CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 223/15

In the matter between:

AGOLLE ABDI JIMMALE First Applicant

MOHAMMED MUQTAAR JIMMALE Second Applicant

and

THE STATE Respondent

Neutral citation:	*Jimmale and Another v S* [2016] ZACC 27
Coram:	Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J
Judgments:	Nkabinde J (unanimous)
Decided on:	30 August 2016
Summary:	non-parole order — section 276B(1) of the Criminal Procedure Act 51 of 1977 — section 12(1)(a) and section 35(3)(n) of the Constitution — discretion of trial court to issue non-parole order — establishment of exceptional circumstances

ORDER

The following order is made:

1. Leave to appeal is granted.
2. The appeal against the non-parole order issued by the High Court of South Africa, Limpopo Local Division, Thohoyandou, is upheld.
3. The non-parole order under case number CC05/2012 is set aside.

JUDGMENT

NKABINDE J (Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J and Zondo J):

Introduction

[1] Parole is an acknowledged part of our correctional system. It has proved to be a vital part of reformative treatment for the paroled person who is treated by moral suasion. This is consistent with the law; that everyone has the right not to be deprived of freedom arbitrarily or without just cause and that sentenced prisoners have the right to the benefit of the least severe of the prescribed punishments. As courts are now clothed with the power to postpone consideration of parole for sentenced offenders, the public interests demand that they have full knowledge of the offender's transgression and personal circumstances, including knowledge of the offender's conditions, when parole is considered. In other words, knowledge and an assessment by courts of facts relevant to the conduct of the prisoner, after the imposition of sentence, is usually a must.

[2] The issue for determination in this application for leave to appeal relates to the power of a trial court to grant a non-parole order – that is – an order by the trial court that the person sentenced should not be considered for parole before a stated portion of the sentence has been served. Leave to appeal is sought against the decision of the High Court of South Africa, Limpopo Local Division, Thohoyandou[1] (trial Court) issuing a non-parole order immediately after convicting and sentencing the applicants. The applicants ask this Court to set aside that order. They also ask for condonation of the late filing of this application. The respondent did not file opposing affidavits but filed written submissions on certain issues, as was directed by the Court.

[3] The applicants had appealed against the conviction, sentence and the non-parole order by the trial Court. On 17 February 2016 this Court granted condonation for the late filing of the application but dismissed the application for leave to appeal against conviction and sentence. It directed the parties to file written submissions on the power of the trial Court to deny the applicants the opportunity to be considered for parole before serving 20 years of their sentences.[2]

[4] The applicants, who act in person,[3] are currently serving a custodial term at Kutama Sinthumule Correctional Centre, in Louis Trichardt, Limpopo. The respondent is the Director of Public Prosecutions, Limpopo. Having decided not to file written submissions in response to the first directions issued by this Court,[4] the

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[1] *S v Jimmale and Others*, unreported judgment of the High Court of South Africa, Limpopo Local Division, Thohoyandu, Case No CC05/2012 (12 June 2012).

[2] The order and directions dated 17 February 2016 read:

> "1. The application for condonation is granted.
>
> 2. The application for leave to appeal against the conviction and sentence is dismissed, subject to the directions in paragraph 3 below.
>
> 3. The Court directs that written argument on the power of the sentencing court to deny the applicants the opportunity to be considered for parole before serving 20 years of their sentence may be lodged by—
>
> (i) the applicants, on or before Thursday, 25 February 2016; and
>
> (ii) the respondent, on or before Thursday, 3 March 2016."

[3] The applicants are assisted by a fellow inmate, who is studying law while in prison.

[4] Above n 2.

respondent was directed again to lodge written submissions on whether, in the light of the decisions in *Gcwala*,[5] *Mthimkhulu*[6] and *Stander*[7], the non-parole order by the trial Court should be set aside.[8] The respondent did file submissions. This Court now decides the issue regarding the non-parole order without an oral hearing.

Background

[5] The applicants were charged with murder and attempted murder. They, together with four others, had driven to the deceased's store. One of them was armed with a large knife and the rest with pangas. They stormed the store without warning and viciously attacked the deceased, stabbing him multiple times. One of the occupants was attacked and lost consciousness.

