IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Appeal number: **AR312/2020**

In the matter between:

MANDLA MAKHATHINI **APPELLANT**

and

THE STATE **RESPONDENT**

ORDER

(a) The appeal is upheld to the extent reflected herein below.

(b) The imposition of a non-parole period by the court *a quo* in terms of s 276B of the Criminal Procedure Act 51 of 1977 is set aside.

JUDGMENT

Judgment was handed down electronically by circulation to the parties' legal representatives by email. Date and time for hand down is deemed to be 10 h 00 on 07 June 2021

McIntosh AJ (Ploos van Amstel J concurring)

[1] This appeal emanates from the Esikhaleni Regional Court where the appellant was charged with one count of rape.

[2] The appellant was convicted on the 4th of July 2011 and was sentenced to 25 years' imprisonment and in terms of s 276B of the Criminal Procedure Act 51 of 1977 ('the CPA'), a non-parole period of 16 years' imprisonment was fixed. In addition, in terms of s 103(1) of the Firearms Control Act 60 of 2000, the appellant was declared unfit to possess a firearm.

[3] With the leave of the court *a quo*, the appellant appealed against his sentence only.

[4] The appellant was charged with raping the complainant, who was 15 years old at the time, on the 24th of April 2010 in the Mkhobozi area. The appellant denied the charge, alleging that the complainant was making a mistake. Only the complainant testified in the State's case and after the State handed into court a certified copy of the complainant's birth certificate, a J88 form and DNA results, the State closed its case.

[5] The appellant did not testify and the defence closed its case without leading any further evidence. The appellant was found guilty of the charge of rape. The entire trial and sentence were all completed on the 4th of July 2011.

[6] Although the appellant appealed against the sentence only, the main thrust of the appeal in both the heads of argument and before this court, was the non-parole period handed down by the court in terms of s 276B of the CPA.

[7] Section 276B states the following:

'**276B Fixing of non-parole-period**

(1)(*a*) If a court sentences a person convicted of an offence to imprisonment for a period of two years or longer, 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 the shorter.
(2) If a person who is convicted of two or more offences is sentenced 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.'

[8] In *S v Jimmale and another* 2016 (2) SACR 691 (CC), after referring to various cases,[1] the Constitutional Court concluded that it was clear that a s 276B non-parole order should not be resorted to lightly. It held at paragraph 20: 'Precedent makes it clear that a section 276B non-parole order should not be resorted to lightly. Courts should generally allow the parole board and the officials in the Department of Correctional Services, who are guided by the Correctional Services Act, and the attendant regulations, to make parole assessments and decisions. Courts should impose a non-parole period when circumstances specifically relevant to parole exist, in addition to any aggravating factors pertaining to the commission of the crime for which there is evidential basis. Additionally, a trial court should invite and hear oral argument on the specific question before the imposition of a non-parole period.'

[9] In *S v Mhlongo* 2016 (2) SACR 611 (SCA) para 9, the Supreme Court of Appeal emphasised that the fixing of a non-parole period was part of a criminal trial and that in accordance with the dictates of a fair trial, an accused person should be given notice of the court's intention to invoke section 276B and to be heard before a non-parole period is fixed. The court held that failure to comply with these procedural requirements constitutes misdirection.

[10] In *Tutton v S* [2019] ZASCA 3, the Supreme Court of Appeal set aside the non-parole period imposed by the high court on the basis that the court failed to establish the existence of exceptional circumstances and it failed to invite the parties to make submissions.

[11] In the court *a quo,* the non-parole period was imposed without the court

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[1] *Strydom v S* [2015] ZASCA 29; *S v Stander* 2012 (1) SACR 537 (SCA) and *S v Mthimkhulu* 2013 (2) SACR 537 (SCA).

first establishing whether there existed any exceptional circumstances for that order to be made. The court *a quo* did not invite the parties to make submissions in that regard, as it should have done. In the circumstances, the imposition of the non-parole order falls to be set aside.

[12] In the result, the following order is made:

(a) The appeal is upheld to the extent reflected herein below.

(b) The imposition of a non-parole period by the court *a quo* in terms of s 276B of the Criminal Procedure Act 51 of 1977 is set aside.

MCINTOSH AJ

PLOOS VAN AMSTEL J

CASE INFORMATION

APPEARANCES

Counsel for the Appellant	:	Adv Marimuthu
Attorney for the Appellant	:	Legal Aid Durban Local Office 22 Dorothy Nyembe Durban c/o Pietermaritzburg Local Office
Counsel for the Respondent	:	Adv K.L.Singh
Attorney for the Respondent	:	Director of Public Prosecutions Pietermaritz Street Pietermaritzburg
Date of Hearing	:	14 May 2021
Date of Judgment	:	07 June 2021