Guidelines require the prosecutor should not be biased, or exercise undue influence over the accused. Case law from the two countries shows that courts require that care is taken when dealing with the unrepresented accused. They, however, place a stringent duty on the accused to exercise his free will in entering a plea negotiation, regardless of the existence of legal counsel. This position point to the fact that the courts require that the accused takes care in entering a plea of guilty. The plea of guilty should reflect

the facts that make up the ingredients, and it should not be entered for other reasons that have no weight on the accused guilt or innocence. The cases from Australia have also illustrated that persons who exert undue pressure on an accused person to plead guilty should be charged for obstructing justice. These developments indicate that an unrepresented accused can benefit from the PSA, if the current framework is revisited.

## 5.2 JUSTIFICATION FOR REFORM

Section 105A provides unequal protection of the law because it is only accused who are legally represented that may benefit from PSA under the section. The accused who cannot afford legal representation do not benefit from the same law. This situation leads to an infringement of the right to equality, which is provided for under section 9 of the Constitution.

The Constitution requires that legislative and other measures be taken to protect persons that are disadvantaged by unfair discrimination.<sup>2</sup> Discrimination may only be allowed if it is fair.<sup>3</sup> As long as the operation of section 105A leads to a dual application with regard to one's ability to have legal representation, then the section does not uphold equality before the law. It is, therefore, prudent to establish if the violation of section 9 of the Constitution 1996 by the continued operation of section 105A can be saved by section 36 of the Constitution 1996. Section 36 provides:

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<sup>2</sup> Section 9(2) of the Constitution 1996.

<sup>3</sup> Section 9(5) of the Constitution 1996.

'(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose'.

The law governing plea and sentence agreements in South Africa is a law of general application insofar as it relates to all accused. The position would be different if the law was restrictive in the application, for instance, people who stay in a particular area in a province.<sup>4</sup> With regard to the nature of the right, there is a need to examine the values that underlie the right to PSAs in the Criminal Procedure Act.<sup>5</sup> The researcher is of the view that section 105A confers a statutory right of the accused, because its restriction of the right to legal representation is a violation of section 9 of the Constitution. The value of the operation of section 105A is seen in quick disposal of cases by the courts. In addition, the combined effect of the factors that inform this right and the effect of limitation is greater than the combined effect of the factors that may be advanced for the limitation.

The purpose of limiting the application of section 105A to the legally represented accused is to avoid taking advantage of the unrepresented litigants by the

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<sup>4</sup> Cheadle H 'Limitation of Rights' in H Cheadle, Davis D & Haysom N (eds) *South African Constitutional Law: The Bill of Rights* (2002) 693 697.

<sup>5</sup> Cheadle (2002) 693 697. See also Kevin Iles 'A fresh look at limitations: unpacking section 36' (2007) 23 *South Africa Journal of Human Rights* 68 73.

overzealous prosecutors.<sup>6</sup> This position is not entirely correct, if one is to look at the application of section 105A since its enactment. It is clear that the prosecutor and the court have obligations to uphold before a PSA is relied on by the court. The prosecutor has to refrain from bias and keep a record of all the correspondence between himself and the accused. He is in a position to keep this obligation even if the accused is not represented. Since the court is expected to be neutral, it can ensure that the accused consents to the PSA. The courts, just like the prosecutors, do not need an accused to be represented before they can perform this duty. It follows, therefore, that the current limited application of section 105A to only legally represented accused is not a justifiable limitation under section 36.

Section 36 (d) of the Constitution requires that the relation between the limitation and its purpose are examined before a decision on the whether a limitation is justifiable is considered. The limitation in section 105A is because of an accused's ability to afford representation. This limitation defeats the purpose of protecting the unrepresented accused from undue influence by the prosecutors and the court. This is because the obligation on both the prosecution and court with regard to fairness can be executed regardless of an accused's presence of legal representation. The requirement that the accused is able to appreciate the nature of the PSA and subsequently consent to its execution is good enough for all the stakeholders involved.

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<sup>6</sup> Rodgers (2010) 239 239;

### 5.3 WORKING FRAMEWORK

The current state of section 105A requires that only represented accused can benefit from it. It, therefore, follows that if there is a change, it has to start with an amendment to the section. The current section provides:

‘105A. Plea and sentence agreements

- (1) (a) 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.....’

This section needs to be amended to provide:

‘105A. Plea and sentence agreements

- (1) (a) A prosecutor authorised thereto in writing by the National Director of Public Prosecutions and an accused may, before the accused pleads to the charge brought against him or her, negotiate and enter into an agreement in respect of.....’

The amendment should be evident in the deletion of the phrase ‘who is legally represented’. This amendment is important because it is based on this that the National Directorate of Public Prosecutions may make changes to the guidelines to allow the prosecutors to enter into a Plea and Sentence Agreements with accused.

After the amendment to the Criminal Procedure Act, the NPA should amend the guidelines to provide for the unrepresented accused. The NPA should look at jurisdictions that have put in place principles that regulate plea and sentence agreements. If guidelines are put in place to recognise the special nature of

unrepresented accused and the need to take caution in entering PSAs with them, the courts will ensure that the guidelines are followed to the letter.