[6] The trial Court convicted them of murder but acquitted them on the count of attempted murder. On 12 June 2012, a custodial term of 25 years was imposed on each accused. The trial Court further ordered that the accused would be eligible for parole only after 20 years. Leave to appeal against the conviction and sentence was dismissed on 15 June 2012 by the trial Court and so was the petition to the Supreme Court of Appeal on 22 September 2014.

In this Court

[7] On 18 November 2015 the applicants sought leave to appeal against the conviction and sentence. The applicants contended that the trial Court "erred grossly in law in the non-parole order [it] made." They also asked for the non-parole order to

[5] *DPP, North Gauteng v Gcwala and Others* [2014] ZASCA 44; 2014 (2) SACR 337 (SCA).

[6] *S v Mthimkhulu* [2013] ZASCA 53; 2013 (2) SACR 89 (SCA).

[7] *S v Stander* [2011] ZASCA 211; 2012 (1) SACR 537 (SCA).

[8] The directions issued by the Chief Justice and dated 25 May 2016 read:

> "1. The National Director of Public Prosecutions is directed to file written argument of not more than 10 pages, on or before 3 June 2016, addressing the issue of whether, in the light of the Supreme Court of Appeal's judgments in *DPP, North Gauteng v Gcwala and Others* 2014 (2) SACR 337 (SCA); *S v Mthimkulu* 2013 (2) SACR 89 (SCA); and *S v Stander* 2012 (1) SACR 537 (SCA), this Court should grant the relief sought by the applicants to set aside the non-parole order of the High Court.
>
> 2. Further directions may be issued."

be set aside and for the belated lodgement of the application to be condoned. The application for leave to appeal was filed a year late, after the Supreme Court of Appeal dismissed the petition on 22 September 2014. The applicants explained that they had run out of funds and that Legal Aid, despite its undertaking to assist them, failed to lodge the application. They sought the assistance of a fellow inmate.

[8] After the order dated 17 February 2016, what remains for determination is whether the non-parole order as part of the sentence by the trial Court was appropriate and whether it should be set aside. The Court directed the parties to file written submissions on the power of the trial Court to deny the applicants the opportunity to be considered for parole before serving 20 years of their sentences. The applicants filed another application on 5 April 2016, seeking leave to appeal against the non-parole order and that it be set aside. Again, they sought condonation for the late filing of the application.[9]

[9] I deal first with leave to appeal and the law regarding the granting of parole.

Leave to appeal

[10] This matter raises an important constitutional issue regarding the power of trial courts to grant non-parole orders. The non-parole order by the trial Court here denies the applicants the opportunity to be considered for parole before four-fifths of their sentence is served whereas, in law, the maximum period for which a non-parole order can be granted is two-thirds of the sentence. Needless to say, that order has the potential of infringing the applicants' right not to be deprived of freedom arbitrarily or without just cause, in terms of section 12(1)(a)[10] of the Constitution or to the benefit

[9] It seems the applicants mistakenly thought that the directions of this Court required them to file another application, rather than just submissions on the non-parole order. In any event, the papers filed do indeed contain submissions on the non-parole order and so the procedural error is excusable, especially as the applicants are unrepresented.

[10] Section 12(1)(a) provides:

> "Everyone has the right to freedom and security of person, which includes the right—
>
> (a) Not to be deprived of freedom arbitrarily or without just cause."

of the least severe of the prescribed punishments.[11] There are prospects of success. It is thus in the interests of justice to grant leave to appeal.

The law regarding imposition of a non-parole order

[11] Originally, the decision to grant parole remained the exclusive field of the Department of Correctional Services, and courts recognised the need for that because of the principle of separation of powers[12] and the fact that courts obtain their sentencing jurisdiction from statute.[13] In *Mhlakaza*[14] the Supreme Court of Appeal, per Harms JA, said:

> "The function of a 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 period 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 . . . There are also other tensions, such as between sentencing objectives and public resources. This question relating to the judiciary's true function in this regard is probably as old as civilisation . . . Our country is not unique. Nevertheless, sentencing jurisdiction is statutory and courts are bound to limit themselves to performing their duties within the scope of that jurisdiction. Apart from the fact that courts are not entitled to prescribe to the executive branch of government as to how long convicted persons should be detained . . . courts should also refrain from attempts, overtly or covertly, to usurp the functions of the [E]xecutive by imposing sentences that would otherwise have been inappropriate."

