MINI-DISSERTATION

A possible amendment to the Criminal Procedure and Evidence Act, 1939 of the Republic of Botswana with regard to plea and sentence agreements in an effort to promote the expeditious and efficient disposition of criminal matters

MASTER OF LAWS (LLM)

IN THE FACULTY OF LAW (DEPARTMENT OF PROCEDURAL LAW)

BY

LAMECK KGOSIEILE

AT

THE UNIVERSITY OF PRETORIA

SOUTH AFRICA

SUPERVISOR: DR. LG CURLEWIS

Declaration

I, **Lameck Kgosieile,**

Student number: **18295127**

Module/Subject of the assignment: Mini-Dissertation **(MND 800)**

Declaration

1. I understand what plagiarism entails and am aware of the University's policy in this regard.
2. I declare that this mini-dissertation is my own original work. Where someone else's work was used (whether from a printed source, the internet or any other source) due acknowledgement was given and reference was made according to the requirements of the Faculty.
3. I did not make use of another student's previous work and submitted it as my own.
4. I did not allow and will not allow anyone to copy my work with the intention of presenting it as his or her own work.

Signature: ___________________________ Date: ________________________

Summary

Plea-bargaining and sentencing agreement is a worldwide phenomenon. Most of the jurisdictions more particularly in the so-called developed countries have adopted and incorporated into their criminal justice system the concept of plea-bargaining and sentence agreement. Same has properly been legislated and documented. In the United States for example, more than 80 per cent of the criminal matters are disposed of through plea-bargaining between the prosecution authority and the defendants.

This system of disposing of criminal matters through plea-bargaining and sentence agreement has saved states resources and saved courts' time. Although the system causes the accused to face a dilemma whenever he or she is supposed to make a choice between waiving his or her constitutional right to trial and pleading guilty. The plea-bargaining system has proved itself in many jurisdictions to be very efficient particularly in completing criminal cases without inordinate delays.

The study is geared at persuading the Legislature of the Republic of Botswana to amend the Botswana's Criminal Procedure and Evidence Act (hereinafter referred to as the CP&E). The proposed amendment entails an insertion of a clause, which provides for plea-bargaining and sentence agreement. The rationale behind the said amendment would be to come up with a legitimate provision, which entitles parties in a criminal case to engage in negotiations relating to the criminal charges as proffered by the prosecution against the accused. The objective of the amendment will be to achieve a mechanism through which criminal cases would be dealt with expeditiously without employing the traditional way of determining the guilt or otherwise of an accused person, that is without having to engage into a fully-fledged criminal trial.

The general overview of the research is a bit broad in the sense that it touches on different jurisdictions such as the United States, The United Kingdom, Hong Kong and the Republic of South Africa. The proposed amendment to the CP&E of Botswana is further precipitated by the high rate of attrition of the lawyers, which is experienced by the Botswana's Prosecution Authority commonly known as the Directorate of the Public Prosecutions. The Prosecution Division of the Attorney General's Chambers is

losing large numbers of lawyers into the private sector on yearly basis. This has caused a serious backlog of the criminal cases across the country.

The Division is left with a small number of lawyers and prosecutors, hence the need to come up with a mechanism through which it would be able to contain the criminal cases with which it is charged. The Criminal Procedure Act 51 of 1977 of the Republic of South Africa (hereinafter referred to as the CPA) was picked and used to provide a benchmark exercise. This is because South Africa has long adopted and incorporated into its criminal justice system, the concept of plea-bargaining and sentence agreement. A number of South African case law were briefly discussed so as to shed light on how the provision of section 105A of the CPA has been applied on live situations. The proposed amendment, which entails an insertion of a provision into the CP&E which provision must mirror section 105A of the CPA, was influenced by the constitutional provisions of the two countries in relation specifically to the rights of the accused persons. The two constitutional provisions in so far as accused's rights are concerned, are similar in material respect.

This study seeks to aid the Legislature to find a solution to the problem of backlog of criminal matters, the attrition rate experienced by the Prosecution Division and further finding a solution to disposing of some criminal cases expeditiously particularly in instances where the accused is willing to negotiate with the prosecution and to help shortening the proceedings. This will also be of great assistance in instances where a case involves a large number of witnesses to testify while the evidence on the other hand is overwhelming. It will safe all the stakeholders involved, a lot of time.

ACKNOWLEDGEMENTS

I express my gratitude and appreciation to different individuals who made it possible for me to complete my mini-dissertation;

To my Creator for all the courage and strength given to me particularly during difficult times, when I found myself having to serve my family in one country while pursuing studies in another at the same time.

To my dear wife Enjinah Kgosieile and my two daughters Chedza and Ndulamo Kgosieile for understanding and allowing me to take up this study just by sacrifice while they needed my presence and attention at all times as the house hold head.

To my mother, brothers and sisters for enduring a lot of excuses on family affairs to enable me to work on my research. I thank you for all your love and support.

To the Directorate of Public Prosecutions and the Attorney General (Republic of Botswana) to have allowed and sponsored me to pursue this invaluable program.

A special thanks to my Supervisor Dr. LG Curlewis for his full support, guidance and contributions made by virtue of being my Supervisor.

TABLE OF CONTENTS

CHAPTER 1 7
INTRODUCTION 7
1.1 PROBLEM STATEMENT 7
1.2 GENERAL OVERVIEW OF PLEA-BARGAINING 8
2. AIM OF STUDY 21
4. DELINEATION AND LIMITATION OF THE RESEARCH 22
5. OUTLINE OF THE RESEARCH 22
Chapter 2 25
THE CONSTITUTIONAL RIGHT TO FAIR TRIAL (BOTSWANA CONSTITUTION) 25
2.1 INTRODUCTION 25
2.2 THE ACCUSED'S RIGHT TO FAIR TRAIL (CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA) 27
2.3 ANALYSIS OF SECTION 105A OF THE CRIMINAL PROCEDURE ACT (REPUBLIC OF SOUTH AFRICA) 28
2.4 CONCLUSION 32
Chapter 3 35
DECIDED CASES WHICH INVOLVE APPLICATION OF SECTION 105A OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 (REPUBLIC OF SOUTH AFRICA) 35
3.1 INTRODUCTION 35
3.2 DECIDE CASES 35
Chapter 4 58
CONCLUSION AND RECOMMENDATION 58
REFERENCES 67
BOOKS 67
ARTICLES 67
CASE LAW 68

CHAPTER 1

INTRODUCTION

A possible Amendment to the Criminal Procedure and Evidence Act of the Republic of Botswana with regard to Plea and sentence Agreement in an effort to promote expedition and efficient disposition of Criminal matters.

1.1 PROBLEM STATEMENT

The Criminal Procedure and Evidence Act of the Republic of Botswana has no provision for plea bargaining in terms of which the prosecution and the accused make an agreement regarding a lesser charge for a guilty plea and a lenient sentence. This legal lacuna constitutes one of the many grounds that account for too much workload and lengthy trials giving rise to a backlog of cases.

The Directorate of Public Prosecution is also losing Prosecutions counsel to the private sector. The mandate of this division of the Attorney General's Chambers is to prosecute all criminal matters on behalf of the state. There is a need to put up measures to ensure that the Directorate of Public Prosecutions remains in control of its cases. The absence of a provision dealing with plea bargaining and sentence agreements has led to a backlog of cases and work overload to a small remaining number of prosecutors. The departure of every Prosecutions Counsel leads to a re-distribution of all the cases he or she handled amongst the already overburdened individuals. This can lead to dismissal of some cases for want of prosecution as all of the prosecutors are overworked leading to misdiarization of some cases and most of the times Prosecutors find themselves multi-booked to appear before a number of Courts on the same date, which is practically impossible.

In the event that there is no one appearing before some of the Courts, which a particular Prosecutor is booked to appear, there is a high risk that cases suffer dismissal due to lack of appearance by Prosecutors.

Normally when officers are multi-booked before different Courts they turn to observe the seniority of the Courts before which they ought to appear and they will attend the high Courts and abandon the Magistrate ones, this conduct leads to the dismissal of the Magistrate Court cases. The attrition rate of Prosecutors and Prosecution Counsel brings in a challenge to put up some measures aimed at managing the cases, which the Prosecution division finds itself having to contain.

One main measure which can be considered to make the work of the Prosecution to be lighter, is to amend the Criminal Procedure and Evidence Act[1] to accommodate Plea-bargaining and sentence Agreement. This would assist in expediting disposal of some criminal cases, as it would afford those that are accused of having committed criminal offences the opportunity to negotiate their fate with the prosecution. It would play a major role in shortening the proceedings and disposing cases expeditiously. Both the self-acting accused and those represented by legal practitioners would enjoy benefits of the amendment and insertion of the plea-bargaining and sentence Agreement clause into the Criminal Procedure and Evidence Act.

The amendment and insertion of the provision dealing with the subject can be fashioned in such a way that it would impose a duty on the Prosecution and the presiding officers to ensure elimination of prejudice on accused who are self-actors. This can be achieved by making enquiry by the presiding officers as to whether the accused when taking the decision to enter into an agreement with the prosecution in relation to plea and sentence agreement, did so on his own volition without being induced thereto.

1.2 GENERAL OVERVIEW OF PLEA-BARGAINING

Plea-bargaining denotes an understanding between an accused person or their legal representative and a prosecutor where the prosecutor promises concessions for the accused in exchange for the accused's agreement to waive his or her constitutional right to trial.[2] In Plea-bargaining a prosecutor would be empowered to provide concessions that fall within his

[1] Criminal Procedure and Evidence Act Cap 08:02 Laws of Botswana.
[2] DA Jones, Crime without Punishment (1979) 61.

or her power to provide. This may include the dismissal of some charges against the accused or his accomplice.[3] A bargained Plea involves some agreement between prosecution and the defense whereby prosecution offers some concession in return for which the accused makes an undertaking for a mutually acceptable plea of guilty.[4]

The Concession by Prosecution may take a variety of forms. Generally, there are a number of considerations available to the defense by Prosecution, and those include such considerations as sentence concession, that is non-custodial sentences *in Lieu* of imprisonment. Concurrency of multiple charges, charge reduction and dropping of some charges. The Common denominator in all those considerations is to afford an accused a lighter sentence.

Plea-bargaining entails a practice whereby an accused person pleads guilty to a charge, in return for which they are afforded some consideration resulting in a sentence agreement.[5] Some developed jurisdictions such as the United States of America have adopted and incorporated into their criminal justice system the concept of plea-bargaining.[6]

In Plea-bargaining and guilty pleas, the accused person abandons all his fundamental rights enjoyable in a trial such as the right to be presumed innocent until proven guilty beyond reasonable doubt before a competent court of law.[7] Although it is mostly argued that sentence is a result of a conviction, rather than a guilty plea, the leniency or otherwise of the sentence, which is likely to be meted out, is an important and a determining factor in making an informed decision on whether or not to plead guilty.[8] In instances where the accused is represented, the decision to plead guilty is considered to have been made with adequate knowledge of the legal implications of such a plea, whereas with an unrepresented accused, it would be unfair to assume that he or she had knowledge of such consequences.[9]

It is highly essential that when an accused is not represented, the court explains all the elements of the offence charged in a language preferred by the accused and in a manner that

---

[3] Jones 1979 (n2 above) 61.
[4] J Baldwin & M McConville, Negotiated Justice: Pressure to plead guilty (1977) 18.
[5] Baldwin 1977 (n4 above) 18.
[6] Baldwin 1977 (n4 above) 19.
[7] Van Der Merwe Barton Kemp ,Plea Procedures in Summary Criminal Trials (1983)
[8] Van Der Merwe 1983 (n7 above)
[9] Van Der Merwe 1983 (n7 above)

they are understandable to the accused.[10] Courts have developed a judicial process of questioning which requires that the essential elements of the offence be ascertained and it be put to the accused as a way of checking whether he or she understood the charge and had intended to plead guilty.[11]

It is the prerequisite of the law that pleas be made freely and willingly under some sound and abstemious senses without due influence.[12] It is therefore judicially desirable that Courts inform the accused persons that they do not have any obligation to plead guilty. An accused that pleaded guilty to a charge cannot be excluded from filing an appeal on the basis that his plea was voluntary and accurate.[13] However, it is vital to inform an unrepresented accused that he or she is not obliged to plead guilty.[14] Each case will therefore be determined on its own unique merits when an accused claim that his or her plea of guilty was involuntary.[15]

Plea-bargaining benefits all the role players in the criminal justice system. Prosecution benefits in the sense that Prosecutors are under pressure to produce good results in disposing cases. They are also expected to increase their conviction rate as that would have a bearing on their progression in the field. The presiding officers also benefit in the sense that where there is plea-bargaining, there would obviously be expeditious disposal of cases. This is viewed from the Botswana perspective where there is scarcity of both the Magistrates and Judges.

The accused would enjoy reduction of sentences, which would have been imposed had a criminal case taken a normal trial route. Furthermore, there may be a likelihood for other charges to be abandoned in cases in which multiple charges were preferred.

Historical background of plea bargaining and sentence agreement

Plea bargaining is generally an old phenomenon.[16] Its origination dates back to seventeenth century in England as a mitigatory factor against harsh sentences. Plea bargaining is still

[10] Van Der Merwe 1983 (n7 above)
[11] Van Der Merwe 1983 (n87 above)
[12] Van Der Merwe 1983 (n7 above).
[13] Van Der Merwe 1983 (n87 above).
[14] Van Der Merwe 1983 (7 above).
[15] Van Der Merwe 1983 (n7 above).
[16] Bond J E 'Plea bargaining and guilty pleas' (1982).

observed as playing a mitigatory function.[17] Plea bargaining developed with the expansion of the criminal code and ultimately covered offences which were initially regarded as less serious offences.[18] It increased with the spread of rehabilitation displacing deterrence as it individualized punishment.[19] In the United States plea bargaining emerged later and as a result of corrupt practices.[20] This phenomenon encompasses a variety of arrangements between prosecution and the accused. Normally it would entail offering of a charge reduction by prosecution with an automatic reduction of the maximum possible sentence a judge would impose under a full trial set up.[21] The difference between the highest possible sentence which otherwise would have been imposed following a conviction by a trial and the one actually imposed as a result of a plea, the occasional practice justifies the following conclusion. …"crimes which carry penalties such as 20 years or life are punishable with as little as 30 days in the county jail."[22] Charge reduction has become the most important factor in this kind of arrangement in that its benefits are tangible, predictable and certain.[23]

In some jurisdictions, the accused is caused to plead guilty to the original charge, the sentence is then passed and suspended for a year or so. If the accused conducts himself well during the suspension period, he will be called upon to withdraw his first guilty plea and tender fresh plea to a lesser offence.[24]

Definition of plea bargaining

Plea bargaining entails a promissory exchange whereby an accused trade his promise to plead guilty and waives his right to trial for the prosecution's promise to recommend a specific sentence.[25]

The process encompasses instances where part of the promise by prosecution is to drop some of the charges against the accused.[26] It can also well be defined as a process by which an accused foregoes his right to trial in exchange for a favorable treatment by the prosecution

