THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case no: 295/2021

In the matter between:

BRANNON JONATHAN PETERSEN **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral Citation: *Petersen v The State* (Case no 295/2021) [2023] ZASCA 26 (16 March 2023)

Coram: NICHOLLS, MBATHA and GOOSEN JJA and NHLANGULELA and SIWENDU AJJA

Heard: 21 February 2023

Delivered: 16 March 2023

Summary: Criminal law and procedure ─ indeterminate sentence ─ section 286A of Criminal Procedure Act 51 of 1977 ─ procedure for reconsideration of sentence in terms of s 286B.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Hlophe JP, sitting as court of first instance):

1 The appeal is upheld, with no order as to costs.

2 The high court order dated 29 August 2019 is set aside and the matter is remitted to the high court for a reconsideration of the indeterminate sentence imposed upon Brannon Jonathan Petersen, in terms of s 286B of the Criminal Procedure Act, 51 of 1977 (the CPA).

3 The reconsideration should be heard by a different judge no later than 15 May 2023.

4 A parole board report as contemplated by s 286B(4) shall be filed on or before 1 May 2023.

5 Any expert reports, to be relied upon by the parties shall be filed on or before 1 May 2023.

6 This judgment and order are to be brought to the attention of the Registrar of the Western Cape Division of the High Court.

JUDGMENT

Nicholls JA and Siwendu AJA (Mbatha and Goosen JJA and Nhlangulela AJA concurring)

[1] This is an appeal against sentence, specifically a reconsideration of an indeterminate sentence imposed in terms of s 286B of the Criminal Procedure Act 51 of 1977 (the Act).

[2] The appellant was convicted by the Western Cape Division of the High Court (the trial court) on 11 August 1998, for crimes committed when he was 18 and 19 years old, respectively. He was declared a dangerous criminal in terms of s 286A of the Act and given an indeterminate period of imprisonment in terms of s 286B(1)*(a)*. The time period after which the appellant was to be brought back to court for reconsideration of his indeterminate sentence, in terms of s 286B(1)*(b)*, was set at 17 years.

[3] The appellant, at his trial, pleaded guilty to the rape of an eight year old girl (count one), and the rape and murder of a nine year old girl (count two and three respectively). Since his plea explanation on the first count of rape was an admission of attempted rape, a plea of not guilty was entered by the trial judge and the trial proceeded on that basis. The first count concerned the rape of a family member – his sister's granddaughter. The appellant coerced and strangled her, albeit not to death. His version that he was interrupted before penetration took place, was found to be reasonably possibly true. The trial court therefore convicted him of attempted rape. On counts two and three, the rape and murder of the nine year old child, the appellant was convicted as charged. The child was found to have been violently and brutally raped. After raping her, the appellant had cut the child's throat with a piece of glass. She had, however, already died as result of asphyxiation due to strangulation by the appellant. The second and third counts of rape and murder were committed while he was out on bail for the first offence.

[4] The trial court took the view that s 286A, which allows for an indeterminate sentence of imprisonment of a person who is found to be a dangerous criminal, was relevant. It therefore called for specialist psychiatric evaluations of the appellant. Three expert reports, two of

specialist psychiatrists and one of a clinical psychologist, were placed before court, as required by s 286A of the Act. The reports indicated that there was a significant risk of recidivism. Having considered the reports and the appellant's anti-social behaviour, the trial court found that the appellant was a dangerous criminal who posed a risk to the community. It took into consideration the gruesome murder and the fact that the appellant related his story coldly with an alarming lack of remorse. The court imposed an indeterminate sentence in terms of s 286B(1) and determined that this sentence not be reconsidered in terms of s 286B(4) until he had served 17 years of imprisonment.

[5] The period of 17 years expired in 2015. When the appellant was brought before court, the reconsideration proceedings were conducted before another judge, Hlophe JP, as provided by s 286B(2). The proceedings commenced on 7 December 2015. The record of those proceedings is not before this Court. All that we have is the order granted by Hlophe JP, which provided that imprisonment for an indeterminate period be confirmed and that the appellant be brought before the court on or before 1 December 2018. The order also provided for the appellant to be afforded an opportunity to consult with a psychiatrist and have intensive psychotherapy with a psychologist.

