

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

CASE NO: AR137/2024

In the matter between:

SIBUSISO MHLONIPHENI MHLONGO

Appellant

and

THE STATE

Respondent

ORDER

On appeal from: the Regional Court for the Regional Division of KwaZulu-Natal held at Esikhaweni, Magistrate T Ngesi presiding:

1. The appeal against sentence is upheld only to the extent that the non-parole period of 18 years' imprisonment imposed in terms of s 276B(1) of the Criminal Procedure Act 51 of 1977 is set aside.
 2. The sentence imposed on the count of rape of 25 years' imprisonment by the court *a quo* is confirmed.
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JUDGMENT

Henriques J (Harrison J concurring)

Introduction

[1] The appellant, who was legally represented at trial, was charged with one count of rape committed on more than one occasion in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters Act)¹ read with the provisions of s 51 and Part 1 of Schedule 2 of the Criminal Law Amendment Act.² The appellant is alleged to have raped the complainant B[...] K[...] M[...] on more than one occasion on 20 February 2011 at knife point.

[2] On 29 August 2012 the appellant at the commencement of the trial was informed of the prescribed minimum sentence of life imprisonment that would apply to any conviction arising from the rape count. He pleaded not guilty to the charge and elected to remain silent. On the same day he was convicted as charged and sentenced to undergo 25 years' imprisonment. The court *a quo* was of the view that it would deviate from the prescribed minimum sentence of life imprisonment and after imposing the sentence of 25 years imprisonment' then proceeded to invoke the provisions of s 276B of the Criminal Procedure Act³ (the CPA) and fix a non-parole period of 18 years.

[3] The imposition of the non-parole period was at the instance of the court *a quo* and from the transcript of proceedings the court prior to imposing such non-parole period did not indicate its intention to do so and secondly did not allow the legal representative of the appellant and the respondent to address it on the provisions of s 276B.

[4] Subsequently, on 11 March 2024, an application for leave to appeal coupled with a condonation application served before a new presiding officer Mr PES Madida, as Magistrate Ngesi had retired. After considering the application for condonation and the grounds of appeal advanced, on the same day Mr Madida granted the appellant leave to appeal against the sentence of 25 years' imprisonment imposed as well as the imposition of the non-parole period. It is this appeal which serves before us.

Issues on appeal

¹ Criminal Law (Sexual Offences and Related Matters Act) 32 of 2007.

² Criminal Law Amendment Act 105 of 1997.

³ Criminal Procedure Act 51 of 1977.

- [5] There are two issues for determination in this appeal on sentence namely:
- (a) whether the court *a quo* committed a misdirection in imposing the non-parole period of 18 years' imprisonment in terms of s 276B of the CPA; and
 - (b) whether the court committed a misdirection in imposing the sentence of 25 years' imprisonment.

Analysis

[6] Turning now to the first issue. On 1 October 2004 the Parole and Correctional Supervision Amendment Act⁴ introduced s 276B into the CPA as a measure to address "an undesirable incursion into the domain of another arm of the State" with a potential "to cause tension between the Judiciary and the executive".⁵

[7] Section 276B of the CPA reads as follows:

'Fixing of non-parole-period

(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] There were a number of differing decisions emanating from various courts as to how s 276B ought to be interpreted and implemented which drew the attention of the Supreme Court of Appeal (the SCA). In *S v Mthimkulu*⁶ the SCA remarked as follows as regards the circumstances under which a sentencing court may fix a non-parole period:⁷ 'In short, s 276B(2), properly construed, does not oblige a sentencing court to fix a non-parole period in respect of the effective period of imprisonment as a matter of routine whenever it has ordered two or more sentences imposed on a

⁴ Parole and Correctional Supervision Amendment Act 87 of 1997.

⁵ *S v Botha* 2006 (2) SACR 110 (SCA) para 25.

⁶ *S v Mthimkulu* 2013 (2) SACR 89 (SCA).

⁷ *Ibid* para 16.

convicted person to run concurrently. What s 2768(2) in fact does is to enjoin a sentencing court, once it has exercised its discretion under s 2768(1)(a) against the convicted person, to then fix the non-parole period in respect of the effective period of imprisonment, taking cognisance of the provisions of s 2768(1)(b).'

[9] It is trite that s 276B provides for a sentencing court to consider as part of the sentence imposed the fixing of a non-parole period. A non-parole period may not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter.

[10] In terms of s 2768(1) a court is required to fix a non-parole period in exceptional circumstances as was held by the SCA in *S v Stander*:⁸

'...An order in terms of s 2768 should therefore only be made in exceptional circumstances, when there are facts before the sentencing court that would continue, after sentence, to result in a negative outcome for any future decision about parole. *Mshumpa* offers a good example of such facts, namely undisputed evidence that the accused had very little chance of being rehabilitated.'

[11] The imposition of a non-parole period involves a two-fold test, which the court in *Stander*⁹ recorded as follows:

'...At least two questions arise when such an order is considered: first, whether to impose such an order, and second, what period to attach to the order. In respect of both considerations the parties are entitled to address the sentencing court. Failure to afford them the opportunity to do so constitutes a misdirection...' (Footnote omitted.)

