

SOUTH AFRICA / JUDGMENT

Ndlovu v S (A121/23) [2023] ZAGPPHC 1804 (16 October 2023)

[2023] ZAGPPHC 1804

COURT

North Gauteng High Court, Pretoria

BEFORE

M P Motha, Selby Baqwa, J Yende

CASE / FILE NUMBER

A121/23

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IN THE HIGH COURT OF
SOUTH AFRICA
(GAUTENG DIVISION,
PRETORIA)

CASE NO: A121/23

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHERS JUDGES: YES/NO

(3)

REVISED

16/10/2023

In the matter between:

JOSEPH LUCKY
NDLOVU
APPLICANT
and
THE STATE
RESPONDENT

JUDGMENT

CORAM:

Introduction

[1] This is an appeal against an imposition of a non-parole-period in terms of section 276B of the Criminal Procedure Act 51 of 1977. My sister Justice Victor imposed a non-parole-period which expires after 38 years.

Facts in brief

[2] The Appellant, Joseph Lucky Ndlovu, admitted that on the 9th of December 2005 at or near Engine One Stop garage along N1 South, Lenasia, he shot and killed Mr. Mohammed Iqbal Majam and raped Miss N. Furthermore, he admitted that he robbed the deceased of several valuable items including a Nissan bakkie. Finally, he admitted that he was armed with a firearm and ammunition without the required license.

[3] On 30 July 2007, the Appellant was arraigned in the Circuit Local Division for the Vereeniging Local District, Gauteng Division of the High Court. He pleaded guilty to the following five counts:

3.1 Count 1 of murder read with section 51(1) of the Criminal Law Amendment Act 105 of 1997.

3.2 Count 2 of rape read with section 51

(1) of the Criminal Law Amendment Act of 105 of 1997.

3.3 Count 3 of robbery with aggravating circumstances as defined in section 1 of Act 51 of 1997.

3.4 Count 4 of unlawful possession of a firearm.

3.5 Count 5 of unlawful possession of ammunition.

[4] He was convicted on all five counts and sentenced as follows:

4.1 On count 1, he was sentenced to life imprisonment.

4.2 On count 2, he was sentenced to 20 years imprisonment.

4.3 On count 3, he was sentenced to life imprisonment.

4.4 On count 4, he was sentenced to 4 years imprisonment.

4.5 On count 5, he was sentenced to 4 years imprisonment.

[5] In respect of counts 2, 4 and 5, the court ordered that they were to run concurrently with the life sentences imposed on counts 1 and 3.

- [6] The parole board was requested not to release the Appellant until a period of 38 years had elapsed.

The law

- [7] Section 276B, which fixes a non-parole-period, 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 2/3 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.”
- [8] This section implicates the comity of the separation of powers. The court is required to venture into the field of the executive cautiously. At the sentencing stage it is not prudent to predict the future of the convicted person by setting a non-parole- period, unless exceptional circumstances exist which justify the imposition of such a period. To properly arrive at the conclusion that there are or no exceptional circumstances, a court, of necessity, must engage the parties. This involves granting the parties audience to make submissions for or against. In this case that did not happen.
- [9] In terms of subsection 1(b) a maximum of 25 years should not be exceeded when fixing a non-parole period. In casu, the court fixed 38 years. Hence, in the judgment for leave to appeal the court said;

“Section 276 of the Criminal Law Act was amended by the parole and correctional supervision amendment Act 87 of 1997 by inserting

section 276B. This section provides:

.....

This amendment was not brought to the courts attention at the time of imposing the sentence.

The imposition of a sentence of non-parole exceeding 25 years is clearly wrong.”

In the result the applicant is given leave to appeal to the full Court to correct the sentence of non-parole.”[1]

- [10] Dealing with section 276B, the court in the matter of S v Stander[2] held:

“[8] Prior to s 276B of the Act a decision about parole remained exclusively within the domain of the Department of Correctional Services as an executive function and courts have persistently recognised the need for that to be so. Two principles underlie that perspective. First, the separation of powers; and, second, the fact that courts obtain their sentencing jurisdiction from statute and until s 276B no statute has empowered courts to make any orders regarding the period of imprisonment to be served before release on parole is considered.

[9] In *S v Mhlakaza and Another* 1997

(1) SACR 515 (SCA) ([1997] 2 All SA 185) Harms JA dealt with the topic as follows:

'The function of a sentencing court is to determine the maximum term of imprisonment a convicted person may serve. The court has no control over the minimum or actual period served or to be served. . . .

The lack of control of courts over the minimum sentence to be served can lead to tension between the Judiciary and the Executive because the Executive action may be interpreted as an infringement of the independence of the Judiciary (cf *Blom-Cooper & Morris The Penalty for Murder: A Myth Exploded* [1996] Crim LR at 707, 716). There are also other tensions, such as between sentencing objectives and public resources.[3]

[11] Again, in the matter of *S v Stander* the court held that:

“Snyders JA (Cloete JA and Petse AJA concurring) considered by him. It came as a surprise to the parties. At least two questions arise when such an order is considered: first, whether to impose such an order and, second, what period to attach to the order. In respect of both considerations the parties are entitled to address the sentencing court. Failure to afford them the opportunity to do so constitutes a misdirection. On this aspect too it could be found that there is a reasonable prospect of success on appeal.”

[12] The constitutional court in the matter of *Makhokha v S*[4] held:

“[11] Sentencing sometimes raises separation of powers concerns. In Mhlakaza Harms JA considered this in a context that did not involve a non-parole period, but concerned a disturbingly high cumulative effect of several sentences. He cautioned against the possible temptation of courts to impose sentences that seek to counteract the ameliorative effects of decisions by the Executive on the actual length of terms to be served in prison. He said:

“The function of a sentencing court is to determine the maximum term of imprisonment a convicted person may serve. The court has no control over the minimum or actual period served or to be served.

. . .

The lack of control of courts over the minimum sentence to be served can lead to tension between the Judiciary and the Executive because the Executive action may be interpreted as an infringement of the independence of the Judiciary. There are also other tensions, such as between sentencing objectives and public resources. This question relating to the Judiciary's true function in this regard is probably as old as civilisation. Our country is not unique. Nevertheless,

sentencing jurisdiction is statutory and courts are bound to limit themselves to performing their duties within the scope of that jurisdiction. Apart from the fact that courts are not entitled to prescribe to the executive branch of government as to how long convicted persons should be detained . . . courts should also refrain from attempts, overtly or covertly, to usurp the functions of the Executive by imposing sentences that would otherwise have been inappropriate.”[9] (References omitted.).”

[13] Having listened to the submissions by the Appellant and State, we agree that the non-parole-period should be removed.

Order

1. The appeal is upheld.

M. P. MOTHA

JUDGE OF THE HIGH COURT, PRETORIA

I Concur

SELBY BAQWA

JUDGE OF THE HIGH COURT, PRETORIA

J. YENDE

ACTING JUDGE OF THE HIGH COURT, PRETORIA

Date of hearing: 16 October 2023

Date of judgement: 16 October 2023

APPEARANCES:

Counsel for Appellant: Adv S. Motseke Instructed by: Legal-Aid Counsel for Respondent: Adv Molatudi Instructed by: Office of the Director of Public Prosecutions

[1] S v Ndlovu at paras 6-8 of the leave to appeal judgment.

[2] 2012

(1) SACR 537 (SCA).

[3] Supra paras 8-9

[4] 2019

(2) SACR 198 (CC).

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