[6] On 6 December 2018, just before the expiry of the three year period, the appellant was duly brought to court for the second reconsideration of his sentence. Again, Hlophe JP presided over the matter. On this occasion, after various postponements, on 29 August 2019 Hlophe JP ordered further detention, in terms of s 286B of the Act, for a period of five years. Leave to appeal against this further period of imprisonment was sought by the appellant, and refused by the court a quo. On 4 February 2021, this Court

granted leave to appeal against the sentence imposed on 29 August 2019. It is this order that is the subject of this appeal.

[7] Indeterminate sentences, as provided by ss 286A and 286B, have seldom been imposed since the sections were promulgated on 1 November 1993.[1] They were enacted to protect the public against extremely dangerous criminals.[2] The Booysen Commission was established to inquire into the 'Continued Inclusion of Psychopathy as a Certifiable Mental Illness and the Handling of Psychopathic and other Violent Offenders'. It made recommendations regarding the handling and release of dangerous and violent offenders, including sex offenders. As a result of the Commission's recommendations, ss 286A and 286B were enacted.[3]

[8] These sections allow a court to impose an indeterminate sentence which, as the phrase suggests, means a sentence of indeterminate duration. In effect, the person so sentenced will be incarcerated for as long as the jurisdictional basis for the sentence exists. The jurisdictional basis is a finding, made by the sentencing court, that the person is a 'dangerous criminal'.

[9] In terms of s 286A, a 'dangerous criminal' is one who 'represents a danger to the physical or mental well-being of other persons' and from whom 'the community should be protected'.[4] In terms of s 286A(2), if it appears to the court or it is alleged that the accused is a danger to the

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[1] Criminal Matters Amendment Act 116 of 1993.
[2] A Haman, C Albertus and W Nortjie 'Deciphering Dangerous: A critical analysis of section 286A and B of the Criminal Procedure Act 51 of 1977' (2019) 22 *PER* at 3-4. The paper pinpoints the case of *H van der Merwe* in 1989, who raped and brutally murdered two female hitchhikers while out on bail for sex crimes against nine other women, as being the catalyst for the search for alternative sentencing options.
[3] *S v Bull & Another*; *S v Chavula* 2001 (2) SACR 681; 2002 (1) SA 535 (SCA) para 5.
[4] Section 286A(1) of the Act.

physical or mental well-being of others, the court is required to conduct an enquiry to determine whether the accused is indeed dangerous. For this purpose, a report by a psychiatrist appointed by the court as well as a psychiatrist appointed by the accused, if he so wishes, are placed before court. The court may also commit the accused to a psychiatric hospital for observation for certain specified periods.

[10] Section 286B deals with the sentence to be imposed once an accused has been declared a dangerous criminal in terms of s 286A. It provides that a court may sentence the accused for an indefinite period subject to certain safeguards:

'(1) The court which declares a person a dangerous criminal shall-

(a) sentence such person to undergo imprisonment for an indefinite period; and

(b) direct that such person be brought before the court on the expiration of a period determined by it, which shall not exceed the jurisdiction of the court.

(2) A person sentenced under subsection (1) to undergo imprisonment for an indefinite period shall, notwithstanding the provisions of subsection (1)*(b)* but subject to the provisions of subsection (3), within seven days after the expiration of the period contemplated in subsection (1)*(b)* be brought before the court which sentenced him in order to enable such court to reconsider the said sentence: Provided that in the absence of the judicial officer who sentenced the person any other judicial officer of that court may, after consideration of the evidence recorded and in the presence of the person, make such order as the judicial officer who is absent could lawfully have made in the proceedings in question if he had not been absent.

(3) . . .