[17] Bond J E 'Plea bargaining and guilty pleas' 1982 (n16 above).
[18] Bond, 'plea bargaining and guilty pleas' 1982 (n16 above).
[19] Bond, 'Plea bargaining and guilty pleas' 1982 (n16 above).
[20] Bond, 'Plea bargaining and guilty pleas' 1982 (n16 above).
[21] Bond, 'Plea bargaining and guilty pleas' 1982 (n16 above).
[22] Bond, 'Plea bargaining and guilty pleas' 1982 (n16 above).
[23] Bond, 'Plea bargaining and guilty pleas' 1982 (n16 above).
[24] Bond, 'Plea bargaining and guilty pleas' 1982 (n16 above).
[25] PM Bekker 'American Plea bargaining in statutory form in South Africa' (2001) comparative and international law journal of South Africa.
[26] Bekker, 'American Plea bargaining in statutory form in South Africa' 2001 (n25 above) 312.

authority.[27] It can as well be defined as the granting of specified benefits to the accused upon his plea of guilty on a criminal charge. Furthermore, it entails the process by which the accused is induced to cooperate in not fully contesting criminal charges against him.[28]

Sentence bargain

As far as sentence bargain is concerned, an accused person would plead guilty to a charge in an exchange for prosecution's recommendation of a lenient sentence, or for a specific sentence.[29] It is a two way process by which either the prosecutor consents to recommending a specific sentence to the court or the court making an agreement to impose a specific sentence. Normally the bargain would encompass a combination of a charge and sentence concessions in exchange for the guilty plea.[30] The major contribution of the accused person to this kind of agreement is his or her guilty plea, however the accused is also entitled to offer to the prosecutor some benefits supplementary to the guilty plea and those may include returning of stolen property, restore the victim's *status quo*, disclosing of some information to the police or making some implicating statements and give evidence as against his or her accomplices.[31]

Charge bargain

Normally a charge bargain will take three forms which include the following:-

i. An accused will plead guilty to a charge in return for dismissal of some other charges.[32]
ii. He or she may plead guilty to a charge in favour for prosecutor's promise not to draft further possible charges.[33]

---

[27] Bekker, 'American Plea bargaining in statutory form in South Africa' 2001 (n25 above)312.
[28] Bekker, American Plea bargaining in statutory form in South Africa 2001 (n25 above)312.
[29] Bekker, 'American Plea bargaining in Statutory form in South Africa' 2001 (n25 above).
[30] Bekker, 'American Plea bargaining in statutory form in South Africa, 2001(n25 above)312.
[31] Bekker, 'American Plea bargaining in statutory form in South Africa' 2001(n25 above)314.
[32] W F McDonald and J A Cramer, 'Plea bargaining' (1990)151.
[33] McDonald and Cramer, 'Plea bargaining' 1990 (n32 above).

iii. He may tender his guilty plea for a prosecutor to reduce the gravity of the charges so that they are either less serious or fewer than they supposed to be or both.[34]

Plea bargaining process (South African system)

Normally the prosecutor will approach the accused and make a proposal of an offer to drop some of the charges against the accused or will propose to make a recommendation to the court for a favorable lenient sentence in exchange for the accused's plea of guilty to a less serious offence.[35] Normally the prosecution will in addition to the accused's plea of guilty bargain for something, for instance, a testimony against his co-accused or accomplices.[36] When the accused is represented, it will be the prosecutor and his legal representative who conduct the plea negotiations.[37] The prosecution will have at its disposal all the information in the docket, this may include the statement made by the accused himself. The opinion made by the investigating officer may also be contained in the docket in form of a statement. When all the information is availed to the defence, the defence will become aware of the strength of the prosecutions case and could on that basis negotiate a deal.[38] At the initial stages of the negotiations, plea negotiations are an informal procedure in the sense that protocol does not dictate which party must make the first move.[39] The determining factor would normally be made according to the nature of the available evidence. Whoever deems his case weaker than the other will be motivated by the circumstances of the case to make the first move. The discussion between the prosecution and the defence would normally be focused on issues of law and facts with due regard to information contained in the police docket.[40]

Important factors to consider when plea bargaining and sentence agreement is at hand

[34] McDonald and Cramer, 'Plea bargaining' 1990 (n32 above).
[35] Bekker, 'American Plea bargaining in statutory form in South Africa 2001 (n25 above)314.
[36] Bekker, 'American Plea bargaining in statutory form in South Africa' 2001(n25 above)314.
[37] Bekker, American Plea bargaining in statutory form in South Africa' 2001 (n25 above) 315.
[38] Bekker, 'American Plea bargaining in statutory form in South Africa' 2001(n25 above)315.
[39] Bekker, 'American Plea bargaining in statutory form in South Africa 2001 (n25 above)315.
[40] Bekker, 'American Plea bargaining in statutory form in South Africa' 2001 (n15 above)315.

A lot of practitioners were hesitant to engage in a charge and sentence bargaining in circumstances where a presiding officer would agree on imposing of a specified sentence.[41] "Since 14th December 2001, there has now been a formal mechanism in form of section 105A of the Criminal Procedure Act 51 of 1977, since its introduction, it has become evident that plea bargaining and sentence agreement is increasingly playing a major role in the South African criminal justice system".[42] The extent at which the criminal justice system is struggling, it was quite necessary for the authorities to place reliance on a mechanism such as plea-bargaining and sentence agreement. It is also very important that practitioners are able to bargain effectively.[43] There are therefore a number of factors which are important to take into consideration which should be observed by defence counsel when considering plea bargaining and sentence agreement. Some of such factors would include the following;[44]

i. Pressure on the state to negotiate.

The criminal justice system of the Republic of South Africa performed quiet badly and was not satisfactory. That caused the system some pressure to improve on its performance. Courts were themselves under pressure to make some improvements in so far as performance is concerned. In a system like that, plea bargaining became absolute solution. Plea bargaining benefited the system in the sense that it afforded speedier disposition of the criminal cases, enhances conviction rate and expedition in finalizing judgments. The state must feel the pressure to offer considerable concessions aiming at obtaining a guilty plea.[45]

ii. Pressure on the accused and his counsel to negotiate.

The accused person in instances where he knows that he committed the offence will always feel the pressure to negotiate a deal with the prosecution because of the risk of facing a harsh sentence that normally flows from a conviction as a result of a trial.[46] Most of the accused lack confidence on the state appointed attorneys and will always be reluctant to engage trials.[47] Some accused will plea bargain for purposes of minimizing publicity thereby expediting the court proceedings.[48] The

[41] W P De Villiers, 'Negotiated Pleas: Notes about and towards Effective assistance by counsel (2006) THRHR.
[42] W P De Villiers, Negotiated Pleas: Notes about and towards Effective assistance by counsel (2006) THRHR.
[43] De Villiers , 'Negotiated Pleas' (2006)153.
[44] De Villiers, Negotiated Pleas: Notes about and towards Effective assistance by counsel (2006)153.
[45] De Villiers, 'Negotiated Pleas: Notes about and towards Effective assistance by counsel' (2006)153.
[46] De Villiers, 'Negotiated Pleas' (2006) 153.
[47] De Villiers, 'Negotiated Pleas: Notes about and towards Effective assistance by counsel'(2006)153.
[48] De Viiliers, 'Negotiated Pleas' (2006) 153.

defence counsel are also on economic pressure to plea bargain as they can only spend as much time as the finances would allow.[49]

iii. Plea negotiation timing

Different practitioners hold different views in relation to the best time to negotiate a deal with the prosecution.[50] Some hold the position that when negotiations are delayed, it is advantageous as the most vital evidence to the state may get spirited away thereby weakening the state case whereas some believe that the sooner the better in plea bargaining and sentence agreement as prosecutors get tougher and tougher over the time.[51]

iv. The judicial officer's policies in relation to such subjects as admissibility of unconstitutionally obtained evidence may have a bearing on an accused's decision to enter into a plea bargaining and sentence agreement.[52] Where there are minimum mandatory sentences prescribed, and the agreed sentence is in issue it will not have a negative bearing as in terms of Criminal Law Amendment Act,[53] the judicial officer is entitled to impose a lesser sentence if found that there exist extenuating circumstances justifying lesser sentence than the minimum set by the law.[54]

Plea bargaining in the United States

Plea bargaining has been identified as a mechanism to resolve over ninety percent of criminal cases.[55] The use of this mechanism is justified on the ground that it plays a major role in saving state resources.[56] It has proved to maximize convictions under budget constraints.[57] It is capable of improving efficiency where trial convictions are costly.[58] When a prosecutor

[49] De Villiers 'Negotiated Pleas' (2006) 153.
[50] De Villiers, Negotiated Pleas' (2006) 154.
[51] De Villiers, 'Negotiated Plea: Notes about and towards Effective assistance by counsel' (2006)154.
[52] De Villiers 'Negotiated Pleas' (2006)154.
[53] Criminal law amendment Act 105of 1997.
[54] De Villiers, 'Negotiated Pleas' (2006) 154.
[55] I Israel et al 'Criminal Procedure and the Constitution' (1990) 510.
[56] Israel et al, 'Criminal Procedure and the Constitution' (1990) 510.
[57] Istrael et al, 'Criminal Procedure and the Constitution' (1990) 510.
[58] J-Yoo Kim, 'Credible plea bargaining' European journal of law and economics (2010).

engages in a plea negotiation, it does not suggest that he or she is possessed of knowledge as to the guilt or innocence of the accused person.[59] There are two benefits of plea bargaining, those being insurance and screening effect.[60] Firstly the risk-averse accused and the prosecutor would prefer a sure conviction of the guilty to a risky litigation process.[61] Secondly a plea bargaining as a screening mechanism has the potential to increase accuracy of the legal process in terms of sentencing.[62] There are two kinds of equilibrium being a pooling equilibrium and a separating equilibrium.[63] In the former, a prosecutor will make an offer which would normally be accepted by both the innocent and the guilty, while in the later the prosecutor makes an offer which could only be accepted by the guilty and the innocent would normally reject.[64] Under normal circumstances, prosecutors only commit to trial when their plea offers are turned down.[65] If the prosecutor draws inference that the accused who turned down the offer is innocent, the prosecutor will withdraw from the trial.[66] However, if after the plea offer is turned down, the prosecutor proceeds to spend resources in gathering the evidence, then his decision will be indicative of his commitment to go to trial.[67]

Plea bargaining is considered to serve the interests of the courtroom work personnel and it is viewed to play a major role in reducing case loads of lawyers. It allows the court system to expeditiously dispose of the criminal cases.[68] The 'shadow-of-trial'[69] model views plea bargaining as the outcome shadow where prosecutors and defence lawyers evaluate the probabilities of conviction based on both the gravity of available evidence and the sentence likely to be imposed upon conviction.

Plea bargaining in Hong Kong

In Hong Kong, the defense may initiate the plea-bargaining negotiation by inviting the prosecution to try and settle the matter by accepting the accused's plea of guilty to a lesser charge than those already laid.[70] Common law world has proved that a majority of criminal

[59] Yoo Kim, 'Credible plea bargaining' 2010 (n58 above)2.
[60] Yoo Kim, Credible plea bargaining' 2010 (n58 above)2.
[61] Yoo Kim , 'Credible plea bargaining 2010 (n58 above)2.
[62] Yoo Kim, 'Credible plea bargaining 2010 (n58 above)2.
[63] Yoo Kim, 'Credible plea bargaining'2010 (n58 above)2.
[64] Yoo Kim, Credible plea bargaining' 2010 (n58 above)2.
[65] Yoo Kim , 'Credible plea bargaining 2010 (n58 above)2.
[66] W F McDonaled, 'The Prosecutor' 1979.
[67] Yoo Kim, Credible plea bargaining' 2010 (n58 above)2.
[68] McDonald, 'The Prosecutor' 1979.
[69] K Kwok-yin Cheng and WH Chui, 'Beyond the shadow-of-trial: Decision making behind plea bargaining in Hong Kong' International journal of law (2014).
[70] Cheng and Chui, 'Beyond the shadow-of-trial: Decision making in Hong Kong' International journal of law.

cases are being disposed of daily due to the implementation of plea-bargaining processes.[71] Plea negotiations are struck on the basis of assessment of probabilities of acquittal and the sentences likely to be imposed if an accused is ultimately found guilty of a charge at trial, with the reduction of sentence as offered by the prosecution in return for early guilty pleas.[72] It is believed that in this way, the resources of conducting trials and the time would be spared while the results of the plea bargaining are likely to be equivalent.[73]

Plea bargaining is more or less the same as rehearsal of prosecutors and defence attorneys in trials.[74] Legal practitioners are said to be more comfortable with plea negotiations than trials because during negotiations between lawyers from both sides, information about the case is usually brought to light and often mitigates the gravity of the charge initially preferred by the prosecutor, resulting in the most appropriate charge being drafted.[75] The process of plea negotiation is thus viewed as a rational practice where accused persons are able to avoid the risk of going to trial and get convicted and be sentenced harshly. The prosecutor is also spared from investing time and resources on cases where evidence against the accused is overwhelming.[76] At the same time, defence lawyers when faced with the challenge of representing clients, they weigh personal motives like gaining trial experience versus the fear to conduct a trial.[77]

The defence attorneys are also mindful of their reputation and would always try to avoid losing trials. The accused's background is one of the important factors to consider in plea bargaining and has a bearing on the severity or otherwise of the sentence to be imposed following a conviction.[78] In plea bargaining, the accused's background maybe used as mitigating factors. If the background is clean a defence attorney will persuade the substantive prosecutor to accept a plea bargain offer. Normally the defence counsel would try and convince the prosecutor not to offer further evidence with a view to proceed with a bind-over order. The rationale behind accepting bind-overs is because (bind-over orders) do not lead to criminal record.[79]In terms of a bind-over, the accused would admit to the wrong doing in line with the facts as put by the prosecution. The results of that would be a bond placed over to the accused

---

[71] Cheng and Chui,'Beyond the shadow-of-trial' 2014 (n69 above)398.
[72] Cheng and Chui, 'Beyond the shadow-of-trial' 2014 (n69 above)398.
[73] Cheng and Chui, 'Beyond the shadow-of-trial' 2014 (n 69 above)399.
[74] Cheng and Chui, 'Beyond the shadow-of-trial' 2014 (n69 above)399
[75] Cheng and Chui, 'Beyond the shadow-of-trial' 2014 (n69 above)399.
[76] Cheng and Chui, 'Beyond the shadow-of-trial' 2014 (n69 above)399.
[77] Cheng and Chui (n69 above)400.
[78] Cheng and Chui, 'Beyond the shadow-of-trial' 2014 (n69 above)400.
[79] Cheng and Chui, 'Beyond the shadow-of-trial' 2014 (n69 above)398.

and a promise that he shall not breach the order and further that should he breach it, he would be forced to pay the agreed amount in terms of the bond.[80]

To individuals who are accused of and convicted of relatively minor offences, a criminal record is viewed as an excessive punishment in the sense that it affects the future of the accused and usually causes difficulty in securing employment and at times it hinders one's international travelling. It is therefore regarded a disproportionate punishment.[81]

The right to trial and plea bargaining

The observers of plea bargain have indicated that there is a 'trial penalty' which the accused normally faces when the he or she refuses the charge or sentence reduction as may be offered to him or her by prosecution, in exchange for a guilty plea.[82] If an accused waives his or her right to trial and tender a plea of guilty, he or she is for that reason afforded a sentence reduction for doing so.[83] If he or she exercises his or her right to trial and is found guilty, at the conclusion of the trial, he or she receives a stiffer sentence than the one that would have given if had pleaded guilty.[84] The former is characterized as "waive rewards" while the latter is characterized as "non-waiver penalties"[85]. The reasoning here is that guilty defendants who are willing to save the state resources and time will normally plead guilty and are as a result rewarded for doing so, whereas those that are reluctant to plead guilty and squander the state resources are penalized accordingly.[86] In other words, defendants who are willing to plead guilty reflect remorseful for committing offences while those that decline to plead guilty on the contrary are less remorseful therefore deserve a harsh punishment.[87]

Advantages of plea bargaining

---

[80] Cheng and Chui, 'Beyond the shadow-of-trial' 2014 (n69 above)398.
[81] Cheng and Chui, 'Beyond the shadow-of-trial' 2014 (n58 above)399.
[82] L Lippke, 'To waive or not to waive: The right to trial and plea bargaining' (2008) International journal for philosophy of crime.
[83] D A Jones, 'Crime without Punishment' 1979.
[84] D A Jones, 'Crime without Punishment' 1979.
[85] Lippke, 'To waive or not to waive: The right to trial and plea bargaining' 2008 (n82 above)182.
[86] Jones, 'Crime without Punishment' 1979.
[87] Lippke, 'To waive or not to waive: The right to trial and plea bargaining' 2008 (n82 above)183.

