1. THE STATE
versus
BLESSED SIXPENCE

2. THE STATE
versus
TATENDA NEIL KUYAZIWA

3. THE STATE
versus
TRUST GUDHU

4. THE STATE
versus
TAPIWA SIRAVHE

5. THE STATE
versus
BRENDON CHIREWO

6. THE STATE
versus
MICHAEL KANDEYA

HIGH COURT OF ZIMBABWE
CHIKOWERO & MUTEVEDZI JJ
HARARE, 18 October 2023

Criminal Review- The sentencing guidelines

MUTEVEDZI J: Change is a complex topic. It baffled even Aristotle and his predecessors. For instance Plato argued that real things do not change. He confined change to the realm of appearances; that is the physical world. Parmenides rejected the concept altogether and argued that change did not exist.[1] Although those early scholars were dealing with the metaphysical, in the modern world of administration of justice, change also remains a frightening proposal. Judicial officers are naturally comfortable with the old, tried and tested systems. They do not want to create new problems. It is one of the reasons why precedent is

[1] https://faculty.washington.edu/smcohen/320/archange.htm#:~:text=Plato%20said%20that%20real%20things,the%20existence%20of%20change%20altogether. Accessed on 17 October 2023

regarded as indispensable in common law jurisdictions. But as will be illustrated below, The Criminal Procedure (Sentencing Guidelines) Regulations, 2023 (the Guidelines) unfortunately introduce a significantly new sentencing regime in the Zimbabwean criminal justice system. The guidelines are law. It has to be followed. Whether judges and magistrates are uncomfortable with them is therefore inconsequential.

The six records of proceedings in issue were all placed before me for what is conversationally called automatic review. In reality though there is nothing automatic about the procedure prescribed in s 57 of the Magistrate's Court Act [*Chapter 7:10*]. If anything is it is manual. It is only now that the advent of the Integrated Electronic Case Management System (IECMS) has mechanised the administration of the process. The real review process however remains human driven. It appears it will be so unless the seemingly idle threat of the use of artificial intelligence in the adjudication of disputes comes to pass.

Each of the six offenders was separately convicted of contravening s 70) (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Criminal Law Code) after having had sexual intercourse with a young person. Some of the offenders were convicted on their own pleas of guilty whilst others went through contested trials. The findings of guilt are not, for the purposes of this judgment, an issue. Those convictions may be an argument on another day. Accordingly I confirm all the verdicts of guilty as being in accordance with real and substantial justice.

The offenders' ages ranged from twenty years to thirty five years whilst the complainants' ages were between thirteen and fifteen years. As will be illustrated below, all the six were sentenced to varying penalties which commenced from as lenient as community service to as severe as six years imprisonment. The magistrates who dealt with the cases were of different ranks. In fact they spanned every grade in the magistracy. One is a magistrate, another is a senior magistrate, two are provincial magistrates and two others are regional magistrates. I deliberately mention all the above specifications because they support the issues I intend to deal with in this judgment. For instance I state the ages of the complainants because they are about of the same age. It is equally arguable that the accused belong to the same age group because:

> "In 2015 The World Health Organization under the United Nations officially revised the age standards. A person is now considered young before 44 years of age. According to the new age classification, the young age is from 20 to 44, middle age is 44-60, elderly age is 60-75, senile age is 75-90 and long-livers are after 90. This international standard is made without taking into account the objective regularities of the development physiology and psychology throughout

> the whole life in the course of rapid growth in youth, smooth development in mature age and the subsequent gradual aging of the human body." [2]

The Zimbabwean Constitution, 2013 in s 20(1) classifies as youths, all people between the ages of fifteen and thirty-five years. I state the range of the sentences imposed because the disparities in them do not make any sense. They are not justifiable on any rational basis. To put that into its proper context I am constrained to particularise these cases.

In *S* v *Blessed Sixpence*, the accused person, a twenty-three year old young adult, had sexual intercourse with a fourteen year old girl. He was convicted by a regional magistrate and sentenced to three years imprisonment twelve months of which was suspended on condition of future good behaviour leaving him to serve an effective twenty-four months imprisonment. In *S* v *Tatenda Neil Kuyazwa*, the accused was twenty-three years old. He had sexual intercourse with a fifteen year old girl. He was ultra-lucky as he walked away with a sentence which read:

> "$300 USD payable at the prevailing interbank rate on the day of payment in default of payment 8 months imprisonment. TTP 31/10/23."

The accused in the third case, *Trust Gudhu* is aged thrity-four years. He had a sexual relationship with a fifteen year old female. He was sentenced to twenty-four months imprisonment ten of which were then suspended on condition of future good behaviour. He is serving fourteen months imprisonment. In the fourth case, *Tapiwa Siravhe* aged twenty-four years bedded a fourteen year old girl. He was unfortunate as he got slapped with two years imprisonment of which nine months imprisonment was suspended on condition that he behaved well going forward. He is currently serving fifteen months imprisonment. In *S* v *Brendon Chirewo* the accused is a twenty-two year old and had sexual intercourse with a fourteen year old girl. He was sentenced to fourteen months imprisonment which were wholly suspended on conditions of future good beahaviour and community service. In *S* v *Michael Mandeya*, the accused who was about thirty-five years was convicted of having sexual intercourse with a girl of thirteen years. A sentence of six years imprisonment was imposed, two years of which were suspended on condition of good behaviour. He is serving four years imprisonment.