(4) *(a)* Whenever a court reconsiders a sentence in terms of this section, it shall have the same powers as it would have had if it were considering sentence after conviction of a person and the procedure adopted at such proceedings shall apply *mutatis mutandis* during such reconsideration: Provided that the court shall make no finding before it has considered a report of a parole board as contemplated in section 5C of the Correctional services Act, 1959 (Act 8 of 1959).

(b) After a court has considered a sentence in terms of this section, it may-

(i) confirm the sentence of imprisonment for an indefinite period, in which case the court shall direct that such person be brought before the court on the expiration of a further period determined by it, which shall not exceed the jurisdiction of the court;

(ii) convert the sentence to correctional supervision on conditions it deems fit; or

(iii) release the person unconditionally or on such conditions as it deems fit.

(5) A court which has converted a sentence of a person under subsection (4)*(b)*(ii) may, whether differently constituted or not –

(a) at any time, if it is found from a motivated recommendation by the Commissioner that that person is not fit to be subject to correctional supervision; or

(b) after such person has been brought before the court in terms of section 84B of the Correctional Services Act, 1959 (Act 8 of 1959) reconsider that sentence and–

(i) confirm the sentence of imprisonment for an indefinite period, in which case the court shall direct that such person be brought before the court on the expiration of a further period determined by it, which shall not exceed the jurisdiction of the court;

(ii) release the person unconditionally or on such conditions as it deems fit; or

(iii) where the person is brought before the court in terms of paragraph (b), again place the person under correctional supervision on the conditions it deems fit and for a period which shall not exceed the unexpired portion of the period of correctional supervision as converted in terms of subsection (4)(b)(ii).

(6) For the purposes of subsection (4)*(b)*(i) or (5)(i), it shall not be regarded as exceeding the jurisdiction of the regional court if the further period contemplated in those subsections and the period contemplated in subsection (1)*(b)*, together exceed such court's jurisdiction.

(7) At the expiration of the further period contemplated in subsection (4)*(b)*(i) or (5)(i), the provisions of subsections (2) up to and including (6), as well as of this subsection, shall *mutatis mutandis* apply.'

[11] In *S v Bull & Another; S v Chavulla*[5] this Court dealt with the constitutionality of ss 286A and B and whether an indeterminate sentence

[5] *S v Bull & Another*; *S v Chavula* 2001 (2) SACR 681; 2002 (1) SA 535 (SCA).

amounted to cruel, inhuman and degrading punishment.[6] The Court found the fact that the section is not limited to offences of any particular severity, means that it does not violate the constitutional principle against gross disproportionality. The Court also held that preventative detention, as provided by the section, is lawful as it serves a legitimate purpose – the protection of society. Further, because the trial court is afforded a discretion with regard to the initial minimum period of imprisonment, the section is saved from unconstitutionality.[7] The stringent requirements laid down by the statute before a declaration that an offender presents 'a danger to the physical or mental well-being of other persons', are safeguards that a declaration of dangerousness will not be lightly made.[8]

[12] The nature of the offence and the conduct of the accused must justify a finding of continued dangerousness which 'requires a pattern of persistent or repetitively aggressive and violent behaviour'. The court is assisted by expert evidence in this determination.[9] In the same manner that the possibility of parole saves a life sentence from being cruel, inhuman and degrading punishment, so too does the requirement that there is a reconsideration within a specified period, with the possibility that the indefinite sentence may, in the future, be revisited. Similarly, in Canada it was found that the review of the sentence at the expiration of three years from the date of its imposition, and every two years thereafter, saved the legislation from being successfully challenged.[10]

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[6] Section 12(1)*(e)* of the Constitution provides that '. . . [e]veryone has the right to freedom and security of person which includes the right . . . not to be treated or punished in a cruel, inhuman or degrading way.'
[7] Ibid fn 5 paras 6 and 16.
[8] Ibid para 19.
[9] Ibid para 19.
[10] *Lyons v The Queen* 44 DLR (4th) 193 at 221. Referred to in *S v Bull & Another*; *S v Chavula* 2001 (2) SACR 681; 2002 (1) SA 535 (SCA) para 6.

