THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no**:** 20182/2014
Not Reportable

In the matter between:

THABANG SIDWELL ZONO **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Zono v The State* (20182/2014) [2014] ZASCA 188 (27 November 2014)

Coram: Cachalia, Leach and Theron JJA

Heard: 26 November 2014

Delivered 27 November 2014

Summary: Sentence – imprisonment – term of – non-parole period – order fixing a non-parole period in respect of offences committed before the promulgation of s 276B of the Criminal Procedure Act 51 of 1977 is improper.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Raulinga J (Kollapen J and Vorster AJ concurring) (sitting as court of appeal):

1 The appeal is upheld.

2 The order of the full court fixing a non-parole period is set aside.

JUDGMENT

Theron JA (Cachalia and Leach JJA concurring):

[1] The appellant was convicted in the High Court (Local Division for the Western Circuit), Klerksdorp, on 12 June 1996, on charges of murder, attempted murder, robbery with aggravating circumstances and unlawful possession of a firearm and ammunition. The incident giving rise to these charges occurred on 24 July 1995. He was sentenced to an effective period of imprisonment of 60 years. The trial court (Grobbelaar J) further recommended that the appellant not be considered for release on parole, before having served a period of 40 years' imprisonment.

[2] The appellant appealed to the full court of the North Gauteng High Court against his convictions and sentences. The appeal was heard on 6 June 2012. The appellant's appeal against his convictions was dismissed but the appeal against sentence was upheld. On appeal the sentence was reduced to an effective period of imprisonment of 45 years and the high court (Raulinga J with Kollapen J and Vorster AJ concurring) 'ordered that the [appellant] . . . serve a non-parole period of 25 years'. The appellant was granted special leave by this court to appeal against that part of the order of the full court pertaining to the

non-parole period of 25 years. At first blush the cumulative effect of the individual sentences imposed by the full court appear to be unusually harsh, but as they were not an issue in this appeal it is unnecessary to deal further with this.

[3] The fixing of a non-parole period constitutes an increase in the penalty imposed on a convicted person, and thus cannot operate retrospectively. The penalty to which the convicted person is subject is that applicable at the time of the commission of the relevant crime, and not the date of either conviction or sentence.[1] This was confirmed by this court in *Mchunu v the State*[2] where Willis JA held:

'As has been emphasised in *R v Mazibuko*, it is an ancient, well-established principle of our common law that the liability for a penalty arises when the crime is committed and not when a person is either convicted or sentenced. An increase in penalty (which the fixing of a non-parole period is) will, therefore, ordinarily not operate retrospectively in circumstances where that additional burden did not apply at the time when the offence was committed . . . The crimes in question were committed before the coming into operation of s 276B of the Act. There are no special circumstances, recognised in our law, which would permit a departure from the general principle that sets its face against the retrospective operation of a penalty. The order of the court below fixing a period of time before the appellants may be released on parole was therefore incorrectly made.'

[4] As at July 1995, when these offences were committed, there was no legislative provision for a court to stipulate a non-parole period. Rather, parole was within the discretion of the executive (in the form of the Correctional Supervision and Parole Board). This was in terms of ss 22A and 65 of the Correctional Services Act 8 of 1959. Sections 22A[3] provides that a prisoner may earn credits amounting to no more than half of the period of imprisonment

[1] E du Toit, FJ de Jager, A Paizes, A St Quintin Skeen & S van der Merwe *Du Toit: Commentary on the Criminal Procedure Act* (2014) at 28-10x.
[2] *Mchunu v State* (825/2012) ZASCA 126 (25 September 2013) para 5.
[3] Section 22A, in relevant part, provides that '[a] prisoner may earn credits, to be awarded by an institutional committee, by observing the rules which apply in the prison and by actively taking part in the programmes which are aimed at his treatment, training and rehabilitation'.

which he or she has served while s 65(4)(*a*)[4] stipulates that a prisoner serving a determinate sentence shall not be considered for parole until he or she has served half of the term of imprisonment and that the date for consideration of parole can be brought forward by the number of credits earned. In terms of this legislation, the appellant was entitled to be considered for parole after having served half of his effective sentence, subject to any 'credits' earned pursuant to s 22A.

[5] Criticism by this court to the imposition of non-parole periods[5] appear to have caused the legislature to enact s 276B of the Criminal Procedure Act 51 of 1977, which deals with the power of a court to determine a non-parole period.[6] Section 276B was introduced by way of the Parole and Correctional Supervision Amendment Act 87 of 1997, operative as at 1 October 2004. In this matter, the offences were committed on 24 July 1995, with judgment on conviction and sentence handed down by the trial court on 12 and 13 June 1996 respectively. As the offences under consideration were committed prior to the coming into operation of s 276B that provision is accordingly not of application in this matter.

[6] In my view the effect of the recent judgment of this court in *Mchunu* above, renders any attempt to stipulate a non-parole period in a matter involving a crime committed prior to the coming into operation of s 276B, impermissible.

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[4] Section 54(4)(*a*) reads: 'A prisoner serving a determinate sentence or any of the sentences contemplated in subparagraphs (ii) and (iii) of paragraph (*b*) shall not be considered for placement on parole until he has served half of his term of imprisonment: Provided that the date on which consideration may be given to whether a prisoner may be placed on parole may be brought forward by the number of credits earned by the prisoner'.

[5] *S v Mhlakaza & another* 1997 (1) SACR 515 (SCA) at 521c-d; *S v Botha* 2006 (2) SACR 110 (SCA) paras 25-26.

[6] See *S v Mthimkulu* 2013 (2) SACR 89 (SCA) para 12 where it is stated that s 276B was introduced 'after this court had expressed disapproval about sentencing courts fixing non-parole periods'. Section 276B, in relevant part, provides: '(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'.

In the absence of legislative authority to do so, it appears that courts that sought to impose such a non-parole period, as both the sentencing court and the full court in this matter did, misdirected themselves. In the circumstances this court is obliged to set aside that imposition of a non-parole period.[7]

[7] For these reasons the following order is made:

1 The appeal is upheld.

2 The order of the full court fixing a non-parole period is set aside.

L V Theron
Judge of Appeal

[7] See *Mchunu* above para 7.

APPEARANCES

For Appellant:	VZ Nel Instructed by: Justice Centre, Pretoria Justice Centre, Bloemfontein
For Respondent:	JJ Kotze Instructed by: Director of Public Prosecutions, Pretoria Director of Public Prosecutions, Bloemfontein