THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 57/2017

In the matter between:

LESHAY KLASSEN **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Klassen v The State* (57/2017) [2017] ZASCA 58 (24 May 2017)

Coram: Leach, Saldulker, Zondi and Mathopo JJA and Coppin AJA

Heard: 4 May 2017

Delivered: 24 May 2017

Summary: Criminal Procedure: sentence: effect of convicted accused not testifying when considering whether substantial and compelling circumstances exist justifying a sentence less than a prescribed minimum: failure to hold an inquiry before imposing non-parole period under s 276B of the Criminal Procedure Act 51 of 1977: effect thereof.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Hartzenberg J and Vilakazi AJ sitting as court of appeal):

It is ordered:

1 The order of the trial court imposing a non-parole period under s 276B of the Criminal Procedure Act 51 of 1977 is set aside.

2 The appeal is otherwise dismissed, and the appellant's sentence confirmed.

JUDGMENT

Leach JA (Saldulker, Zondi and Mathopo JJA and Coppin AJA concurring)

[1] The appellant was together with three others arraigned on a charge of murder in the Benoni Regional Court. The case arose out of an incident that occurred in the early hours of 17 June 2006 which led to the death of a young man, Joseph Mbane (the deceased). The appellant and his co-accused were convicted on the charge which carried a prescribed minimum sentence of 15 years' imprisonment under the provisions of s 51(2)*(a)*(i) of the Criminal Law

Amendment Act 105 of 1997. The trial court concluded that there were no substantial and compelling circumstances justifying a lesser sentence than the prescribed minimum, and proceeded to impose a sentence of 15 years' imprisonment on the appellant and each of his co-accused. Thereafter, without further ado and without making any inquiry relevant to the issue, the trial court issued an order under s 276B of the Criminal Procedure Act 51 of 1977 (the CPA) that the appellant and his co-accused should not be placed on parole before they had served two thirds of their sentence. The effect of this was, of course, that a period of ten years' imprisonment was to be served before the appellant and his co-accused could be paroled.

[2] The appellant proceeded to appeal against both his conviction and sentence to the Gauteng Division of the High Court, Pretoria. His appeal was dismissed on 5 June 2009. With special leave of this Court, he now appeals against both the length of the period of imprisonment imposed as well as the imposition of the non-parole period.

[3] The evidence on record discloses that early on the morning in question, the deceased was seen running towards a convenience shop at a filling station, pursued by the appellant and his co-accused who had arrived on the scene in a motor vehicle. They caught up with the deceased and began to assault him all over the body, kicking him with booted feet and punching him. The appellant was armed with a snooker cue which he used to strike the deceased over the head. The deceased fell to the ground but was able to regain his feet and break away from his attackers. He ran across the road but lost his footing and fell, whereupon they caught up with him and once more severely assaulted him. The attack upon the deceased continued despite the intervention of a bystander,

Mr Bezuidenhout, who attempted to come to the aid of the deceased and to persuade his attackers to desist. His effort was in vain and in response to his entreaties they threatened to assault him.

[4] The attack upon the deceased was prolonged and vicious. According to another eye witness, Mr Morrison, the attackers kept on kicking and hitting the deceased despite his terrible screams. Mr Bezuidenhout described the appellant and his co-accused as having acted 'like a pack of wild dogs'.

[5] Eventually the attack stopped and the deceased's attackers climbed back into their vehicle and drove away, leaving him lying inert on the ground. Mr Bezuidenhout immediately went to see if he could help the deceased, but on examining him discovered that he had no pulse. The death of the deceased was confirmed by the paramedics and police who arrived on the scene some time later. During a post mortem examination, the deceased was found to have bruises on the head and shoulders, several lacerations on the head, swelling of the brain and blood in his mouth and trachea. There were pin-point bleedings in his lungs and heart, indicating a lack of oxygen. Essentially, he had been beaten to death.

[6] Despite their plea of not guilty, the appellant and his co-accused were correctly convicted of the deceased's murder. As I have said, an appeal to the high court failed and the only issues before this Court are the length of the period of imprisonment imposed and the non-parole period.

[7] In regard to the prescribed minimum of 15 years' imprisonment that was imposed, counsel for the appellant placed emphasis upon his client's age (he was about 18 years of age at the time of the offence). This, it was contended, taken together with the appellant having been a first offender who was, so it was argued, heavily under the influence of alcohol at the time, justified a finding that there were substantial and compelling circumstances not to impose the prescribed minimum sentence.