The large majority of the plea bargaining are implemented to save time and resources.[88] Prosecution always face severe budgetary pressure, the plea-bargaining method of resolving criminal cases is viewed as an important instrument for the management of a large number of cases.[89] Plea bargaining saves both time and money, this is achieved by reducing the time spent in court by both judges and prosecutors. Court's time is basically an essential element in the smooth running of the criminal justice system.[90] Plea bargaining gained more recognition when these essential elements became more and more binding.[91] However despite the said advantages of a plea bargaining, the system still suffers criticisms from other scholars.

In 2004 there was a memo which was issued to all federal prosecutors in relation to sentencing.[92] Same was directed to the Department of justice and the objective of it was for the Department to impose restrictions on plea bargaining.[93] There is some argument to the effect that plea bargaining is unfair and that it undermines the nature of the criminal justice system.[94] Some hold the view that excessive implementation of plea bargaining lowers the effectiveness of appropriate sentences.[95] There is however another line of argument that ineffectiveness of stiffer sentences has got no deterrence value. Plea bargaining goes hand in hand with a guilty plea whereby the accused and the prosecution make an agreement to divide the surplus created by savings generated by trial avoidance. When a prosecutor's competency is evaluated, normally what is being cited is the number of indictments he or she has, the conviction rate and the total imprisonment terms achieved.[96] Prosecutors care much about both conviction rates and the terms of imprisonment imposed. This is because the future career outcome of the federal prosecutors is highly influenced by the terms of imprisonment secured.[97]

Disposition of criminal cases around 1970s in the United States

---

[88] W M Modise, A Practical guide to Criminal Procedure in Botswana'(2016) 275.
[89] S Mongrain et al: 'Plea bargaining with budgetary constraints' (2009) International review of law and economics.
[90] Modise, 'A Practical approach to Criminal Procedure in Botswana' (2016) 275.
[91] Mongrain: 'Plea bargaining with budgetary constraints' 2009 (n89 above)8.
[92](http://news.findlaw/hdocs/docs/doj/ashcraft 92203chrgmem.pdf)8.
[93] Mongrain, 'Plea bargain with budgetary constraints' 2009 (n89 above)8.
[94] Mongrain, 'Plea bargain with budgetary constraints' 2009 (n89 above)8.
[95] Mongrain: 'Plea bargaining with budgetary constraints' 2009 (n89 above)8.
[96] Mongrain: 'Plea bargaining with budgetary constraints' 2009 (n89 above)9.
[97] Mongrain: 'Plea bargaining with budgetary constraints' 2009 (n89 above)9.

More often than not, criminal charges in the United States are now resolved through negotiations between the prosecution and the accused.[98] As a result of the negotiation, the accused is likely to tender a plea of guilty to one or more of the charges against him regardless of the seriousness of the offences charged.[99] Plea bargaining has become the most common method through which criminal cases are disposed. This has proved to achieve a considerable number of convictions.[100] Normally an accused will waive his constitutional right to trial on each and every charge and will opt to be convicted on all the charges to which he pleaded guilty. The prosecution may consider dismissing all other charges against the accused that remain outstanding. In most cases, prosecution will make recommendation for a lenient sentence to the court. The reason for doing so is ton reward the accused for having shortened the proceedings and his or her cooperation in avoiding unnecessary trial.[101] In instances where the prosecution is reluctant to make a recommendation for a lenient sentence, the prosecutor would simply remain silent and abstain from making any recommendation for sentence to the judge.[102] The prosecutor would not recommend a severe sentence where the accused has pleaded guilty. Where the prosecutor is of the view that it should be imposed, he or she will demand that expressly.[103] The practice policy is that a prosecutor is expected to fulfill any promise which he made to the accused leading to a plea of guilty by accused to a criminal charge. If the judge is not comfortable with the sentence as agreed between the prosecution and the accused he will normally allow or encourage the accused to withdraw his or her guilty plea. The whole process under such circumstances would start afresh.[104]

The concept behind plea bargaining is that when an accused pleads guilty, he is entitled to receive mercy while an accused who gets convicted as a result of a trial is entitled to receive justice.[105] His punishment would under the prevailing circumstances be premised upon the nature of the offence committed and on whether he has previous convictions rather than on the manner in which he is found guilty.[106] Disposition of most criminal cases mainly consists of dismissal of charges, accused's acquittal by the judge without a trial but by the accused's plea of guilty.[107]

---

[98] Mongrain (n89 above)9.
[99] Mongrain (n89 above)9.
[100] D A Jones (1979), 'Crime without punishment'.
[101] Jones, 'Crime without punishment' 1979 (n84 above)41.
[102] Jones, Crime without punishment'.
[103] Jones, 'Crime without punishment' 1979 (n84 above)41.
[104] Jones, 'Crime without punishment' 1979 (n84 above)42.
[105] Jones, 'Crime without punishment.
[106] Jones, 'Crime without punishment' 1979 (n84 above)42.
[107] Jones, 'Crime without punishment' 1979 (n84 above)42.

2. AIM OF STUDY

The aim of the study is to find a solution in relation to expeditious disposal of criminal cases in Botswana. It has already been indicated that the Directorate of Public Prosecutions in Botswana is one of the divisions of the Attorney General's Chambers, which is faced with a very high attrition rate of Prosecutors. That has caused a back log of cases.

The objective of this study is to make a recommendation for the inclusion of the plea-bargaining provision in the Criminal Procedure and Evidence Act of Botswana. The Amendment must provide in clear and unambiguous terms that prosecution is empowered to approach the accused person either directly or through his legal representative with a view to negotiate a deal. The provision must empower Prosecution to make an offer in relation to a range of considerations such as abandonment of some charges in the event of multiple charges, reduction of sentences to be imposed regardless of offences with minimum mandatory sentences prescribed by law, and freeing of some accomplices depending on the surrounding circumstances of each case. The Amendment to the Criminal Procedure and Evidence Act would add tremendous value to the disposal of the criminal matters in the sense that the country is also experiencing a low number of the judicial officers both at the Magistrate Court level and the high Court. It is already hit by the backlog in so far as Criminal Cases are concerned.

3. RESEARCH METHODOLOGY

The research is based on the desktop research methodology. The study will rely on primary sources of law such as legislation and case law. The study will further refer to secondary sources of law such as journal articles and textbooks. The comparative study will inform the research methodology that is the comparison of Botswana's Criminal Procedure and Evidence Act with the South African Criminal Procedure Act.

4. DELINEATION AND LIMITATION OF THE RESEARCH

This study will focus mainly on the manner in which plea-bargaining and sentence agreements are implemented. Different articles and textbooks authored by individuals from different jurisdictions will be used in giving general understanding of plea-bargaining and sentence agreement together with guilty pleas.

The study will focus on the Criminal Procedure and Evidence Act of Botswana relative to section 105A of the Criminal Procedure Act of South Africa regarding the plea bargaining. The Provision of Section 105A of Act 51 of 1977 will be analyzed so as to provide a benchmark exercise to the proposed amendment to the Criminal Procedure and Evidence Act. The study will further interrogate the applicability of section 105A of the Criminal Procedure Act of South Africa in various court cases. In so far as this section of the study is concerned, the research will be confined within the bounds of the Republic of South Africa, so that focus will clearly be made to the said provision of Section 105A and its application to a variety of case law within the South African jurisdiction.

The research will also analyses the Provision of Section 10 of the constitution of the Republic of Botswana. The aim of which will be to demonstrate that the constitution of the Republic of Botswana, as the supreme law of the country does provide for the rights of the accused, detained and the arrested. Further that the right to trial is also enshrined despite the proposed Amendment to the criminal procedure and Evidence Act. The study will clearly show that the accused will be at liberty to exercise his or her constitutional right to trial if uncomfortable with the plea-negotiation process.

5. OUTLINE OF THE RESEARCH

CHAPTER 1: GENERAL OVERVIEW AND HISTORICAL BACKGROUND OF PLEA-BARGAINING AND SENTENCE AGREEMENT

This chapter will focus on the general overview, historical background and application of plea-bargaining and sentence agreement. The chapter will be aimed at evaluating to what extent

plea-bargaining and sentence Agreement could be of assistance in disposing of criminal cases within a reasonable time. Focus here will not only be limited to the Republic of South Africa. Some developed jurisdictions such as the United States of America and the United Kingdom will be considered.

Chapter 2: Constitutional right to trial

(Section 10 of the Constitution of the Republic of Botswana), Section 35(3) of the Constitution of the Republic of South Africa, then Section 105A of the Criminal Procedure Act 51 of 1977 (South Africa).

This chapter will discuss the Constitutional rights available to an accused person. The aim will be to analyze the provision of section 10 of the Botswana Constitution with a view to demonstrate that the accused are afforded a fair right to trial and to demonstrate further that the proposed Amendment will not in any way force the accused person to negotiate a deal (plea-bargain) with the prosecution. The proposed Amendment will simply be there as an option available to an accused person in so far as he or she weighs the gravity of the state case as against his or hers.

The Amendment which this research seeks to achieve in relation to Criminal Procedure and Evidence Act of Botswana entails insertion or inclusion of a provision that mirrors the provision of Section 105A of the South African Criminal procedure Act. It is therefore imperative for this research to analyze Section 105A of Act No. 51 of 1977. The aim is to evaluate the fairness of the provision of that section as it will be used as a yardstick to measure the relevance of the proposed Amendment. This chapter will confine itself to the meaningful, relevance and fairness of Section 105A of Act No. 51 of 1977. The other aspect will be to evaluate the constitutionality of the provision. Section 35 of the South African Constitution is of paramount importance in so far as evaluation of Section 105A of the Criminal Procedure and Act is concerned. This chapter will analyze section 35(3) of the Constitution of the Republic of South Africa which provides for the accused's right to fair trial.

Chapter 3: Case Law dealing with application of Section 105A of Criminal Procedure Act No. 51 of 1977

This chapter will focus on a number of decided cases where section 105A of Act 51 of 1977 was applied. This will further evaluate fairness and constitutionality of Section 105A. As the section 105A is broad, quite a number of cases will be picked and evaluated which deals with different aspects of the provision of that section. Here the focus will be within the South African Jurisdiction to provide a benchmark exercise for the proposed amendment to the Criminal Procedure and Evidence Act of the Republic of Botswana.

Chapter 4: Conclusion and Recommendation

This chapter will discuss on the recommendation of the possible Amendment to the Criminal Procedure and Evidence Act. The recommendation will be based on what will have been unpacked on analyzing the provision of section 105A of the criminal procedure Act together with the variety of decided cases which involved application of the provision of the section. Recommendation will finally be given based on the fairness in so far as the rights of the accused are concerned and constitutionality of the entire provision.

Chapter 2

THE CONSTITUTIONAL RIGHT TO FAIR TRIAL (BOTSWANA CONSTITUTION)

2.1 INTRODUCTION

Section 10 of the Constitution of the Republic of Botswana provides for the accused's Right to trial. Section 10 (1) of the constitution, makes provision for the right of a person charged with a criminal offence, that unless a decision to withdraw such charges is taken, the matter has to be registered for hearing by an independent tribunal which is recognized by the law.[108] It further provides that such hearing has to be within a 'reasonable time' although reasonable time is not defined.

Section 10(2) (a) deals with the accused's right to presumption of innocence until otherwise proven. It stipulates that such right of presumption of innocence is enjoyed until the accused is proved guilty or has so pleaded.[109] Section 10(2) (b) makes provision for the accused to be informed as expeditiously as possible about the nature of the offence charged, further that such information be disseminated to him or her in a language that he or she accused understands.[110] Section 10(2) (c) focuses on the accused's right to be afforded enough time and resources to prepare for his or her defense.[111] Section 10(2) (d) to 10 (2) (f) focuses on the accused's right to raise a defense of his or her choice and that such may be conducted in person or through a defense counsel of the accused's own choice and at the accused own expenses.

This provision goes on to provide that the necessary facilities shall as a matter of procedure be availed and provided to the accused for examination either in person if he is self-acting, to his or her attorney of record, if he or she is represented. These include examination of witnesses appearing to testify against him or her before court. It is further stipulated that the accused shall be allowed free of charge the benefit of assistance of an interpreter in the event

[108] Section 10(1) of the constitution of the Republic of Botswana.
[109] Section 10(2)(a) Botswana constitution (n108 above).
[110] Section 10(2)(b) Botswana constitution (n108 above).
[111] Section 10(2)(c) Botswana constitution (n108 above).

that he cannot follow the proceedings in the court's language.[112] It also states that the accused shall be present during his trial except in instances where he behaved in a way that made it impossible for the proceedings to take place in his presence, under which circumstance he would for reasons of making progress be removed from the court room.

Section 10 (3) makes provision that on accused person is entitled whether directly or through his counsel subject to payment of fee as prescribed by the law, to be given a copy of the judgment or copy of the proceedings and such has to be availed within a reasonable time.[113]

Section 10 (4) to 10 (8) of the constitution deals with acts or omission conducted at a time when such had not been criminalized. An accused cannot be held criminal liable on account of an act that did not, at the time of its commission, constituted an offence. An accused who avails information before court to the effect that he or she has been tried by a recognized tribunal for an offence and was either convicted or acquitted cannot be tried further on the same criminal act, or for any possible criminal act ought to have been convicted at the time of that trial unless by an order of a superior court at an appeal or review stage.[114] When an accused person avails information to the effect that he or she has been pardoned for the act or omission, he or she shall not be tried for the same offence. When an accused person is being tried for the offence with which he or she is charged, he or she would not be compelled to testify at that trial.[115]

Section 10 (8) stipulates that an accused shall not be found guilty of a charge for an act, unless such act is clearly defined as a criminal offence and a penalty thereof is also prescribed in a written form. This section has a proviso aimed at empowering a court of record to impose punishment on persons accused of contempt of court.[116] Section 10 (11) empowers the courts and other adjudicating authorities to exclude from any proceedings any individuals other than parties to the dispute or their legal representatives to the extent that such authority deems necessary in instances where publicity would compromise the interest of justice.[117]

[112] Section 10(2)(f) Botswana constitution (n108 above).
[113] Section 10(3) Botswana constitution (n108 above).
[114] Section 10(5) Botswana constitution (n108 above).
[115] Section 10(6) Botswana constitution (n108 above).
[116] Section 10(8) Botswana constitution (n108 above).
[117] Section 10(11) Botswana Constitution (n108 above).

