IN THE KWAZULU-NATAL HIGH COURT

PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NUMBER: AR 644/2017

DATE: 31 AUGUST 2018

NHLAKANIPHO CYRIL YALO

versus

THE STATE

BEFORE

THE HONOURABLE JUDGE MBATHA

and

THEHONOURABLE JUDGE CHILI

FOR THE APPELLANT ADVOCATE (MS) Z ANAST ASIOU

FOR THE RESPONDENT: ADVOCATE (MS) G SHANGE

TRANSCRIBER: KERRY DICKINSON

DATE TRANSCRIBED: 19 SEPTEMBER 2018

JUDGMENT (31 AUGUST 2018)

MBATHA J

1. The appellant was convicted by the regional court, Port Shepstone, on 18 September 2012 for one count of housebreaking with intent to rape and rape in contravention of Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (the Sexual Offences Act).

2. He was subsequently sentenced to fifteen years' imprisonment. It was further ordered that in terms of Section 276B of the Criminal Procedure Act that the appellant not be considered for a fixed term of 10. ten years imprisonment.

3. The crisp issue on this appeal is whether the trial court was correct in imposing a non-parole period in terms of Section 276B of the Criminal Procedure Act without inviting the parties to make submissions before doing so. Furthermore, if there were exceptional circumstances which existed and justified the imposition of the non-parole period.

4. The complainant in the court *a quo* related that on the day in question while she was asleep she awoke to the presence of the appellant. This took her by surprise as she had secured the premises, as well as the room where she was sleeping that night. She was subsequently raped by the appellant who was known to her.

5. The State also led the evidence of Sabelo Sikobi who testified that at about 02:59 he noticed a missed call from the complainant. When Sabelo phoned

her back he learnt from the complainant that she had been raped. Sabelo then immediately left for the Margate Police Station to report that the complainant had been raped. Doctor Kabanga, who examined the complainant, testified for the defence and confirmed that rape could not be ruled out as there were bruises on the lower part of the vagina of the complainant.

6. The DNA analysis report handed in by consent also corroborated the State's case in that the appellant's DNA matched the DNA in the articles worn by the complainant.

7. The appellant did not testify in his defence, although his defence was that sexual intercourse between himself and the complainant was consensual.

8. The court a *quo* found the appellant guilty as charged.

9. In sentencing the appellant the court took into consideration that he was twenty years old, that he was a first offender and· also considered the seriousness of the offence. Though not specifically stated it is clear from the court a *quo's* judgment and sentence that it deviated from imposing the prescribed life sentence and sentenced the appellant to fifteen years' imprisonment. The court a *quo* then went on to fix a non-parole period of ten years in terms of Section 276B of the Criminal Procedure Act.

10. The basis of the appeal is that the trial court misdirected itself when it made an order in terms of Section 276B of the Criminal Procedure Act by fixing the non-parole period of ten years in respect of his sentence without inviting the parties to make submissions before doing so. It further contended that no exceptional circumstances existed, therefore the court's exercise of its discretion to fix a non-parole period was not justified.

Section 276B reads as follows -

"(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 twenty-five 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 sha11>subject to subsebti6h (1)(b), fix the non parole-period in respect of the effective period of imprisonment."

11. Section 2768 of the Criminal Procedure Act came into effect in October 2004. Prior to this, the issue of parole fell squarely within the purview of the Correctional Services Act 111 of 1998 and its regulations. Before the enactment of this provision courts had no control over the sentence served by a convicted person.

As PONNAN AJA, as he then was, said in *S v Botha* –

"The function of a sentencing court is to determine the term of imprisonment that a person, who has been convicted of an offence, should serve. A court has no control over the minimum period of the sentence thatought to be served by such a person. A recommendation of the kind encountered here is an undesirable incursion into the domain of another arm of State, which is bound to cause tension between the judiciary and the executive. Courts are not entitled to prescribe to the executive branch of government how long a convicted person should be detained, thereby usurping the function of the executive. (See *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) (1997) 2 All SA 185 at 521 (f)-(i))'

12. The Supreme Court of Appeal has confirmed that Section 276B was enacted to give sentencing courts power to control the minimum or actual period to be served by a convicted person. In the same vein it has highlighted the challenge presented by the non-parole order, stating that such an order is, as stated in *S v Pakane and Others* 2008 (1) SACR 518 (SCA) 47, -

"A present determination that the person would not deserve being released on parole in the future."

13. It is for this reason that a non-parole order should only be made in exceptional circumstances which can be established through the investigation of the salient facts, legal submissions and sometimes further evidence, as stated by DAMBUZA J in *S v Pauls.* This assertion by DAMBUZA J was affirmed by the Constitutional Court in *Jimmale v S* where it was held that -

"In determining a non-parole period following punishment, a court in effect makes a prediction on invaded the sanctuary of the complainant."

14. Accordingly, I make the following order -

- THE APPEAL IS UPHELD TO THE LIMITED EXTENT SET OUTBELOW:

(a) THE ORDER OF THE TRIAL COURT FIXING A NON- PAROLE PERIOD OF TEN (10) YEARS IS SET ASIDE;

(b) SAVE AS AFORESAID, THE APPEAL AGAINST SENTENCE IS DISMISSED.

- THE APPELLANT IS THEREFORE SENTENCED TO AN EFFECTIVE TERM OF FIFTEEN (15) YEARS' IMPRISONMENT ANTEDATED TO 18 SEPTEMBER 2012.

CHILI J I agree.

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MBATHA J It is so ordered.