



**THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

**Reportable
Case no: 511/2006**

In the matter between:

DAVID ASHLEY PRICE

APPELLANT

and

MINISTER OF CORRECTIONAL SERVICES

RESPONDENT

**Coram: Scott, Nugent, Van Heerden, Mlambo JJA et
Kgomo AJA**

Date of hearing: 9 November 2007

Date of delivery: 28 November 2007

Summary: Meaning of 'date of release' in s 276A(3)(a)(ii) of Act 51 of 1977 in relation to a prisoner to whom the provisions of Act 8 of 1959 relating to placement under community corrections are applicable – Person serving a sentence on parole not entitled to have sentence reconsidered in terms of s 276A(3)(a)(ii) of Act 51 of 1977.

Citation: This judgment may be referred to as *Price v Minister of Correctional Services* [2007] SCA 156 (RSA).

JUDGMENT

SCOTT JA/....

SCOTT JA:

[1] The appellant was sentenced to an effective period of 15 years' imprisonment on two counts of fraud. He commenced serving his sentence on 21 December 2000. After serving four and a half years, and while still a prisoner at the St Albans Medium B Prison in Port Elizabeth, he launched proceedings in the High Court, Port Elizabeth, to review the decision of functionaries of the respondent not to consider him as eligible for possible placement under correctional supervision in terms of s 276A(3)(a)(ii) of the Criminal Procedure Act 51 of 1977 ('the CP Act') together with certain other relief of an ancillary nature. The primary issue in this appeal is the correct interpretation of the words 'date of release' in that section.

[2] In order to read the provision in its contextual setting, I quote the whole of s 276A to the extent that is relevant.

'276A. Imposition of correctional supervision, and conversion of imprisonment into correctional supervision and *vice versa*.

(1) Punishment shall only be imposed under section 276(1)(h)—¹

(a) after a report of a probation officer or a correctional official has been placed before the court; and

(b) for a fixed period not exceeding three years.

(2) Punishment shall only be imposed under section 276(1)(i)—²

(a) if the court is of the opinion that the offence justifies the imposing of imprisonment, with or without the option of a fine, for a period not exceeding five years; and

(b) for a fixed period not exceeding five years.

(3) (a) Where a person has been sentenced by a court to imprisonment for a period—

(i) not exceeding five years; or

(ii) exceeding five years, but his date of release in terms of the provisions of the Correctional Services Act, 1959 (Act 8 of 1959), and the regulations made thereunder is not more than five years in the future,

¹Section 276(1)(h) provides for the imposition of a sentence of correctional supervision.

²Section 276(1)(i) provides for the imposition of a sentence of 'imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board'.

and such a person has already been admitted to a prison, the Commissioner or a parole board may, if he or it is of the opinion that such a person is fit to be subjected to correctional supervision, apply to the clerk or registrar of the court, as the case may be, to have that person appear before the court *a quo* in order to reconsider the said sentence.

(b) On receipt of any application referred to in paragraph (a) the clerk or registrar of the court, as the case may be, shall, after consultation with the prosecutor, set the matter down for a specific date on the roll of the court concerned.

(c) . . .

(d) Whenever a court reconsiders a sentence in terms of this subsection, it shall have the same powers as if it were considering sentence after conviction of a person and the procedure adopted at such proceedings shall apply *mutatis mutandis* during such reconsideration: Provided that if the person concerned concurs thereto in writing, the proceedings contemplated in this subsection may be concluded in his absence: Provided further that he may nevertheless be represented at such proceedings or cause to submit written representations to the court.

(e) After a court has reconsidered a sentence in terms of this subsection, it may —

- (i) confirm the sentence or order of the court *a quo*;
- (ii) convert the sentence into correctional supervision on the conditions it may deem fit; or
- (iii) impose any other proper sentence:

Provided that the last-mentioned sentence, if imprisonment, shall not exceed the period of the unexpired portion of imprisonment still to be served at that point.’

. . .