[11] See section 35(3)(n) of the Constitution which provides:

> "Every accused person has a right to a fair trial, which includes the right—
>
> (n) to the benefit of the least severe punishment if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing".

[12] See *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa (1996)* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at paras 111-3.

[13] *Stander* above n 7 at para 8.

[14] *S v Mhlakaza and Another* [1997] ZASCA 7; 1997 (1) SACR 515 (SCA) at 521D-I.

[12] Section 276 of the Criminal Procedure Act[15] (Criminal Code or CPA) was amended by the Parole and Correctional Supervision Amendment Act[16] (Amendment Act) by inserting section 276B.[17] Section 276B(1) provides:

> "(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."

[13] The section 276B non-parole order is described as "an order which is a determination in the present for the future behaviour of the person to be affected thereby. . . . [I]t is an order that a person does not deserve being released on parole in future."[18] 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.[19] 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.[20]

[14] Following the Amendment Act and its coming into operation, several trial courts ordered that sentenced accused should serve at least two-thirds of their sentences before being considered for parole but the decisions were reversed on

[15] 51 of 1977.

[16] 87 of 1997. It came into force on 1 October 2004; see GG 26808 of 1 October 2004.

[17] This amendment was through the insertion of section 22 of the 1997 Amendment Act.

[18] *Strydom v S* [2015] ZASCA 29 at para 16.

[19] Id.

[20] *Stander* above n 7 at para 20.

appeal.[21] In *Botha*, the Supreme Court of Appeal, per Ponnan AJA, relying on *Mhlakaza*, remarked that the recommendation by the trial court was—

> "an undesirable judicial incursion into the domain of another arm of State which is bound to cause tension between the Judiciary and the [E]xecutive".[22]

Judicial interference – even where it manifests itself in the form of a mere "recommendation" as was the case in *Botha* – is unacceptable in that it is unfair to both an accused person as well as the correctional services authorities.

[15] In *Stander*, the Supreme Court of Appeal said that the section 276B enactment is unusual and that:

> "[I]ts enactment does not put the court in any better position to make decisions about parole than it was in prior to its enactment. Therefore, the remarks by this Court prior to section 276B still hold good.
>
> An order in terms of section 276 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. *Mshumpa* offers a good example of such facts, namely, undisputed evidence that the accused had very little chance of being rehabilitated."[23]

[16] The Court remarked further that "the consideration of the suitability of a prisoner to be released on parole requires the assessment of facts relevant to the conduct of the prisoner after the imposition of sentence".[24] It endorsed *Pauls*,[25] and said that exceptional circumstances cannot be spelled out in advance in general terms,

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[21] See for example *Stander* above n 7, *Gcwala* above n 5 and *Mthimkhulu* above n 6. For the position before the Amendment Act came into force see *S v Botha* 2006 (2) SACR 110 (SCA). *Botha* was decided in May 2004, before the Amendment Act came into force. See also *S v Makena* 2011 (2) SACR 294 (GNP). The case dealt with the law as it was before 1 October 2004.

[22] *Botha* above n 21 at para 25.

[23] *Stander* above n 7 at para 16. The Supreme Court of Appeal referred to the case of *S v Mshumpa and Another* [2007] ZAECHC 23; 2008 (1) SACR 126 (E) (*Mshumpa*).

[24] Id at para 12.