Section 10 (13) speaks about a situation, in which an accused is held in a lawful detention. It simply provides that under such circumstances, the provisions of subsections "(1), (2)(d) and (e) and subsection (3)" of section 10 do not apply to the accused's trial for criminal offences under the law regulating discipline of persons held in detention. Section 10 (14) stipulates that [criminal offence] under the provision refers specifically to "criminal offence" under the law in Force in Botswana.[118]

2.2 THE ACCUSED'S RIGHT TO FAIR TRAIL (CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA)

Just like the constitution of the Republic of Botswana, the South African Constitution makes provision for the accused's right to a fair trial. This is provided for under Section 35(3) of the Constitution.[119] Section 35 (3)(a) to 35 (3)(o) provides for the accused's right to a fair trial. The section stipulates that everyone who is accused of a criminal offence or charged therewith, is entitled to a fair hearing, that the fair trial of an accused include the following rights:

The right to be adequately alerted of the alleged offence in a detailed form.[120] That such an accused is entitled to be afforded sufficient time together with sufficient facilities in preparation for his defense.[121] The accused is further entitled to be tried in an open court by an independent and impartial tribunal.[122] The accused is also intitled to have his or her trial commenced within a reasonable time and concluded without being subjected to an inordinate delay.[123] Moreover, the accused in terms of the provision of Section 35 (3), is entitled to be present at his trial during the said trial.[124]

In terms of this section, the accused person has a right to choose and be represented by an attorney. He also has a right to be informed promptly of the former right.[125] The accused person in terms of the provisions of Section 35 (3), has a right to be availed an attorney by the state

[118] Section 10(14) Botswana constitution (n108 above).
[119] Constitution of the Republic of South Africa Act 108 of 1996.
[120] Section 35(3)(a) South African constitution (n119 above).
[121] Section 35(3)(b) South African constitution (n119 above).
[122] Section 35(3)(c) South African constitution (n119 above).
[123] Section 35(3)(d) South African constitution (n 119 above).
[124] Section 35(3)(e) South African constitution (n119 above).
[125] Section 35(3)(f) South African constitution (n 119 above).

at the states expense, this right is afforded an accused in instances where there is anticipation of prejudice on the accused side if he is not availed counsel to act on his or her behalf. He or she is also entitled to be informed of this right as soon as is practical possible.[126]

The constitution further provides for the accused's right of presumption of innocence. It further provides for his or her right to remain silent and it stipulates that he or she has a right not to give evidence during the proceedings, the right to adduce and challenge evidence. It further stipulates that the accused has a right not to be compelled to adduce self-implicating evidence. The constitution further provides for the accused's right to have his trial conducted in a language that he or she understand and if that is not practical possible, the court proceedings has to be interpreted into a language that the accused understands.[127]

The accused person cannot be found guilty of an act or omission which was not listed as such in terms of the national or international law, at the time that accused did commit or omit such an act.[128] If the accused was previously tried for any offence and as a result got convicted or acquitted, under no circumstances would he or she be again tried for the same act.

The accused person is as matter of right entitled to benefit from the least severe prescribed punishment for the offence allegedly committed. In the event that the set punishment has been altered between the time that the offence was committed and the time of sentencing.[129] Upon a conviction as a result of trial, an accused is entitled to appeal the findings of the trial court or to have it reviewed by a higher court. Any evidence which was gathered in a fashion that violates any of the rights embodied in the Bill of rights, stands to be excluded if it is clear that the admission of such evidence would result in an unfair or would be prejudicial to the proper administration of justice.[130]

2.3 ANALYSIS OF SECTION 105A OF THE CRIMINAL PROCEDURE ACT (REPUBLIC OF SOUTH AFRICA)

[126] Section 35(3)(g) South African constitution (n119 above).
[127] Section 35(3)(k) South African constitution (n119 above).
[128] Section 35(3)(l) South African constitution (n119 above).
[129] Section 35(3)(n) South African constitution (n119 above).
[130] Section 35(5) South African constitution (n119 above).

The Criminal Procedure Act,[131](herein after referred to as the CPA) of the Republic of South Africa has a provision for plea and sentence agreements. It provides that a prosecutor operating under the written permission by the National Director of Public prosecutions and an accused person who is under a legal Representation may engage in negotiations and ultimately enter into an agreement before the accused pleads to the charge as proffered against him or her.[132] Such agreement is aimed at securing a guilty plea by the accused to the offence charged or to a competent verdict of the offence charged. Should the accused as a result be found guilty as per his guilty plea of the offence charged, a 'just' sentence will be meted out by the court if such sentence is not postponed in terms of Section 297 (1) (a).[133] The just sentence as may be found by the court will be imposed and same may be wholly if not partly suspended as per the terms of Section 297(1)(b). Where applicable the court may order an award for compensation.

Before a prosecutor engages into negotiations with a view to enter into an agreement with the accused, it is essential that he consults the person who is charged with the investigation of the matter.[134] Such consultation would be in relation the nature and circumstances of the offence, the personal circumstances of the accused and whether he or she (accused) has some previous convictions, and of course the interest of the community at large.[135] The complainant or his or her representative must be afforded opportunities where reasonably possible to present their views to the prosecutor in so for as the nature and circumstances of the offence committed is concerned, such presentations are relative to the contents of the agreement and where necessary addition of such clauses as may relate to compensating the complainants, or offering some beneficial services to the complainants,[136] may be made.

If the prosecution holds the view that consulting the investigating officer will cause inordinate delay in disposing of the case to the extent that such process is likely to cause prejudice to both prosecution and accused, ending up affecting the whole administration of justice, the prosecution will normally do away with such consultation. The agreement between the accused and the prosecution must be reduced to writing and clearly stipulate that before an agreement was entered into, the accused was informed of his right to be presumed innocent

[131] Criminal Procedure Act 51 of 1977.
[132] Section 105A(1)(a) (n131 above).
[133] Section 105A(1)(a)(ii)(bb) (n131 above).
[134] Section 105A(1)(b)(i) (n131 above).
[135] Section 105A(1)(b)(ii) (n131 above).
[136] Section 105A(b)(iii) (bb) (n131 above).

until proved guilty, and that he has a right to remain silent and to choose not to give any evidence during the proceedings, also that he or she is not obliged to give any self-implicating evidence.[137] The agreement must clearly and expressly outline the terms as agreed, the facts of the matter and any other facts essential to the sentence agreement including any admissions made by the accused. The agreement needs to be signed by parties thereto, being the prosecutor, the accused or his or her lawyer.[138] In the event that the negotiations were held with the assistance of an interpreter, the agreement must be comprised of a certificate by such an interpreter effecting that he or she did interpret with accuracy when the negotiations were ongoing and in so for as the contents of the agreement are concerned.

During negotiations, the court does not participate in any form whatsoever. Upon appearance of parties before court, the prosecutor informs the court that there is an agreement entered into between prosecution and the accused. This information is disseminated before the accused person is asked to plead to the charge. Upon such, the court then enquire from the accused if indeed such an agreement was made.[139] When the court assesses the agreement entered into and finds that some requirements have not been complied with, the court will inform the parties of such non-compliance and it will afford the parties to comply with those requirements.[140] Once the court has satisfied itself that all the requirements have been complied with, the court asks the accused to plead to the charge and makes the order to the effect that terms of the agreement as entered between parties be disclosed in open court.[141] Once the terms of the agreement have been disclosed, the court makes enquires with the accused with a view to ascertain whether the accused does confirm that the terms as contained in the agreement is a true reflection of the parties agreement and whether admissions made in terms of the agreement is the whole truth about his admissions. The court will further ascertain with the accused person as to whether he or she confirms and admits the allegations as framed in the charge to which he or she pleads guilty. The court also has a duty to make enquiries with the accused in an effort to ascertain whether the accused entered into the agreement 'freely and voluntarily in his or her sound and sober senses without having been unduly influenced'.

When the court after concluding its inquiries with the accused is of the opinions that the accused is not guilty of the offence in so far as the agreement suggests, or it transpires to the

[137] Section 105A (2)(a) (n 131 above).
[138] Section 105A (2)(c) (n 131 above).
[139] Section 105A (4) (n131 above).
[140] Section 105A (4)(b)(ii) (n131 above).
[141] Section 105A (5) (n131 above).

court that the accused does not confirm the alleged facts in the agreement and or he or she raises a valid defense to the charge and the court finds that a guilty plea cannot stand, the court enters a plea of not guilty and will inform the parties of its reasons.[142]

In the event that the court enters a plea of not guilty, the trial will normally start *'de novo'* and same being then handled by a different magistrate or judge, unless the accused waives his right to be tried by a different presiding officer. However, should the court be satisfied in so far as the factual allegations are concerned, and that in its considered view the accused is guilty of the offence as per the parties agreement, it shall proceed to consider the sentence agreement.[143] If the court is so satisfied as aforementioned, it may proceed and inquire with prosecution about the previous conduct of the accused whether he or she has previous convictions, the inquiry may also be directed to the accused himself or herself and hear evidence or statement by or on behalf of the accused or the complainant.[144]

If the court is satisfied and consider the sentence agreement to be 'just', the court normally will share its opinion with the prosecution and the accused openly in court that it is so satisfied, then immediately proceed to convict the accused of the offence charged and as per the accused's guilty plea then impose such sentence as it deems just.[145] However, should the court form the view that the sentence agreement is unjust, it is as a result duty bound to inform the parties that it considers the sentence agreement to be unjust. It further has to inform the parties as to what sentence it deems just in the circumstances.[146]

When the parties receive information which pertains the sentence which the court considers unjust, parties may choose to abide by their agreement regarding the charge whereby they would then inform the court that 'subject to the right to lead evidence and to present argument relevant to sentencing', the presiding officer may continue and sentence the accused according to the sentence that he or she deems just in the circumstances or withdraw from the agreement.[147]

---

[142] Section 105A (6) (n131 above).
[143] Section 105A (7) (n131 above).
[144] Section 105A(7)(b) (n131 above).
[145] Section 105A (8) (n131 above).
[146] Section 105A (9) (a) (n131 above).
[147] Section 105A (9) (b) (n131 above).

If parties to the agreement, decide to stick to their agreement, such information will be disclosed to the court which would then exercise its powers to convict the accused and pass such sentence as it deems just. However, should the prosecutor and the accused decide to abandon the agreement as they are at liberty to do so, then the trial has to be commenced '*de novo*' and same will be handled by a different presiding officer. In instances where trial is conducted afresh before a different magistrate or judge, the initial agreement becomes '*null and void*' and no reference whatsoever may be made to it.[148]

All the negotiations which led to the agreement and any agreed facts solidified by parties during such negotiations including any record which would have resulted from the discussion of the sentence agreement fall away. Only the accused will be empowered and entitled out of his or her own free will to give "consents to the recording of all or certain admissions made by him or her in the agreement or during any proceedings relating thereto", and such will be taken as proof of what had happened initially.[149] Once parties have abandoned the agreement, under no circumstances would they be allowed to reconstruct and enter into another "plea and sentence agreement", again based on the same charge arising from the same facts. The prosecutor will be at liberty to draft and proceed on any charge.[150]

2.4 CONCLUSION

Similarities between section 10 of the Botswana constitution and section 35(3) of the south African constitution

Section 10 of the Constitution of the Republic of Botswana provides for the accused's right to a fair trial. Similarly, the accused's right to fair trial is also contained in section 35(3) of the South African Constitution. The two provisions of these constitutions are similar in material respect. It is due to these similarities and the nature of the rights contained in both constitutions that the current possible amendment to the Criminal Procedure and Evidence Act is proposed. The South African Criminal Procedure Act provides for plea and sentence agreement as per Section 105A of the Act. This provision of the Act was analyzed in this chapter and it is evident

[148] Section 105A (10) (n131 above).
[149] Section 105A (10) (a) (n131 above).
[150] Section 105A (10) (c) (n131 above).

in terms of the provision of Section 105A that the provision is in line with Section 35(3) of the Constitution of the Republic of South Africa.

Section 10 of the Constitution of the Republic of Botswana is structured more or less the same as Section 35(3) of the South African Constitution. However, the Criminal Procedure and Evidence Act of the Republic of Botswana makes no provision for Plea and Sentence Agreement. In chapter one, it was demonstrated that most of the developed jurisdictions have plea bargaining and Sentence Agreement in their Criminal Justice Systems. It follows that where there is plea bargaining and sentence agreement in the Criminal Justice System, there seem to be quick disposition of the criminal matters. The developed jurisdictions such as the United States of America, England, Hong Kong and the Republic of South Africa have plea and sentence agreements in their systems to help in the disposal of criminal matters within reasonable time.

The proposed possible amendment to the Botswana Criminal Procedure and Evidence Act is premised on the fact that some developed jurisdiction do have such provision in their systems. The proposed insertion of a provision for plea and sentence agreement in the Criminal Procedure and Evidence Act of the Republic of Botswana is also influenced by the similarities found in the constitutions of both Botswana and South Africa with regard particularly to the rights of the accused persons.

Both constitutions have common rights afforded to the accused persons some of which include the following. The accused's right to presumption of innocence.[151] The accused's right to be afforded sufficient time and facilities to prepare for his defense,[152] the accused's right to make a choice in Representation as well as the right to be informed of the same right.[153] In both constitutions, the accused are afforded the right to trial in a language of the accused's choice or to have the proceedings interpreted into his or her language of choice in the event that trial by his language of choice is not possible.[154] The accused is afforded a right not to be compelled to give evidence in both constitutions.[155] Both constitutions make provisions to the effect that the accused has a right not to be tried for an offence that he or she has been either

[151] Section 35 (3) (h) (n119 above) and section 10 (2) (a) (n108 above).
[152] Section 35 (3) (b) (n119 above) and section 10 (1) (c) (n108 above).
[153] Section 35 (3) (f) (n119 above) and section 10 (1) (d) (n108 above).
[154] Section 35 (3) (k) (n119 above) and section 10 (1) (f) (n108 above).
[155] Section 35 (3) (j) (n119 above) and section 10 (7) (n108 above).

convicted for or acquitted on.[156] The two constitutions speak to the accused's right not to be found guilty of a criminal offence on account of an act or omission that did not constitute a criminal offence at the time of the commission or omission of the same act.[157]

The two constitutional provisions are similar in material respect with regard to the rights of an accused person. The proposed possible amendment to the Criminal Procedure and Evidence Act of Botswana needs to the basically an insertion of a clause crafted more or less the same as the provision of Section 105A of the Criminal Procedure Act 51 of 1977.

[156] Section 35 (3) (m) (n119 above) and section 10 (5) (n108 above).
[157] Section 35 (3) (l) (n119 above) and section 10 (4) (n108 above).

Chapter 3

DECIDED CASES WHICH INVOLVE APPLICATION OF SECTION 105A OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 (REPUBLIC OF SOUTH AFRICA)

3.1 INTRODUCTION

The South African Jurisdiction, like other developed jurisdictions has an established system of handling criminal cases in an expeditious way. This involves a trend to apply the provisions of Section 105A of the Criminal Procedure Act number 51 of 1977. Today South Africa has a plethora of case law which were decided in terms of Section 105A of the South African Criminal Procedure Act.

It is self-explanatory when a close look is taken that some of the cases which were decided and concluded in terms of the provision of Section 105A of the Criminal Procedure Act, saved the court's time thereby benefiting both the prosecution and the accused.[158] It is in form as palpable that normally the prosecution will benefit in the sense that they are able to conclude matters which otherwise would have lasted for some years, within some few days or months.

