IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ***NO***

(2) OF INTEREST TO OTHER JUDGES: ***NO***

(3) REVISED: ***Yes***

Date: ***2nd August 2019*** Signature: _____

REVIEW CASE NO: 60/2018

COURT *A QUO* CASE NO: RC315/2014

DATE: 2nd August 2019

In the matter between:

SOUTTER: DILLEN DAVID Applicant

- and -

THE STATE Respondent

REVIEW JUDGMENT

Adams J (Unterhalter J concurring):

[1]. This matter was referred to this court on review by Randfontein Magistrate Van Niekerk, who presided over the criminal trial of the accused, Mr Soutter, who had been charged with and convicted of Housebreaking with Intent to steal. On the 13th of August 2014 Mr Soutter was convicted by the Randfontein District Court on the strength of his plea of guilty. On the same day the accused was sentenced by that Court to direct imprisonment for a period of six years. The important portion of the sentence, which concerned the Magistrate and which caused him to refer the matter to this court for review, relates to the condition imposed by the Magistrates Court that the accused was to serve the full term of his custodial sentence of six years, without the option of parole.

[2]. The accused subsequently attempted to appeal his sentence. In his application for leave to appeal, which he filed without the benefit of legal assistance or representation, he indicated his intention to appeal the sentence, which by then had increased to eight years by virtue of the fact that a suspended sentence of two years direct imprisonment imposed by the same court on the 5th of May 2014, had also kicked in. The basis for the application for leave to appeal the accused indicated to be his personal circumstances, notably the fact that at that stage he had two small children to support. His application for leave to appeal was refused by the Magistrates Court on the 26th of May 2015. That seems to have been the end of the attempts by Mr Soutter to appeal his sentence.

[3]. This matter again came to the fore during August 2018 presumably because the accused, who by then had served four years of his six year sentence, enquired from the Department of Correctional Services as to when he would be considered for release on parole. The department then noticed the non-parole period imposed by the Randfontein Court and queried with that court the lawfulness of this portion of the sentence. The Magistrates Court, in turn, referred this matter to this Court for a special review and setting aside of the

non-parole portion of the sentence. Implicit in the referral for a review by the Magistrates Court was an acknowledgment that the imposition of a non-parole period was an irregularity.

[4]. This review is before us in terms of the provisions of section 304 (4) of the Criminal Procedure Act, Act 51 of 1977 ('the CPA'), which provides as follows:

'(4) If in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section.'

[5]. This provision in the Act should be read in conjunction with s 22 the Superior Courts Act, Act 10 of 2013 ('the Superior Courts Act'), which provides thus:

'22 **Grounds for review of proceedings of Magistrates' Court**

(1) The grounds upon which the proceedings of any Magistrates' Court may be brought under review before a court of a Division are—

(a) absence of jurisdiction on the part of the court;

(b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;

(c) gross irregularity in the proceedings; and

(d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

(2) This section does not affect the provisions of any other law relating to the review of proceedings in Magistrates' Courts.'

[6]. Even when the requirements of s 22 are not met, the High Courts have frequently noted their inherent powers of review, based on common-law principles. These principles have been bolstered to some extent by s 173 of the Constitution, which reads as follows:

'The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

[7]. However, for purposes of this judgment the provisions of s 304 (4) of the CPA are important and find application. This section provides for a special or exceptional review process in the case of criminal matters concluded before the Magistrates Court. The section states that this court has the power to review the proceedings of the Randfontein Court if it is brought to its attention that the proceedings were not in accordance with justice.

[8]. This is clearly a case in which the proceedings were not in accordance with justice. The magistrate who presided over the proceedings says so in as many words. The irregularity in the proceedings relates to the imposition of the non-parole period of imprisonment, which, by all accounts, was unlawful.

[9]. The Magistrate imposed the non-parole period of imprisonment pursuant to the provisions of s 279B of the CPA, which provides as follows:

'276B 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.

[S 276B inserted by s 22 of Act 87 of 1997.]'