Provision is also made in s 287(4) of the CP Act for correctional supervision where imprisonment has been imposed as an alternative to a fine. The section reads:

‘(4) Unless the court which has imposed a period of imprisonment as an alternative to a fine has directed otherwise, the Commissioner or a parole board may in his or its discretion at the commencement of the alternative punishment or at any point thereafter, if it does not exceed five years —

(a) act as if the person were sentenced to imprisonment as referred to in section 276(1)(i); or

(b) apply in accordance with the provisions of section 276A(3) for the sentence to be reconsidered by the court *a quo*, and thereupon the provisions of section 276A(3) shall apply *mutatis mutandis* to such a case.’

[3] The appellant’s contention, in short, is that by reason of the reference to the Correctional Services Act 1959 (‘the 1959 Act’), the words ‘date of release’ in s 276A(3)(a)(ii) of the CP Act are to be construed as meaning the earliest date upon

which a prisoner becomes eligible to be considered for placement on parole or the date upon which the prisoner may be released upon the expiration of his or her sentence, whichever occurs first. The respondent, on the other hand, contends that the words 'date of release' mean the date of the expiration of the prisoner's sentence, less any legal remission of that sentence.

[4] The 1959 Act was repealed by the Correctional Services Act 111 of 1998 ('the 1998 Act'). Section 136 of the latter contains transitional provisions. Subsection (1) reads:

'Any person serving a sentence of imprisonment immediately before the commencement of Chapters IV, VI and VII is subject to the provisions of the Correctional Services Act, 1959 (Act 8 of 1959), relating to his or her placement under community corrections, and is to be considered for such release and placement by the Correctional Supervision and Parole Board in terms of the policy and guidelines applied by the former Parole Boards prior to the commencement of those Chapters.'

The chapters referred to in the section commenced in 2004, ie while the appellant was serving his sentence, so that the provisions of the 1959 Act relating to his placement under community corrections were applicable to him. It is also apparent from the section that the functions of 'the Commissioner or a parole board' referred to in s 276A(3)(a)(ii) of the CP Act were to be exercised by the Correctional Supervision and Parole Board established under the 1998 Act.

[5] It was common cause between the parties that the procedure adopted at the St Albans Medium B Prison is for a Case Management Committee ('the CMC') to prepare a profile report on a prisoner together with a recommendation which is then submitted to the Correctional Supervision and Parole Board for the latter to consider whether in its opinion the prisoner is fit to be subjected to correctional supervision as contemplated in s 276A(3)(a)(ii). If the CMC decides not to recommend the prisoner for correctional supervision, no recommendation is forwarded to the Correctional Supervision and Parole Board and the process ends with the CMC's decision. The CMC will, however, only consider whether the prisoner is fit for correctional supervision if it is satisfied that his or her 'date of release' is 'not more than five years in the future' as contemplated in s 276A(3)(a)(ii). It was the CMC's decision that the

appellant's date of release was more than five years in the future that the appellant sought to have reviewed in the court *a quo*. That decision, as indicated above, was premised on the interpretation of 'date of release' to mean the expiration of his sentence, less any remission. It was not in dispute that having regard to the length of time the appellant had already served and the number of credits awarded to him, the earliest date on which he would become eligible for parole was less than five years in the future. What was in issue was whether that entitled him to be considered for correctional supervision as contemplated in s 276A(3)(a)(ii).

[6] The meaning to be attributed to the words 'date of release' in s 276A(3)(a)(ii) has been the subject of conflicting decisions in the High Courts.³ The issue was eventually decided by a full court in *Steenkamp v Commissioner of Correctional Services; Maaga and others v Minister of Correctional Services and others* [2005] JOL 13668 (T) which upheld the interpretation adopted by the respondent in the present case. In the court *a quo* Froneman J simply adopted the reasoning in *Steenkamp's* case and dismissed the application with costs, but granted leave to appeal to this court.

[7] Subsequently, on 2 October 2006, the appellant was released on parole. He contends, however, that this does not preclude him from being considered for placement under correctional supervision in terms of s 276A(3)(a)(ii) of the CP Act. The reason, so the contention goes, is that on reconsideration of his sentence, the trial court may, in the exercise of the discretion afforded to it in terms of s 276A(3)(d) and (e), 'impose any other proper sentence' which could well result in his unconditional release. In order to decide whether the appellant is still eligible for consideration for correctional supervision in terms of s 276A(3)(a)(ii), it remains necessary therefore to determine the correct meaning to be attributed to the words 'date of release' in the section. To this extent the appeal is not rendered academic by the appellant's subsequent release on parole.