[13] It is precisely because s 286B provides for an opportunity for a proper reconsideration of the sentence that indeterminate sentences pass constitutional muster. Section 286B(4)*(a)* provides that the court reconsidering the sentence has the same powers as if it were considering the sentence *de novo*. The same procedure is applicable and the court reconsiders the prisoner's continued dangerousness in the light of new evidence using the same powers as the sentencing court.[11] The important difference is the requirement of a report of a Parole Board as contemplated in s 5C of the Correctional Services Act 8 of 1959 (the Correctional Services Act). Integral to an accused's constitutional fair-trial rights,[12] is that the procedural requirements set out in s 286B must be strictly observed.[13] A court's failure to obtain and consider the report of a parole board, as required in terms of s 286B(4)*(a)*, is a fatal irregularity in the proceedings.[14]

[14] The court has three options, in terms of s 286B(4), when a prisoner is brought before it for reconsideration. It can confirm the sentence for an indeterminate period and fix a future date within which the prisoner must again be brought to court for reconsideration of sentence. It can convert the sentence into one of correctional supervision or release the prisoner unconditionally, or upon conditions it deems fit. These options are all subject to the proviso that the court shall make no finding before it has considered a report of a Parole Board.

[15] Section 286B(2) makes provision for a prisoner to be brought to court within seven days of the date set for reconsideration. The seven day

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[11] *S v Bull & Another*; *S v Chavula* 2001 (2) SACR 681; 2002 (1) SA 535 (SCA) para 27.
[12] Section 35(3) of the Constitution.
[13] *Moetjie v The State and Another* 2009 (1) SACR 95 (T) para 8.
[14] Ibid para 10.

requirement is intended as another safeguard to ameliorate any prejudice arising from the imposition of an indeterminate sentence. In this matter, the seven day period was complied with, but thereafter the matter was postponed on no less than eight occasions, to the prejudice of the appellant.

[16] The appellant was brought before court on 2 November 2018, one month shy of the obligatory three year period. On that date, the court did not reconsider the sentence but postponed the hearing until 16 November 2018 to enable the appellant to apply for legal aid. It further ordered that reports be obtained from the psychiatrist and the clinical psychologist who treated the appellant which had to be filed with the Registrar no later than 15 November 2018. In addition, the Case Management Committee and the Parole Board were to file their report in terms of s 5C of the Correctional Services Act, on or before 30 November 2018.

[17] On 16 November 2018, the court did not hear the matter but ordered that the psychiatrist who evaluated the appellant in December 2015, Emeritius Professor Tuviah Zabow, consult and evaluate the appellant and compile a report in terms of s 286B of the Act to be filed with the court by no later than 7 December 2017 (sic).

[18] When the appellant appeared on 10 December 2018, the matter did not proceed and the court ordered that he be evaluated by the Department of Correctional Services for suitability as a candidate for correctional supervision, in terms of s 276(1)*(i)* of the Act. The report from this evaluation was to be delivered and filed on or before 31 January 2018.

[19] On 4 February 2019, the correctional supervision report was unavailable and the matter was postponed until 25 March 2019.

[20] On 25 March 2019, the matter was postponed to 3 June 2019 to afford the appellant an opportunity to start and complete the Restorative Justice programme, and to consider the report by the Department of Correctional Services.

[21] On 3 June 2019, by agreement, the matter was yet again postponed to 1 August 2019 to ensure all the reports were at hand.

[22] On 1 August 2019, the court postponed the case to 29 August 2019 in order to obtain the Victim Dialogue and Restorative Justice Report which had to be filed by no later than 27 August 2019. It further ordered that a random multi-screening drug test be conducted.

[23] Finally on 29 August 2019, 22 years after the initial sentence, and almost 10 months after the appellant had first appeared in court for a second reconsideration of his sentence, the hearing commenced. Mr Lin Adriaan Andries Hanekom (Mr Hanekom), a clinical psychologist, and Colonel Anneke Myburgh (Ms Myburgh), a social work manager, both employed by the Department of Correctional Services, testified for the State.