It is also important to point out that three of the accused persons were sentenced before 8 August 2023 whilst the other three were sentenced after that date. The significance of 8

[2] https://journals.scholarpublishing.org/index.php/ASSRJ/article/view/2924

August 2023 is that it is the date on which statutory instrument No. 146/2023 cited as the Criminal Procedure (Sentencing Guidelines) Regulations 2023 became effective. The guidelines usher a significant shift in the current sentencing trends. The instant cases unfortunately suggest a worrying scenario where judicial officers appear to take the business as usual approach. There is no distinction, in these cases, between the sentencing approaches employed prior to 8 August 2023 and those that should have been used after the effective date of the guidelines. In all the cases, there was not even an attempt to proceed in terms of the new guidelines. The pretence was that they did not exist. I inquired from the concerned magistrates. The common thread was that whilst they were aware of the coming into effect of the guidelines, the magistrates had no clue how to implement them. In terms of s 171(1)(b) of the Constitution, one of the responsibilities of the High Court is to supervise the magistrates' courts. Contrary to popular belief my view is that the duty to supervise should seldom extend to censure. Rather it requires the High court to observe, direct and guide the operations of the magistrates' courts. It was on that basis that I considered it necessary to assist not only the magistrates whose proceedings are the subject of this judgment but all other magistrates.

The drafting and publication of the guidelines was done following the processes prescribed under s 334A of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the Code). The initiative is novel. Although Zimbabwe may not be the first country to enact sentencing guidelines, it is clearly the first to do so in the format that SI 146/2023 is in. A number of other jurisdictions have attempted to guide sentencing by producing guidelines to that effect. For instance, Kenya did so in 2020. The Kenyan guidelines however are in the form of what can be described as a bench book. In essence they amount to nothing more than another textbook on sentencing because they are not binding. Author, Okoth Juliet in her article "*The pursuit of consistency in sentencing: Exploring Kenya's sentencing guidelines*," *South African Journal of Criminal Justice*, vol. 33, no. 1, Jan. 2020, pp. 106 whilst acknowledging the progressive nature of the guidelines remarked on their weakness in the following terms:

> "Nonetheless, the relaxed approach adopted by the guidelines towards sentencing raises doubts as to whether it is an effective measure towards achieving consistency in sentencing."

Whilst the Americans guidelines were originally set to be binding the US Supreme Court in the case of *United States* v *Booker 2005* ruled that the guidelines violated offenders' right to a fair trial. That finding resulted from the guidelines' rigidity which left judicial officers without any discretion but to impose the set sentences. The guidelines came in the form of a

tariff. As a result the American guidelines are now regarded as simply advisory. [3] The uniqueness in the Zimbabwean approach is that the guidelines bind all judicial officers but at the same time they ensure that the judge/magistrate retains a modicum of discretion in what sentence to impose. Because of the obligatory nature of our guidelines, a magistrate has no choice in the assessment of sentence but to proceed as dictated in the guidelines. Another significant feature is that the guidelines are in the form of a sleek, user friendly pamphlet deliberately designed to break the dryness, lack of appeal and dreariness associated with textbooks. That quality makes them a perfect guide on the subject with the table of presumptive penalties being a one stop library for judicial officers. Sections 4 and 5 of the guidelines provide as follows:

> ***"4. Application***
> These guidelines shall apply to all criminal proceedings in the Supreme Court, High Court, Magistrates' Court or any other court specified in a statute.
> ***5. Binding nature of guidelines on judicial officers***
> (1) Where these guidelines have provided for a presumptive penalty, **the courts shall pay due regard** to the applicable sentencing guidelines when sentencing offenders.
> (2) Where a sentencing court departs from a prescribed presumptive penalty as provided for in these guidelines it shall give reasons for that departure. (Bolding is for emphasis)"

[3] https://en.wikipedia.org/wiki/United_States_Federal_Sentencing_Guidelines#:~:text=the%20Booker%20decision.-,Guidelines%20basics,history%20(the%20criminal%20history%20category)- Accessed on 4 October 2023

The current scenario is that whilst the sentence which must be imposed on any convict is contemplated by law, the Criminal Law Code does not fix such sentences except in relation to crimes where minimum mandatory sentences are prescribed. What it does is to simply provide the maximum penalty imposable. The new sentencing regime is directed towards focussing a court's attention to specified factors which must be taken into account to arrive at the envisaged penalty. The objective is that such penalty must be of the severity contemplated by law. The rationale is that the law cannot simply set maximums and then permit a judicial officer the latitude to pick any sentence between the base and the zenith. To allow that would amount to not setting a judiciary governed by the law but one governed by man. It is from that understanding that the idea of presumptive penalties is perceived as ideal. A presumptive penalty is defined in s 334 A(1) as:

> "a penalty expressed as a specific amount of a fine or a specific period of imprisonment or both that is midway between an augmented penalty which may be imposed in aggravating circumstances (whether or not these circumstances are specified in the enactment concerned), and a diminished penalty which may be imposed in mitigating circumstances (whether or not these circumstances are specified in the enactment concerned)."

