14/11/2017

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION - PRETORIA

Case Number: A185/16

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

14/11/2017 .....

In the matter between:

MUZI GONYA Appellant

THE STATE Respondent

CORAM: Mngqibisa-Thusi J and Phahlane AJ

JUDGMENT

MNGQIBISA-THUSI, J

[1] On 23 August 2012 the appellant was convicted in the Benoni Regional Court for rape as contemplated in section 3 of the Sexual Offences and Related Matters Amendment Act 32 of 2007 read with sections 51 and 52 of the Criminal Law Amendment Act 105 of 1997 ("the Act").

[2] The appellant was sentenced to 20 years imprisonment. Further with regard to sentence, the court *a quo* ordered, in terms of section 276B of the Act[1] that the appellant should serve at least two thirds of the sentence before he may be eligible for release on parole ("the non-parole order"). In imposing sentence the court *a quo* took into account that the appellant had a previous conviction for armed robbery for which he was sentenced to 15 years imprisonment. The offence which is relevant to these proceedings (the rape) was committed whilst the appellant was still on parole for the conviction for armed robbery.

[3] The court *a quo* refused leave to appeal against conviction and sentence. The appellant's petition to the Supreme Court of Appeal for leave to appeal against conviction and sentence was also refused. However, the SCA granted the appellant leave to appeal against the court *a quo*'s non-parole order. Writing the appellant leave to appeal against the no-parole period of the sentence the SCA[2] stated that:

> "[16] The suitability of a non-parole period has been dealt with in several judgements of this court. In *S v Mhlakaza & Another* [1997] ZASCA 7; 1997 (1) SACR 515 (SCA) at 521 Harms JA dealt with the topic as follows:
> 'The function of the sentencing court is to determine the maximum term of imprisonment a convicted person may serve. The court has no control over the minimum or actual served or to be served ... The lack of control of courts over the minimum sentence to be served can lead to tension between the Judiciary and the executive because the executive action may be interpreted as an infringement of the independence of the Judiciary.' In particular Harms JA emphasised that where a non-parole sentence is imposed then it is the duty of the judicial officer to set out the reasons explicitly in the judgement.
> [17] In *S v Stander* 2012 (1) SACR 537 (SCA) (paras 12 and 16) Snyders JA stated as follows:
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> > 'Despite the fact that s 276B grants courts the power to venture onto the terrain traditionally reserved for the executive, it remains generally desirable for a court not to exercise that power.
> > ... An order in terms of s 276B should therefore only be made in exceptional circumstances, when there are facts before the sentencing court that would continue, after sentence, to result in a negative outcome for any future decision about parole.'

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[1] Section 276 B was introduced by the Parole and Correctional Supervision Amendment Act 87 of 1997. Section 276B came into effect on 1 October 2004.
[2] S v Gonya 2016 JDR 0536 (SCA) Full Bench).

> [18] In this matter the regional court referred to the effect of the crime on the complainant, the repugnance of society to this type of crime and the personal circumstances of the appellant, but did not mention why the serving of his sentence could not be left to the Department of Correctional Services. The exceptional circumstances as referred to in *S v Stander* above justifying a non-parole period were not referred to or dealt with by the regional court. In addition this aspect should have been raised prior to the judgement on sentence so as to afford the appellant and the State an opportunity to deal with it.
> [19] In the result the regional court and the high court erred in this regard. The appellant should be granted leave to appeal against his sentence, but only in so far as the imposition of the non-parole period of his sentence is concerned."

[4] Therefore the only issue to be dealt with in this appeal is whether the court a quo misdirected itself in ordering the non-parole period as part of the appellant's sentence without affording the parties to make submissions in this regard.

[5] The conviction of the appellant arises as a result of the multiple rape on 24 July 2011 at Etwatwa, Benoni, after the appellant had dragged the complainant to his home. At the time of the rapes, the complainant was 15 years old. During the ordeal the complainant got injured around her neck. The court *a quo* could not conclusively come to a determination that the appellant had stabbed her.