[24] Mr Hanekom's evidence was that the appellant was not a suitable candidate for correctional supervision at that point, because he was unable to give up his daily use of cannabis. Traces of heroine had also been found in his urine a month prior. A further concern was that the appellant was a high-ranking member of the notorious 28 gang, a gang operating both inside and outside prison. The fear was that he would inevitably be drawn into the gang once he was out of prison as he had stated that if he wanted to leave the gang on his release, he would be killed. Because he had not

acquired an accredited skill in prison, it would be difficult for the appellant to find work once released.

[25] Ms Myburgh expressed similar concerns about the appellant's gang involvement. She stated that he was very influential and had told her that it was in his power to either create chaos in the prison or ensure there was peace and quiet. She also mentioned that the appellant's sister had withdrawn her offer to accommodate the appellant after his release from prison. This was due to safety concerns for her nine year old deaf mute granddaughter who lived on the property. The community was also opposed to the appellant living there.

[26] After hearing the evidence for the State, the court ordered that the appellant to be brought to court on or before 29 August 2024 for a third reconsideration of his sentence.[15] By that date the appellant would have served a sentence of 27 years.

[27] Counsel for the appellant argued that he did not get a fair hearing. She stated that she was not given an opportunity to place the Parole Board report before court, even though she had same in her possession at the time. Nor was she given an opportunity to call the appellant to testify, or any other witnesses on his behalf.

[15]To add further confusion it appears that two different orders were granted on 29 August 2019. In the first, a draft order apparently signed by Hlophe JP, after declaring that the appellant was a dangerous criminal, it was ordered that at that hearing on 29 August 2019 (sic), further reports should be submitted: the report of the Parole Board; a report from the clinical psychologist that proceeded with the treatment from Mr Hanekom; and a correctional supervision report. In addition, the appellant had to undergo random drug testing and drug counselling, as well as be afforded an opportunity to attend a training programme with an accredited skill. A second order also dated 29 August 2019, issued by the Registrar, accords with the order granted by Hlophe JP in open court. It merely states that 'further detention is ordered in terms of s 286 of CPA for 5 (five) years. That the accused is to appear before Hlophe JP on 29 August 2024'.

[28] A perusal of the court record reflects the following exchanges. At the end of Ms Myburgh's evidence, the court excused her and addressed counsel: 'You may argue. I'll give you two minutes to argue'. At the end of argument, Hlophe JP delivered an *ex tempore* judgment as follows:

'You shall be detained further in terms of section 286 of the Criminal Procedure Act for a further period of five years. You will come back to me. I will still be sitting in this seat, I will not have retired by then. You will come back to me on 29 August 2024. It will be a Thursday exactly as it is today.

Sir, I am warning you. Your future is in your hands. You have heard the evidence of Mr Hanekom, as well as Ms Myburgh. You know exactly what is required of you when you go back to prison. If you do not do that, I will have no hesitation in keeping you in prison again.

Your future is in your hands. Cooperate with the prison authorities. You know exactly what is expected of you. In short, keep away from drugs. Keep away from gangs in prison, it is not going to help you, and be honest with the prison authorities. If you do all those things, you are honest with yourself.

Most importantly, sir, upgrade your skills. So that when you come out of prison, you are ready to integrate into society, you have skill, you can do something else. You can be a plumber. You can be a welder. You can be a bricklayer. There are various skills that are offered in prison. I am sure you can even be an electrician if those skills are offered in prison. The future is in your hands. If you come back here, you have not done that, we are going back to square one. And it is no excuse that everybody is doing it in prison. I quoted Mandela earlier on, when he was in prison. He came out of prison and led this country to democracy and we are all proud of him. So the future is in your hands.

The court will adjourn. I am not going to engage you any further. That's the order of the court. The court will adjourn. See you on 29 August 2024.'

[29] There can be no doubt that immediately after the State witnesses had testified, counsel was called upon to argue without calling for evidence from the appellant. It was of course open to counsel for the appellant to insist on these rights, but throughout the hearing she had been admonished

and berated for wasting the court's time and made to believe that any attempts to place a contrary view to that of the State was a futile exercise.