Essentially the same definition appears in the guidelines. My understanding of the definition is that the presumptive sentence is a punishment that is found midway between a crime committed in what I may describe on one hand as a run of the mill circumstances and the particularly horrendous ones on the other. It is a median. It is a starting point. It is not a mandatory minimum penalty. Put differently, what the law has done is to streamline particular mitigating and aggravating circumstances and declared that where such are present, the ideal penalty is the presumptive sentence stated in the guidelines. A court must pay due regard to the stated factors. The phrase *'pay due regard'* as used in the guidelines is not an idle one. It means a court must treat the factors listed with proper care or concern. The factors must be respected and the court must undertake a considerable, meticulous, unprejudiced and dispassionate discussion of the factors. In simpler terms it is an admonishment, a remonstrance of judicial officers to take the listed issues seriously and to give them sufficient attention when assessing sentence. What is different between the old and the new procedures is that whilst in the past the mitigating and aggravating factors were not listed anywhere and were viewed as part of the esoteric and mystic understandings of the legal profession, in the new regime, such factors are all populated against each crime in the table of presumptive penalties (3rd schedule to the

guidelines). Those aggravating and mitigating factors which are generic to all crimes are itemised under ss 8 and 9 of the Guidelines respectively.

As shown however by the language used in s 5 of the guidelines, a sentencing court is permitted to either go higher or lower than the presumptive penalty. Where the court does that the requirement is that it must justify that departure. It need not be stated therefore that where a court fails to give not just reasons but cogent reasons for the departure such failure will constitute a gross irregularity warranting the vitiation of the sentencing proceedings. As already pointed out the purpose of the guidelines is to ensure rational and consistent sentencing practices in this jurisdiction. The unacceptably wide disparities shown in the sentences above imposed on similar offences committed in comparable circumstances by offenders who are almost similarly placed make sad reading. They call into question the so-called exercise of discretion by judicial officers. They unmask the disguise called judicial discretion and reveal that what lies at the core of the entire process may be nothing but judicial arbitrariness.

When sentencing becomes akin to a game of poker for offenders and everyone else involved the process ceases to represent the interests of the triad which this court called for in the oft-cited case of *S* v *Shariwa* 2003(1) ZLR 314(H) in which it encouraged judicial officers to embrace rationality in sentencing and shun the instinctive approach. It further implored judicial officers to endeavour to find punishments which are suitable for the crime, the offender and society. Despite these constant reminders when sentences of such widely varying severity as is illustrated in the cases under review are imposed the public's concerns that there is no objectivity whatsoever in the sentencing process are vindicated. The theories of punishment are all equally important. None of them can be more important than others. Retribution for instance is a cornerstone of the criminal law which unfortunately appears to have been relegated to the periphery of considerations. There is no equality on the treatment of victims and offenders. In sentencing, a court ought to always bear in mind that one of the primary purposes of the criminal law is retribution. That purpose of punishment must be blended with all the others to come up with a sentence which serves the interests of all. If there was any doubt about that, s 6 of the guidelines dispels it. It provides that:

6. "The objective of a sentencing court shall be to correct, rehabilitate and punish a convicted offender to the extent and in such a manner that is just and proportionate. (underlining is mine)"

The above provision is couched in peremptory language. Further, the objectives are set in a conjunctive format. That means punishment in its retributive sense is much a priority as are correction and rehabilitation. Society has a significant if not the most significant stake in the punishment of offenders. The courts do not own sentencing discretion. Rather that discretion belongs to the people through their representatives in Parliament. As such, if courts pass sentences which do not reflect a proper consideration of the interests of society, but which tend to suggest that factors extraneous or foreign to the sentencing function may have been at play, the risk is that the law giver may withdraw the discretion. Examples abound of where this has happened across the world. The enactment of these sentencing guidelines is a subtle protest by society and a clear warning to the judiciary that the public is not happy with the existing sentencing trends in Zimbabwean courts. A more open version of that fulmination may be the recent amendment of s 65 of the Criminal Law Code to provide for minimum mandatory sentences for the crime of rape. The message is clear that the courts cannot ignore the vested interests of the public because public acceptance and public confidence are central to the resolution of criminal matters. I have however already said the law maker saw it fit to let judicial officers retain discretion in the overwhelming majority of crimes. There is therefore no question of the guidelines taking away the courts' discretion in sentencing. What the guidelines simply do is to guide that discretion and in the process remove arbitrariness by ensuring that the sentencing process justifies the penalty which is ultimately imposed. Authors DeSmith, Woolf and Jowell in their work *"Judicial Review of Administrative Action*", 5th edition, p 296 comment on the concept of discretion as follows:

> "The legal concept of discretion implies power to make a choice between alternative courses of action or inaction. If only one course can lawfully be adopted the decision taken is not the exercise of discretion but the performance of a duty. To say that someone has a discretion presupposes that there is no uniquely right answer to a problem. There may however be a number of answers that are wrong in law. And there are degrees of discretion -varying scope for decisional maneuver afforded to the decision maker."

The end purpose of the guidelines is that sentencing must become predictable. An offender must be able after his conviction to have a fairly accurate assumption of what his/her sentence will be. Admittedly the procedure does not advocate for absolute uniformity in sentencing because it is unachievable except in cases where there is a tariff system. What the system calls for is substantial uniformity. In the end the offender, the victim and society must all get equal protection and equal benefit of the law. Everyone must have the expectation that

if all variables were held constant, the result would largely be the same. Further, if these guidelines were published following the participation of the stakeholders listed under s 334A(3) then I would not be off the mark to suggest that they represent the views of the Zimbabwean society and must be respected as such. That section provides as follows:

> "(3) The Judicial Service Commission may from time to time convene a conference bringing together representatives of---
> (a) judges of the Constitutional Court, the Supreme Court and the High Court; and
> (b) magistrates; and
> (c) the National Prosecuting Authority; and
> (d) the Police Service; and
> (e) the Prisons and Correctional Service; and
> (f) the Law Society of Zimbabwe; and
> (*g*) such other organisations and bodies as, in the Commission's opinion, have expertise or an interest in crime, punishment and the rehabilitation or treatment of criminals".