³ The interpretation advanced on behalf of the Minister was upheld in *Fourie v Minister van Korrektiewe Dienste en andere* (unreported judgment of Swart J, case no 18605/97, delivered on 4 November 1998); *Koen v Minister van Korrektiewe Dienste NO en andere* (unreported judgment of Bertelsmann J, case no 3446/2000, delivered on 20 June 2000). The opposite view was taken in *Giani v Commissioner of Correctional Services* (unreported judgment of Webster J, case no 18141/2001 delivered in 2002.)

[8] It will be observed from the provisions of the CP Act quoted in paragraph 2 above that, in most instances where correctional supervision may be imposed, the period for which it is to endure is quite clearly limited, whether expressly or by necessary implication, to five years at the most. Thus, in terms of s 2761(h), read with s 276A(1)(b), a sentence of correctional supervision imposed by a court may not exceed three years. Where, in terms of s 276(1)(i), imprisonment is imposed from which a person may in terms of s 276A(2) be placed under correctional supervision at the discretion of the 'Commissioner or a parole board', such imprisonment may not exceed five years. Again, provided the sentence of imprisonment does not exceed five years, the 'Commissioner or a parole board' may apply to the clerk or registrar of the trial court to have the prisoner brought before court for reconsideration of his or her sentence in terms of s 276A(3)(a)(i). Yet again, where imprisonment which 'does not exceed five years' is imposed as an alternative to a fine the 'Commissioner or a parole board' may at the commencement of the alternative judgment or at any time thereafter either act as if the person had been sentenced in terms of s 276(1)(i) or apply to have the person brought before court in accordance with the provisions of s 276A(3)(a)(i).

[9] In the light of the above, the reference to 'date of release' in s 276A(3)(a)(ii) would at first blush appear to be a reference to the date of the expiration of the prisoner's sentence so that the period of the correctional supervision provided for in that section would similarly not exceed five years. But the words 'date of release' in s 276A(3)(a)(ii) are qualified by what immediately follows, namely 'in terms of the provisions of the Correctional Services Act, 1959 (Act 8 of 1959), and the regulations made thereunder'. As previously mentioned, by reason of s 136 of the 1998 Act the provisions of the 1959 Act relating to the placement of a prisoner under community corrections remain applicable to the appellant. It was common cause between the parties, and I shall assume this to be the case, that one such provision is s 63 of the 1959 Act. In broad outline, s 63(1) provides that a parole board (it would now be a CMC) is obliged in respect of each prisoner serving a sentence in excess of six months to submit a report to the Commissioner (now the Correctional Supervision and Parole Board) together with recommendations regarding the placement of the prisoner under correctional supervision by virtue of s 276(1)(i) or s 287(4)(a) of the CP Act or by virtue of a conversion of the sentence

under s 276A(3)(e)(ii) or s 287(4)(b) of the latter Act. Of particular significance is the proviso contained in s 63(1)(b)(i) of the 1959 Act, which is to the effect that for the purposes of the recommendations made to the Commissioner the date of release contemplated in s 276A(3)(a)(ii) of the CP Act is deemed to be the earliest date on which a prisoner may in terms of the 1959 Act be considered for placement on parole or the date on which the prisoner may be released upon the expiration of his or her sentence, whichever occurs first. For the sake of completeness I quote s 63(1) in full:

‘(1) A parole board shall, in respect of each prisoner under its jurisdiction serving an indeterminate sentence or a sentence of imprisonment in excess of six months or in respect of whom a special report is required by the Minister or the Commissioner having regard to the nature of the offence and any remarks made by the court in question at the time of the imposition of sentence if made available to the Department, and at the times and under the circumstances determined by the Commissioner or when otherwise required by the Minister or the Commissioner –

(a) submit a report to the Commissioner or to the Minister, as the case may be, with regard, *inter alia*, to the conduct, adaptation, training, aptitude, industry and physical and mental state of such prisoner and the possibility of his relapse into crime;

