THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 925/2016

In the matter between:

KHUMBULANI COLLEN NDLOVU **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Ndlovu v S* (925/2016) [2017] ZASCA 26 (27 March 2017)

Coram: Tshiqi, Petse and Mbha JJA and Fourie and Mbatha AJJA

Heard: 15 February 2017

Delivered: 27 March 2017

Summary: Imposition of non-parole period in terms of s 276B of the Criminal Procedure Act 51 of 1977 : sentence : misdirection by trial court in imposing a non-parole period : appeal upheld.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Jappie DJP and Steyn and Nkosi JJ sitting as court of appeal):

1 The appeal is upheld to the limited extent set out below.

2 The order of the Full Court is set aside and substituted as follows:

'(a) The order of the trial court fixing a non-parole period of 13 years is set aside;

(b) Save as aforesaid, the appeal against sentence is dismissed.'

3 Paragraph 2 of the order of the full court is confirmed.

4 The appellant is therefore sentenced to an effective term of 20 years' imprisonment antedated to 29 March 2011.

JUDGMENT

Mbatha AJA (Tshiqi, Petse and Mbha JJA and Fourie AJA concurring)

[1] The issue in this appeal is whether the trial court was correct in imposing a non-parole period in terms of s 276B of the Criminal Procedure Act 51 of 1977 (the CPA), without inviting the parties to make submissions before doing so.

[2] The appellant, Mr Khumbulani Collen Ndlovu, was part of a group that planned to rob a cash pay point on 14 August 2008, in Glencoe, KwaZulu–Natal. He was not present at the scene during the robbery, but a shoot-out ensued and a security guard was shot and killed. He was

arrested and charged in the KwaZulu-Natal Division of the High Court, Pietermaritzburg with two counts of robbery with aggravating circumstances, one count of murder and one count of attempted murder. He tendered a plea of guilty in terms of s 112(2) of the CPA to the counts of robbery with aggravating circumstances and murder. The prosecutor accepted the guilty pleas tendered by the appellant and withdrew the charges relating to the other counts.

[3] In his s 112(2) statement the appellant said that although he was not present at the scene of the robbery, he was aware that the robbers were heavily armed and that someone might get killed during the commission of the robbery. In spite of that knowledge, he continued his involvement in the planning of the robbery and did not distance himself from it. He admitted that he had consequently formed a common purpose with the robbers to commit the crimes. He was convicted of robbery with aggravating circumstances and murder.

[4] Before imposing the sentence, the trial court had regard to the personal circumstances of the appellant. These included the fact that he was a 37 year old first offender; that he was a widower and a father to three minor children; that at the time of the conviction he was gainfully employed and earned a salary of R2000 per month; and that he had done community service as a police reservist. Moreover, the trial court considered that the appellant made a confession to a magistrate immediately upon his arrest; that he had tendered a plea of guilty; that he had offered to testify against his erstwhile co-accused in their trial; and that he had not shared in the spoils of the robbery.

[5] The trial court took the following aggravating factors into account: firstly, that the crimes were planned and premeditated; secondly, that they were committed in a public place where elderly persons were collecting their pension; thirdly, that a security guard was fatally shot; fourthly, that a sum of R1 215 110, seven firearms and a motor vehicle were stolen; and finally, that the crimes were motivated by nothing else other than greed. The court, however, found that there were substantial and compelling circumstances present, entitling it to deviate from the prescribed minimum sentences. It sentenced the appellant to undergo 12 and 20 years' imprisonment on the counts of robbery and murder respectively. These two sentences were ordered to run concurrently. In respect of the sentence of 20 years' imprisonment imposed on the murder conviction, the court fixed a non-parole period of 13 years.

[6] With leave having been granted by the trial court, the appellant appealed to the court a quo against the sentence imposed. Notably, he was also granted leave to lead further evidence in relation to his status as the primary caregiver to his minor children. The court a quo dismissed his appeal on sentence, but accepted the further evidence and, in line with the Constitutional Court in *MS v S (Centre for Child Law as Amicus Curiae)*,[1] gave the following directions concerning the children:

2.1. That the Department of Social Development investigate the circumstances of the appellant's minor children, to wit Aphiwe Ndlovu and Philasande Ndlovu, without delay and investigate whether:

2.1.1. The children are in need of care and protection as envisaged in section 150 of the Children's Act 38 of 2005, and if so, to take the necessary steps required by the Act:

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[1] *MS v S (Centre for Child Law as Amicus Curiae)* [2011] ZACC 7; 2011 (2) SACR 88 (CC).

2.1.2. The children remain in contact with the appellant during his incarceration and have contact with him, insofar as it is permitted by the Department of Correctional Services.'

