

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 93/2013

In the review between:-

THE STATE

and

TEFO MOKOENA AND 11 OTHERS

CORAM: VAN ZYL, J *et* DAFFUE, J

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 4 JULY 2013

[1] This is a special review in accordance with the provisions of s 304(4) of the Criminal Procedure Act, 51 of 1977 (“the Act”).

[2] Twelve accused were charged in the Witsieshoek Magistrates’ Court with escaping from lawful custody in contravention of s 117(a) of the Correctional Services Act, 111 of 1998. They were represented by a legal representative who prepared statements in terms of s 112(2) of the Act for and on behalf of each of them. On 15 April 2011 the court *a quo*, having been satisfied with their pleas of guilty and the contents of their statements, convicted them as charged. They were each sentenced the same day to five (5) years’ imprisonment in

terms of s 276B(1)(b) of the Act and it was directed in terms of s 276B(1)(a) that the accused had to serve four (4) years' imprisonment before they could be considered for parole. In passing it is noted that the court *a quo* confused the two subsections insofar as the sentences should have been imposed in terms of subsection (a) and the direction pertaining to the non-parole period should have been in terms of subsection (b).

[3] The matter came to the attention of Lekale J in April 2013, thus two years after the convictions and sentences. The delay cannot be explained. On 25 April 2013 Lekale J enquired in writing as to whether the sentences were competent insofar as s 276B(1)(b) of the Act is clear that the non-parole period may not exceed two-thirds of the term of imprisonment imposed, or 25 years, whichever is the shorter. The court *a quo*'s response was received on 19 June 2013. The presiding magistrate, who has retired in the meantime, acknowledged in this response that the sentences imposed by her did not comply with the provisions of s 276B(1).

[4] The court *a quo* committed serious misdirections in relying on section 276B(1) of the Act and imposing the sentences for the following two reasons:

1. Although it could fix a period during which the accused

shall not be placed on parole as part of its sentence in terms of s 276B(1), this non-parole period could not have exceeded two-thirds of the term of imprisonment imposed, to wit five (5) years. *In casu* the court *a quo* ordered that four of the five years, i.e. 80% of the term of imprisonment, shall be the non-parole period and in doing so it transgressed its statutory powers;

2. Secondly, no reasons have been advanced by the court *a quo* why a non-parole period was fixed at all, especially insofar as the record does not reflect that the accused's legal representative was given an opportunity to either address the court in this regard, or to lead evidence why such order should not be made.

[5] Section 276B came into operation on 1 October 2004. Prior thereto a decision about parole remained exclusively within the domain of the Department of Correctional Services. In **S v Botha** 2006 (2) SACR 110 (SCA), an appeal which was admittedly decided on 28 May 2004 and prior to the coming into operation of s 276B, a recommendation by the trial judge that the appellant should serve at least two-thirds of his sentence before being considered for parole has been found by the Supreme Court of Appeal in para [25] of the judgment as an undesirable judicial incursion into the domain of another arm of State. See also **S v Mhlakaza & others** 1997 (1) SACR 515 (SCA) at 521 f – i.

- [6] In **S v Pauls** 2011 (2) SACR 417 (ECG) at paras [14] to [18] the court relied on the two judgments quoted above as well as **S v Williams; S v Papier** 2006 (2) SACR 101 (C) for its viewpoint that exceptional circumstances should exist before a non-parole period might be imposed. The court concluded that a court must exercise care and caution when considering whether exceptional circumstances exist to warrant a non-parole period. In **S v Pakane and Others** 2008 (1) SACR 518 (SCA) the Supreme Court of Appeal found that the aggravating circumstances that prevailed, the seriousness of the offences and the fact that the appellant was a policeman warranted the fixing of a ten year non-parole period.
- [7] The latest reported judgment on this issue is **S v Stander** 2012 (1) SACR 537 (SCA). The Supreme Court of Appeal considered all the judgments referred to herein and warned against imposing non-parole periods, save in exceptional circumstances. It stated that it remains generally desirable for courts not to exercise their powers in this regard, particularly because courts are not equipped to make decisions about the parole of a prisoner at the time when sentence is imposed. 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. See paras [8] – [20].

[8] No exceptional circumstances were present *in casu* and given the absence of reasons by the court *a quo*, it is difficult to understand why it deemed it necessary to prescribe to the Department of Correctional Services how long the convicted persons should be incarcerated.

[9] In view of the aforesaid misdirections this court is at liberty to reconsider sentence afresh. Bearing in mind the seriousness of the offence of escaping from lawful custody, the sentences of five (5) years' imprisonment in respect of each accused are in order. However that part of the sentences in terms whereof the court *a quo* directed a non-parole period of four (4) years' imprisonment should be deleted.

[10] Consequently the following orders are made:

10.1 The convictions of all twelve accused are confirmed.

10.2 The sentences imposed are reviewed, set aside and substituted with the following:

All twelve accused are sentenced to five (5) years' imprisonment in terms of section 276(1)(b) of Act 51 of 1977.

10.3 The sentences are antedated to 15 April 2011.

J.P. DAFFUE, J

I concur.

C. VAN ZYL, J

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