[6] The rapes committed by the appellant fell within the purview of the prescribed minimum sentence for such an offence which is life imprisonment. However, the court a quo found that substantial and compelling circumstances existed justifying a deviation from the prescribed minimum sentence after taking into account the fact that the accused had been in custody as an awaiting trial prisoner for 8 months and was self-employed. Further, the court a quo found as aggravating factors that the appellant had no remorse for what he had done and that he had committed the rapes while still under parole.

[7] The appellant was sentenced to 20 years imprisonment together with an order, in terms of s 276B of the Act that he should not be considered for parole until he has served two-thirds of his sentence. Furthermore the court *a quo* ordered that the appellant should start serving his sentence only after he has completed serving the period remaining under his parole.

[8] Section 276B provides that:

"(1)(a) If a court sentences a person convicted of an offence to imprisonment for a period of 2 years, the court may as part of the sentence, fix a period during which the person shall not be placed on parole.
(b) Such period shall be referred to as the non-parole period, and may not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is shorter.
(2) If a person who is convicted of 2 or more offences is sentence to imprisonment and the court directs that the sentences of imprisonment shall run concurrently, the court shall, subject to subsection (1) (B), fix the non-parole period in respect of the effective period of imprisonment".

[9] In relation to an order in terms of section 276B, the Constitutional Court in,[3] stated that:

> "[13] The order should be made only in exceptional circumstances, which can be established by investigation of salient facts, legal argument and sometimes further evidence upon which a decision for non-parole rests. In determining a non-parole period following punishment, a court in effect makes a prediction on what may well be inadequate information as regards the probable behaviour of the accused. Therefore, a need for caution arises because a proper evidential basis is required".

[10] In *S v Stander;*[4] the SCA laid down to requirements to be satisfied when a court considers imposing a non-parole period, these are:

> "[22] First, whether to impose such an order and, second, what period to attach to the order. In respect of both considerations the parties are entitled to address the sentencing court. Failure to afford them the opportunity to do so constitutes a misdirection[5]".

[11] It is not in dispute that the court a quo did not alert the parties during the sentencing proceedings that it intended considering applying the provisions of section 276B nor did it give the parties an opportunity to address it on the issue. Counsel for the state has conceded so much and has suggested that the matter

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[3] 2016(2) SACR 691 (CC).
[4] 2012 (1) SACR 537 (SCA).
[5] See also in this regard *S v Ndlovu* (925/2016) (20170 ZASCA 26) handed down on 27 March 2017.

be remitted to the court a quo for sentence to be considered afresh, alternatively, for the sentence imposed, barring the non-parole period imposed, to be confirmed.

[12] It appears that in imposing a non-parole period the court a quo had taken into account the gravity of the offences for which the appellant had been convicted, the fact that the offences were committed whilst the appellant was still on parole and the impact the offences had on the complainant. The court a quo does not appear to have considered whether exceptional circumstances existed justifying the application of the non-parole period.

[13] I am of the view that the court a quo misdirected itself in imposing a non-parole period without giving the parties the opportunity to make submissions in this regard bearing in mind the prejudice and non-parole period has on accused's legitimate expectation to be considered for parole at the opportune time. I am therefore satisfied that this court should interfere with the sentence imposed in relation to the non-parole period.

[14] In the result the following order is made:

1. The appeal in relation to the non-parole order issued by the Benoni Regional Court is upheld.
2. The order of the court a quo fixing a non-parole period of 13 years and four months is set aside.

NP MNGQIBISA-THUSI
Judge of the High Court

I agree

PD PHAHLANE
Acting Judge of the High Court

Appearances

For the Applicant: Ms MMP Masete
Instructed by: Pretoria & Mafikeng Justice Centre
For the Respondent: Adv E Leonard SC
Instructed by: Director of Public Prosecutions, Gauteng