CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 118/23

In the matter between:

MANDLAKAYISE ENOS SITHOLE Applicant

and

THE STATE Respondent

Neutral citation: *Sithole v S* [2024] ZACC 31

Coram: Madlanga ADCJ, Kollapen J, Majiedt J, Mhlantla J, Rogers J, Seegobin AJ, Theron J, Tolmay AJ and Tshiqi J

Judgments: Mhlantla J (unanimous)

Decided on: 20 December 2024

Summary: Criminal Procedure Act 51 of 1977 — section 276B — fixing of non-parole-period — failure to notify parties and failure to establish exceptional circumstances — misdirection

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ORDER

On appeal from the Full Court of the High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg (hearing an appeal from the High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg). The following order is made:

1. Leave to appeal against the imposition of the non-parole order issued by the High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg, is granted.
2. The appeal succeeds and the imposition of the non-parole period is set aside.
3. Save as aforesaid, leave to appeal against the convictions and sentences is refused.

JUDGMENT

MHLANTLA J (Madlanga ADCJ, Kollapen J, Majiedt J, Rogers J, Seegobin AJ, Theron J, Tolmay AJ and Tshiqi J concurring):

Introduction

[1] This application concerns the validity of a non-parole period of a sentence of imprisonment which was fixed without affording the accused an opportunity to make submissions on whether the non-parole period should be fixed. The applicant, Mr Mandlakayise Enos Sithole, also applies for leave to appeal against the convictions and sentences imposed by the High Court, KwaZulu-Natal Division, Pietermaritzburg (High Court).

Background and litigation history

[2] On 2 February 2006 the applicant, in concert with three others, committed robbery at the Camperdown Post Office where they forcibly stole an amount of R110 000, various items with an estimated value of R3 099 and two revolvers.

During the course of the robbery, the applicant and his accomplices fired at police officers who attempted to foil the armed robbery.

[3] One of the perpetrators was arrested at the scene of the crime, after having been wounded in the gun battle with the police. A cellular phone was recovered from the arrested person and a number of calls were directed to this cellular phone enquiring about the whereabouts of the arrested person. One of the police officers pretended to be the arrested person, and requested the suspected co-conspirators to come and rescue him. It is through this resourceful operation that the applicant was found and arrested on suspicion of having been involved in the commission of the offences.

[4] The applicant and one Mr Mandla Alfred Ndlovu were charged with one count of robbery with aggravating circumstances and four counts of attempted murder, before the High Court. The applicant pleaded not guilty and did not disclose the basis of his defence. The State adduced evidence implicating the applicant. One of the witnesses, Inspector Khumalo, knew the applicant as someone who lived in the Cato Ridge area. The inspector, who was present at the scene of the crime, identified the applicant as one of the individuals in the vehicles that were used in the robbery. The applicant elected not to testify in his defence.

[5] The High Court, per Patel J, made factual findings that the nature of the applicant's arrest in the ploy to rescue his wounded co-conspirator was sufficient to establish his involvement in the commission of the robbery and the gun battle with police. The Court noted that the coincidence of the applicant coming to the aid of the arrested accused was so remarkable that it could lead to no other inference other than that he was part of the gang that robbed the staff at the Post Office. Further, the Court was satisfied by the identification of the applicant by Inspector Khumalo.

[6] Furthermore, the Court held that the applicant's alibi, that he was at a bank in a different location making a deposit during the relevant period, emerged late in the

proceedings. The High Court rejected it as not reasonably possibly true and concluded that the applicant was at the scene of the crime.

[7] On 27 August 2006, the applicant was convicted and sentenced on one count of robbery with aggravating circumstances, resulting in a sentence of 20 years' imprisonment, and four counts of attempted murder, where a sentence of 10 years' imprisonment on each count was imposed. The Court ordered that the sentences for attempted murder run concurrently. Therefore, the effective sentence to be served was 30 years' imprisonment – being the ten years for four counts of attempted murder plus 20 years for robbery. Without affording the parties an opportunity to address it on the non-parole issue, the High Court recommended that the applicant should not be considered for parole until he had served a minimum of 20 years of his sentence.

[8] On 28 August 2006, the High Court granted the applicant leave to appeal against the convictions to the Full Court of the Pietermaritzburg High Court. On 20 July 2010, the Full Court dismissed the appeal and confirmed the convictions. The applicant thereafter applied for leave to appeal against his sentence at the High Court. On 9 September 2011, the application was dismissed.

[9] The applicant petitioned the Supreme Court of Appeal and applied for condonation and special leave to appeal.[1] On 18 July 2016, Maya DP and Mathopo JA granted condonation, but dismissed the application for special leave to appeal on the basis that there were no special circumstances meriting a further appeal to that Court.

[1] Ordinarily, the application for special leave would be against the convictions as the Full Court had dismissed his appeal against convictions. Since his application for leave to appeal against sentence had been dismissed by the High Court, the applicant should have petitioned the Supreme Court of Appeal for leave to appeal against the sentences. However, he launched one application for special leave which appears to be in respect of both the convictions and sentences.

