

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR 629/14

In the matter between:

SIFUNDO MTSHALI

APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

Delivered on: Tuesday, 11 August 2015

OLSEN J (SISHI J and SEEGOBIN J concurring)

[1] The appellant in this matter was granted leave to appeal against the fixing of a non-parole period in respect of sentences imposed on him amounting to an effective term of imprisonment of 30 years following his conviction on 2 counts of murder and 2 counts of robbery with aggravating circumstances. The trial Judge found that there were substantial and compelling circumstances justifying sentences of imprisonment less than the minimum ones set out in the Criminal Law Amendment Act 105 of 1997.

[2] In *S v Stander* 2012 (1) SACR 537 the Supreme Court of Appeal endorsed the proposition that a non-parole period should only be ordered in exceptional circumstances, and that these circumstances should be relevant to the question of parole, and not only looked for in aggravating factors of the crime committed. There must be a proper evidential basis for a finding that such circumstances exist.

[3] In this matter there was a brief address by counsel for the appellant and the State at the instance of the trial Judge after the sentences had been imposed. The trial Judge raised the question of the imposition of a non-parole period. The only subject canvassed earlier was the severity of the crimes of which the appellant had been convicted. There was no consideration of factors going to parole (i.e. what the future might hold) and no attempt to identify or debate exceptional circumstances. Accordingly, and putting aside the apparent conflict between the finding that substantial and compelling circumstances justified sentences below the minimum, and the finding that exceptional circumstances justified a non-parole period, the decision to impose such a restriction on the grant of parole to the appellant was not made in accordance with law.

[4] The State concedes this and supports the appellant's contention that the order fixing a non-parole period should be set aside.

[5] The following order is made.

(1) The Appeal against the imposition of a non-parole period of 20 years ordered on 27 September 2012 is upheld.

(2) The order that the appellant should not be eligible for parole until such time as he has served at least 20 years of the terms of imprisonment imposed by the trial Court on 27 September 2012 is set aside.

OLSEN J

SISHI J

SEEOBIN J