[7] With special leave having been granted by this court, the appellant appeals against his sentence. The basis of the appeal is that the trial court misdirected itself when it made an order in terms of s 276B of the CPA, fixing a non-parole period of 13 years in respect of his sentence for murder without inviting the parties to make submissions before doing so. It is further contended that no exceptional circumstances existed; therefore, the court's exercise of its discretion to fix a non-parole period was not justified. Section 276B reads:

'(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] Section 276B of the CPA came into effect in October 2004. Prior to this, the issue of parole fell squarely within the purview of the Correctional Services Act 111 of 1998 and its regulations. Before the enactment of this provision, courts had no control over the sentence served by a convicted person. As Ponnan AJA said in *S v Botha*:[2]

'The function of a sentencing court is to determine the term of imprisonment that a person, who has been convicted of an offence, should serve. A court has no control

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[2] *S v Botha* 2006 (2) SACR 110 (SCA) para 25.

over the minimum period of the sentence that ought to be served by such a person. A recommendation of the kind encountered here is an undesirable incursion into the domain of another arm of the State, which is bound to cause tension between the Judiciary and the executive. Courts are not entitled to prescribe to the executive branch of government how long a convicted person should be detained, thereby usurping the function of the executive. (See *S v Mhlakaza & Another* 1997(1) SACR 515 (SCA) ([1997] 2 ALL SA 185) AT 521f-i.)'[3]

[9] This court has confirmed that s 276B was enacted to give sentencing courts power to control the minimum or actual period to be served by a convicted person.[4] In the same vein, it has highlighted the challenge presented by a non-parole order, stating that such an order is '…a "present determination" that the person will not deserve being released on parole in the future.'[5] It is for this reason that a non-parole order should only be made in exceptional circumstances which can be established through the investigation of the salient facts, legal submissions and sometimes further evidence.[6] As Dambuza J explained in *S v Pauls*[7]

'. . . . a court must exercise care and caution when considering whether exceptional circumstances in a particular case exist to warrant a non-parole period. A proper judicial consideration can, in my view, only be made where both the State and the defence have made submissions on the issue.'

[10] This assertion by Dambuza J was affirmed by the Constitutional Court in *Jimmale v S*[8] where it was held that:

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[3] *S v Mhlakaza & onother* 1997 (1) SACR 515 (SCA) at 521.
[4] *S v Pakane & others* 2008 (1) SACR 518 (SCA) para 47.
[5] *S* v *Stander* 2012 (1) SACR 537 (SCA) para 15.
[6] *Jimmale & another v S* [2016] ZACC 27, 2016 (2) SACR 691 (CC).
[7] *S v Pauls* 2011 (2) SACR 417 (ECG) para 15.
[8] Supra fn 6; See also *Director of Public Prosecutions North Gauteng*: *Pretoria v Gcwala & others;* and *Mthimkulu v The State* ([2013] ZASCA 53, 2013 (2) SACR 89 (SCA).

'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.'

[11] Importantly, the court held that in cases where exceptional circumstances are found to exist, the judicial officer bears the duty to explicitly state such circumstances, unless they are easily ascertainable.[9] Where a trial court seeks to impose a non-parole order, the convicted person is entitled to address it and that a failure to provide such an opportunity may constitute a misdirection.[10]

[12] It is common cause that the appellant and the State were not informed by the court that it intended to invoke the provisions of s 276B and were not invited to make submissions as to whether the court should impose the non-parole period. It is not clear from the judgment of the trial court what factors were taken into account in the imposition of the non-parole period. Counsel for the State conceded that the court misdirected itself in this regard. The other misdirection committed by the trial court was that it imposed the non-parole period only in respect of a portion of the sentence, namely the 20 years' imprisonment imposed in respect of murder, and not in respect of the effective term of imprisonment as required by s 276B(2) of the CPA.

[13] Counsel for the appellant confirmed that the appeal is confined to the imposition of the non-parole period by the trial court and it is thus not

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[9] Supra fn 7 para 16.
[10] Supra fn 5 para 22 See also *Jimmale & another v S* [2016] ZACC 27, 2016 (2) SACR 691 (CC) para 16; *Mthimkulu v The State* ([2013] ZASCA 53, 2013 (2) SACR 89 (SCA) para 20; and *Mhlongo v S* [2016] ZASCA 152; 2016 (2) SACR 611 (SCA) para 10; *Mvubu v S* [2016] ZASCA 184 (29 November 2016) para 10.

necessary for this court to deal with the effective term of 20 years' imprisonment imposed upon the appellant. It follows that this sentence shall remain and only the imposition of the non-parole period falls to be set aside.

[14] For the aforegoing reasons the following order is made:

1 The appeal is upheld to the limited extent set out below.

2 The order of the Full Court is set aside and substituted as follows:

'(a) The order of the trial court fixing a non-parole period of 13 years is set aside;

(b) Save as aforesaid, the appeal against sentence is dismissed.'

3 Paragraph 2 of the order of the full court is confirmed,

4 The appellant is therefore sentenced to an effective term of 20 years' imprisonment antedated to 29 March 2011.

Y T MBATHA

ACTING JUDGE OF APPEAL

Appearances

For appellant:	L Smit Instructed by: Legal Aid, Pietermaritzburg Legal Aid, Bloemfontein
For respondent:	N E S Buthelezi Instructed by: Director of Public Prosecutions, Pietermaritzburg Director of Public Prosecutions, Bloemfontein