[30] In addition, there are several glaring irregularities with the procedure followed by the high court. In the first place, the court was obliged to consider whether the appellant was still 'a dangerous criminal' posing a danger to society and to give reasons for its declaration. It failed to do so. Secondly, no report of a Parole Board was placed before court. The high court was therefore in no position to determine whether the indeterminate sentence should be converted into a determinate one or whether the appellant ought to be released. On these grounds alone the order falls to be set aside.

[31] Apart from the procedural irregularities, the court a quo approached the matter as though there was an onus on the appellant to prove that he qualified for parole. Instead, it was the court's duty to enquire into whether the appellant remained a dangerous criminal. The matter was conducted in an ad hoc and haphazard manner with no thought to the requirements of the Act, procedural fairness and interests of the appellant. In the light of these findings, the order made by the high court cannot stand. What remains to be considered is what order should be made by this Court.

[32] Counsel for the appellant argued vigorously for this Court to intervene to 'balance the injustice' suffered by the appellant and to summarily release him. That option, however, is not available to this Court having regard to the peremptory language employed in the statute. In the first instance, a Parole Board report is not before Court as required by s 286B(4). Such report has to deal with, *inter alia*, the conduct of the prisoner, adaptation, training, mental state and the possibility of relapsing

into crime. Where the reconsideration court decides not to confirm the sentence, it must have a basis for making the decision and its election to convert the sentence into one of correctional supervision sentence or to release the person unconditionally or on any conditions it deems fit. Correctional supervision can only be implemented if supervised.

[33] The ability of this Court to substitute the sentence of the high court with its own sentence is constrained by the absence of that report. Furthermore, the primary task of a reconsideration court is to consider whether an indeterminate sentence is still appropriate. That requires consideration of whether the prisoner concerned is still to be treated as a 'dangerous criminal'. In this instance that enquiry was not done. There is no evidence upon which this Court may make such determination.

[34] The many postponements before the hearing for reconsideration finally commenced, amounted to a manifest injustice. Section 286B requires that the reconsideration occur as expeditiously as possible, as is evidenced by the requirement that the matter be heard within seven days of the date ordered. These considerations ought to inform the procedure for reconsideration of an indeterminate sentence.

[35] An order remitting the matter to the high court so that a proper inquiry may be carried out in terms of s 286B, carries with it the risk of still further delay to the obvious prejudice of the appellant. It is incumbent upon the prosecuting authority, which is aware of the date set for reconsideration of such a sentence, to ensure that the reconsideration hearing can proceed upon the reconsideration date. To this end the process of gathering the requisite reports, particularly the s 5C Parole Board, ought to commence well ahead of the date of the reconsideration hearing.

Timeous and appropriate arrangements must be made with the court seized with reconsideration to ensure that the matter is not beset by unnecessary and prejudicial postponements.

[36] In order to ensure that justice is delayed no further, it is this Court's intention to place strict time limits as to when the appellant should be brought before court again for a proper determination of whether he is a dangerous criminal at present and what sentence to impose, if any.

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

1 The appeal is upheld, with no order as to costs.

2 The high court order dated 29 August 2019 is set aside and the matter is remitted to the high court for a reconsideration of the indeterminate sentence imposed upon Brannon Jonathan Petersen, in terms of s 286B of the Criminal Procedure Act, 51 of 1977 (the CPA).

3 The reconsideration should be heard by a different judge no later than 15 May 2023.

4 A parole board report as contemplated by s 286B(4) shall be filed on or before 1 May 2023.

5 Any expert reports, to be relied upon by the parties shall be filed on or before 1 May 2023.

6 This judgment and order are to be brought to the attention of the Registrar of the Western Cape Division of the High Court.

C H NICHOLLS

JUDGE OF APPEAL

NTY SIWENDU

ACTING JUDGE OF APPEAL

APPEARANCES:

For appellant:	C J Teunissen
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For respondent:	S Kuun
Instructed by:	The Director of Public Prosecutions, Cape Town
	The Director of Public Prosecutions, Bloemfontein