[8] I accept that the appellant was a youth of 18 years and that he was a first offender, but one cannot find that alcohol played any part in the proceedings. The only evidence in that regard is that, after the incident when the vehicle which had been used by the appellant and his co-accused was traced, it smelled of alcohol as did the breath of one of his co-accused. But the appellant himself did not testify at the trial. In *S v Roslee* 2006 (1) SACR 537 (SCA) para 33 this court stated that although there is no onus on an accused to prove the presence of substantial and compelling circumstances justifying a sentence less than the prescribed minimum, 'it must be so that an accused who intends to persuade a court to impose a sentence less than that prescribed should pertinently raise such circumstances for consideration'. This the appellant failed to do. As he failed to give any evidence in regard to the consumption of intoxicating liquor, and no such evidence appears from the record, it would be impermissible speculation to find that his actions had in any meaningful way been influenced by his intoxication.

[9] Bearing in mind that for the present offence a minimum of 15 years' imprisonment is prescribed in respect of an 18 year old first offender – and that the question of sentence is to be approached conscious of the fact that the

legislature has ordained that as the sentence which should ordinarily be imposed – I am of the view that the appeal against the length of the period of imprisonment imposed by the trial court must fail.

[10] That then brings me to the question of the non-parole period imposed under s 276B of the CPA. As already mentioned, after imposing the sentence of 15 years' imprisonment, the trial court immediately proceeded to order that the appellant not be released on parole until he had served at least ten years of that sentence. This was done without any inquiry as to whether such an order was appropriate and without hearing representations in regard to the issue.

[11] The grant of parole is something best left to the executive and those officials charged with the duty of considering and deciding upon parole – see *S v Stander* [2011] ZASCA 211; 2012 (1) SACR 537 (SCA) para 20 and *S v Botha* 2006 (2) SACR 110 (SCA) para 27. Consequently, the power of a trial court to act under s 276B should be sparingly exercised, and then only after holding an inquiry as to the desirability of such an order and hearing argument on the issue. This is now well established by the jurisprudence not only of this court but of the Constitutional Court – see *S v Jimmale & another* [2016] ZACC 27; 2016 (2) SACR 691 (CC) paras 19-25; 2016 (11 BCLR 1389) and *Strydom v S* (20215/2014) [2015] ZASCA 29 (23 March 2015) para 16. Indeed the necessity of adopting such a procedure is so trite that it is surprising, to say the least, that this issue has recently had to be dealt with by this court on several occasions – see eg *Ndlovu v S* (925/2016) [2017] ZASCA 26 (27 March 2017), *Mvubu v S* (518/2016) [2016] ZASCA 184 (29 November 2016) and *Mhlongo v S* [2016] ZASCA 152; 2016 (2) SACR 611 (SCA) – all of which reaffirmed

that it is a fatal misdirection to impose a non-parole period without an inquiry as to whether it ought to be imposed.

[12] For some reason, no mention was made of this issue when the matter went on appeal from the trial court to the court a quo. Be that as it may, Ms Leonard SC, who appeared in this court on behalf of the state, whilst supporting the 15 years' imprisonment imposed upon the appellant, conceded immediately and without demur that the further order relating to non-parole had to be set aside.

[13] The judgment of the court a quo was delivered on 5 June 2009. It took more than six years until the appellant applied to this Court for special leave to appeal and, once such leave was granted, there appears to have been a problem in timeously obtaining a record. Consequently, more than nine years has passed since sentence was imposed on the appellant in the trial court on 28 March 2008. In these circumstances, Ms Leonard SC conceded on behalf of the state that, in the light of this lapse of time, no purpose would be served in asking for the matter to be remitted to the trial court to hold the necessary inquiry and to reconsider possibly imposing a non-parole period under s 276B. Not only is she clearly correct, but there is nothing in the record itself which indicates that this was an appropriate case for a non-parole period to be imposed, especially upon a young man who has hopefully been rehabilitated by the period of imprisonment he has already served.

[14] A further issue of concern is that the appellant's three co-accused, who received the same sentence as he did, still labour under a non-parole period

improperly imposed upon them. That this is unjust, cannot be gainsaid: but none of the co-accused are before this Court which, in the circumstances, has no jurisdiction to ameliorate their plight. We raised this with the legal representatives of the parties who appeared before us and who gave us the undertaking to immediately take the matter up to see if an equitable solution could be found as a matter of urgency. We are grateful to them for doing so.

[15] In the light of the above, the appeal must succeed only in regard to the non-parole period. It is therefore ordered:

1 The order of the trial court imposing a non-parole period under s 276B of the Criminal Procedure Act 51 of 1977 is set aside.

2 The appeal is otherwise dismissed, and the appellant's sentence confirmed.

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L E Leach

Judge of Appeal

Appearances:

For the Appellant:	J M Mojuto
Instructed by:	Pretoria Justice Centre, Pretoria
	Bloemfontein Justice Centre, Bloemfontein
For the Respondent:	E Leonard SC
Instructed by:	Director of Public Prosecutions, Pretoria
	Director of Public Prosecutions, Bloemfontein