(b) together with the report on each prisoner submitted in terms of paragraph (a), make recommendations to the Commissioner regarding –

(i) the placement of such prisoner under correctional supervision by virtue of a sentence contemplated in section 276(1)(i) or 287(4)(a) of the Criminal Procedure Act, 1977 (Act No 51 of 1977), or by virtue of the conversion of such prisoner’s sentence into correctional supervision under section 276A(3)(e)(ii) or 287(4)(b) of the said Act and the period for which and the conditions on which such prisoner may be so subjected to correctional supervision: Provided that for the purposes of such recommendations a prisoner’s date of release contemplated in section 276A(3)(a)(ii) of the Criminal Procedure Act, 1977, shall be deemed to be the earliest date on which a prisoner may, in terms of this Act, be considered for placement on parole or the date on which the prisoner may be released upon the expiration of his sentence, whichever occurs first; or

(ii) the placement of such prisoner on parole in terms of section 65 or on daily parole in terms of section 92A and the period for which, the supervision under which and the conditions on which such prisoner should be so placed; and

(c) exercise such other powers and perform such other functions and duties as may be prescribed by regulation.⁴

⁴ Section 63(1) of the 1959 Act corresponds to s 42(2) of the 1998 Act. The latter contains no similar deeming provision.

The construction placed by the appellant on the words 'date of release' in s 276A(3)(a)(ii) of the CP Act is, of course, based upon the proviso in s 63(1)(b)(ii), which was inserted in the 1959 Act⁵ shortly after s 276A⁶ was inserted in the CP Act.

[10] In *Steenkamp* the full court, following the decisions in *Fourie and Koen*⁷, rejected the argument advanced on behalf of the appellant in the court *a quo* (and in this court) on essentially two grounds. The first was that the 'date of release' referred to in the proviso to s 63(1)(b)(i) of the 1959 Act was deemed to be the date of release only for the purposes of the recommendations made by the parole board (now the CMC) and for no other purpose. The second was that the construction contended for would result in serious anomalies and would be contrary to the intention of the legislature evident from the CP Act that the period for which a person should be under correctional supervision was not to exceed five years. In my view neither ground is sound.

[11] The recommendations referred to in s 63(1) of the 1959 Act are clearly intended to be taken into consideration by the Commissioner (now the Correctional Supervision and Parole Board) when deciding whether the prisoner in question is fit for placement under correctional supervision as contemplated in s 276A(3)(a)(ii) of the CP Act. If the 'date of release' in s 276A(3)(a)(ii) were to be construed as meaning the expiration of the sentence, the deeming provision in the proviso to s 63(1) of the 1959 Act would serve no purpose. Indeed, the obvious question that would arise is for what possible reason would the date of release be deemed for the purpose of the recommendation to be the date on which the prisoner became eligible for parole if that date is not also the date of release that is relevant for the purpose of the Correctional Supervision and Parole Board's decision to refer the prisoner for reconsideration of sentence. No answer is provided in the *Steenkamp* decision or the decisions on which it relies; nor were counsel for the respondent in this court able to advance any reason for such an obviously anomalous situation. In my view, the proviso makes it clear that, subsequent to its insertion in s 63(1) of the 1959 Act, the

⁵By s 21 of Act 68 of 1993.

⁶By s 42 of Act 122 of 1991.

⁷See footnote 3.

words 'date of release' in s 276A(3)(a)(ii) of the CP Act were intended to have the same meaning as that deemed to be their meaning in the proviso.