[10]. The legislature in section 279B of the Act did not provide for the forewarning by the sentencing court of the possibility of a non-parole period being imposed. However, in *S v Jimmale and Another*, 2016(2) SACR 691

(CC), the Constitutional Court held that a failure by a court to invite the parties to make submissions relating to a non-parole period, which he intends imposing, was considered to be a 'material misdirection'. The Constitutional Court also cited with approval the judgment in *S v Strydom*, 2015 ZASCA 29, at para 16, in which it was held that a non-parole period should be imposed only in exceptional circumstances, the determination of which had to entail an investigation into all factors that have relevance to the decision for the imposition of a non-custodial sentence. By all accounts, this process was not followed by the Randfontein Magistrates Court *in casu*. This is apparent from a reading of the court record.

[11]. This is a clear misdirection on the part of the trial Court. Even more telling is the fact that, if regard is had to the express provisions of s 279B (1) (b), which prescribes that the non-parole period should not exceed two thirds of the term of imprisonment imposed, the non-parole period fixed by the Regional Court was *per se* unlawful and invalid.

[12]. There was clearly a misdirection on the part of the sentencing court, which probably also amounts to an irregularity. This misdirection is two-fold: firstly, the regional court unlawfully fixed a non-parole period in excess of that permitted by the legislation; secondly, the trial court did not give the accused an opportunity to address the issue, which means that the court imposed a non-parole period of imprisonment without satisfying himself that exceptional circumstances exist which warrant the fixing of the non-parole period. All of this, in turn, leads me to conclude, ineluctably so, that the sentencing proceedings in the Magistrates Court relating to Mr Soutter 'were not in accordance with justice'. The sentence therefore stands to be reviewed in terms of the provisions of s 304 (4) of the CPA.

[13]. The trial court materially misdirected itself by imposing the six year non-parole period without first establishing the exceptional circumstances necessary for that order to be made. Furthermore, the court did not invite the parties to make submissions in that regard, as it should have done. That also constitutes a material misdirection.

[14]. The next question is whether the matter should be referred back to the trial court for it to comply with the provisions of s 276B. In this regard I am of the view that it is fair and equitable that the matter be finalised sooner rather than later. The accused has already served almost five years of the six year sentence. To refer the matter back to the trial court may result in further delays in circumstances in which the accused may very well already be entitled to be released on parole.

[15]. The Magistrate dealt with the factors relevant to sentence, notably the three previous convictions of the accused, which the Magistrate regarded as weighty in the imposition of an appropriate sentence. In my judgment, none of them constituted exceptional circumstances warranting the imposition of a non-parole period. In the circumstances of this case, I cannot conceive of exceptional circumstances suddenly popping up upon remittal. Thus remittal will be an exercise in futility. This matter has been outstanding for a long time. Interests of justice dictate that it be brought to finality now.

[16]. In conclusion, the non-parole order falls short of the more stringent tests in terms of the law. The non-parole order granted by the trial court is inappropriate and must be set aside.

Order

Accordingly, I make the following order:-

1. The non-parole order issued on the 13th of August 2014 by the Randfontein Magistrates Court in *S v Soutter*, under case number: RC315/2014, is reviewed and set aside.

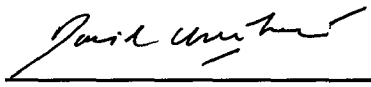
2. That part of the sentence of the Magistrate's Order of the 13th of August 2014 that Mr Soutter serves the full term of the sentence of six years direct imprisonment imposed upon him, without the option of parole, is hereby set aside, and in its stead is substituted the following:

   'The accused is sentenced in respect of the Housebreaking with Intent to steal conviction to a period of six years direct imprisonment.'

3. The sentence is antedated to the 13th August 2014.

L R ADAMS
Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

I agree,



D UNTERHALTER
Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

HEARD ON:	No oral hearing
JUDGMENT DATE:	2nd August 2019
FOR THE APPLICANT:	Not applicable
FOR THE RESPONDENT:	Not applicable
