

SOUTH AFRICA / JUDGMENT

S M v S (676/18) [2018] ZASCA 162 (28 November 2018)

[2018] ZASCA 162**COURT**

Supreme Court of Appeal

BEFORE

Cachalia, Wallis, Makgoka, Carelse, Matojane

CASE / FILE NUMBER

676/18

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 676/18

In the matter between:

S M APPELLANT

and

THE STATE RESPONDENT

Neutral Citation: S M v The State (676/18) [2018] ZASCA 162 (28 November 2018).

Coram: Cachalia, Wallis and Makgoka JJA, and Carelse and Matojane AJJA

Heard: 8 November 2018

Delivered: 28 November 2018

Summary: Sentence – order fixing non parole period in respect of offences committed before s 276B of the Criminal Procedure Act of 1977 came into operation is a misdirection.

ORDER

On appeal from: KwaZulu-Natal Provincial Division, Pietermaritzburg (Koen, Pillay and Ploos van Amstel JJJ concurring sitting as court of appeal);

1 The appeal against the order fixing a non-parole period is upheld.

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

Matojane AJA: (Cachalia, Wallis and Makgoka JJA and Carelse AJA concurring)

[1] This is an appeal against sentence only. The appellant was convicted in the KwaZulu-Natal Division of the High Court, Pietermaritzburg

(the high court) on charges of murder and robbery with aggravating circumstances. On 25 July 2003, he was sentenced to undergo a term of life imprisonment on the murder conviction and fifteen years on the robbery with aggravating circumstances conviction.

[2] The incident that led to his conviction was that of 20 February 2002, the appellant and his co-perpetrator robbed and killed an occupant of a farmhouse while he was asleep and stole money, firearms and other valuables. The appellant was a minor when he committed these offences.

[3] The appellant appealed to the full court of the high court against his sentence. On 14 February 2013 the full court upheld the appeal against sentence and made the following order.

[4] In respect of the conviction for murder, the appellant was sentenced to twenty-five (25) years' imprisonment. In respect of the conviction of robbery with aggravating circumstances, the appellant was sentenced to fifteen (15) years' imprisonment. Both sentences were antedated to run from 25 July 2003. The court directed that the ten years of the 15-year sentence imposed in respect of the robbery with aggravating circumstances shall run concurrently with the sentence of 25 years imposed in respect of the murder conviction, thus giving an effective term of imprisonment of 30 years.

[5] The court fixed a non-parole period of 20 years in terms of section 276B (2) of the Criminal Procedure Act 51 of 1977 (the Act).

[6] The appellant after that sought leave from this court to appeal against the imposition of the non-parole period. On 27 January 2016, this Court granted him special leave to appeal against that part of the order of the Full Court about the non-parole period.

[7] Section 276B (1) of the Act was inserted by s 22[1] of the Parole and Correctional Supervision Amendment Act 87 of 1997. It provides for a Court to stipulate a non-parole period when sentencing a person convicted of an offence. The Act came into operation on 1 October 2004.

[8] The crime was committed and appellant was sentenced before the coming into operation of s 276B of the Act. As a general rule statutes are presumed as having no retrospective operation unless such a construction is expressly or by necessary implication required by the language of the particular Act. The clear language of the section makes it apparent that the legislature never intended s 276B to operate retrospectively. See *S v Mpetha*[2], *R v Silas*[3]

- [9] It appears that the attention of the full court was not drawn to the fact that the crime was committed before the coming into operation of s 276(B)(2) of the Act. Accordingly, the order setting a non-parole period falls to be set aside.
- [10] At the time of his sentence, parole was within the discretion of the executive in terms of the Correctional Services Act 8 of 1959. In terms of s 22A[4] of the said Act, a prisoner may earn credits by observing the rules which applies in the prison amounting to no more than half of the period of imprisonment that he or she has served. The appellant has already served almost fifteen years of his custodial sentence and is entitled to be considered for parole as he has served half of his effective sentence, subject to any 'credits' earned under s 22A of the said Act.
- [11] Having regard to the period of imprisonment the appellant has already served and the fact that he would have been considered for parole by now, he would suffer prejudice if the matter is remitted to the court a quo to determine the appropriateness of the imposition of the non-parole order.
- [12] For these reasons the following order is made:

Acting Judge of Appeal

E Matojane

APPEARANCES

For the Appellant : P Marimuthu

Instructed by: Justice Centre, Pietermaritzburg

c/o Justice Centre, Bloemfontein

For the Respondent: S Singh

Instructed by: Director of Public Prosecutions Pietermaritzburg.

c/o Director of Public Prosecutions, Bloemfontein

[1] '276B Fixing of non-parole-period.

'(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 10 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.'

‘(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 10 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.’

[2] S v Mpetha 1985 (3) 702 at 717 -718.

[3] R v Silas 1959 (4) SA 305 at 311 E-G.

[4]The section provided:‘(1) 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.

Provided that– (a) A prisoner may not earn credits amounting to more than half of the period of imprisonment which he has served (2) The number of days and months earned by a prisoner as credits may be taken into account in determining the date on which a parole board may consider the placement of such a prisoner on parole.’

[4]The section provided:‘(1) 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.

Provided that–

- (a) A prisoner may not earn credits amounting to more than half of the period of imprisonment which he has served
- (2) The number of days and months earned by a prisoner as credits may be taken into account in determining the date on which a parole board may consider the placement of such a prisoner on parole.’

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