[12] In the *Steenkamp* case the court postulated two situations in order to demonstrate the anomalies that could arise if s 276A(3)(a)(ii) were to be construed in the manner for which the appellant contends. The first was the case of a prisoner sentenced to 50 years imprisonment. The court pointed out that in terms of the 1959 Act⁸ such a prisoner, in the absence of credits, would become eligible for consideration for parole after serving 25 years. If the prisoner were to become entitled to be considered for placement under correctional supervision five years before the completion of 25 years, it would mean that this would occur 30 years before the actual expiration date of the sentence. Such a result, said the court, would be contrary to the whole tenor of the CP Act regarding correctional supervision which was that correctional supervision was not to endure for more than five years of the total sentence. The anomaly complained of is based on a misreading of s 276A. It is true that before a prisoner will be referred back to the trial court for reconsideration of his or her sentence, the Correctional Supervision and Parole Board must be 'of the opinion that such a person is fit to be subjected to correctional supervision'. But the fallacy of the so-called anomaly would appear to be the assumption that by reason of the inquiry postulated in the section the competency of the court would be limited to the narrow issue of considering the appropriateness or otherwise of correctional supervision and, if appropriate, of imposing correctional supervision for the remaining period of the sentence. That is not the position at all. As appears from s 276A(3)(a), the object of bringing the prisoner before the trial court is for the court to 'reconsider' the sentence. In terms of s 276A(3)(d), the court has the same powers as if it were considering sentence after conviction. Section 276A(3)(e), in turn, provides that after reconsidering the sentence, the court may confirm the original sentence; it may convert the sentence into correctional supervision on the conditions it may deem fit; or it may impose any other proper sentence. The consequence of the interpretation of 'date of release' for which the appellant contends, does not, therefore, mean as was supposed in *Steenkamp*, that in the event of the court imposing correctional supervision it would be for a period of 30 years. If the court considered it appropriate, it could, for example, impose a fresh sentence of 28 years'

⁸Section 65(4).

imprisonment and convert the final three years into correctional supervision, or for that matter impose any other proper sentence, whether custodial or otherwise.

[13] The second 'anomalous' situation postulated in *Steenkamp* was the case of a person sentenced to seven years' imprisonment. It was said that if the 'date of release' in s 276A(3)(a)(ii) were construed as meaning a date five years prior to becoming eligible for consideration for parole, the result would be that the 'date of release' would arrive before the person commenced serving his or her sentence. This was because by reason of s 65(4) of the 1959 Act the person concerned would otherwise have become entitled to be considered for parole after serving three and a half years' imprisonment. There are two answers to the supposed anomaly. First, in terms of s 276A(3)(a) the person concerned must already have been admitted to prison. Second, just as in the case of imprisonment imposed in terms of s 276(1)(i)⁹ of the CP Act, a prisoner serving a sentence subject to the 1959 Act was required to serve a certain minimum period before being considered for correctional supervision. The position is now governed by statute.¹⁰

[14] It follows from the foregoing that, in my view, the *Steenkamp* case was wrongly decided. The 'date of release' referred to in s 276A(3)(a)(ii) of the CP Act means, for the purpose of a prisoner subject to the provisions of the 1959 Act relating to his or her placement under community corrections, the date on which such prisoner may be considered for placement on parole or the date on which the prisoner may be released upon the expiration of his sentence, whichever occurs first. The appellant is accordingly entitled to a declarator to this effect.

[15] A declaratory order was also sought in the court below to the effect that the arrival of the date upon which a prisoner becomes eligible for parole consideration in terms of the 1959 Act does not constitute a valid reason for the CMC to refuse subsequently to recommend the prisoner as a suitable candidate for placement under correctional supervision in terms of s 276A(3)(a)(ii) of the CP Act.

⁹See footnote 2.

¹⁰ Section 73(7) of the 1998 Act provides that a person sentenced to imprisonment under s 276(1)(b) of the CP Act must serve at least a quarter of the effective sentence or the non-parole period, if any, whichever is the longer before being considered for placement under correctional supervision, unless the court has directed otherwise. The provisions relating to imprisonment in terms of s 276(1)(i) of the CP Act appear to be contradictory.

