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: ***7th August 2019*** Signature: _____

REVIEW CASE NO: 109/2018

COURT *A QUO* CASE NO: SH97/2008

DATE: 7th August 2019

In the matter between:

S: P Applicant

and

THE STATE Respondent

Coram: Fisher *et* Adams JJ

Heard: No oral hearing

Delivered: 07 August 2019

Summary: Criminal law – Non-parole order under s 276B of the Criminal Procedure Act not to be lightly imposed unless justified by circumstances relating to parole – parties should be forewarned of the intention to make such an order and be invited to present oral argument on the specific issue.

Criminal Procedure – non-parole order reviewable in terms of s 304(4) of the CPA.

REVIEW ORDER

On review from: The Springs Regional Court (Regional Magistrate J R Nkosi sitting as Court of first instance):

(1) In terms of section 304(4) of the Criminal Procedure Act, Act 51 of 1977, the non-parole order issued on the 22nd of July 2008 by the Springs Regional Court in *S v S*, under case number: SH76/2008, is reviewed and set aside.

(2) That part of the sentence of the Regional Court Order of the 22nd of July 2008 that Mr S serves fifteen years of the twenty years direct imprisonment imposed upon him before he becomes eligible to be placed on parole, is hereby set aside, and in its stead is substituted the following:

'The accused is sentenced as follows:

(1) Count 1 (Rape): twenty years direct imprisonment.

(2) Count 2 (Rape): twenty years direct imprisonment.

(3) The sentences shall run concurrently, resulting in an effective sentence of twenty years direct imprisonment.'

(3) This sentence is antedated to the 22nd of July 2008.

REVIEW JUDGMENT

Adams J (Fisher J concurring):

[1]. This matter was referred to this court on review by the Regional Court President (Gauteng Division) and relates to the non-parole portion of a

sentence imposed on the accused, Mr S, who had been convicted on two counts of rape of his twelve year old stepdaughter. Mr S was sentenced by the Springs Regional Court on the 22nd of July 2008 on each of the rape convictions to twenty years direct imprisonment, with the sentences to run concurrently. The important portion of the sentence, which concerned the Regional Court President ('the RCP') and which caused him to refer the matter to this court for review, relates to the condition imposed by the Presiding Regional Magistrate that fifteen years of the sentence imposed on the accused was ordered to be 'non-parolable'. I read this to mean that, according to the order of the Regional Court, the accused was not to be placed or released on parole or to be considered for parole before he had served fifteen years of his effective sentence of twenty years direct imprisonment.

[2]. The accused subsequently attempted to appeal his conviction and sentence. In his application for leave to appeal and the subsequent petition to this court the accused indicated his intention to appeal the sentence primarily on the basis that the effective sentence of twenty years direct imprisonment was shockingly inappropriate and that the sentencing court did not take into account his personal circumstances. His application for leave to appeal was refused by the Regional Court on the 19th of September 2008, as was his subsequent petition to this court (Msimeki *et* Ebersohn JJ), which was refused on the 3rd of April 2009. That seems to have been the end of the attempts by Mr S to appeal his sentence.

[3]. This matter again came to the fore during November 2018 presumably because the accused, who by then had served more than half of his effective 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 Springs Regional Court and queried with that court the lawfulness of this portion of the sentence. The Regional Court, in turn, referred this matter to this Court for a special review and setting aside of the non-parole portion of the sentence. The RCP expressed the view that 'the sentence imposed by the Regional Magistrate does not comply with section

276B of the Criminal Procedure Act 51 of 1977'. Therefore, implicit in the referral by the RCP for a review was an acknowledgment by him that the imposition of a non-parole period was a serious misdirection and 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 of 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 a lower Court if it is brought to the attention of this court that the proceedings were not in accordance with justice.

[8]. In light of the advices from the RCP the provisions of s 304(2)(a) of the CPA are rendered inapplicable. This subsection prescribes a procedure which requires this court, when it believes that the proceedings in the Regional Court were not in accordance with justice, to obtain from the judicial officer who presided at the trial a statement setting forth his reasons for convicting the accused and for the sentence imposed. In any event, as will be elaborated on later on in this judgment, I was of the opinion that the sentence imposed by the sentencing court was clearly not in accordance with justice and that the accused would be severely prejudiced if the record of the proceedings was not forthwith placed before this court, being the Full Bench of this Division.

[9]. This is clearly a case in which the proceedings were not in accordance with justice. The Regional Magistrate who presided over the proceedings misdirected himself in that he imposed the non-parole period of imprisonment, which, by all accounts, was unlawful. There are two difficulties with the imposition of the non-parole period by the Regional Court. Firstly, the non-parole period exceeds the maximum period allowed by the provisions of s 276B of the CPA, and secondly the Regional Court did not forewarn the accused that it was contemplating the imposition of a non-parole period. I deal with these two concerns in more detail later on in this judgment.

[10]. The Regional Magistrate imposed the non-parole period of imprisonment pursuant to the provisions of s 276B 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.]’

[11]. In terms of s 276B(1)(b) at worst Mr S could not be eligible for parole before serving 13.33 years’ imprisonment. That means the Regional Court simply did not have the power to fix a non-parole period of fifteen years in respect of the effective sentence of twenty years direct imprisonment.

