



IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

APPEAL CASE NO: **AR158/2018**

In the matter between:

ZAKHELE CHRISTOPHER NTAMO

Appellant

vs

THE STATE

Respondent

APPEAL JUDGMENT

Delivered on 16 March 2018

MBATHA J

[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 applicant, Mr Zakhele Christopher Ntamo, was part of the group that conspired, planned and decided to rob the Barretts' home on or about 16 September 2009. He was subsequently arrested and indicted for murder, robbery with aggravating circumstances and unlawful possession of a prohibited firearm and

ammunition in terms of the Firearms Control Act 60 of 2000 in the KwaZulu-Natal Division of the High Court, Pietermaritzburg.

[3] He tendered a plea of guilty in terms of s 112(2) of the CPA to the counts of robbery with aggravating circumstances, unlawful possession of a firearm and ammunition. The prosecutor accepted the guilty pleas tendered by the appellant and withdrew charges relating to the murder count.

[4] In his s 112(2) statement he stated that the deceased Erasmus had given him and his co-assailants information that the Barretts kept a large amount of money in their safe. He had realised that they might have to use force to achieve their objective. To this extent they armed themselves with firearms. Though he was present when the firearms were distributed, he was not given a firearm.

[5] He drove his co-assailants in a bakkie to the Barretts. Under the pretext that they were lost, the Barretts opened the door, and one of his co-assailant overpowered them, pointed the firearms at them and demanded money from them. Their co-conspirator, Erasmus was in the garden and firearms were pointed at him as well whilst pretending to rob him.

They ransacked the house and dispossessed the Barretts of their valuables, including a cellphone. The Barretts were tied up and locked in the bathroom.

[6] Before leaving, one of his co-assailants returned into the house. He heard a single gunshot. Upon his return he informed them that he had to shoot Erasmus as he was angered by the fact that he did not find the money which Erasmus had promised them to be in the house.

[7] On 26 September 2009 he was arrested and the 38 Astra revolver was found together with ammunition in his room.

[8] He admitted been involved in the planning of the robbery and acting in concert and in furtherance of a common purpose to commit the crimes that he tendered a plea of guilty to.

[9] He was subsequently convicted of robbery with aggravating circumstances, unlawful possession of a prohibited firearm and ammunition. The charge of murder was withdrawn against the appellant.

[10] Before imposing the sentence the trial court had regard to his personal circumstances. These included the fact that he was 31 years old, first offender, that he had demonstrated remorse, not only by co-operating with the police, but also in ultimately tendering a plea of guilty at the inception of the trial. The court also took into account the assistance which he rendered to the police, which resulted in the arrest of other co-accused and of certain section 204 witnesses.

[11] The trial court took the following aggravating factors into account: that he played an active role in the robbery, that the occupants of the farm were held up at gunpoint, were terrorised and robbed of their possessions, and that the appellant had erased the serial number of the firearm either to sell it or perpetrate further crimes.

[12] 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 years imprisonment on the robbery count, 10 years for possession of a firearm in contravention of section 4 of Act 60 of 2000, but directed that one half of the sentence to run concurrently with the sentence on count 2 and 3 years' imprisonment for unlawful possession of ammunition, the whole of which was to run concurrently with the sentence imposed on possession of a prohibited firearm. The court fixed a non-parole period of 11 years.

[13] With leave having been granted by the Supreme Court of Appeal to the Full Court of the KwaZulu-Natal Division of the High Court, Pietermaritzburg the appellant appeals against his sentence.

[14] 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 11 years in respect of his sentence 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.'

[15] 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 Ponnann AJA said in *S v Botha*:¹

'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 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.)'²

[16] The Supreme Court of Appeal 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.³ 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.'⁴ 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.⁵ As Dambuza J explained in *S v Pauls*⁶

'... 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.'

¹ *S v Botha* 2006 (2) SACR 110 (SCA) para 25.

² *S v Mhlakaza & another* 1997 (1) SACR 515 (SCA) at 521.

³ *S v Pakane & others* 2008 (1) SACR 518 (SCA) para 47.

⁴ *S v Stander* 2012 (1) SACR 537 (SCA) para 15.

⁵ *Jimmale & another v S* [2016] ZACC 27, 2016 (2) SACR 691 (CC).

⁶ *S v Pauls* 2011 (2) SACR 417 (ECG) para 15.

[17] This assertion by Dambuza J was affirmed by the Constitutional Court in *Jimmale v S*⁷ where it was held that:

‘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.’

[18] 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.⁸ 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.⁹

[19] 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.

[20] 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 necessary for this court to deal with the effective term of 17 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.

[21] For the foregoing reasons the following order is made:

1. The appeal is upheld to the limited extent set out below.
2. ‘(a) The order of the trial court fixing a non-parole period of 11 years is set aside;
(b) Save as aforesaid, the appeal against sentence is dismissed.’

⁷ 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)).

⁸ Supra fn 7 para 16.

⁹ 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.

3. The appellant is therefore sentenced to an effective term of 17 years' imprisonment antedated to 8 September 2010.

MBATHA J

CHETTY J

LAW AJ

Date of Hearing: 16 March 2018

Date of Judgment: 16 March 2018

(Handed down in "D" court)

For the Appellant : Adv L Barnard

For the Respondent: Adv A Ludick

Instructed by: Deputy Director of
Public Prosecution