What the above means is that it is outside the court's jurisdiction to question the severity or the leniency of the presumptive penalties. The sentences are law which ought to be followed and to be interpreted as it is. The sentences stipulated must be dependent on neither the whims and caprices nor the idiosyncrasies of judicial officers but rather on reason and the sentencing patterns advocated for in the guidelines.

The sentencing procedure

The next question relates to the procedure which ought to be followed in order to comply with the guidelines in the sentencing of offenders. I wish to state upfront that the guidelines do not supplant the existing legislation governing sentencing. The Criminal Law Code and the Criminal Procedure and Evidence Act remain the primary sources of sentencing law in this country. Those two, constitute the manufacturing plant and the guidelines are simply a tool-box within that factory. The guidelines must therefore be taken as a weapon which complements the existing statutes. I view them as regulations intended to bring order into the somewhat haphazard sentencing processes which are apparent in many proceedings. If the six records of proceedings *in casu* and this court's experiences in the past are anything to go by I would be forgiven for describing the current sentencing trends as chaotic. The guidelines envisage a binding and formal procedure which every sentencing court is required to follow. S 12 thereof prescribes a mandatory pre-sentencing hearing in the following terms:

> ***"12. Pre-sentencing hearing***
> (1) Prior to sentencing an offender, a court shall inquire into and investigate the following—
> (a) the characteristics of the offender including his or her social background;
> (b) the characteristics of the victim(s) of the offence including the impact of the offence

on such victim(s);
(c) the probability of the offender committing a similar or other offences;
(d) the desirability or need to protect the victim(s) or society from the offender; and
(e) the ability of the offender to make restitution to the victim(s) or to society.
(2) The offender shall address the court first, personally or through a representative on matters listed in subsection (1) and on any other mitigating factors. In doing so, the offender may call the evidence of witnesses.
(3) The State shall have the onus to produce proof of the offender's previous convictions if any and evidence on all the matters listed in subsection (1) if any.
(4) The court shall explain to the offender his or her right of response and shall afford the offender the opportunity to respond. (Underlining is mine for emphasis)".

Admittedly, the pre-sentencing hearing is not a new aspect. It has always been there. In a very general and permissive manner, s 334(3)(a) - (d) of the Code states that:

"(3) The court **may,** before passing sentence and for the purpose of informing itself as to proper sentence to be passed, receive—
(a) evidence on oath, including hearsay evidence;
(*b*) affidavits and written reports which may be tendered by the prosecutor, the accused or his legal representative;
(*c*) written statements made by the prosecutor, the accused or his legal representative;
(d) statements not on oath made by the accused: (Bolding is for emphasis)".

Unlike s 12 of the Guidelines which is obligatory, s 334(3) made the pre-sentencing hearing an optional course which could be taken at the discretion of the court. What is also inconspicuous from s 334 is a specific structure which the courts could follow. It did not direct the court's focus to any particular issues. It just provided general suggestions on what to look out for. More importantly s 12(1) requires a court to inquire into and investigate particular issues. Once again, it must follow that if a court fails to do so, it would have committed a gross irregularity which can be a ground for the vacation of its proceedings. The words inquire and investigate are generally regarded as synonymous but they have their differences. The distinctions are heightened where both words are used at once in a statute like in s 12 of the Guidelines. In relation to sentencing, an inquiry on one hand, usually refers to a general solicitation for information conducted to gather superficial data about a subject. An investigation on the other, is an elaborate and comprehensive analysis of a specific issue. The purpose of an investigation is to discover or expose facts or information about that particular issue in a bid to reveal the cause of the criminal behaviour or to analyse if the particular circumstances surrounding the crime are linked to its occurrence. Unlike an inquiry an investigation extends to other activities such as collecting and examining evidence and

interviewing witnesses among other activities. Put simply an inquiry entails requesting for information, while an investigation is an in-depth examination of a specific issue to find out the cause of a problem. S 12 requires both the inquiry and the investigation to be carried out. In other words the court must request information and at the same time carry out a detailed assessment of the issues listed in the provision. Those issues include the following:

a. The characteristics of the offender

These in my view, encompass the general information about the offender such as his/her sex, age, physical disability, mental health and social background among any other which may be peculiar to the offender. The special categories of offenders are enumerated in s 21 of the Guidelines. The course which must be taken is equally suggested. Once a finding is made a court must necessarily turn to s 21 for assistance on how to deal with an offender who falls into a section 21 category. The table of presumptive penalties shows against each offence whether or not particular offender characteristics would be mitigatory or aggravating. The thinking by judicial officers and legal practitioners that every challenge in life has a legal solution is inaccurate. The court must therefore be open minded to look for and accept opinions of other professionals particularly in relation to the social background of an offender. The guidelines do not restrict the investigation into an offender's social background to juveniles only. It is open ended and must include social backgrounds of adults if need be.

