

SOUTH AFRICA / JUDGMENT

Fani v S (CC55/2016) [2017] ZAECHHC 2 (2 May 2017)

[2017] ZAECHHC 2

COURT

Eastern Cape High Court, Bhisho

BEFORE

Mbenenge

CASE / FILE NUMBER

CC55/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE LOCAL DIVISION, BHISHO)

CASE

NO: CC55/2016

In

the matter between:

SIYABULELA

FANI

Applicant

and

THE

STATE

Respondent

JUDGEMENT

ON APPLICATION FOR LEAVE TO APPEAL

MBENENGE J:

- [1] The applicant, a repeat offender who was 27 years old at the time of committing rape and kidnapping subject to this application pleaded not guilty to, but was convicted on two counts of rape and on one count of kidnapping. He was thereupon sentenced to undergo life imprisonment in respect of each one of the rape charges and five years' imprisonment for the kidnapping.

- [2] One of the witnesses who testified on behalf of the State and who's testimony was found to have corroborated that of the complainant in material respects regarding the events of the fateful night was Thembinkosi Bhengu (Mr Bhengu), who, pursuant to pleading guilty to committing the same offences, was, in respect of the rape charges, sentenced to undergo twenty two years' imprisonment. No further details of the circumstances surrounding the sentencing of Mr Bhengu were furnished during the trial preceding the instant application.
- [3] The applicant now seeks leave of this court to appeal against the two life imprisonment sentences. Three contentions underpin the application. In the first place, it is contended that the court failed to adequately take into account the age of the applicant, the fact that he did not initiate the commission of the offence, Mr Bhengu having been the first to rape the complainant and that he had been pressurized by his peers to commit the subject offences. It is further contended that the court erred in finding that the applicant had diminished aspects of rehabilitation. The final contention raised relates to the disparity in the manner Mr Bhengu and the applicant were sentenced, regard being had to the fact that they had been found guilty of committing the same offences.
- [4] Two issues need to be disposed of without ado; in pleading not guilty the applicant did not confide to the court. It hardly lies with him to now seek to advance reasons for committing the rape offences. Secondly, in *S v Matyityi*[1] the Supreme Court of Appeal found that the age of the accused in that matter [2] was a neutral factor with regards to sentencing.
- [5] In this matter it was found that the applicant's tender of a plea of not guilty evinced lack of remorse on his part and the fact that he was previously sentenced for an unrelated offence[3] showed that he spurned the opportunity to rehabilitate. In *S v Dyantyi*[4] the court found that an accused will rarely be able to show that he is a suitable candidate for rehabilitation without proving to the court that he is genuinely remorseful. That principle applies with equal force in the instant matter.
- [6] There remains one outstanding issue to dispose of – the complaint about disparate sentences. It has often been said “similar is not identical”[5]. Whilst Mr Bhengu pleaded guilty and was a first offender, the applicant in this matter pleaded not guilty and was not a first offender. Moreover and in any event, “[r]elevant precedents can provide a fair measure of predictability and can promote and enhance general consistency and uniformity... [but they] can never displace the fundamental principle that there must be individualization in the sentencing process”.[6]
- [7] Having considered all the relevant submissions for and against the application for leave to appeal, I come to the conclusion that the appeal sought enjoys no reasonable prospects of success.
- [8] In the result, the application for leave to appeal is refused.

S M MBENENGE

JUDGE OF THE HIGH COURT

Attorney for the applicant: S Pango Instructed by: The Justice Centre King William's Town

Counsel for the respondent: D Rantsane Instructed by: Office of the DPP Bhisho

Heard on: 28 April 2017

Delivered on: 2 May 2017

[1] 2011 (1) SACR 40 (SCA) at para [14].

[2] Coincidentally, even in that matter, the accused had been 27 years old.

[3] Housebreaking with intent to kill and theft for which he was sentenced to undergo two years' imprisonment, one year of

which was conditionally suspended, on 14 June 2014.

[4] 2011 (1) SACR 540 (ECG).

[5] "Very similar means 'similar but not quite the same'. If they were quite the same, they would not be similar but identical; and if they weren't so similar, they wouldn't

be very similar" John Lawler.

[6] Du Toit et al, Commentary on the Criminal Procedure Act, 2015 (JUTA) at 28-10B-12.

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Prepared on 9 October 2026 · Esheria