The circumstances giving rise to such a prayer were the following. The Parole Manual drafted under the 1959 Act provided that a prisoner who had reached his or her parole consideration date remained eligible to have his or her sentence converted into correctional supervision if the latter option was the 'best' for the prisoner.¹¹ In *S v Leeb* 1993(1) SACR 315 (T) at 319 d-e Coetzee J remarked obiter that it would be pointless for him to reconsider the sentence of a prisoner in terms of s 276A(3)(a)(ii) if the prisoner were in any event to be released on parole in three and a half months' time. Based apparently on this *dictum*, the Department of Correctional Services adopted a policy that once a prisoner had reached his or her parole consideration date, that prisoner would no longer be considered for correctional supervision. In *Klaasen v Minister of Correctional Services*¹² the policy was seemingly upheld but only on the limited ground that once a prisoner had been found unfit to be released on parole it would be an exercise in futility to then consider, taking into account the same criteria, whether that prisoner was fit to be subjected to correctional supervision. It is no doubt so, that there would be no point in considering whether a prisoner was fit for correctional supervision if he or she had recently been found unfit to be released on parole. But to the extent that the *Klaasen* decision may be regarded as authority for a more general recognition of the validity of the policy or for the proposition that once parole has been refused, a prisoner may never again be considered for correctional supervision, I regret that I am unable to agree. There are material differences between release on parole and the possible consequences of a referral for reconsideration of sentence in terms of s 276A(3)(a)(ii) of the CP Act. I can think of no good reason why a prisoner who has reached his or her parole consideration date should as a matter of policy be arbitrarily denied the opportunity of having his or her sentence thereafter reconsidered while still a prisoner. However the appellant has since been released on parole and it is accordingly no longer necessary to finally determine the issue as it has become academic for the purpose of the present appeal.

[16] There remains to consider whether the appellant is entitled to have his sentence reconsidered in terms of s 276A(3)(a)(ii) now that he has been released on parole and is no longer a prisoner. Counsel for the appellant pointed to what they

¹¹See Chapter VI, Service Order 1(A) section (7)(a)(ii).

¹²Unreported judgment, Case no 2120/2005 (SECLD).

described as the unique features of s 276A(3) and how the consequences of a reconsideration of the appellant's sentence could differ from his position as a released prisoner serving out his sentence on parole, and argued that in these circumstances there was no reason why it should not remain open to the appellant to have his sentence reconsidered at any stage up until the expiration of his sentence, even though he had been released on parole. I cannot agree. Section 276A(3)(a)(ii) quite clearly requires the person concerned to be a prisoner. Thus, such a person is required to be 'a person [who] has already been admitted to prison' and his 'date of release' must be 'not more than five years in the future'. Similarly, s 63(1) of the 1959 Act makes it clear that the recommendation of the CMC, which initiates the process, relates to 'a prisoner'. A person released on parole is no longer a prisoner, even though his sentence is yet to expire. The provisions of s 276A(3)(a)(ii) are accordingly not applicable to a person once released on parole.

[17] The principle issue in this appeal has been the proper interpretation of the words 'date of release' in s 276A(3)(a)(ii) of the CP Act. In this the appellant has been successful. The issue is undoubtedly one of importance and as a result of the appellant's efforts the decision in *Steenkamp*, which was followed in the court *a quo*, has been overruled. In addition, the appellant was obliged to proceed with the appeal after his release on parole in order to have the costs order against him reversed. In these circumstances, I think that he is entitled to his costs of appeal, notwithstanding his failure on the issue dealt with in the previous paragraph.

[18] The appeal succeeds to the following extent:

- (a) The respondent is ordered to pay the appellant's costs of appeal, such costs to include those occasioned by the employment of two counsel;
- (b) The order of the Court *a quo* is set aside and the following is substituted in its place:
 - '(i) It is declared that the 'date of release' referred to in s 276A(3)(a)(ii) of the Criminal Procedure Act 51 of 1977 means, for the purpose of a prisoner subject to the provisions of the Correctional Services Act 8 of 1959 relating to his or her placement under community corrections, the date on which such prisoner may be considered for placement on parole or the date

upon which the prisoner may be released upon the expiration of his or her sentence, whichever occurs first.

- (ii) The respondent (the Minister of Correctional services) is ordered to pay the costs of the applicant (Mr David Price).'
- (c) In addition, it is declared that while on parole, the appellant is not entitled to have his sentence reconsidered in terms of s 276A(3)(a)(ii) of the Criminal Procedure Act 51 of 1977.

D G SCOTT
JUDGE OF APPEAL

CONCUR:

NUGENT	JA
VAN HEERDEN	JA
MLAMBO	JA
KGOMO	AJA