As to the accused person, the benefit flows from his or her co-operation with the state leading to a plea of guilty, giving evidence against his co-accused and as a result being subjected to a lesser sentence than otherwise would have been the case under a full trial conviction.[159]

At times the accused benefits through abandonment of some charges by the prosecution or being charged with less serious offences. This works for whole criminal justice system as the case management report of the courts will reflect a tremendous report of case disposition.

3.2 DECIDE CASES

[158] Bond 1982 (n16 above).
[159] Bond 1982 (n16 above).

State V Sassin and others (84/02) [2003] ZANCHC 44 (20 October 2003).

This matter involved three accused persons, who were apparently, a father, son and daughter. The first accused person, the father entered into agreement with the prosecution, as a result the state withdrew charges to which the first accused had pleaded not guilty.

3.2.1 Background

According to the prosecution, the accused during the years, 1997 and 1998 practiced what was commonly known as [pyramid scheme].[160] Interested members of the public deposited huge sums of money for investment on the [Johannesburg Stock Exchange].[161] The total amount of money involved was R29 167 761.80 received from various investors. The scheme was made under different company names at various centers, and later all those companies were wound up through court orders.[162]

The allegation by the prosecution was that the accused defrauded the investors by way of making misrepresentation detrimental to such investors.[163] Prosecution had drafted 1655 charges. The accused expended a considerable amount of money involved to purchase personal property, both immovable and movable. The misrepresentation made to the investors included expression that returns or profit would be as high as 700%,[164] safety of the investor's investment and omitting to disclose to the investors how the scheme was to run. Such information as limited continuance of the scheme and such facts as payment of profits to investors through deposits made by other investors.[165] The counts also involved a considerable number of charges under different statutes, such as the Banks Act.[166] Contravention of some provision of the Stock Exchange Control Act.[167] Some charges also pertained contravention of some provision of the Financial Markets Control Act.[168] There were also charges which were in relation with breaching provisions of the Companies Act.[169]

[160] See para 2 of the judgment.
[161] See para 2 of the judgment.
[162] See para 3 of the judgment.
[163] See para 3 of the judgment.
[164] See para 7.1 of the judgment.
[165] See para 7.3 of the judgment.
[166] Act 94 of 1990.
[167] Act 1 of 1985.
[168] Act 55 of 1989.
[169] Act 61 of 1973.

Some of the charges were in relation to contravening provision of the Financial Institutions Act,[170] the Financial Services Board Act.[171] Contravention of provisions of the Unit Trusts Control Act,[172] were also charged for amongst others.

3.2.2 Plea and sentence agreement.

The written agreement by the parties was consistent of guilty pleas by the accused on various charges as drafted by the prosecution. It also disclosed the "proposed just sentence" to be meted out by the presiding officer.[173] The agreement had been signed by both counsel for the state and accused's lawyer.[174] There was an attachment to the agreement reflecting the guilty plea by the accused person and same spelt out clearly the facts and legal basis of the guilty plea.[175]

For compliance purposes, with particular reference to Section 105A (1)(a) of the Criminal Procedure Act, the substantive prosecutor filed a certificated which indicated that he had duly been authorized to engage in negotiation and possibly enter into a plea and sentence agreement with the accused. The proof of authority was considered to be of paramount importance under Section 105A.[176]

The prosecutor further filed an affidavit, deposed to by the officer charged with the investigation of the matter.[177] The affidavit was to the effect that the deponent had been consulted and was satisfied with agreement and the sentence as proposed by parties.[178] This was further viewed as an essential element and compliance with section 105A. The prosecution further had filed affidavits from the joint liquidators of various companies supplemented by thirty-one other affidavits deposed to by representative investors. All the deponents expressed gratification on both the agreement and the proposed sentence. Those

[170] Act 28 of 2001.
[171] Act 97 of 1990.
[172] Act 54 of1981.
[173] See para 9 of the judgment.
[174] See para 9 of the judgment.
[175] See para 9 of the judgment.
[176] See para 10 of the judgment.
[177] See para 10 of the judgment.
[178] See para 11.1 of the judgment.

were viewed to be in compliant with the requirements of Section 105A (1)(b)(i) and (ii) of the Act.[179]

It was also mentioned that where reasonably possible, in consideration of the nature and circumstances of the offence committed and the interest of the complainant, "complainants needed to be afforded opportunities to make presentations to the prosecutor regarding", - such aspects as compensating the victim and or rendering some beneficial services *in lieu* of compensating such victims or complainants.[180] The provision of Section 105A were viewed as encouraging 'victim participation' in the criminal justice system and the society at large. The court observed that society also benefits when victim participation is promoted and implemented in that, allowing them to partake, leads to adequate information being availed to the decision maker.[181] It also improves the efficiency in the operation of the criminal justice system.[182] The court remarked that, "Affording victims a say in the plea bargaining process furthermore enhances transparency and lends credence to the adage that justice must be manifestly be seen to be done".[183]

The court was amenable to accept the thirty-one affidavits as a reasonable reflection of representatives of the 1600 victim- investors. The contents of the affidavits were such that there was no objection to the plea agreement and the proposed sentence to be imposed. The court further accepted two affidavits from the liquidators as they were clearly [representative] of the investors in terms of Section 105A (1)(b)(iii) of the Act.[184] The court satisfied itself that at the beginning, accused one was fully advised of his rights in terms of Section 105A (2)(a)(i), (ii) and (iii) of the Act. To that effect, it also came to the realization of the court that the accused possessed legal qualification and previously practiced as an attorney.[185] It was the court's finding that even the requirements of subsection (1)(b)(i) and (ii) had been met. The charges were then formally put to the accused person after the plea agreement had been disclosed in open court. He (accused) was asked to plead to the charges. The accused positively confirmed terms of the agreement together with the admissions contained therein.[186]

---

[179] See para 11.2 of the judgment.
[180] See para 11.3 of the judgment.
[181] See para 11.3 of the judgment.
[182] See para 11.4 of the judgment.
[183] See para 11.4 of the judgment.
[184] See para 11.6 of the judgment.
[185] See para 11.6 of the judgment.
[186] See para 13 of the judgment.

The accused person further made an indication to the effect that he entered into the agreement on his own free will, and that at the time of agreement, he was in his sound and sober senses and without being unduly influenced thereto. As far as the plea agreement is concerned, the accused person pleaded guilty to 1527 counts of fraud. Altogether prosecution had framed a total fraud charges amounting to 1655. A balance of the charges was presented by counsel as duplications.[187]

In the accused's plea explanation, his version corresponded in material respect with the summary of facts as amplified by prosecution and as reflected by the indictment. The accused substantively confirmed the following elements;

(i) That he misrepresented himself to the public as stated by the prosecution,

(ii) That he posse's knowledge as to the true state of the affairs in so far as such misrepresentations were concerned;

(iii) That he omitted a legal duty and a duty to disclose the truth as presented by the prosecution's summary of facts.

(iv) That his misrepresentations caused the public and investors at large a substantial loss of huge sums of money.[188]

Having confirmed the essential elements of the offences charge, the court accordingly convicted the accused person upon his own plea of guilty.[189]

3.2.3 The proposed sentence.

The plea agreement proposed a sentence of 15 years imprisonment, 6 years of which was to be suspended for 5 years on condition that the accused is not found guilty on charges of fraud.[190] On charges of contravening provisions of the Banks Act, the accused was fined a sum of R50 000.00- or 5-years imprisonment wholly suspended on condition that he should not be convicted of contravening Section 4(1) of the Stock Control Act. With regard to charges in relation to contravening Stock Exchange Control Act, he was fined R15 000.00 or 3 years

[187] See para 14.1 of the judgment.
[188] See para 14.2 of the judgment.
[189] See para 14.2 of the judgment.
[190] See para 15 of the judgment.

imprisonment in default of payment, also wholly suspended on condition that he should not be found guilty of contravening the same Act.

On charges relating to contravening sections of the Companies Act, the accused sentenced to R10 000.00 or 2 years imprisonment and wholly suspended on condition that he should not be convicted of contravening section 424 of the Companies Act.[191]

The accused's record was clean, he had no previous convictions. The prosecutor and counsel for the accused had filed an agreed list of factors which they believed to be constitutive of substantial and compelling circumstances as per the provision of Section 51(3)(a) of the Criminal Law Amendment Act,[192] thus justifying imposition of lesser sentence than the minimum mandatory prescribed by the law[193]. There was a minimum sentence of 15 years imprisonment in respect of fraud charges which exceeded R500 000.00 in value, in terms of Section 51(2) of Act 105 of 1997. The provision of Section 105A (7)(b)(ii) required due regard to be made in instances where minimum sentence was prescribed when the court considers whether a proposed sentence was just.

A sentencing court is not bound to abide by the sentence as maybe proposed by the parties, what a court considers is the facts and circumstances of the case with due regard to the needs and interests of the society at large.[194] This is considered together with the interests of the victim and blended with the personal circumstances of the accused person.[195]

After taking into consideration the above mentioned factors and the court's finding of the existence of substantial and compelling circumstances, the court ordered that the proposed sentence was just.[196]

[191] See para 15 of the judgment.
[192] Criminal law amendment Act.
[193] See para 15 of the judgment.
[194] See para 15.5 of the judgment.
[195] See para 15.5 of the judgment.
[196] See para 15.5 of the judgment.

3.3 State V Solomons 2005(2) SACR 432(C).

3.3.1 Background.

The case had been brought before court for special review in terms of Section 304(4) of the CPA.[197] The reason being that the magistrate had failed to observe the provisions of Section 105A (9) of the Act. The accused person had been tried on five counts of fraud before a magistrate court in Goodwood.[198] The prosecutor and defense counsel entered into a plea and sentence agreement in terms of which the accused would plead guilty to all the charges and a specific sentence would apply.[199] The agreement was accordingly availed to the magistrate for assessment. The magistrate, having assessed the agreement made an indication that in his view, the sentence as had been agreed was not "just". However, he proceeded and imposed a different sentence from what had been agreed by parties.[200]

The presiding officer imposed a fine of R2 000.00 or 18 months imprisonment in default of payment, which was wholly suspended for 5 years on condition that the accused is not found guilty of fraud or theft during the period of suspension.[201] On the contrary the sentence as had been agreed between parties was, one year imprisonment, wholly suspended on condition that, the accused is not found guilty of fraud or theft, during the suspension period, that the accused would pay back the complainant the sum of R12 223,12 at an arrangement of R300.00 per month, and that the same payments be effected through court clerk of the Goodwood magistrate court.[202]

3.3.2 The record.

Before the court could commence the review process, it made comments on the record of proceedings. It observed that the record of proceedings was not complete. Further that the record had been supplemented by an affidavit deposed to by the defense counsel, note of the prosecutions counsel and that of the magistrate.[203] To the court's opinion the record of

[197] Act 51 of 1977.
[198] See para 1 of the judgment.
[199] See para 1 of the judgment.
[200] See para 1 of the judgment.
[201] See para 2 of the judgment.
[202] See para 2 (a), (b) and (c) of the judgment.
[203] See para 3 of the judgment.

proceedings was of very limited assistance as it could not reflect clearly the sequence of the proceedings.[204] Parties themselves appeared to disagree in so far as what had actually transpired, therefore, referring the matter back for record reconstruction would not have borne any fruits.[205]

As to the record of proceedings the court emphasized, "the plea-bargaining process is governed by extraordinary procedure and, where the record is taken down in longhand, it is essential that it be recorded fully and properly. Each step taken and each decision made in such process must be clearly recorded. The object is to avoid any dispute, whether on appeal, review or otherwise as the what transpired in the proceedings".[206]

3.3.3 Plea bargaining.

The court reiterated that Section 105A (9)(a) of the CPA provided that in the event that the court hold the view that the sentence as agreed by parties is not just, it must inform the parties of the sentence which is just in its view.[207] That move would enable parties to make informed decision whether to abide by the plea agreement or to withdraw from same.[208] In the event that parties choose to abide by the agreement, the court would be empowered to convict the accused as per the charge and his plea of guilty. The court will then impose that sentence which it deems just.[209] Should parties, after an indication by the presiding officer that he or she does not consider the agreed sentence to be just, decide to withdraw from the agreement, the trial then starts *de novo* before a different presiding officer, save where the accused waives his right to be trial by a different presiding officer.[210]

The court viewed plea bargain and sentence agreement to be a 'fundamental departure' from the common system of the traditional criminal law. On one hand the prosecution would compromise the gravity of the punishment for the offence committed and on the other, the accused person foregoes some of his or her constitutional rights afforded to him or her under

[204] See para 3 of the judgment.
[205] See para 3 of the judgment.
[206] See para 5 of the judgment.
[207] See para 5 of the judgment.
[208] Section 105A (9) (b) CPA.
[209] Section 105A (9) (c) CPA.
[210] Section 105A (9) (d) CPA.

a fair trial process.[211] The provisions of Section 105A of the CPA were said to be peremptory and strict compliance therewith was a requirement.[212] The court picked up three 'caveats' which contributed towards the trial court's misdirection. The first one was in relation to the admissions made by the accused person which amounted substantially to repetition of allegations in the charge sheet. They were materially lacking facts admissions upon which such allegations were based as per the demand of Section 105A (6)(a) (ii).[213]

The other factor pertained a question as to whether such plea bargaining agreement was entered into by the accused person "freely and voluntarily in his sound and sober senses and without having been unduly influence thereto" as per provision of the Section 105A (6) (a) (iii).[214] The record was reflective of the accused's confirmation as to the contents of the plea bargain to be correct. It materially made reference to the accused's guilty plea and left out other aspect, thereby breaching the demands of peremptory provisions of the subsection.[215]

The third factor was that the record did not specify what sentence the presiding officer deemed 'just' before he proceeded to convict the accused and imposed the sentence.[216] The record reflected that reading of the plea and sentence agreement, the magistrate was of the view that the agreed sentence was not just. He then proceeded and meted out the sentence which he deemed just.[217] The court pointed out that there were several parties in a plea and sentence agreement, those included prosecutors and the accused, supplementary to that are the investigating officer of the matter together with the complainant.[218] The presiding officer is duty bound to inform the parties being the accused and the prosecutor of the sentence which he or she considers to be just before convicting the accused so as to afford them to make an informed decision whether to abide by the agreement or resile therefrom.[219] His failure to do so constituted non-compliance with the peremptory requirement of Section 105A (9)(a).[220]

---

[211] See para 7 of the judgment.
[212] See para 7 of the judgment.
[213] See para 8 of the judgment.
[214] See para 9 of the judgment.
[215] See para 9 of the judgment.
[216] See para 9 of the judgment.
[217] See para 10 of the judgment.
[218] See para 10 of the judgment.
[219] See para 10 of the judgment.
[220] See para 11 of the judgment.