b. The victim characteristics and victim impact statements

Like the offender, the victim's characteristics are also important. The specifics to look for are the same as stated for the offender. The extra consideration here is the requirement for a court to investigate the impact of the offence on the victim(s). A court must endeavour to restore the dignity of the victims of offences. There is nothing spectacular about a victim impact statement. In plain language it is a written or oral statement made by the victim or his/her representative presented to the court at sentencing. Its primary purpose is to present an opportunity to the judicial officer to hear how a criminal action has affected the victim and those around him or her. In the process the victim assists the court to feel his/her trauma. There is no doubt that nobody can ever truly understand what another feels. It is therefore difficult if not impossible to cover the complete impact of a crime. The involvement of the victims in the process however may assuage the bruises they will have suffered because of the criminal activities. They would surely feel included and consulted in the process of punishing the

offender. That on its own may, in no small way, contribute to the victim(s)' healing. This new initiative stemmed from the realization that victims, their family members/ friends are often ignored by sentencers. There is no gainsaying that in Zimbabwe very rarely have victims directly participated or spoken at the sentencing stage. In fact in most common-law jurisdictions where the adversarial justice systems dominate, a criminal trial is a match between the prosecution and the accused refereed by a supposedly neutral judicial officer. Even that system goes down as a recent invention because the practice in earlier times was that the offended person had the obligation to pursue his/her victim, subdue him, in the literal sense, and drag him to justice. With the growth of civilisation that was abandoned when the state arrogated itself power to represent wronged individuals. That took with it the victims' active participation in the resolution of the crimes which directly affected them. If at all they participate the offended persons' involvement is consigned to being witnesses for the prosecutor but even that low level participation is not guaranteed. On many a times, the offender may plead guilty to the crime and in the process dispensing with the need to call the victim to testify. The offender is sentenced, more often than not after a process where his rights are viewed as more important than those of the victim of his crime. In the end by denying the offended individuals participation and input in relation to the punishment of '*their offenders'* the entire process loses credibility.[4]

Many countries have already abandoned the unhelpful system of relegating victims to by-standers in the administration of criminal justice. For instance, the United States of America, way back in 1982 setup what came to be known as the President's Task Force on Victims of Crime, 1982, which made many recommendations that revolutionised victim participatory rights. Similarly in Canada, in 1998, the government commissioned a Standing Committee on Justice and Human Rights, which pioneered a new dispensation in the treatment of victims of crime and their rights to participate during the trial of offenders. More or less the same initiatives were undertaken in many other jurisdictions. At international level the United Nations Seventh Congress on the Prevention of Crime and Treatment of the Offender held in 1995, resolved that signatory jurisdictions had an obligation to accommodate the 'views and concerns of victims at appropriate stages of the criminal justice process.

[4] https://criminal-justice.iresearchnet.com/forensic-psychology/victim-participation/ Accessed on 5 October 2023

With that consciousness, the law now obliges judicial officers to consider the impact of crimes on the victims. It birthed the concept of victim participatory rights. Whatever opinion one may hold, there is little argument that the stage of a criminal trial that victims are most concerned with is the punishment stage because they believe that it is sentencing which vindicates their suffering. A court cannot therefore purport to arrive at an appropriate sentence without hearing the victim. It is the absence of victim participation which at times leads to baseless and abstract conclusions such as the oft-repeated assertion that a victim of rape *"was severely traumatized by the rape and will live the rest of her life with it."* Such utterances are in most cases untrue. Where they are true, it would not be by design but sheer coincidence because at the time the judicial officer would have made them he/she would have had no clue as to how the victim felt. The lesson is that it is only the victim himself/herself who should in one way or another, tell the court how they feel.

In cases which are resolved through contested trials, the process of eliciting such evidence from the victim can be done simultaneously with his/her testimony regarding the criminal liability of the offender. There is no reason to wait until the offender is convicted for the victim to testify about the impact of the crime. An astute judicial officer would therefore remain alive to these issues throughout the trial. A diligent prosecutor would equally adduce such evidence from his/her witnesses at that stage. The need to separately call victims to testify may arise in instances where an offender pleaded guilty. In such cases, the court usually proceeds on the basis of a statement of agreed facts which only captures the essentials of the crime. It neither depicts the emotions of the victim nor portray the impact which the crime had on him/her. Even then, it may not be always necessary for the victim to physically appear in court. The rules of admissibility are more relaxed at sentencing than they are during trial. Section 334(3) of the Code allows a court to receive evidence in various ways. It may admit evidence on oath and when that is so, the person giving evidence may include hearsay evidence. It may accept evidence through affidavits and written reports submitted by either the state or the defence. The evidence may also be in the form of written statements made by the prosecutor or by the offender or his legal practitioner. The rider is only that the requirements stated in the proviso to s 334(3) must be observed. The magistrate must therefore adopt a robust common sense approach within the confines of the law and decide which method can best be utilised to achieve the ends of justice. The advent of the IECMS in this jurisdiction may have arrived at an opportune moment. Once it becomes operational in the Magistrates' Court it can become a

handy tool in the presentation of victim impact statements by victims of crime. The participation of victims extends to allowing them to suggest the penalty which they think is suitable for the wrong committed on them. That must however not mean that a judicial officer must be swayed by outlandish proposals and succumb to vengeful justice. The magistrate must remain objective and be guided by the sentencing guidelines and the enabling statutes. When dealing with this aspect a court must bear in mind that the impact of a crime on a victim may be physical, social, psychological or financial.