[12]. That portion of the non-parole period that is not prescribed by s 276B(1)(b), namely the portion in excess of two thirds of twenty years’ imprisonment, constitutes an infringement of the accused’s right under section 12(1)(a) of the Constitution: the right not to be deprived of freedom arbitrarily or without just cause. It is so that it is not a foregone conclusion that a sentenced prisoner will be released on parole. But then a sentenced prisoner who would have been entitled to be released on parole may end up serving a term of imprisonment in excess of a term which he should serve purely because of an unlawful non-parole period. That will happen contrary to the express provisions of section 276B(1)(b) which outlaw a non-parole period in excess of two thirds of the effective term of imprisonment. That is antithetical to the rule of law, a founding value of our Constitution, and thus at odds with the provisions of section 12(1)(a) of the Constitution. In *S v Boesak,* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC), Langa DP held that ‘[a]s far as the substantive aspect of [the section 12(1)(a)] right is concerned, “just cause” must

be grounded upon and consonant with the values expressed in section 1 of the Constitution and gathered from the provisions of the Constitution as a whole'.

[13]. For these reasons, the non-parole period is not only in conflict with the statute but constitutionally invalid and falls to be set aside.

[14]. In *Jimmale & another v The State*, [2016] ZACC 27; 2016 (11) BCLR 1389 (CC); 2016 (2) SACR 691 (CC), the Constitutional Court after referring to various cases such as *Strydom v S*, [2015] ZASCA 29; *S v Stander*, [2011] ZASCA 211; 2012 (1) SACR 537 (SCA); and *S v Mthimkhulu*, [2013] ZASCA 53; 2013 (2) SACR 537 (SCA), concluded that these cases made it clear that a s 276B non-parole order should not be resorted to lightly. It held at para 20:

'Precedent makes it clear that a section 276B 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. Additionally, a trial Court should invite and hear oral argument on the specific question before the imposition of a non-parole period.'

[15]. It is abundantly clear from a reading of the trial court record that the trial court did not invite and hear oral argument on whether it was appropriate to impose a non-parole period. The SCA in *S v Mhlongo* 2016 (2) SACR 611 (SCA) para 9, emphasised that the fixing of a non-parole period was part of a criminal trial and that in accordance with the dictates of a fair trial, an accused person should be given notice of the court's intention to invoke s 276B and to be heard before a non-parole period is fixed. The SCA accordingly held that failure to comply with these procedural requirements constitutes a misdirection.

[16]. The trial court committed a serious misdirection by imposing the fifteen year non-parole period without first establishing whether there existed exceptional circumstances for that order to be made. Furthermore, it did not invite the parties to make submissions in that regard, as it should have done.

[17]. In the circumstances the imposition of the non-parole order falls to be set aside. All of this, in turn, leads me to conclude, ineluctably so, that the sentencing proceedings in the Regional Court relating to Mr S '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.

[18]. 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. I do not think it necessary to remit the matter to the Regional Court. That is because of what the Constitutional Court held in *Jimmale* about circumstances in which it is appropriate to impose a non-parole period. That court held that a sentence with a non-parole period should be imposed—

'only in exceptional circumstances, which can be established by investigation of salient facts, legal argument and sometimes further evidence upon which a decision for non-parole rests. 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.'

[19]. *Jimmale* further quoted with approval what the Supreme Court of Appeal said in *Stander (supra)* about section 276B:

"[I]ts enactment does not put the court in any better position to make decisions about parole than it was in prior to its enactment. Therefore the remarks by this court prior to section 276B still hold good. An order in terms of section 276B 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.'

[20]. 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 Springs Regional Court *in casu*. This is apparent from a reading of the court record.

[21]. The Regional Magistrate dealt at length with the factors relevant to sentence. Mr S had four previous convictions, which went back as far as 1979, 1980, 1985 and 1987 on charges of assault, theft, assault with intent to do grievous bodily harm and theft respectively. At the time he was sentenced, Mr S was 48 years old and unmarried, with four adult children. At the time of his arrest, he had been employed for a period of five months by a construction company. His highest level of education was standard five and he had been in custody since his arrest during or about February 2008. The Regional Magistrate found that there existed substantial and compelling circumstances which warranted a deviation from the prescribed minimum sentences of direct imprisonment for life applicable in respect of both the charges. The substantial and compelling circumstances the Regional Court found in the fact that, according to the court, it had not been proven that the complainant in the rape charges was injured in the assaults on her person, although the Magistrate did comment that this was not to say that the child had not been psychologically traumatised. We are not convinced that the approach adopted by the trial court was correct. However, this issue is not before us.

[22]. None of the factors considered relevant by the sentencing court constituted, in our judgment, exceptional circumstances warranting the imposition of a non-parole period. More importantly, in the circumstances of this case, we 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.

[23]. 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, not in accordance with the interest of justice and must be set aside.

Order

Accordingly, I make the following order:-

(1) In terms of section 304(4) of the Criminal Procedure Act, Act 51 of 1977, the non-parole order issued on the 22nd of July 2008 by the Springs Regional Court in *S v S*, under case number: SH76/2008, is reviewed and set aside.

(2) That part of the sentence of the Regional Court Order of the 22nd of July 2008 that Mr S serves fifteen years of the twenty years direct imprisonment imposed upon him before he becomes eligible to be placed on parole, is hereby set aside, and in its stead is substituted the following:

'The accused is sentenced as follows:

(1). Count 1 (Rape): twenty years direct imprisonment.

(2) Count 2 (Rape): twenty years direct imprisonment.

(3) The sentences shall run concurrently, resulting in an effective sentence of twenty years direct imprisonment.'

(3) The sentence is antedated to the 22nd July 2008.

L R ADAMS

Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

I agree,

D FISHER

Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

HEARD ON:	No oral hearing – section 304(2)(a) of the CPA
JUDGMENT DATE:	7th August 2019
FOR THE APPLICANT:	Not applicable
FOR THE RESPONDENT:	Not applicable