3.3.4 Court's decision.

The court's decision was that the terms of Section 105A were peremptory and required strict compliance. Further that proceedings before the court *aquo,* were tainted with irregularities in that Section 105A (6) (a)(ii) was not complied with, the accused had not admitted the facts upon which the allegations were based, thereby not complying with section 105A (6)(a)(iii).[221] He further did not confirm that he had entered into the agreement "freely and voluntarily, in his sound and sober senses and without having been unduly influenced to do so, and after expressing that the sentence agreed upon was not just in his views, the magistrate failed to disclose to parties what sentence was just in his opinion before imposing it".[222]

3.4 Van Eeden V Director of Public Prosecutions, Cape of Good Hope [2004] JOL 12916(C).

3.4.1 Factual background.

The applicant was in the company of one Mr. Adams, the duo were travelling in a motor vehicle driven by the applicant at the material time.[223] They were stopped by the police who conducted a search and found a bag with 2000 mandrax tablets in the car. Dagga was also found on Mr. Adams. The two were accordingly arrested.[224] The applicant recorded a statement before the police of what had happened. In the statement he indicated that as he was driving, he found Mr. Adams hitch-hiking and offered him a lift.[225] He noticed that his passenger was in possession of a bag which he did not know its contents, it later transpired that the bag contained mandrax.[226] Mr. Adams also provided a statement to the police and same was corroborative of the applicant's in material respect.[227]

The two suspects were jointly charged with dealing in drugs contrary to Section 5(b) of Act 140 of 1992. They were both represented by one attorney, who then approached the

---

[221] See para 11 of the judgment.
[222] See headnote of the case.
[223] See para 1 of the judgment.
[224] See para 1 of the judgment.
[225] See para 1 of the judgment.
[226] See para 3 of the judgment.
[227] See para 3 of the judgment.

prosecutor with a view to negotiate a deal.[228] The defense counsel's offer was that Mr. Adams would plead guilty to a lesser offence of unlawful possession of drugs in question and the state not proceed on a charge of dealing and would withdraw charges against the applicant.[229] The Respondent filed no opposing affidavit to that effect but indicated that they would rely on an affidavit which had been filed earlier with the Applicant's founding affidavit, however it did not dispute the evidence of the applicant.[230] The court then accepted the correctness of the Applicant's version, and the arresting officers' statements were inconsistent with the exculpatory statements by the two suspects.[231] As per the defense proposal, the state later accepted the offer of a guilty plea on a lesser charge of possession by Mr. Adams, abandoned charges of dealing and withdrew charges against the applicant.[232]

3.4.2 Plea Bargaining (Consequences of the facts).

About one and half years down the line, the applicant was charged with the same offences jointly with two more accused persons.[233] The applicant then filed an application to the effect that he entered into a plea bargain with the prosecutor and agreed on terms that charges against him would be withdrawn on condition that his co-accused pleaded guilty to charge of possession.[234] His further contention was that the state was bound by the agreement and could not lay same charges against him.[235] The court cited with approval the case of *North Western Dense Concrete cc and another V Director of Public Prosecutions (Western Cape) 1999(2) SACR 669(c)* and stressed that "plea bargaining was an integral part of the process of criminal justice in South Africa, and that plea bargaining as a means of achieving a settlement of *lis* between the state and the accused was [as much an entrenched, accepted and acceptable part of the law of procedure as are negotiations aimed at achieving a settlement of the *lis* between private citizens in civil disputes]".[236]

The court ventilated that under the circumstances, as submitted by the applicant the respondent ought to be held to its part of the agreement.[237] That a prosecutor should abide by

[228] See para 4 of the judgment.
[229] See para 5 of the judgment.
[230] See para 6 of the judgment.
[231] See para 6 of the judgment,
[232] See para 9 of the judgment.
[233] See para 9 of the judgment.
[234] See para 9 of the judgment.
[235] See para 10 of the judgment.
[236] See para 11 of the judgment.
[237] See para 10 of the judgment.

an agreement made during negotiations which gave birth to plea and sentence agreement.[238] What was common cause was that an agreement relating to plea and sentence had been concluded. The dispute was only in relation to the terms thereof. The applicant averred that they sealed a composite [deal] with the state on condition that his co-accused would plead guilty to a lesser offence and the charge for dealing in drugs would be abandoned and charges against him be withdrawn.[239] On the contrary the prosecutor's affidavit alleged that charges were withdrawn against the applicant on the basis of lack of sufficient evidence.[240] It was difficult to tell whether the prosecutor's account was mistaken or untruthful. The court found that the applicant's version was truthful and that agreement had been founded on the terms as alleged by him.[241] Therefore, the state was bound by it.[242]

The question that the court asked itself was, what if indeed the prosecutor believed, although mistakenly so that chances of securing a conviction against the applicant were closed to nil at the material time, based on insufficient evidence, further that charges were as a result withdrawn purely on that reasoning than on the basis of any arrangement forming part of a plea bargaining.[243] A solution to the above question was that even if the prosecutor never intended to enter into an agreement on terms expressed by the applicant, (he and his co-accused reasonably believed that she was entering into a plea bargaining on those terms and acted in accordance with that reasonable belief).[244] What was common cause was that the two accused proposed a plea bargain to the prosecution, which proposal was accepted and carried out. The conclusion was that either there had been a plea and sentence agreement as per the applicant's contention or there had been what is commonly known as *'quasi-mutual assent'*. [In the quasi-mutual assent situation, it is accepted that there is no true consensus *ad idem*. The one party says 'But I never agreed'… but your conduct led the other party reasonably to believe you agreed, so you will be treated as if you agreed].[245]

Plea bargaining process was viewed in a perspective of the constitutional right to a fair trial, consequently, the state was held to a plea bargain which it had concluded or deemed to have

[238] See para 11 (c) of the judgment.
[239] See para 11 of the judgment.
[240] See para 12.2 of the judgment.
[241] See para 14 of the judgment.
[242] See para 14 of the judgment.
[243] See para 15 of the judgment.
[244] See para 17 of the judgment.
[245] See para 23 of the judgment.

concluded.[246] The court accordingly observed that there had to be an element of substantive fairness, it would obviously be unfair to permit the state to enjoy the benefits of a plea-bargaining agreement and be at liberty to disregard clear terms of the agreement.[247] Consequently, the prosecution of the applicant on charges per the charge sheet was stayed, as the state was found to be bound by the agreement.

3.5. S V Nel (A352/07) [2008] ZAGPHC 43 (28 January 2008).

3. 5.1 Brief facts.

The appellant had been charged with theft, read with Section 51 of the Criminal Law Amendment Act,[248] before the Regional Court (Boksburg). The state alleged that the appellant had stolen 70 538 liters of petrol with a value worth of R234 369,56 during April 2003.[249] During all the court processes, the appellant was under a legal representation. Through the assistance of his attorney, he entered into a plea and sentence agreement with the prosecution as per the provision of Section 105A of the CPA. He pleaded guilty and was as a result convicted on his own plea and sentenced to eight years imprisonment, three of which was suspended on condition that he should not commit or be convicted of theft during the suspension period.[250]

3.5.2. Plea and sentence Agreement.

The appellant then lodged an appeal against the decision of the trial court on both conviction and sentence. The guiding Section 105A of the CPA permitted the prosecution and the accused directly or through attorney to enter into a plea and sentence agreements.[251] The terms of Section 105A excluded the normal plea arrangements between the accused and the prosecution, *S V Mlangeni 1976 (1) SA_528(T).* The provision of Section 105A of the CPA required a strict compliance therewith.[252] If strict compliance is adhered to, the appellate court will not easily interfere with the decision of the court of first instance save where there would

---

[246] See para 23 of the judgment.
[247] See para 23 of the judgment.
[248] Criminal law amendment Act 105 of 1997.
[249] See para 1 of the judgment.
[250] See para 2 of the judgment.
[251] Section 105A (1) (a) (i) CPA.
[252] See para 4 of the judgment.

be conspicuous irregularities or clear violation of the accused's constitutional right to fair trial.[253]

3.5.3 Appellant's grounds of Appeal.

The appellant's appeal was founded on the following grounds;

(i) That the magistrate failed to ensure the appellant's constitutional right to fair trial.[254]

(ii) That the appellant had been persuaded by his attorney and the officer charged with investigation of the matter to conclude the agreement.

(iii) That the sentence meted out was harsh and induced a sense of shock as the magistrate failed to consider the personal circumstances of the accused.[255]

The court's concern was that the appellant advanced a total fresh version which had never been subjected to test before the court *aquo.*[256]

The appellate court's reading of the proceedings drove it to a position that the court *aquo* had in fact aligned itself and complied with the provisions of Section 105A of the Act.[257] The record of proceedings indicated that upon questioning by the magistrate, the appellant demonstrated that he concluded the agreement and there was an exhibit to that effect. There was also a reflection to the effect that the accused confirmed before the trial magistrate contents together with admissions made in the agreement.[258] Same applied to the factual allegation as per the structure of the charge sheet to which he made a plea of guilty.[259]

One of the important factors that the appellate court picked from the record of proceedings was that the appellant had expressed that he entered into the agreement

[253] See para 4 of the judgment.
[254] See para 4 of the judgment.
[255] See para 5 of the judgment.
[256] See para 6 of the judgment.
[257] See para 6 of the judgment.
[258] See para 7 of the judgment.
[259] See para 7 of the judgment.

"freely and voluntarily whilst in his sound and sober senses, and without any undue influence".[260] At an arraignment stage, as the charges were put to the appellant, he responded that he understood the charges and consequently pleaded guilty.[261] The presiding magistrate proceeded to look at the contents of the agreement specifically the terms relating to a plea of guilty and the proposed sentence to be imposed. Based on that, the appellant was accordingly convicted, and the agreed sentence was imposed.[262]

When the magistrate sentenced the appellant, he was alive to the fact that he (appellant) was a first offender and that Section 51 of the Criminal Law Amendment Act was not applicable. The appellant's personal circumstances were also taken into consideration as per the agreement of the parties.[263] The magistrate concisely explained to the appellant his rights including his right to appeal and the appeal procedure despite the fact that he (appellant) was represented throughout the proceedings. It was evident from the agreement that it had been signed by the appellant, his attorney and the prosecutions counsel duly authorized by the Deputy Director of Public Prosecutions.[264] The agreement was reflective of the allegations pertaining the charge against the appellant, admissions made and the personal circumstances of the appellant. It also reflected particulars of the proposed sentence.[265]

The appellate court found that there had been no misdirection in the exercise of the terms of Section 105A of the Act by the magistrate. In fact, in the appellant's heads of Argument, it had been specified that, [It is conceded that the proceedings in the court *aquo* was, *ex facie* the record in accordance with justice, more particularly in that the appellant's plea of guilty was properly noted and he was properly convicted by the trial court after he had freely and voluntarily pleaded guilty].[266]

---

[260] See para 7 of the judgment.
[261] See para 7 of the judgment.
[262] See para 7 of the judgment.
[263] See para 8 of the judgment.
[264] See Para 8 of the judgment.
[265] See para 8 of the judgment.
[266] See para 9 of the judgment.

The appellate court then cited with approval the case of *S V Armugga and other 2005(2) SACR 259 (N),* where the court had been faced with same situation of an appeal although the appeal was only against the sentence. The conviction had in *Armugga* case been arrived at in terms of Section 105A of the Act. The appeal judge quoted the words of Msimang J as follows, [… It has always been contemplated that the right of appeal in those cases would be a limited one and that the appellants in those cases would be granted relief only in exceptional circumstances. The position can be equated with the position of an appellant who is convicted on his plea of 'guilty' and thereafter appeals the very same conviction…][267]

The appellate court then reiterated that the appellant when asked by the presiding officer, he expressed having entered into the agreement on his own volition and free will, without any coercion whatsoever.[268] There was no evidence to the contrary, which suggested that his version at the appeal stage was purely an afterthought precipitated by a reflection of his mind towards a prison term.[269] The court then expressed that the court *aquo* properly convicted and sentenced the appellant.[270] In its concluding remarks when dismissing the appeal, the court clearly indicated that the purposive interpretation of Section 105A of the CPA would be defeated, "… if the accused persons who entered into procedurally faultless plea and sentence agreements were subsequently allowed to resile from such agreements at will, and not on any legal or constitutional basis".[271]

3.6 SV Esterhuizen and others [2003] JOL 11319(T).

3.6.1 Mini Summary.

In this case, three accused persons had jointly been charged with a variety of counts being fraud and theft. When the matter was registered before court, an agreement in terms of

[267] See para 10 of the judgment.
[268] See para 11 of the judgment.
[269] See para 11 of the judgment.
[270] See para 11 of the judgment.
[271] See para 15 of the judgment.

Section 105A (1) had been entered into.[272] The court was accordingly informed of the agreement between the parties, and each one of the three accused was represented.[273] The court expressed its appreciation for the assistance of counsel for the state and counsel for the accused in dealing with the matter.

3.6.2 Plea and Sentence Agreement.

When the case was called, counsel for the state informed the court that an agreement in terms of the provisions of Section 105A (1) of the CPA had been entered into. Same was confirmed by the three-counsel representing the accused. The court expressed that from the papers filed, it was satisfied that three accused had admitted the allegations in the charge sheet to which each accused pleaded guilty.[274] The court stated that for most of the offences involved in the charge sheet, it was necessary for it to consider the provision of Section 51 of the Criminal Law Amendment Act and satisfy itself that the agreed sentence was just. For it to come to that decision, the court considered the following factors.

(i) The legislative procedure as employed by the state and the defense with a view to shorten up the trial process.[275]

(ii) The legislative process allowing the accused to admit guilt and agree with the state on a sentence specified.[276]

(iii) To achieve a settled result, there is a need to open a substantial room between defense and prosecution based on a 'give and take'.

(iv) Several factors had been mentioned in the agreement which motivated the settling of the matter.[277]

(v) Concluding a plea and sentence agreement did not simply implied "abject pleading of guilty by the accused to all counts put forward by the state coupled with imposition by a court of such a sentence as it deems appropriate".[278]

---

[272] See para 4 of [2003] JOL 11319 (T).
[273] See para 5 of [2003] JOL 11319 (T].
[274] See para 5 of the case.
[275] Se para 5 of the case.
[276] See para 5 of the case.
[277] See para 5 of the case.
[278] See page 5 of [2003] JOL 11319 (T).

As per the papers filed, the court was satisfied that the requirement of subsection (1) (b) (i) and (iii) had been observed. The court reiterated further the provision of Section 105A (8), that in the event that court is satisfied that the proposed sentence is just. It shall inform the parties that it is so satisfied and proceed to formally convict the accused in line with the agreement.[279] The court did so after a mature consideration of the provision of Section 51(2) of Act 105 of 1997. The court considered that the state together with the accused were under a proper representation and that counsel from both sides had meticulously scrutinized the merits and demerits of the state's case and accused's defense taking into consideration the length and expense of the trial. It is in form as palpable that once the parties have entered into an agreement, the information relating to the evidence in general is shared amongst parties.[280]

The court aired the view that when the negotiations are entered into, there has to be a room for adjustment of the preferred charges by the state because the accused may also have offered a plea of guilty to a charge which the state would have not been able to prove at all.[281] When the legislature promulgated laws relating to plea and sentence agreement, it had seriously assessed that the mechanism is capable of bringing home the results which are satisfactory to the interest of justice at large whenever an offence had been committed,[282] although the punishment may not be as tense as it would otherwise be in the event of a full trial. As long as there is relatively adequacy between the crime committed and moral blameworthiness, justice must be seen to have been saved hence the word 'just' sentence, and not appropriate one. The justness and unjustness of a plea and sentence agreement is profounded on a well-known Zinn trial.[283]

In *casu*, the accused were faced with a total of about 30 000 counts of fraud and theft. As a result of their own plea of guilty and conviction therefrom, they were sentenced as follows: Accused 1 was sentenced to twelve years imprisonment four of which was suspended for five years on condition that he is not found guilty of any offence

---

[279] See page 4 of [2003] JOL 11319 (T).
[280] See page 5 of [2003] JOL 11319 (T).
[281] See page 6 of [2003] JOL 11319 (T).
[282] See page 6 of [2003] JOL 11319 (T).
[283] R v Zinn 1969 (2) SA 53 (A).

involving dishonesty.[284] Accused 2 was sentence to fifteen years in imprisonment five of which was suspended for five years on the same condition as the 1st accused, while Accused 3 was sentenced to five years imprisonment, wholly suspended for five years on the same condition as the other two accused.[285]

3.7 Jansen V The State (20043/14&229/14) [ZASCA 151.

3.7.1 Factual background.

The two appellants Denise Jansen and Marco Bernord first and second appellants respectively had been charged jointly for murder and child abuse. The first appellant pleaded guilty to charges of murder and child abuse, while the second appellant pleaded guilty to culpable homicide. These were in line with their plea and sentence agreement with the state.[286] To the said agreement, was an attachment setting out facts and legal basis of the pleas in question. What had also been attached was a copy of the post-mortem report and a document containing mitigating and aggravating factors.[287] The allegations against the appellants were that they had assaulted two minor children who were first accused's children from her previous relationship. The younger one died as a result.[288] The assaults were perpetrated by using hard object and burning them with cigarettes.