Lastly, it is critical to note that victims of crime are not obligated to participate. They must not be forced to participate against their wishes. Some victims may find it comfortable to remain out of the criminal justice processes as it may accord them better closure than to continually return to court and relive their horrific experiences. A court must grant them their wishes and resort to alternative methods of obtaining information relevant for sentencing in such instances. In addition magistrates must be mindful that victims are not further traumatised by the publication of sensitive information. In these days of unforgiving, unsympathetic and insensitive media trolls a court's efforts may be undone when the misery of a victim is inadvertently compounded by revelation of their unsavoury detail on unregulated social media platforms. Such pitfalls may be avoided by the making of gag orders against the publication of details which may potentially cause further injury to the victim.

c. The probability of the offender committing a similar or other crimes and the desirability of protecting the victim or society from the offender

As is clear, the probability of an offender committing a similar or other crimes is a consideration which hitherto played no part in sentencing. It is a novel and inchoate principle in our sentencing law. It built its prominence in applications for bail. But as **Monahan J and Skeem JL. 2014**[5] put it, the concept is viewed as banal in jurisdictions such as the United States of America where it was already in use as far back as the First World War. Sometime in between then and the early 1990s, its use was discontinued. It has since returned to American courts with a vengeance and is credited, by some scholars, with the declining crime rates in America.[6] In essence it is an assessment of the risk of a convicted person reoffending. Its objective is to reduce recidivism through incapacitating or indisposing high-risk offenders by imprisoning

[5] Monahan J and Skeem JL. 2014 Risk Redux: *The Resurgence of Risk assessment in criminal Sanctioning. Fed Sentencing Re*. 26:158-66

[6] See Travis J, Western B, Redburn S. 201. *The Growth of Incarceration in the United States: Exploring causes and Consequences.* Washington, DC: Natl.Acad. Press

them on one hand and to decongest prison facilities by diverting low-risk offenders from prison on the other. My understanding of how this works is that it is not random. Rather it is a systematic application of established predictive risk factors which show whether or not an offender is predisposed to reoffending or not.

Kraemer et al. 1997[7] define a risk factor as a variable that precedes and increases the likelihood of criminal behaviour. These can be categorised into fixed markers, variable markers, variable risk factors and causal risk factors. A fixed marker is a trait which cannot be changed such as that an offender is a man. At least in the Zimbabwean context an offender's gender is unchangeable. A variable marker is one that cannot be changed by intervention such as the age of an offender. A variable risk factor is one that can be changed by intervention such as instances where an offender committed the crime because he/she was unemployed. Lastly a causal risk factor is one that is changeable by intervention and when changed it reduces the offender's risk of recidivism. Factors such as substance abuse fall into this category. It cannot be denied though, that perhaps the most obvious indicator of the risk to reoffend is a convicted person's past involvement in crime. That indicator not only heightens an offender's blameworthiness for the offence he stands convicted of but is equally indicative that he is likely to reoffend. There are many other factors which a court may take into account when assessing the offender's risk of recidivism. These include where an offender committed the crime whilst he/she was under the influence of drugs such as the notorious methamphetamine; or where he/she was part of a violent gang; or where the current conviction came whilst he/she was under some form of legal restraint which includes being on trial for another crime or being on bail for a different offence.[8] What these factors do is that they concurrently worsen an offender's culpability for the current crime and increase the assessed risk for any future offence. Because the jurisprudence around the sentencing guidelines is still in its embryotic stages I need to emphasise that the examples I have cited are just a tip of the iceberg. The body is yet to fully develop and any court must be able to bring into play and use in this assessment kindred risk factors.

d. The ability of the offender to make restitution to the victim(s) or to society.

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[7] Kraemer HC, Kazdin AE, Offord DR, Kessler RC, Jensen PS, Kupfer DJ, 1997. *Coming to terms with the terms of risk. Arch. Gen. Psychiatry* 54:337-43

[8] Tonry M. 2014. *Legal and Ethical issues in the prediction of recidivism. Fed. Sentencing Rep*. 26: 167-76

This particular aspect is self-explanatory and in any case, there is a whole body of authorities which has succinctly explained what a court must consider when making an assessment of an offender's ability to make reparation.

The actual pre-sentencing hearing procedure

The guidelines prescribe a template which must be followed by magistrates at the pre-sentencing hearing. I have illustrated earlier that the inquiry preceding sentencing has in most instances, been approached in a perfunctory fashion where the court heaped together a bundle of words some of which would be totally divorced from the sentencing process and then caption them as mitigation or aggravation. The roles of the prosecution and the offender are sometimes mixed up with no clear understanding of who should address the court at what stage. The template in the 1st schedule to the guidelines is therefore intended to remove that confusion and specifically direct judicial officers to the important issues which must not be missed. The schedule stipulates that there shall be an introduction where the crime with which the offender is charged is indicated. It may include any other information relating to the offender. The court must also indicate the offender's plea and a summary of the relevant facts. It is important because it trains the court's focus on what is before it. In instances where the conviction followed a contested trial, the court must summarise those facts which were proven at trial which are relevant for purposes of sentence. The same applies where the offender was convicted on his own plea of guilty.

At this same stage a court is required to explain the law to an unrepresented offender. Terms used in sentencing such as special circumstances/reasons or any other technical phrases are explained and such explanations are recorded. The court is also obligated to advise the offender of the normal range and type of sentences which are applicable in his/her case. Failure to do so will constitute a misdirection on the part of the magistrate. An interesting aspect which would require explanation for example is the new form of penalties brought in by s 3 of the Criminal Law (Codification and Reform) Amendment Act, 2023 (the Amendment) which amended s 65 of the Criminal law Code in relation to the sentences for the crime of rape. It provides as follows:

> **"3 Amendment of section 65 of [Chapter. 9:23]**
> Section 65 ("Rape") (4) of the principal Act is amended by the repeal of the resuming words in subsection (1) and the substitution of—
> "shall be guilty of rape and liable—
> (i) if the crime was committed in aggravating circumstances as described in subsection (2) (that is to say if there is a finding

> adverse to the accused on any one or more of those factors), to life imprisonment or any definite period of imprisonment of not less than fifteen years; or
> (ii) if there are no aggravating circumstances, to a period of not less than five (5) years and not more than fifteen (15) years.".