[12] Consequently, before invoking the provisions of the section and making a determination to impose a non-parole period, a court is enjoined to invite argument from the respective parties' legal representatives as to whether or not exceptional circumstances exist and to address the court as to whether or not the provisions of the section ought to be invoked. The approach in *Stander* has been followed and approved of by the SCA in *Mthimkulu*.¹⁰

⁸ *S v Stander* 2012 (1) SACR 537 (SCA) para 16.

⁹ *Ibid* para 22.

¹⁰ *Mthimkulu* para 20.

[13] Mr *Chiliza*, who appears for the appellant and Mr *Mzulwini*, for the respondent are at idem that the court *a quo* when imposing the non-parole period committed a misdirection in failing to invite representations from the respective parties prior to imposing the non-parole period. Nor is it evident from the judgment of the court what its reasons for invoking s 276B were.

[14] We agree with the submissions of the appellant that before imposing an order in terms of s 276B, the court *a quo* was enjoined to invite and hear argument from the parties as to whether the provisions of the section should be invoked. In addition, it ought to have alerted the parties of its intention to invoke such provisions. This much is evident from the preamble to the Parole and Correctional Supervision Amendment Act which states that a court sentencing "**may** fix a non-parole period", indicative of a discretion vested in the court whether to impose such a sentence.

[15] It is clear that the court *a quo* when imposing the non-parole period committed a misdirection and this court is entitled to interfere with the sentence imposed on this basis.

[16] The Constitutional Court in *S v Jimmale and Another*¹¹ emphasised the principle of separation of powers and stated that courts should allow the parole board and officials of the Department of Correctional Services to make parole assessments and decisions relating to parole. It stated:¹²

'Precedent makes it clear that a s 2768 non-parole order should not be resorted to lightly. Courts should generally allow the parole board and the officials in the Department of Correctional Services, who are guided by the Correctional Services Act, and the attendant regulations, to make parole assessments and decisions. Courts should impose a non-parole period when circumstances specifically relevant to parole exist, in addition to any aggravating factors pertaining to the commission of the crime for which there is evidential basis...' (Footnote omitted.)

[17] Accordingly, the matter falls to be correctly determined by the parole authorities as to whether or when the appellant may be released from imprisonment.

¹¹ *S v Jimmale and Another* 2016 (2) SACR 691 (CC).

¹² *Ibid* para 20.

[18] Turning now to the second issue. Mr *Chiliza* submits that when imposing the sentence of 25 years' imprisonment, the court *a quo* did not take into account the appellant's personal circumstances nor the time spent in custody awaiting trial. In addition he submitted that this was not the worst rape and the complainant did not sustain any injuries.

[19] Mr *Mzulwini* on the other hand submits that there is no basis to interfere with the sentence imposed as the court *a quo* properly applied its mind to the relevant factors when imposing the sentence it did and further did not commit a misdirection.

[20] The appellant was convicted of the rape of the complainant in circumstances where she was raped on more than one occasion at knife point. The court *a quo* in its judgment considered the personal circumstances of the appellant when imposing sentence as well as the triad of *Zinn*. In sentencing the appellant, it was of the view that the appellant's personal circumstances when juxtaposed against the nature of the offence receded into the background. Apart from the seriousness of the offence the court considered as aggravating the fact that the appellant took advantage of the complainant when she was alone in her employer's house. He threatened her at knifepoint at the time of raping her. In addition, he also threatened her that if she made a report and returned to her home in Ingwavuma, that he would find her and harm her.

[21] The court *a quo* deviated from the prescribed minimum sentence of life imprisonment and imposed a lesser sentence. Although it is not evident from the record on what basis the court deviated from imposing the prescribed minimum sentence, the appellant does not complain of any misdirection in this regard nor could we find same on the record.

[22] We agree with the findings of the court *a quo* that the appellant's personal circumstances had to recede into the background given the *Zinn* triad. In addition, it is trite that a court of appeal does not readily interfere with a sentence imposed in the absence of a material misdirection and in circumstances where the sentence imposed does not induce a sense of shock and is not disturbingly or startlingly

inappropriate. The question of sentence falls pre-eminently within the domain of a sentencing court.¹³

[23] It was contended by Mr *Chiliza* that in light of the misdirection by the sentencing court this court as an appeal court "is obliged to interfere and impose a sentence afresh". We decline the invitation by the appellant to interfere with the sentence of 25 years' imprisonment for the reason that we can find no misdirection in the actual sentence of 25 years' imprisonment imposed. The court *a quo* deviated from imposing the prescribed minimum sentence of life imprisonment. We are satisfied that the sentence of 25 years' imprisonment when viewed against the triad of *Zinn* and the victim, properly takes account of the personal circumstances of the appellant and the time spent in custody.

[24] The misdirection of the court *a quo* is limited to the imposition of a non-parole period only.

Order

[25] In the result the following orders will issue:

1. The appeal against sentence is upheld only to the extent that the non-parole period of 18 years' imprisonment imposed in terms of s 2768(1) of the Criminal Procedure Act 51 of 1977 is set aside.
2. The sentence imposed on the count of rape of 25 years' imprisonment by the court *a quo* is confirmed.

Henriques J

Harrison J

CASE INFORMATION

Date of Hearing: 21 February 2025

Date of Judgment: 24 February 2025

¹³S v AM 2021 (2) SACR 437 (WCC) para 15

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