



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Reportable

CASE NO 158/2007

In the matter between

TAKALANI FHETANI

Appellant

and

THE STATE

Respondent

Coram: Nugent, Jafta JJA and Mhlantla AJA

Heard: 11 SEPTEMBER 2007

Delivered: 21 SEPTEMBER 2007

Summary: Sentence – s 22 of the Sexual Offences Act 23 of 1957 prescribes a maximum sentence of 6 years' imprisonment with or without a maximum fine of R12 000 – incompetent to impose imprisonment in excess thereof for contravening s 14 of the Act.

Neutral citation: This judgment may be referred to as *Fhetani v The State* [2007] SCA 113 (RSA)

JAFTA JA

[1] This appeal was heard on 11 September 2007 and at the conclusion of the hearing the following order was made:

- ‘1. The appeal against sentence is upheld.
2. The sentence imposed by the court below is set aside and substituted with a sentence of 3 years’ imprisonment.
3. The appellant must be released from prison immediately.’

It was stated at the time the order was made that the reasons for such order would follow. These are the reasons.

[2] The appellant was arraigned in the Venda High Court on a charge of rape, alternatively unlawful sexual intercourse with a girl below the age of 16 years. He pleaded and the prosecutor accepted the plea of guilty to the alternative charge. The trial court (Hetisani J) convicted and sentenced him to 15 years’ imprisonment. He appeals against the sentence with the leave of the court below.

[3] The court seems to have been under the impression that there were facts before it that established that the appellant was guilty of rape and it sentenced him accordingly. In its judgment the court said:

‘The court has to pass sentence which must be deterrent to others who may be thinking of meeting girls in the evening, producing a knife and pulling them to empty houses and rape them.’

Later in the judgment on the application for bail the court stated further that:

‘Now your legal counsel has now come with your instructions that you ask that while the appeal is being processed you need to be granted bail. Of course it is one of your

rights, but one will always consider that we have communities there today, no longer the old communities which were fast asleep. Today's communities are very much up against people who have been convicted of offences like rape, and more particularly the rape against minor children. One cannot imagine the horror with which the people out there will see you now walking around and enjoying Christmas when they know that you have perhaps spoiled the future of that poor child....'

[4] There was no basis for such findings because no evidence was led at the trial. The court impermissibly relied on the summary of substantial facts for its findings. The summary does not constitute evidence nor admitted facts. Its sole purpose is to inform an accused about the nature of the case he or she is facing by setting out material facts on which the prosecution relies (*S v Van Vuuren* 1983 (1) SA 12 (A) at 21E).

[5] The approach adopted by the trial court in assessing punishment has led to an excessively disproportionate sentence being imposed. Punishing the appellant as if he had been convicted of rape violated his right to a fair trial. It is a well-established principle of our law that the sentence imposed must fit the nature of the offence of which the accused was found guilty. Put differently, the severity of the sentence must not be grossly disproportionate to the offence itself. An exemplary sentence such as the one we are concerned with here, is not a fair and just punishment because it is disproportionate to the true deserts of the offender. In discouraging the imposition of such punishment this court in *S v Sobandla* 1992 (2) SACR 613(A) said (at 617 f-g):

'As to the magistrate's view of the need for a strongly deterrent sentence, the peculiar circumstances of the present case do not, in my assessment, suggest the risk of a repeated robbery or housebreaking by the appellant. Essentially what the trial court had in mind was, in the interests of the community, a sentence which would deter others who might, given the prevalence referred to, contemplate similar serious criminal conduct. Having regard to all the facts of the present matter, however, it

seems to me that appellant's counsel (who appeared at the court's request, and for whose assistance we are grateful) was right in contending, in effect, that appellant was sacrificed on the altar of deterrence, thus resulting in his receiving an unduly severe sentence.'

[6] This does not mean that deterrence is no longer an object of sentencing. In this matter it is unlikely that the appellant would commit the same offence again. A severe sentence would only serve as a deterrence to other would-be offenders who might contemplate having sexual intercourse with girls below the age of 16 years. A sentence that is intended to serve this purpose must not, however, be grossly disproportionate to the offence of which an accused person was convicted. Because a grossly disproportionate sentence does not only violate the accused person's right to a fair trial but also his or her right not to be punished in a cruel, inhuman or degrading manner (*S v Dodo* 2001 (1) SACR 594 (CC) paras 35-39).

[7] Moreover, in sentencing the appellant the court below overlooked the provisions of the Sexual Offences Act 23 of 1957 in terms of which he was convicted. Section 14 thereof makes it an offence for a male person to have sexual intercourse with a girl under the age of 16 years, even if she consents to such intercourse. For this offence, section 22 prescribes a sentence of imprisonment for a period not exceeding six years with or without a fine not exceeding R12 000 in addition to such imprisonment.