There is a lot of explaining which a magistrate would need to do regarding the amendment. My reading of the new provision is that it creates two sentencing regimes for the offence of rape. For starters it prescribes that where rape is committed and a court makes a finding which is unfavourable to the offender regarding the presence of any one or more of the factors listed in subsection (2) of s 65 that finding shall constitute an aggravating circumstance. The offender becomes liable or in other words shall be sentenced to life imprisonment or to any determinate period of incarceration which is not below fifteen years. Put differently, the amendment creates a minimum mandatory sentence of fifteen years imprisonment for rape committed in aggravating circumstances. It is different from other minimum mandatory sentence creating provisions in that whereas the others allow a court to make a finding of special circumstances/reasons to be released from imposing the minimum mandatory sentence the amendment to s 65 does not permit that once a decision is made that there is one or more aggravating factors present. It follows that no amount of mitigation standing on its own or cumulatively may be used by a court to avoid imposing at least fifteen years imprisonment where it has made a finding that the rape was committed in any one or more of the aggravating factors stated in subsection (2). The amendment is couched in the same way that s 47(4) of the Criminal Law Code which provides for punishments for murder is formulated. As such, the explanations made by this court regarding the interpretation of s 47(4) apply with equal force but with the necessary changes to the amendment to s 65. See the cases of *S* v *Emelda Marazani* HH 212/23 and *S* v *Tafadzwa Shamba and Tapiwa Makore* HH 419/23. Those cases make it clear that a court can find more aggravating factors outside those listed. In fact the table of presumptive penalties has already suggested a host of aggravating factors for rape in addition to those stipulated in s 65(2). The similarities with murder unfortunately only go that far.

The second sentencing regime attendant from the s 65 amendment is that where a court convicts an offender of rape and determines that it was not committed in aggravating circumstances, the law once more circumscribes the punishment. It provides a minimum mandatory sentence of five years and a maximum of fifteen years imprisonment. What this means is that no one convicted of rape under whatever circumstances and even in the face of

palpably weighty mitigation can be sentenced to imprisonment of less than five years. To put that into context a juvenile convicted of rape cannot escape the stated penalty. Whilst s 47(4) obligates a court which has convicted an offender of murder where there are no aggravating factors to imprison him/her without prescribing the minimum, I interpret that to mean that the court in such circumstances is permitted to impose anything from as low as four days imprisonment. Theoretically then, other than that a murder convict may be sentenced to death, the sentences for rape have in a way become more severe than those for murder. I state this reality because it is what the court is expected to explain to the offender on the part which requires it to explain the law. Regional magistrates who deal with the offence of rape appear to have their work cut out. In passing I may also point out that the presence of many aggravating factors may be a pointer that both the state and the court itself must be careful that the regional magistrate will have the adequate jurisdiction to sentence the offender in case of a conviction.

Next, the offender is given an opportunity to make a statement on his/her personal information. Note must be taken that it is with this opportunity that the offender is afforded a chance to speak to issues relating to his/her characteristics and any other information as earlier explained. In crimes requiring him/her to prove special circumstances he/she makes that statement at this stage. In crimes such as rape where the presence or otherwise of aggravating factors is critical, the offender must be afforded the opportunity to speak to the absence of such factors. All must be recorded. The court must allow the offender to call evidence on any aspect of his statement if he/she wishes. After the offender completes giving his evidence the prosecutor must also be given the opportunity to address the court and to rebut the offender's submissions in mitigation or in relation to special circumstances. He does so by pointing out crime characteristics, the impact of the crime on the victim and or those around him/her and presenting evidence in aggravation generally.

After the prosecutor's address the offender is once more allowed to respond. He/she has the right to controvert any aggravation made by the prosecutor. He can dispute the state's assertion regarding the presence of aggravating factors as earlier stated. In cases where the state called witnesses, the offender retains the right to cross examine them. Needless to say, everything must once again be recorded. When the arguments are closed, the court must rule on all contested issues. For example it must pronounce its findings in relation to the existence or otherwise of special circumstances. Where no special circumstances exist the court is required to state and explain the mandatory sentence to the offender and inquire from him/her

if he/she properly understood its explanation. Where special circumstances are however found to exist the court must proceed to hear and record aggravation and mitigation. This is a problematic area to many magistrates although it is elementary to comprehend that the presence of special circumstances reinstates the court's full discretion in assessing sentence. For it to assess an appropriate sentence it follows that a court must undertake an examination of the aggravating and mitigating factors. The court must equally rule on the presence or absence of aggravating factors when dealing with crimes whose punishments are dependent on that. In doing all the above, the magistrate must take into account reports and other written documents provided to the court by experts or any other professionals if any. These may include social worker reports, forensic psychiatric reports, medical reports and testimonials.

