THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 294/18

In the matter between:

JOHN TUTTON **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Tutton v The State* (294/18) [2019] ZASCA 03 (20 February 2019)

Coram: Tshiqi, Saldulker, Zondi and Schippers JJA and Dlodlo AJA

Heard: No oral hearing in terms of **s 19(a)** of the **Superior Courts Act 10 of 2013**.

Delivered: 20 February 2019

Summary: Non-parole order under s 276B of the Criminal Procedure Act not to be lightly imposed unless justified by circumstances relating to parole - parties should be forewarned of the intention to make such an order and be invited to present oral argument on the specific issue.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Koen J, with Tshabalala JP and Govinsamy AJ concurring sitting as court of appeal):

1.1 The appeal is upheld to the extent reflected herein below.

1.2 The imposition of a non-parole period by the court a quo in terms of s 276B of the Criminal Procedure Act 51 of 1977 is set aside.

JUDGMENT

Zondi JA (Tshiqi, Saldulker and Schippers JJA and Dlodlo AJA concurring)

[1] This appeal concerns the propriety of the imposition of a non-parole period of 15 years, made in terms of s 276B(2) of the Criminal Procedure Act 51 of 1977 (the Act), by the Full Court of the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the full court). In terms of s 276B a court has the power, when sentencing the accused, to direct that the accused shall not qualify for parole for a certain period. The appeal is with the special leave of this court. The respondent does not oppose the appeal.

[2] The appellant, Mr John Tutton together with his erstwhile co-accused was, on 21 December 2007, convicted in the Camperdown Regional Court of one count of dealing in 8.1 tons of dagga from 16 June 2006 to August 2006, in contravention of s 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 and one count of dealing in 150 kg of cocaine from September 2006 to October 2006, in contravention of the same Act.

[3] The appellant was sentenced to 20 years' imprisonment on each count; 10 years of which were ordered to run concurrently, resulting in an effective period of imprisonment of 30 years. The trial court in terms of s 276B of the Act further ordered

that the appellant serve at least 15 years before he could be considered for release on parole. An application for leave to appeal against the convictions and sentences was dismissed by the trial court. The appellant was granted leave to appeal against sentences on petitioning the Judge President in terms of s 309C of the Act.

[4] The full court (Koen J, with Tshabalala JP and Govinsamy AJ concurring) upheld the appeal against sentences imposed to the extent that it directed that 15 years of the sentence imposed in respect of a count of dealing in cocaine should run concurrently with that in respect of dealing in dagga, resulting in an effective term of 25 years. In addition, the full court fixed a non-parole period of 15 years in terms of s 276B(2) of the Act.

[5] The appeal is directed at the fixing of non-parole period. The appellant contends that prior to the setting of the non-parole period the trial court and subsequently the full court did not notify him of the intention to do so and that he was on both occasions not afforded the opportunity to address the courts concerned before s 276B(2) was invoked. The appellant asked this court to set aside the order fixing the non-parole period.

[6] Before s 276 of the Act was amended, the decision to grant parole remained the exclusive field of the Department of Correctional Services, and courts recognised the need for that because of the principle of separation of powers and the fact that courts obtain their sentencing jurisdiction from statute. (See *Jimmale & another v The State*[1])

[7] Section 276 of the Act was amended by the Parole and Correctional Supervision Amendment Act 87 of 1997 by inserting s 276B. This section provides:

‘(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.’

[1] *Jimmale & another v The State* [2016] ZACC 27; 2016 (11) BCLR 1389 (CC); 2016 (2) SACR 691 (CC).

[8] In *Jimmale* the Constitutional Court after referring to various cases such as *Strydom v S* [2015] ZASCA 29; *S v Stander* [2011] ZASCA 211; 2012 (1) SACR 537 (SCA); and *S v Mthimkhulu* [2013] ZASCA 53; 2013 (2) SACR 537 (SCA), concluded that these cases made it clear that a s 276B non-parole order should not be resorted to lightly. It held at para 20:

'Precedent makes it clear that a section 276B non-parole order should not be resorted to lightly. Courts should generally allow the parole board and the officials in the Department of Correctional Services, who are guided by the Correctional Services Act, and the attendant regulations, to make parole assessments and decisions. Courts should impose a non-parole period when circumstances specifically relevant to parole exist, in addition to any aggravating factors pertaining to the commission of the crime for which there is evidential basis. Additionally, a trial Court should invite and hear oral argument on the specific question before the imposition of a non-parole period.'

[9] It is not in dispute in this case that the trial court did not invite and hear oral argument on whether it was appropriate to impose a non-parole period. This court in *S v Mhlongo* 2016 (2) SACR 611 (SCA) para 9, emphasised that the fixing of a non-parole period was part of a criminal trial and that in accordance with the dictates of a fair trial, an accused person should be given notice of the court's intention to invoke s 276B and to be heard before a non-parole period is fixed. This court held that failure to comply with these procedural requirements constitutes a misdirection.

[10] The trial court committed a serious misdirection by imposing the 15 year non-parole period without first establishing whether there existed exceptional circumstances for that order to be made. Furthermore, it did not invite the parties to make submissions in that regard, as it should have done. The misdirection of the trial court was perpetuated by the full court when it imposed the 15 year non-parole period. In the circumstances the imposition of the non-parole order falls to be set aside.

[11] The next question is whether the matter should be referred back to the trial court for it to comply with the provisions of s 276B. In this regard I agree with the appellant's contention that it is fair and equitable the matter be finalised. A referral of the matter to the trial court would result in further costs to the appellant. Besides the costs

consideration, the appellant has already served almost 11 years of the 25 year sentence. To refer the matter back to the trial court may result in further delays. In any event, the appeal is not opposed by the State.

[12] In the result the following order is made:

1.1 The appeal is upheld to the extent reflected herein below.

1.2 The imposition of a non-parole period by the court a quo in terms of s 276B of the Criminal Procedure Act 51 of 1977 is set aside.

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D H Zondi

Judge of Appeal

APPEARANCES:

Counsel for Appellant:	S Matthews
Instructed by:	Mason Incorporated
	C/O Webbers Inc, Bloemfontein
Counsel for Respondent:	A Truter
Instructed by:	Director of Public Prosecutions, Pietermaritzburg
	Director of Public Prosecutions, Bloemfontein