[8] The court has, contrary to the clear provisions of s 22, imposed 15 years' imprisonment thereby exceeding the maximum prescribed sentence. Therefore, the sentence was not competent for the offence of which the appellant was convicted.

[9] In view of the above misdirections we are entitled to interfere with the sentence imposed. At the time of the trial the appellant was a 23-year-old student. He was doing matric at school. The complainant was 15 years old when the offence was committed. There is no evidence to suggest that she did not consent to having intercourse with the appellant. It is unlikely that the prosecutor would have accepted the plea of guilty to a lesser offence, if evidence that she did not consent existed. In assessing punishment, we must also take into account the fact that the appellant has been in prison since September 2002 to date (five years in total).

[10] The appellant has effectively served five years in prison – as we were informed at the hearing of this appeal – even though he was granted bail on 5 December 2002. He was unable to raise the bail money which was fixed at an exorbitant amount of R10 000. At the hearing of the bail application, his attorney informed the court that he could afford to pay the sum of R4 000 which was in itself quite substantial when regard is had to the fact that he was a student. Contrary to the principles applicable to the fixing of the amount of bail, the trial judge fixed it at an amount which he could clearly not afford to pay. Fixing bail at an excessive amount in a case involving a poor person such as the present appellant, is tantamount to a refusal.

[11] Before granting bail the trial court's attention was drawn to the error it had committed by imposing a sentence which exceeded the maximum punishment prescribed for the offence. This manifestly demonstrated good prospects of success in favour of the appellant. During the hearing of that application, the court alluded to the fact that it would take long for his appeal to be heard. Yet bail was fixed at an amount he could not afford to pay. In *S v Mohamed* 1977 (2) SA 531 (A) Trollip JA said (at 544H):

‘The means and resources of an accused are therefore an important, although not the sole, criterion in fixing the amount of bail Hence, speaking very generally, I think that if a court is minded in all the circumstances to release an accused on bail, it should not fix an amount that is quite beyond his means and resources, otherwise that would nullify its decision to release him.’

[12] In this case the exorbitant amount fixed coupled with the delays in prosecuting the appeal have infringed the appellant’s right of appeal. He ended up serving more time in prison than justified. As it appears from the substituted sentence, he served two additional years without just cause and in violation of his right to freedom.

[13] The delays in prosecuting the appeal were mainly caused by the attorneys appointed by the Legal Aid Board for him, as he could not afford legal representatives of his choice. He was granted leave on 5 December 2002 and the first step towards the prosecution of the appeal was taken in January 2003. His attorney instructed adv Sikhwari to prepare a notice of appeal. Nothing happened afterwards until May 2004 when the advocate returned the brief without the notice because he had a dispute about fees with the Board. Meanwhile the attorney had taken receipt of the record, consisting of 47 pages only, from transcribers on 24 July 2003. No explanation was given for this delay despite the fact that s 316 of the Criminal Procedure Act 51 of 1977 requires such record to be transmitted to the registrar of this court immediately after leave has been granted.

[14] The next step taken by the attorney was to brief adv Snyman on 1 July 2004. He was instructed to draw heads of argument which he failed to produce for a period of a year. His explanation for the failure is that he was unable to carry out the instructions due to other work-related commitments. It is not explained why he did not return the brief

immediately as he could not attend to it. In these circumstances I find the explanation given by Snyman to be unsatisfactory. Although the appellant's attorney has deposed to an affidavit in support of the application for condonation, he has furnished no explanation for the delays occasioned by his inaction. This conduct by an officer of the court is unacceptable, more so in circumstances of the present case.

[15] By providing legal representation in matters such as this the Board is discharging one of the most important constitutional obligations imposed on the state by our Constitution (s 35(3)). This obligation is necessitated by the fact that the majority of people in this country are – as the law reports inform us – poor and they cannot afford to pay for legal representation. Poor service by lawyers appointed by the Board, which lead to infringement of accused persons' rights, does not constitute a proper discharge of that obligation. As already indicated, the delays have resulted in the appellant serving unjustifiably excessive time in prison. In view of the fact that none of these delays were attributed to the appellant and that the state did not oppose the application, we granted condonation asked for.

[16] Having had regard to all factors relevant to sentence, it appeared to us that a sentence of 3 years' imprisonment was appropriate in the present circumstances. It followed that the appeal had to succeed. For these reasons the order referred to in para [1] above was issued.

C N JAFTA
JUDGE OF APPEAL

CONCUR:)
) NUGENT JA
) MHLANTLA AJA