3.7.2 Plea and Sentence Agreement.

The first appellant (Ms. Jansen) had agreed to a sentence of 18 years imprisonment on the count of murder and 3 years on the count of child abuse. The agreement was that the sentences would run concurrently.[289] The second appellant (Barnord) had agreed to a sentence of 12 years imprisonment for a charge of culpable homicide with a conditional suspension of 5 years. When the trial commenced, the prosecutor informed the court that there had been an agreement between the state and the defense in terms of Section 105A of

---

[284] See page 10 of [2003] JOL 11319 (T).
[285] See page 11 of [2003] JOL 11319 (T).
[286] See para 2 of the judgment.
[287] See para 2 of the judgment.
[288] See para 3 of the judgment.
[289] See para 3 of the judgment.

the CPA and that such agreement had been concluded.[290] The prosecutor submitted to the court that all the requirements had been complied with in so far as the state was bound, reference being made to consulting the officer charged with investigation of the matter and family of the deceased. He further mentioned that the accused's constitutional rights were 'safeguarded'.[291]

The prosecutor mentioned that four of other counts against the first appellant had been withdrawn and that as the state, they will be proceeding on a charge of murder and child abuse. As to the second appellant, the state was to proceed on a charge of child abuse. The court proceeded in the traditional way of putting questions to the appellants with a view to ascertaining their level of understanding charges against themselves and whether they had concluded the agreement with the state on their own volition freely without any undue influence.[292] Counsel from both sides made submissions to the court effecting that the proposed sentences were 'just' in the circumstances. The judge *aquo* in return made mention that he needed more time to go and consider what sentence was appropriate.[293] The matter was accordingly adjourned. At a later date the trial court imposed sentences different from those ones proposed as per the agreement.

In respect of the first appellant, the judge imposed fifteen years, three years of which was suspended for five years on conditions that she is not found guilty of an offence with violence as an element. This sentence was in relation to both counts.[294] The second appellant was sentenced to fifteen years, three of which was suspended on the same conditions as the first appellant. The sentences imposed by the trial judge differed substantially from the proposed sentences by parties.[295] The appellants were dissatisfied and filed an application for leave to appeal to the Supreme Court of Appeal and same was met with an application by the state for "reservation on a question of law in terms of Section 319 of the Act".[296]

When the matter was before the Court of Appeal, it was expressed that both parties had noted irregularities committed by the trial judge. That he failed to comply with the provision of Section

[290] See para 5 of the judgment.
[291] See para 5 of the judgment.
[292] See para 5 of the judgment.
[293] See para 7 of the judgment.
[294] See para 9 of the judgment.
[295] See para 9 of the judgment.
[296] See para 11 of the judgment.

105A (9)(a) which provision demanded that parties under such circumstances were entitled to be informed of the judge's view that he regarded the proposed sentence to be 'unjust'.[297] The trial judge had furthermore omitted to inform parties of the sentence he considered 'just'. Counsel for the state when making submissions, indicated that the judge *aquo* supplementary to the mentioned irregularities, should have decided on the justness or unjustness of the proposed sentences before formally convicting the appellants.[298]

The Supreme Court of Appeal went on and emphasized that the purpose of the plea bargaining process was basically aimed at affording parties the opportunity to make an informed decision whether or not to abide by the agreement.[299] The said process encompassed consulting all the interest parties being the accused, the complainant, the victim and stakeholders. The court noted that under a plea and sentence agreement, the trial court must first inform the parties of the sentence it considers just, upon which the parties will make an informed decision on whether to abide by their agreement or withdraw from it. In the event that both parties to the agreement decide that they shall abide by their agreement after having been informed that the court does not consider the proposed sentence to the just, the court will be at liberty to proceed to impose whatever sentence it considered just in the circumstances.[300]

When a sentence which is not a subject of the agreement between parties is imposed, after such parties had duly been informed that the court shall depart therefrom, parties cannot later complain that they suffered prejudice as they would have had sufficient time to reconsider their agreement.[301] The judge after indicating that he does not consider the proposed sentence to be just, he must indicate the one that he deems just in the circumstances.[302] The importance of this part of the procedure is to afford parties an opportunity to make an informed decision as once formally convicted, they would not do anything besides going to an appeal. The court observed that parties had been denied the opportunity to engage on an informed decision.[303]

---

[297] See para 13 of the judgment.
[298] See para 14 of the judgment.
[299] See para 14 of the judgment.
[300] See para 19 of the judgment.
[301] See para 19 of the judgment.
[302] See para 19 of the judgment.
[303] See para 19 of the judgment.

On its concluding remarks, the court indicated that the trial court is always best placed in determining the position of an accused person in so far as admissions and state of charges is concerned.[304] That the same process involved questions whether the accused understood the charges and whether he or she "entered into the agreement freely and voluntarily in his or her sound and sober senses".[305] The same process involves leading of evidence which can best be done by the trial court. The matter was accordingly remitted to the trial court to start *de novo* before a different judge.[306]

3.8 Conclusion.

The South African Criminal Justice System has adopted plea bargain and sentence agreement. This phenomenon has proved to work as a catalyst in disposing of criminal matters, particularly in instances where a criminal matter involves a large number of counts. Most of the fraud matters, involve quite a number of counts which would take some years to dispose of, under a full trial route. The South African Criminal Justice System provides a benchmark exercise in the current proposed Amendment to the Criminal Procedure and Evidence Act (CP&E) of Botswana, with particular reference to the provision of Section 105A of the CPA. The current chapter has demonstrated how the South African System has dealt with a number of decided criminal cases under the operation of Section 105A of the Act.

A number of case law was discussed with a view to shed light on the application of the said Section 105A. In the case of *SV Esterhuizen and other [2003] JOL 11319(T),* the accused were facing thirty-thousand counts on fraud charges and theft. One would just imagine the period of time which such cases would last on the roll under a normal traditional criminal trial. Normally cases like this one will delay to be completed considering the number of witnesses normally involved in cases of this nature, also availability of experienced, magistrates and judges particularly in developing jurisdictions like the Republic of Botswana, where there is already shortage of judges and magistrates not to talk about the experienced prosecutors. Chances of securing convictions in fraud cases is sometimes a worrying factor under a full-fledged trial where there is no spirit to 'give and take'.

---

[304] See para 20 of the judgment.
[305] See para 22 of the judgment.
[306] See para 22 of the judgment.

The *Sassin case* discussed under this chapter involved charges with one thousand six hundred and fifty-five counts of fraud. This was resolved through a plea and sentence agreement and the court's time was saved, a conviction was secured. The South African criminal justice system has got an established system of plea and sentence agreement procedure. This is the reason why same was picked to provide a benchmark exercise in the current proposed amendment to the CP&E of Botswana so as to provide a permanent solution to the backlog of the criminal cases. The few discussed cases in this chapter have given a convincing map on the application of the provision of the CPA which the current proposed amendment aims to achieve through an insertion of a clause similar to section 105A of the Criminal Procedure Act of South Africa.

Chapter 4

CONCLUSION AND RECOMMENDATION

Plea bargaining has been regarded a legal fact of life in most of the developed jurisdictions in the world. It is viewed as an essential "component of the administration of justice by the United Kingdom and the United States".[307] The court system operates quite efficiently with a mechanism of expeditious nature. However, the injustices precipitated by pleas and sentence agreements should not be condoned on the basis that the system is aimed to curb for the growth of the backlog of cases.[308] The standard of justice employed and the observation of an accused person's rights to a fair trial totally outweighs the considerations of criminal case loads and all other administrative problems as may be faced by any prosecution authority.[309] The bargaining techniques usually implemented by some police force may drive an accused person to submit a written statement which is inculpatory in material respect and may be detrimental to the accused or his or her accomplice.[310]

It is of paramount importance that an accused person be represented by counsel when engaged in negotiations pertaining plea and sentence agreement as the duty of counsel is to ensure that the accused's account of his or her act constitutes a criminal offence and that the accused's plea is in consonant with the allegations laid by the prosecution.[311] Whenever during consultation, the accused claims to be innocent despite having submitted an incriminating statement during interrogation by police, counsel should be prepared to pursue the accused's vindication of innocence on one hand while on the other, trying to explain to the accused the position of the prosecution case.

There is a real need for accused persons to be represented when negotiating pleas and sentence agreements with the prosecution. This is because some accused persons may plead

[307] Frank et al, 'Plea bargaining' (1980)191.
[308] Frank et al, 'Plea bargaining' 1980 (n307 above)191.
[309] Frank et ai, 'Plea bargaining' 1980 (307 above)191.
[310] Frank et al, 'Plea bargaining' 1980 (n307 above)191.
[311] Frank, 'Plea bargaining 1980.

guilty on the basis of inability to contest their cases.[312] "The inability to contest cases"[313] is normally influenced by a lack of compulsory legal representation. Counsel's duty to advise the accused or his client must not be limited or restricted in anyway. He must make it a point that he advises his client at the best of his ability. This would automatically include advice to the effect that a genuine plea of guilty carrying a noticeable element of remorse would be a mitigating factor which may drive the court to impose a lesser sentence that otherwise would be the case.[314]

Counsel will always give proper advice to the accused not to plead guilty unless he indeed committed the act which constitutes an offence as the prosecution's allegation in the charge sheet. The accused person properly advised by counsel should be in a position to make an informed decision on whether or not to plead guilty.[315] There must also be freedom of access to the judge between counsel from both sides that is, the prosecutions counsel and the defense counsel. The importance of access is premised on the fact that there may be a need to hold some communication or discussion of nature that due to the interest of his client, counsel would not openly mention those in open court.[316] While it is understood that justice must be administered in open court, counsel must only seek to see the judge when it is necessary and in the best interest of justice. The judge on the other hand must not under such circumstances mention the sentence which he is minded to impose.[317] The court may give a signal to the defense to plead guilty to either a lesser offence or a competent verdict or conversely to the prosecution to accept the guilty plea to such a competent verdict.[318]

The plea negotiations and plea agreements need to be afforded statutory recognition. When this is done, quite a large number of the trial cases pending before court would be reduced in number leading to a manageable process of disposing criminal cases.[319] The implementation of plea and Sentence Agreements is capable of bringing home an important contribution towards the accelerated criminal justice process.[320] The prosecution may hold discussions aimed to strike a compromise between the state and the accused in so far as the plea

---

[312] Frank, 'Plea bargaining' 1980 (n307 above)194.
[313] Frank, 'Plea bargaining' 1980 (n307 above)194.
[314] Frank, 'Plea bargaining' 1980 (n307 above)194.
[315] Frank, 'Plea bargaining' 1980 (n307 above)194.
[316] Frank, 'Plea bargaining' 1980 (n307 above)195.
[317] Frank, 'Plea bargaining' 1980 (n307 above)195.
[318] Bekker, 'American plea bargaining in statutory form in South Africa'2001 (n19 above).
[319] Bekker, 'American plea bargaining in statutory form in South Africa'2001 (n25 above)319.
[320] Bekker, 'American plea bargaining in statutory form in South Africa'2001 (n25 above)319.

proceedings and disposing of the case is concerned.[321] When an agreement is entered into between a prosecutor and an unrepresented accused, the accused is likely to suffer prejudice. To curb for the prejudice under such circumstances, a mechanism can be put in place whereby the court would be duty bound to satisfy itself that the unpresented accused fully understands the terms of the agreement and that he or she entered into such agreement on his or her own free will, without being influenced.[322]

When an agreement relating to plea and sentence agreement is at hand, same shall be reduced to writing and both parties thereto, attach their signatures. Terms of the agreement must concisely be stated together with any admissions which the accused may have made.[323] The presiding officer seized with the matter shall avoid direct participation in discussing the matter, however he or she may be approached by parties in chambers just to shed light on general issues, relating to acceptability of the proposed agreement.[324] However, once such discussions are held and an agreement concluded, the terms thereof would be disclosed in open court.[325] The court will still take position to assess whether the agreement was made according to the acceptable principle and where it finds that it was not, accordingly enter a plea of not guilty on behalf of the accused and order that trial proceed.[326]

When this happens, nothing from the plea agreement or anything contained therein or any statement relating thereto would be admitted to prove the accused's guilt in a subsequent criminal trial.[327]

The implementation of plea and sentence agreement in some developing jurisdictions as per the proposed amendment which entails an insertion in the Criminal Procedure and Evidence Act (Botswana) of a provision similar to Section 105A CPA, could make a tremendous improvement to the criminal justice process. Statutory measures need to be employed so as to provide legitimate object and ensure that the procedure would be adopted for usage on improvement to the effectiveness of the criminal justice system. Legal representation has to be extended to all the accused persons who cannot for economic reasons afford services of attorney, by the state at the state's expense. This would pave a way to achieving a well-

[321] Bekker, 'American plea bargaining in statutory form in South Africa' 2001 (n25 above)319.
[322] Bekker, 'American plea bargaining in statutory form in South Africa' 2001 (n25 above)319.
[323] Bekker, 'American plea bargaining in statutory form in South Africa' 2001 (n25 above)319.
[324] Bekker, 'American plea bargaining in statutory form in South Africa' 2001.
[325] Bekker, 'American plea bargaining in statutory form in South Africa' 2001 (n25 above)320.
[326] Bekker, 'American plea bargaining in statutory form in South Africa' 2001 (n25 above)320.
[327] Bekker, 'American plea bargaining in statutory form in South Africa' 2001 (n25 above)320.

founded process of plea negotiations.[328] The implementation of the procedure would have to be established in accordance with the unique system in operation within the prosed jurisdiction.

There is a serious problem of the backlog of criminal cases in the courts in that the state has always experience some difficulties in financing the defence of the needy. When there is an established plea and sentence agreement system, legal practitioners would also be of great assistance as they would then be able particularly on instances where the outcomes of the case are easily predictable, to advise their clients who are guilty to plead guilty.[329] Plea and sentence agreements will automatically bring about a commendable level of victim protection from publicity and save them from being subjected to cross-examination. In offences where minimum sentences are prescribed, the prosecution will be at liberty to make preference to charge the accused with a lesser charge or to accept a guilty plea on a lesser charge.[330] When it is practiced in this fashion, it will also accelerate disposal of the cases as it will be favorable to the accused.