[10] The applicant then filed an application for reconsideration by the President of the Supreme Court of Appeal. However, this application was not accepted by the Registrar as the Deputy President of the Supreme Court of Appeal had since been appointed as the President of the Court and, as she had been one of the Justices that had considered the initial application for leave to appeal, she could not reconsider her own decision.

[11] The applicant, who is unrepresented, filed an application for leave to appeal in this Court. His application was filed more than six years after the decision of the Supreme Court of Appeal. The applicant submits that the delay was due to the difficulty of securing legal assistance while incarcerated, as well as delays occasioned by the onset of the Covid-19 pandemic. He requests that the late filing be condoned.

[12] With respect to the merits, the applicant primarily attacks the factual findings made by the High Court. The applicant avers that the victims and witnesses did not identify him, his alibi evidence was not fully taken into consideration and that the investigating officer did not testify against him.

[13] On sentence, he is aggrieved by the inclusion of an order that he should serve a minimum sentence of 20 years' imprisonment before being considered for parole. He submits that the Court was unfair in making that order.

[14] The respondent does not oppose condonation. However, it opposes the relief sought by the applicant with respect to the convictions and supports the judgment of the High Court.

[15] The respondent concedes that the decision of the High Court when it declared that the applicant should not be eligible for parole until he has served 20 years cannot stand. The respondent submits that there were no exceptional circumstances to warrant such an order and the parties were not afforded an opportunity to address the

High Court on this point. The respondent relies on *Jimmale*,[2] and records that it does not oppose the application for the removal of the non-parole period fixed by the High Court.

Issues

[16] This Court has to determine the following issues:

(a) whether its jurisdiction is engaged and, if so;

(b) whether leave to appeal should be granted;

(c) whether the appeal should be upheld;

(d) whether the non-parole order or recommendation as part of the sentence by the High Court was appropriate; and

(e) what is an appropriate remedy.

Analysis

[17] This matter has been decided without a hearing. Before dealing with the issues and for the sake of completeness, it is apposite to address the High Court's phraseology of the non-parole order.

[18] After sentencing the applicant and Mr Ndlovu, Patel J stated that "it is further recommended that both the accused not be considered for parole until such time they have served twenty (20) years of their sentence". The issue is whether this is a non-parole order for purposes of section 276B of the Criminal Procedure Act[3] (CPA) or a mere recommendation that could be ignored by the Department of Correctional Services with no legal consequences.

[19] This issue was not ventilated, no submissions were made and this Court did not direct the parties to submit written submissions on it. Accordingly, without deciding the point, I will assume that it is an order for purposes of section 276B as it has been

[2] *S v Jimmale* [2016] ZACC 27; 2016 (2) SACR 691 (CC); 2016 (11) BCLR 1389 (CC) at para 24.

[3] 51 of 1977.

understood as such by at least two of the parties involved in its enforcement – the applicant and the respondent.

[20] Further, it is not necessary to comment on the competency of a High Court to make such a recommendation (if it intended for it to be a mere recommendation); the appropriateness of the recommendation; and whether the respondent or the Department of Correctional Services could and should have sought clarity from the High Court on the nature of the phrase. It suffices to say that it is trite that courts should strive to make clear orders that can be enforced without the need for affected parties to revert to the court for clarity.[4]

Condonation

[21] The application was filed more than six years after the dismissal of the application for special leave to appeal by the Supreme Court of Appeal. In essence, the applicant submits that the circumstances of his incarceration prevented him from bringing the application timeously. The explanation for the delay is tenuous. However, I am inclined to accept his explanation about the difficulties encountered due to the fact that he is serving a sentence, which can be a significant obstacle for timeous filing of an application to this Court. Furthermore, the respondent does not oppose condonation and the granting thereof will not prejudice the respondent. Therefore, condonation is granted.

Jurisdiction and leave to appeal

[22] The applicant complains about various factual findings made by the High Court. It is trite that this Court cannot entertain disputes of fact, as these do not engage our jurisdiction. Therefore, the application for leave to appeal against the convictions falls to be dismissed.

[4] *Ex parte Minister of Home Affairs* [2023] ZACC 34; 2024 (1) BCLR 70 (CC); 2024 (2) SA 58 (CC) at para 38 and *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal* [2013] ZACC 10; 2013 (4) SA 262 (CC); 2013 (6) BCLR 615 (CC) at para 162.

[23] The only issue that warrants this Court's consideration is the order concerning the imposition of the non-parole period. Section 276B of the CPA, titled "Fixing of non-parole-period", provides:

> "(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."[5]

[24] In *Jimmale*, the applicants were charged with murder and attempted murder.[6] They, together with four others, were armed with pangas and a large knife.[7] They stormed the deceased's store and viciously attacked the deceased by stabbing him