With regard to the unrepresented accused, the guidelines should provide that the prosecutor ensures that the accused is accurately informed of the prosecution case such that he is in a position to offer a response, which is informed and free of undue influence.<sup>7</sup>

The prosecutor should at the initial stages of the offering information to the accused, maintain a degree of detachment from the accused's interests. This stance helps to keep the negotiations free from actual or perceived bias, or expectations that would tarnish their integrity. The prosecutor should perform an informative role at this stage. This rids the process of actual or perceived bias on the part of all stakeholders like the victim, the investigators, and the court.<sup>8</sup>

If the prosecutor and the accused engage in oral communication, after charges have been brought against the accused but before the plea is taken, all communication with the unrepresented accused should as far as practicable be witnessed by another party. Oral communications with an unrepresented accused, should so far as practicable, be reduced to writing.<sup>9</sup>

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<sup>7</sup> Guideline 23 of the Guidelines of the Office of the Directorate of Public Prosecutions, New South Wales, Australia, available at <http://www.odpp.nsw.gov.au/prosecution-guidelines> last accessed 16 August 2016.

<sup>8</sup> Guideline 23 with necessary modification.

<sup>9</sup> Guideline 23 with necessary modification.

The prosecutor should act as an officer of the court with regard to negotiating PSA with an unrepresented accused.<sup>10</sup> This is premised on the fact that the accused's right to a trial and liberty and security of a person may be waived. The prosecutor, as an officer of court, should owe the duty to the accused to inform him of the consequences of his decisions on his rights at trial. The prosecutor has the duty to ensure that he gives the judicial officer all the relevant information that pertains to the case such that the appropriate decision is given after the application of an amended section 105A.<sup>11</sup> A PSA should not be accepted from an unrepresented accused if doing so would distort the facts disclosed by the available evidence and result in an artificial basis for the sentence.<sup>12</sup> This will guard against undue influence upon the accused.

A PSA from an accused who is not represented should only be accepted if the public interest is satisfied that consideration of given circumstances exist, that justify the negotiation of the PSA.<sup>13</sup> Some of the circumstances should include

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<sup>10</sup> See Guideline 5 of the Director's Policy: The Crown's Role on Plea and Sentence Hearings, Victoria, Australia, available at <http://www.opp.vic.gov.au/getattachment/27855e5d-fc4a-432f-a07d-18e0b402eeb7/9-Crown-s-Role-of-Plea-and-Sentence.aspx> last accessed 16 August 2016

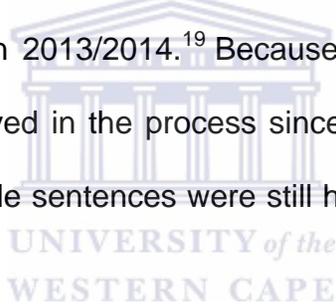
<sup>11</sup> Guideline 23 with necessary modification.

<sup>12</sup> Guideline 10.4 of the Guidelines for Prosecutors and the Director of Public Prosecutions, Ireland, available at [https://www.dppireland.ie/filestore/documents/Guidelines\\_for\\_Prosecutors\\_\(Revised\\_Oct07\)\\_ENGLISH1.pdf](https://www.dppireland.ie/filestore/documents/Guidelines_for_Prosecutors_(Revised_Oct07)_ENGLISH1.pdf) last accessed 16 August 2016.

<sup>13</sup> Lawrence S ' Negotiating with the Police & Prosecutors' Aboriginal Legal Service NSW/ACT Ltd Annual Conference, Terrigal, New South Wales, 2 June 2011,

the consideration that alternative charges reflects the ingredients of the offence,<sup>14</sup> and that the available evidence to support the prosecution case is weak in material particulars.<sup>15</sup> Other considerations should be that the PSA would save the court costs and time weighed against the likely outcome of the case if it proceeds to trial,<sup>16</sup> and that it will save a victim and vulnerable witnesses from the trauma that the court hearings may bring.<sup>17</sup>

According to the Report of the National Prosecuting Authority for 2014/2015, a total of 1,760 PSAs were arrived at under section 105A of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).<sup>18</sup> This represented a 33% increase compared to the 1,323 PSAs recorded in 2013/2014.<sup>19</sup> Because of negotiating these PSAs, valuable court time was saved in the process since lengthy trials were avoided while convictions and suitable sentences were still handed down.<sup>20</sup> This disposal



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para 58 available at

[http://www.alsnswact.org.au/media/BAhbBlshOgZmSSlhMjAxMy8wNy8xNS8yMV8xM18wNV82NjFfZmlsZQY6BkVU/21\\_13\\_05\\_661\\_file](http://www.alsnswact.org.au/media/BAhbBlshOgZmSSlhMjAxMy8wNy8xNS8yMV8xM18wNV82NjFfZmlsZQY6BkVU/21_13_05_661_file) last accessed 16 August 2016.

<sup>14</sup> Lawrence (2011) para 58.

<sup>15</sup> Lawrence (2011) para 58.

<sup>16</sup> Lawrence (2011) para 58.

<sup>17</sup> Lawrence (2011) para 58.

<sup>18</sup> NDPP Annual Report 2014/2015, 39 available at <https://www.npa.gov.za/sites/default/files/annual-reports/Annual%20Report%202014%20-%202015.pdf> last accessed 16 August 2016.

<sup>19</sup> NDPP Annual Report 2014/2015, 39.

<sup>20</sup> NDPP Annual Report 2014/2015, 39.

rate was in line with the NDPP's objective of increased successful prosecution.<sup>21</sup> If section 105A is amended to cater for the unrepresented accused within given parameters, then the NDPP and the courts will be in a position to dispose of more cases.



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<sup>21</sup> NDPP Annual Report 2014/2015, 14.

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