REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: A102/2019

DPP REF NUMBER: 10/2/5/1-2019/87

Date of Appeal: 14 October 2019

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

17/10/19 .....

In the matter between:

Sigubu Morris Sibusiso — Appellant

and

The State — Respondent

Judgment

Van der Linde, J:

[1] The appellant was found guilty by the Germiston Regional Court on his plea of guilty on five counts. These were two counts of robbery with aggravating circumstances as read with section 51 of the Criminal Law Amendment Act 105 of 1997; and three counts of rape, read with the same section. There were thus three counts of rape and two counts of robbery with aggravating circumstances.

[2] The sentences imposed by the court below were 10 years imprisonment in respect of each rape count, 15 years imprisonment in respect of the first robbery count, and five years imprisonment in respect of the second robbery count. The court directed that the two sentences in respect of the two rape counts four and five of 10 years each, were to run concurrently with the sentences imposed in respect of the first three counts. The effect was that the appellant was sentenced to an effective period of 30 years imprisonment.

[3] The magistrate however additionally fixed a non-parole period of imprisonment of 20 years, acting in terms of section 276 B of the Criminal Procedure Act 51 of 1977. A magistrate granted leave to appeal against the sentence and in doing so limited the appeal to the order that was made in terms of that section. The magistrate who granted leave to appeal was not the magistrate who presided over the trial; that magistrate has since retired.

[4] Section 276B(1) provides:

"(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."

[5] In arguing the appeal before us counsel for the appellant drew the attention of the court to the following dictum in **Jimmale and Another v S** (CCT223/15) [2016] ZACC 27; 2016 (11) BCLR 1389 (CC); 2016 (2) SACR 691 (CC) (30 August 2016):

"[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."

See also **Britz v S** (889/2015) [2016] ZASCA 86 (31 May 2016) at [6].

[6] The Constitutional Court relied on amongst others **Strydom v S** (20215/2014) [2015] ZASCA 29 (23 March 2015) in which it was held:

"[16] The third issue is whether a magistrate should allow or invite argument prior to the imposition of a non-parole period. The imposition of such an order has a drastic impact on sentence. In this matter invoking s 276B came as a surprise to both the appellant and the respondent. It was not suggested by the prosecution and, as indicated above, there was no warning that it was being contemplated. Section 276B entails an order which is a determination in the present for the future behavior of the person to be affected thereby. In other words, it is an order that a person does not deserve being released on parole in future. (See: S v Bull; S v Chavulla & others). Such an order should only be made in exceptional circumstances which can only be established by investigation and a consideration of salient facts, legal argument and perhaps further evidence upon which such a decision rests."

[7] Locally, in this division, these judgments have been stressed. In **Soutter v S** (60/2018) [2019] ZAGPJHC 255 (2 August 2019) Adams J said:

"[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.

"[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."

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[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."

[8] In this case the court *a quo* also did not afford the appellant an opportunity to address it on the imposition of the section 276B order. In fairness to the learned magistrate who presided over the trial, the judgements referred to above were given after he gave the order. It is clear however that we should set aside the order, given that the magistrate was not able properly to inform himself of the relevant facts, having not heard the appellant on the effect of the intended imposition.

[9] The question that arises is whether we should refer the matter back to the court *a quo* afresh to consider whether it would be appropriate to impose such a non-parole period. **Jimmale** set aside the imposition of the non-parole period but did not refer it back to the court *a quo* to reconsider the matter.

[10]I agree with Ms Simpson for the appellant that it would not serve the interests of justice to refer the matter back to the court *a quo*. Compare **Tutton v The State** (294/18)[2019]ZASCA 03 (20 February 2019) at [11]; and the unreported judgment on review in this division by Adams, J in **Sibeko, P v The State**, Review case no 109/2018, delivered on 7 August 2019, both of which cases followed the same approach.

[11]The test remains, as I see it, not simply whether the sentence ultimately imposed was shockingly inappropriate, but whether the appellant will have had a fair trial in terms of section 35 (3) of the Constitution. I do not believe that referring back will serve that objective.

One reason is that so much time has already elapsed, more than 10 years; another reason – flowing from the fact just mentioned – is that the magistrate has retired. A further factor which I bear in mind is that the appellant was but 22 years old when these offences, serious as they are, were committed.

[12]Finally, I bear in mind that the Constitutional Court has held that a sentence with a non-parole period should be imposed only in exceptional circumstances; in **Makhokha v S** (CCT170/18) [2019] ZACC 19; 2019 (7) BCLR 787 (CC); 2019 (2) SACR 198 (CC) (3 May 2019) the court again underscored what it had held in **Jimmale** at [13] about the imposition of such an order:

"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."

See too **Makhokha** at [11] to [13].

[13]In these circumstances I do not accept that counsel for the state is correct in submitting that we should uphold the sentence of the court *a quo* in this regard and I accordingly make the following order:

(a) The appeal succeeds.

(b) The order by the court *a quo* imposing a non-parole period in terms of section 276B of Act 51 of 1977 is set aside.

WHG Van der Linde, J

Judge of the High Court

South Gauteng Local Division

I agree

LM Grenfell, AJ

Acting Judge of the High Court

South Gauteng Local Division

Date of Apeal : 14 October 2019

Date judgment: 25 October 2019

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