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[5] It is worth noting that section 276B of the CPA authorises the imposition of a non-parole period where an offender "is convicted of an offence", meaning one offence. It goes on to provide that 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 fix the non-parole-period "in respect of the effective period of imprisonment". In the present case, the applicant was convicted on five offences. In respect of four of the offences (attempted murders), the four sentences of ten years each were ordered to run concurrently, so a non-parole period in respect of those four offences would have been determined in respect of the effective sentence of 10 years. In respect of the sentence for armed robbery, 20 years, it was not ordered to run concurrently with any other sentence. Section 276B does not appear to contemplate a non-parole period in respect of cumulative effective result of two sentences which do not run concurrently. If so, it means that in the present case the High Court, if it had justification for imposing a non-parole period, needed to do so separately in respect of the effective ten concurrent years (for the four counts of attempted murder) and in respect of the separate sentence of twenty years (for armed robbery). Conceivably, in such a case, the court might find exceptional circumstances in respect of the one sentence but not the other. See also section 39(2)(b) of the Correctional Services Act 111 of 1998 (Correctional Services Act), which may support this view as it provides:

> "In the case of the imposition of more than one period of incarceration, the non-parole period or periods, fixed by the court must be served consecutively before a sentenced offender becomes eligible for parole."

Needless to say, I leave this open as it is not an issue before this Court in the present case.

[6] *Jimmale* above n 1 at para 5.

[7] Id.

multiple times.[8] One of the occupants was also attacked and lost consciousness.[9] The trial Court convicted the applicants of murder and acquitted them on the count of attempted murder.[10] They were sentenced to 25 years' imprisonment.[11] The trial Court ordered that the accused would be eligible for parole only after serving 20 years.[12]

[25] The applicants in *Jimmale* had sought to appeal against the non-parole order on the basis that they were not afforded an opportunity to make submissions and the trial Court had not established exceptional circumstances warranting the order.[13] This Court, when considering whether its jurisdiction was engaged and whether leave to appeal should be granted, held that the matter raised an important constitutional issue regarding the power of trial courts to grant non-parole orders and said:

> "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 are 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) of the Constitution, or to the benefit of the least severe of the prescribed punishments.[14]

[26] In the matter before us, the issue also concerns the power of trial courts to make a non-parole order and this is a constitutional issue. Therefore, this Court's jurisdiction is engaged.

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[8] Id.

[9] Id.

[10] Id at para 6.

[11] Id.

[12] Id.

[13] Id at paras 7 and 19.

[14] Id at para 10.

[27] Two requirements must be met before a trial court may invoke the fixing of non-parole period provisions. These are: the trial court must establish exceptional circumstances that warrant an order for a non-parole period,[15] and it must have invited the parties to make submissions in that regard before granting such an order.[16] Failure by the trial court to give effect to both these requirements is a material misdirection.[17]

[28] In *Mhlongo*,[18] the Full Court of the Pietermaritzburg High Court, upheld an appeal against a sentence of life imprisonment and substituted it with a sentence of 18 years' imprisonment and a non-parole period of 12 years in terms of section 276B of the CPA. The appellant attacked the non-parole order on the basis that, amongst others, he was not given notice that section 276B would be invoked and the parties were not afforded an opportunity to present arguments in this regard.[19] The Supreme Court of Appeal held:

> "The fixing of a non-parole period is part of a criminal trial and it must thus accord with the dictates of a 'fair trial' that an accused person be given notice of the court's intention to invoke section 276B of the CPA, and to be heard before a non-parole period is fixed. Failure to do so amounts to a misdirection by the sentencing court."[20]

[29] In the matter before us, the applicant was sentenced to an effective term of 30 years' imprisonment, and the period of ineligibility for parole was set at 20 years. This represents two-thirds of the sentence and is in accordance with section 276B(2) of the CPA. However, there is nothing on the record that indicates that the High Court afforded the parties an opportunity to be heard before invoking section 276B. In terms of section 73(6)(a) of the Correctional Services Act, the applicant would have

[15] Id at para 13.

[16] Id at para 24.

[17] Id.

[18] *S v Mhlongo* [2016] ZASCA 152; 2016 (2) SACR 611 (SCA).

[19] Id at para 2.

[20] Id at para 9.

been entitled to be considered for parole after serving half of the sentence, being 15 years.

[30] The respondent conceded that the High Court misdirected itself and its decision must be set aside as none of the parties had made any representations and there were no exceptional circumstances that warranted the imposition of a non-parole period.

[31] The High Court erred when it imposed a non-parole period in circumstances where the applicant and the respondent were not given notice, or an opportunity, to make representations. Having failed to grant the parties an opportunity to make representations, it is irrelevant whether the High Court had established the existence of exceptional circumstances warranting the non-parole order. It appears that the Department of Correctional Services acted in accordance with the non-parole order as the applicant has to date served 18 years' imprisonment and has not yet been considered for parole. But for the order, it is possible that he would have been considered for parole after serving half of his sentence.

[32] It follows that the appeal against the sentence must succeed to the extent that the High Court was not entitled to impose a non-parole period.

Conclusion

[33] Therefore, the application for leave to appeal against the convictions and sentences must be dismissed, save to the extent set out in the preceding paragraph.

Order

[34] In the result, the following order is made:

1. Leave to appeal against the imposition of the non-parole order issued by the High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg, is granted.
2. The appeal succeeds and the imposition of the non-parole period is set aside.

3. Save as aforesaid, leave to appeal against the convictions and sentences is refused.

For the Applicant:	Unrepresented
For the Respondent:	S Singh instructed by the Director of Public Prosecutions