The sentencing judgment

The nomenclature sentencing judgment just like the choice and use of the term offender is a deliberate inclusion in the guidelines. It substitutes what was previously referred to as reasons for sentence in much the same way that offender replaces the oft-used phrase accused person. Just like the difference between an accused and an offender is that the former is yet to be convicted whilst the latter's guilt has been proved beyond reasonable doubt, the difference between a judgment and reasons is glaring. In the first place whilst reasons can be compiled by anyone, judgment writing is a professional activity which goes to the heart of the judicial function. In terms of adjudication of criminal cases, it is only the judicial officer who can write a judgment. The rationale for the change of name from reasons for sentence to **sentencing judgment** is therefore not difficult to discern. It is to ensure that judicial officers remain alive to their duties in the sentencing process. A judgment is supposed to deliver justice. There is a standard by which it is measured to distinguish a good judgment from a bad one. Without requiring reasons for sentence to conform to the standard of a judgment, the haphazard manner in which many of those reasons were structured could not be queried yet they were barely understandable even by legally trained people. It led to the outcry about arbitrariness in sentencing. True to the major objectives of the sentencing guidelines which seek to achieve rationality and consistency in punishments, prescribing that reasons for sentence shall be in the form of a judgment serves to further ensure that the process justifies the outcome. As a result, the structure of a sentencing judgment must closely follow that of any other judgment. It must resolve the contestation between the state and the offender as to what punishment the court must impose.

The actual structure of the sentencing judgment

Once more, the guidelines in the 2nd schedule thereto, provide a template to be followed by judicial officers. The sentencing judgment consolidates all the information presented and all the evidence tendered during the pre-sentencing hearing inquiry. It is a self-contained stage which standing alone must be capable of informing, in summary terms, any interested person of what happened in the case and what led to the offender getting the punishment which was imposed on him/her. Anyone who picks up a sentencing judgment must be able to fully comprehend the entire trial without the need to read the record of proceedings or the court's reasons for its verdict. For that reason, it must have an **introduction** in which the court states the offence with which the offender stands convicted. Additionally it may include any other information describing the offender such as his name, age and sex. It must state whether the offender **pleaded guilty or not guilty.** Where the offender was initially charged with one offence but was **convicted of a different one** that status must appear in the sentencing judgment. It is important to mention it so that the court does not make the mistake of sentencing him for the crime on which he was acquitted. It also protects the court from unnecessary criticism by the public and interested parties who may mistakenly believe for instance, that a person charged with rape got away with a lenient sentence yet the person was convicted of the competent charge of having sexual intercourse with a young person which for all intents and purposes merited the punishment imposed. At all times, sight must not be lost of the ever present interest of the public in criminal sentences. More often than not the public has no idea how the actual trial progressed. Their concern solely lies in the arrest and the punishment of the offender.

Where there was a contested trial the court briefly outlines the evidence called and proved which is relevant to sentence. If the accused pleaded guilty, reference must be made to the summary of facts or the statement of agreed facts which grounded the conviction. As a rule, the court is required in its sentencing judgment to state the penalty creating statutory provision e.g. that the penalty for the crime of rape as provided under s 3 of the Criminal Law (Codification and Reform) Amendment Act, 2023 is:

(i) "if the crime was committed in aggravating circumstances life imprisonment or any definite period of imprisonment of not less than fifteen years; or
(ii) (ii) if there are no aggravating circumstances, a period of not less than five (5) years and not more than fifteen (15) years."

In that way the court states the minimum/maximum sentences for the crime. It must also state any mandatory disqualifications which may follow such as the suspension from driving or the cancellation of a driver's licence under the Road Traffic Act. There is no escape from the court citing authorities which it bases its sentence on. A discussion of the established sentencing trends on the crime must follow. Above all the magistrate must state the presumptive penalty as provided in the guidelines. The mitigating and aggravating factors must be listed and discussed. The heavy presence of mitigating factors is what may allow the court to choose a sentence lower than the median (presumptive penalty) if the mitigation outweighs the aggravation. Where aggravation is heavier it is what will inform the court to impose a sentence higher than the presumptive penalty. When all is done the judgment must explain the sentence to the offender and ensure that it is properly understood and recorded. The interplay between mitigating and aggravating factors is central because it is what justifies the sentence imposed.

Disposition

I have already stated that I took no umbrage with the convictions in all the six cases. They are appropriate. But as illustrated the same cannot be said of the sentences predominantly because of the process which led to their imposition. It was arbitrary. I also indicated that in three of the records of proceedings the offenders were sentenced prior to the coming into effect of the Sentencing Guidelines whilst the other three were sentenced after. I have consulted my brother CHIKOWERO J who is in agreement with the views I expressed herein and the orders indicated below. In relation to the former set of cases I can do no more than withhold my certificate whilst in the latter set the sentences cannot stand because they were arrived at without following the mandatory procedures prescribed in the Guidelines. It is therefore directed that:

1. The convictions in all the six cases are confirmed as being in accordance with real and substantial justice
2. I withhold my certificate in relation to the sentences imposed in the cases of *The State* v *Trust Gudhu* on Mt Darwin CRB No. MTD 629/23; *The State* v *Tapiwa Siravhe* on Shamva CRB No. SHM 156/23; *The State* v *Brendon Chirewo* on Chivhu CRB No. SA 79/23;
3. The sentences imposed in the cases of *The State* v *Michael Kandeya* on Bindura CRB No. BNR 482/22; *The State* v *Blessed Sixpence* on Marondera CRB No. R105/23; and

the State v *Tatenda Neil Kuyaziwa* on Epworth CRB No. EPW 711/23; be and are hereby quashed in their entirety.

4. The matters of *The State* v *Michael Kandeya*; *State v Blessed Sixpence* and *State* v *Tatenda Neil Kuyaziwa* are each remitted to the respective trial magistrate for him/her to sentence the offenders afresh using the guidelines stated in this judgment.

CHIKOWERO J: ……..AGREES