There is therefore a really need to promulgate statutory support aimed at giving birth to a legitimate operation of the proposed amendment thereby making some improvements to the current criminal justice system without deviating from the constitutional established principles of the criminal justice system. The proposed amendment to the Criminal Procedure and Evidence Act of Botswana which entails the insertion of a provision similar to the provision of Section 105A of the Criminal Procedure Act must reflect instances where the accused agrees with the prosecution to a guilty plea on the condition that the agreed sentence would be imposed. The proposed amendment may be drafted along the following guidelines.

(a) Negotiations must be engaged between the parties and an agreement be reached prior to the taking of a plea.[331]
(b) Once the accused person and the prosecution have reached a common understanding in their negotiation leading to an agreement relating to the plea and sentence, soon after the plea had been entered, the said agreement

[328] Bekker, 'American plea bargaining in statutory form in South Africa' 2001 (n25 above)320.
[329] Bekker, 'American plea bargaining in statutory form in South Africa' 2001 (n25 above)321.
[330] Bekker, 'American plea bargaining in statutory form in South Africa' 2001 (n25 above)321.
[331] Bekker, 'American plea bargaining in statutory form in South Africa' 2001 (n25 above)322.

becomes binding on the accused and the prosecution. However, the agreement should not bind the court.[332]

(c) The agreement between the parties must be reduced to writing and it must further bear signatures of the parties to the agreement. There further has to be a preamble stating precisely the rights of the accused person as had been explained to him or her prior to the agreement being concluded.[333]

(d) When parties have entered into the agreement, the accused will accordingly make a plea of guilty. Parties then would proceed to disclose their plea and sentence agreement openly in court.[334]

(e) Before the court formally convicts the accused as per his or her guilty plea, the court will engage on making inquiry with a view to ascertain whether the accused did understand his or her rights. Also to try and find out if the accused concluded the agreement freely and voluntarily without being induced thereto. The court to take further steps in trying to ascertain if the plea and sentence agreement is in line with the facts of the matter as per the allegation by the prosecution in their charge sheet.[335]

(f) The court will also have the opportunity to evaluate whether the agreed sentence is appropriate or inappropriate, after which the court will either accept or reject the agreement.[336]

(g) In the event of an acceptance of the agreement by court, the accused is formally convicted as per the agreement and the agreed sentence will be meted out.[337]

(h) If the opinion of the court is that the agreed sentence is harsh compared to the one that in the court's mind is the most appropriate, the court will continue to impose the lesser sentence which it deems appropriate in the circumstances.[338]

(i) In case of rejection of the agreement by the court, parties would be informed, after which they may have to discuss on whether to continue abiding by their

---

[332] Bekker, 'American plea bargaining in statutory form in South Africa' 2001 (n25 above)322.
[333] Bekker, 'American plea bargaining in statutory form in South Africa' 2001 (n25 above)322.
[334] Bekker, 'American plea bargaining in statutory form in South Africa' 2001 (n25 above)322.
[335] Bekker, 'American plea bargaining in statutory form in South Africa' 2001 (n25 above)322.
[336] Bekker, American plea bargaining in statutory form in South Africa '2001 (n125above)323.
[337] Bekker, 'American plea bargaining in statutory form in South Africa' 2001 (n125above)323.
[338] Bekker, 'American plea bargaining in statutory form in South Africa' 2001 (n25 above)323.

agreement where upon the matter would proceed as set, or the parties would withdraw the agreement and have the whole matter starting *de novo,* before a different presiding officer. In the event that parties agree to withdraw from the agreement and trial starts *de novo*, no reference would then be made to plea and sentence agreement in proving the guilt of the accused.[339] The proceedings as they were before the first court under no circumstances could they be used in the second phase of the matter.[340]

(j) The judicial officers should not be allowed to take an active role in the negotiations. The negotiations must strictly be held between parties.

(k) Once an accused person is found guilty formally as a result of a plea and sentence agreement entered into between him or her and the state, he or she would not have the right to appeal either the conviction or sentence. The only available remedy would be review in such circumstances as where undue influence may be claimed.[341]

An accused person or his attorney should be allowed to engage in negotiations relating to plea and sentence agreement with the prosecuting authority solely on charges emanating from one criminal transaction at a time, negotiations in relation to any further charges of a total different criminal transaction should be delayed until such time that the accused is sentenced for the charges emanating from the first transaction.[342] A seasoned and repeated offender who may happen to be a skilled criminal can wipe off several years' worth of known offences in a single stroke, by way of tendering a plea of guilty to some of the charges resulting from two transactions out of many criminal transactions he or she stands accused.[343] What must be taken into consideration and be remembered all the times is that no victim of crime should be regarded less important than another, but this happens whenever an offender avoids conviction thereby escaping punishment on offences against many victims by tendering a guilty plea to an offence against only one of them.[344] When focus is directed at one criminal transaction at a time, the prosecutor is enable to deal exclusively with the actual harm as may have been suffered by each and every victim, and so can the sentencing judicial officer.[345]

---

[339] Bekker, 'American plea bargaining in statutory form in South Africa' 2001 (n25 above)323.
[340] Bekker, 'American plea bargaining in statutory form in South Africa' 2001.
[341] Bekker, 'American plea bargaining in statutory form in South Africa' 2001 (n25 above)323.
[342] Jones, 'Crime without punishment' 1946 (n84 above)205.
[343] Jones, 'Crime without punishment' 1946 (n84 above) 205.
[344] Jones, 'Crime without punishment' 1946 (n84 above) 205.
[345] Jones, 'Crime without punishment' 1946 (n84 above) 206.

The accused person or his attorney should be allowed to engage on negotiations with the prosecution authority strictly on charges which emanate from the earliest criminal transaction pending against him or her.[346] Prosecutors must avoid at all costs to embark on negotiations with the defense on recent charges against the accused while there are still other old charges pending against the same accused person.[347] The judiciary should be seen to be supportive of that restraint on prosecutorial discretion. There are in fact a number of reasons why criminal charges ought to be dealt with on the basis of their chronological sequence. One of the reasons would be to enable the sentencing court to have proper and relevant information regarding the conduct of the accused person whether he or she has the propensity to commit crimes, so that the most appropriate sentence would in the circumstances be imposed.[348] The other reason of course would be to allow the presentence investigation report so that the subsequent charges would reflect the previous convictions of the accused.[349]

Prosecutors should avoid consenting to the accused's guilty plea to a criminal charge in exchange for the dismissal or reduction of other criminal charges that emanated from a separate criminal transaction. Transaction bargaining poses a danger to both the accused and the society. Some accused persons would "gamble to receive the desired sentence or sentence ceiling for all pending offences".[350] When the gamble fails and the accused is subsequently subjected to severe sentences, he or she will seek to void his or her guilty pleas. In the event that the said plea would have pertained to only one criminal transaction, he or she would be at liberty to proceed on a new plan or to proceed to trial on those charges.

At formal charging stage, all the known victims, substantive prosecutor of the matter, witnesses and the arresting officers of the matter should all depose to affidavits wherein they should succinctly aver on whether or not the criminal transaction from which charges resulted, "involved possession, use not resulting in injury, or use resulting in injury by the accused person or his accomplice of any lethal weapons",[351] such affidavits must have clauses for perjury. The possession of any seriously weapon at the time of the commission of such

[346] Jones, 'Crime without punishment.
[347] Jones, 'Crime without punishment' 1946 (n84 above)206.
[348] Jones, 'Crime without punishment' 1946 (n84 above)206.
[349] Jones, 'Crime without punishment.
[350] Jones, 'Crime without punishment'1946 (n84 above)206.
[351] Jones, 'Crime without punishment' 1946 (n84 above)207.

offence.[352] More often than not, the law will focus on the presence or absence of the actual harm caused or inflicted and forget about the risk of harm. When all witnesses are caused to depose to affidavits, as to whether or not during the commission of the offence the accused did or did not possess or used a weapon, a step would have been taken to establish the accused's conduct and the danger which he or she posed to the victims and the society in general.[353]

When an accused person has pleaded guilty and formally convicted following his plea, a presentence investigation report has to be compiled. The presentence hearing has to be held in order to provide guidance in so far as mitigating as well as aggravating factors are concerned.[354] When a presiding officer imposes sentence, he or she must have fully been appraised of the mitigating and aggravating circumstances surrounding the commission of the offence. In order to promote this aspect, presentence hearing has to be compulsory in all matters involving plea and sentence agreements.[355] This can best be achieved by way of affording all individuals involved and capable of participating as witnesses in the prosecution of the accused, the opportunity to make an input in the sentencing process.[356]

The funding of public defender agency to represent the bulk of the indigent criminal accused should be discouraged.[357] A public defender agency may perform well and satisfactory at the initial stages of the instructions or criminal justice process, however a voluminous caseload may subvert the efficiency of such an agency particularly with the passage of time, more especially with regard to the accused charged with more serious offences.[358] An option over the public defender agency would be the assignment of indigent criminal accused to private practitioners who are members of the local bar.[359] The assignment could be carried on based on a properly managed rotation. Such practice would even promote the spirit of attorney-client relationship which is an important aspect of substantive justice.[360]

---

[352] Jones, 'Crime without punishment' 1946 (n84 above)207.
[353] J J Joubert, Criminal Procedure hand book (1994) 285.
[354] Jones, 'Crime without punishment' 1946 (n84 above)208.
[355] Joubert, Criminal Procedure hand book (1994) 285.
[356] Jones, 'Crime without punishment' 1946 (n84 above)208.
[357] Joubert, 'Criminal Procedure hand book (1994) 286.
[358] Joubert, 'Criminal Procedure hand book (1994) 286.
[359] Jones, 'Crime without punishment' 1946 (n84 above)209.
[360] P J Utz, 'Settling the facts : Discretion and negotiation in criminal court. (1978).

In event that an accused is charged with an offence involving the intent to inflict terror upon the complainant, depending on the factual allegation as per the victim's statement, the accused should be denied the opportunity to engage in a plea and sentence agreement or to negotiate a deal with the prosecution.[361] "The negotiation process itself may become the source of additional terror to the victim"[362]. Once this happens, the victim will be left in a position to believe that the accused has conspired with the prosecution and the court so that he or she may be released so that he or she would come and perpetuate terror on the victim again"[363].

Finally, the logical and recommended thing to do in the proposed amendment to the Criminal Procedure and Evident Act, is to insert a clause dealing specifically with issues relating to plea and sentence agreement.[364] The clause has to be crafted in a similar fashion as the provision of Section 105A of the Criminal Procedure Act 51 of 1977 (Republic of South Africa). Plea bargaining in general is an entrenched, accepted and acceptable part of the Criminal Justice System in developed jurisdictions. In instances where an agreement would be concluded between an accused person and the prosecution, leading to accused person to surrender certain rights in exchange for abandonment of prosecution and the state later decides to withdraw from the agreement, the remedy should be to order a permanent stay of the prosecution.[365] In instances where the accused persons would be self-acting, the presiding officer will be bound to exercise due diligence in ascertaining the fact that the accused did enter into agreement freely and voluntarily without being influenced thereto, and that the accused understood clearly the terms and conditions of the agreement.[366]

[361] Utz, 'Settling the facts' (1978).
[362] Jones, 'Crime without punishment' 1946 (n54 above)211.
[363] Jones, 'Crime without punishment' 1946 (n54 above)211.
[364] Utz, 'Settling the facts'(1978)
[365] Bekker, 'American plea bargaining in statutory form in South Africa 2001 (n 25 above)324.
[366] Utz, 'Settling the facts' (1978).

BIBLIOGRAPHY

REFERENCES

BOOKS

1. Bond , J E (1982) Plea Bargaining and Guilty Pleas
2. Mc Donald W F & J A Cramer (1980) Plea Bargaining.
3. Jones, D A (1979) Crime Without Punishment
4. Baldwin J & M Mc Conville (1977) Negotiated Justice: Pressure to plead guilty.
5. Mather L M (1979) Plea bargaining or Trial? The process of criminal case disposition.
6. Mc Donald W F (1979) The prosecutor.
7. Uzt P J (1978) Settling the facts: Discretion and Negotiation in criminal court.
8. B K Van Der Merwe (1983) Plea Procedures in Summary Criminal Trials.
9. W M Modise (2016) A practical guide to Criminal Procedure in Botswana.
10. C F Hemphill, Jr (2005) Criminal Procedure: The Administration of Justice.
11. Israel et al (1990) Criminal Procedure and the Constitution.

ARTICLES

1. F H Stephen et al; Incentives , 'Criminal defence lawyers and Plea Bargaining (2008)' International Review of Law and Economics Journal
2. Bekker MP 'American Plea Bargaining in Statutory form in South Africa' (2001) comparative and international law Journal of Southern Africa.
3. J E Call et al; Abolition of Plea Bargaining in the Coast guard (1983), Journal of Criminal Justice.
4. G T Felkenes 'Plea Bargaining: It's Pervasiveness on the Judicial System (1976) Journal of Criminal Justice.
5. P A Whitman 'Judicial Plea Bargaining' (1967) Stanford Law Review Journal.
6. N Berg et al; Plea bargaining with multiple defendants and its deterrence effect (2018) International review of law and economics.

7. K Kwok-yin et al; Beyond the Shadow-of-trial: Decision making behind plea bargaining in Hong Kong (2015) International journal of law, crime and justice.
8. R L Lipppke; To waive or not to waive: The right to trial and plea bargaining (2008) International journal for philosophy of crime, criminal law and punishment.
9. W C M Maqutu 'Discontinuance of Prosecutions and plea bargaining' (1980) Comparative and International law Journal of Southern Africa.

CASE LAW

1. *S v Sassin and others (84/02) [2003] ZANCHC 44 (20 October 2003)*
2. *S v Nel (A352/07) [2008] ZAGPHC 43 (28 January 2008)*
3. *Jansen v The State (40043/14;229/14 [2015] ZASCA 151;2016 SAACR 377 (SCA) 2 October 2015*
4. *S v Solomons 2005 (2) SACR 432 (c)*
5. *Van Eeden v The DPP, Cape of Goodhope [2004] Jol 12916 (c)*
6. *S v Esterhuizen and Others [2003] JOL 11319 (T)*
7. *S v Assante 2003 (2) SACR 117 (SCA).*
8. *Maroulis v The State (240/2008) [2008] ZASCA 161 (27/11/28).*
9. *S v Sanei 2002 (1) SACR 625 (W)*
10. *North Western Dense Concrete cc and Another v Director of Public Prosecutions (Western Cape) 1999 (2) SACR 669 (c).*
11. *S v Mlangeni 1976 (1) SA 528 (T).*
12. *S v Armugga and Others 2005 (2) SACR 259 (W).*
13. *Maroulis v The State (240/2008) ZASCA 161 (27/11/28).*
14. *S v B 2003 (1) SACR 51 (SCA).*
15. *S v Ngubane 1985 (3) SA 677 (A).*
16. *S v Legoa 2003 (1) SACR 13 (SCA).*
17. *S v Moorcroft 1994 (1) SACR 317 (T)).*
18. *S v Rasengani 2006 SACR 431 (SCA).*
19. *S v Sanei 2002 (1) SACR 625 (W).*
20. *S v Sadler 2000 (1) SACR 331 (SCA).*
21. *S v Zuma and others 1995 (2) SA 642.*
22. *S v Mthwana 1992 (1) SA 343.*
23. *Magano and Another v District Magistrate, Johannesburg and others (2) 1994 SA 172 (W).*

24. S v Taylor 2006 (1) SACR 51 (C).
25. S v Salie 2007 (1) SACR 55 (C).