[25] *S v Pauls* 2011 (2) SACR 417 (ECG).

but should be determined on the facts of each case. The Court said that there "should be circumstances that are relevant to parole and not only aggravating factors of the crime committed, and a proper evidential basis should be laid for a finding that such circumstances exist."[26] The Supreme Court of Appeal said that two issues arise when a court considers imposing a non-parole period:

> "[F]irst, 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."[27]

[17] In *Mthimkhulu* the Supreme Court of Appeal dealt with an order of a non-parole period imposed in terms of section 276B(2).[28] There, the trial Court failed to invite the parties to address the Court before it imposed the non-parole order. The Court said that the failure might well, depending on the case, constitute an infringement of the accused's fair-trial rights.[29]

[18] In *Gcwala*, the Supreme Court of Appeal said that the period spent in custody while awaiting trial should be taken into account and should be deducted when calculating the date on which the sentence is to expire for purposes of considering parole. The Court stressed that the non-parole order should be made only in exceptional circumstances.[30]

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[26] *Stander* above n 7 at para 20.

[27] Id at para 22.

[28] Section 276B(2) provides:

> "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."

[29] *Mthimkhulu* above n 6 at para 21.

[30] *Gcwala* above n 5 at para 21.

Is the non-parole order appropriate?

[19] The applicants contended that the trial Court erred grossly in law in issuing the non-parole order. They said that they were not afforded an opportunity to make submissions and that the trial Court made no findings as to the existence of exceptional circumstances to warrant the non-parole order. The trial Court found, without establishing the factual bases, that the murder was premeditated. This, they argued, constituted a misdirection on the part of the trial Court. The trial Court without more ordered the applicants to serve 20 years of the custodial term of 25 years before being eligible for parole.

[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.[31] Additionally, a trial Court should invite and hear oral argument on the specific question before the imposition of a non-parole period.[32]

[21] Here the trial Court did not invite oral argument on these issues. It should have done so. This is so because the imposition of that kind of an order has a drastic impact on the sentence to be served.

[22] Section 276B(1)(b) sets a limit that where a non-parole period is ordered it may not exceed two-thirds of the sentence imposed. Having been sentenced on 12 June 2012, the applicants have served approximately four years of their sentence. The respondent conceded in its written submissions that the trial Court erred in

[31] *Stander* above n 7 at para 20.

[32] *Strydom* above n 18 at para 16.

imposing a non-parole order. It submitted that there was no basis to contend that exceptional circumstances existed for the order.

[23] Notably, the trial Court imposed the non-parole period before considering the requirements set out by the Supreme Court of Appeal in *Stander*.[33] The trial Court seems to have operated from the premise that the applicants are incorrigible and beyond redemption from a life of crime and beyond rehabilitation. That does not follow from the fact that they committed a horrendous crime.[34] Their incorrigibility had to be established, as a further fact, relevant to the later consideration of parole. The non-parole order is clearly prejudicial to the applicants. If it stands, the applicants will be denied the opportunity to be considered for parole before four-fifths of their sentences are served instead of the statutorily prescribed maximum period of two-thirds of their sentence had proper non-parole orders been granted.

[24] The trial Court misdirected itself. Additionally, that Court materially misdirected itself by imposing the 20 year non-parole period without first establishing the exceptional circumstances necessary for that order to be made. Furthermore, the Court did not invite the parties to make submissions in that regard, as it should have done. That also constitutes a material misdirection.

[25] In conclusion, the non-parole order falls short of the more stringent tests in terms of the law. The non-parole order granted by the trial Court is inappropriate and must be set aside. That being so, in terms of section 73(6)(a)[35] of the Correctional Services Act the applicants will be required to serve at least half their sentences before being eligible for parole.

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[33] At [15] above.

[34] See in this regard the decision of the Full Court in *S v Makena* above n 21 at 299E.

[35] Section 73(6)(a) of the Correctional Services Act provides:

> "[A] sentenced offender serving a determinate sentence . . . of more than 24 months may not be placed on day parole or parole until such sentenced offender has served either the stipulated non-parole period, or *if no non-parole period was stipulated, half of the sentence*, but day parole or parole must be considered whenever a sentenced offender has served 25 years of a sentence or cumulative sentences."

Order

[26] The following order is made:

1. Leave to appeal is granted.
2. The appeal against the non-parole order issued by the High Court of South Africa, Limpopo Local Division, Thohoyandou, is upheld.
3. The non-parole order under case number CC05/2012 is set aside.

For the Applicants:	Unrepresented
For the Respondent:	N E Gcingca instructed by the Director of Public Prosecutions