THE STATE

Versus

NKANYISO SIZIBA

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 4 MARCH 2020

Criminal Review

KABASA J: The accused, a 19 year old man, was convicted on his own plea of guilty on a charge of rape. He raped the complainant, a grade 5 pupil who was 10 years old at the time. She was born on 2nd March 2009 and the rape occurred in March 2019.

The facts of the matter are these: On a date unknown to the prosecutor but in March 2019, the complainant's family left their keys at the accused's family home. In the afternoon of that day the complainant went to the accused's home to fetch the keys so she could let herself into the house. She found the accused at home and he proceeded to lay her on a couch, lifted her skirt before raping her.

The accused was sentenced to a wholly suspended 4 year term of imprisonment. I considered this sentence inappropriate given the accused's age as compared to the child's and queried the sentence with the learned Regional Magistrate. The following was her response:

"In assessing sentence the court took into consideration that the accused person is a student doing his 'A' level and the court did not want to interfere or disrupt the accused person's educational career, hence justice was tempered with mercy.

At 19 years the court considered accused as also young and immature and deserved a second chance in life hence I gave him a wholly suspended prison term to deter him in future and not to destroy his life and his educational career'

The learned Regional Magistrate correctly articulated the aggravating factors. Rape is a serious and reprehensible offence and when perpetrated on a child of the complainant's age by a 19 year old, the seriousness assumes even greater proportions and the sentence must

reflect so. The accused is a neighbor to the complainant and took advantage of the fact that the complainant had to fetch their house keys from his home on her way from school.

Whilst the accused is a first offender who pleaded guilty and was in form 6 at the time, the sentence of 4 years imprisonment wholly suspended for 5 years failed to strike an appropriate balance between the ends of justice and the accused's personal circumstances. It is desirable to impose a custodial sentence only when no other suitable and appropriate penalty is possible. But there are many cases which are so grave that there is no possibility that any form of sentence other than a custodial one could be imposed. (S v Marongwe HC-H 67-88). This is one such case.

Whilst tampering justice with mercy is an approach a judicial officer can adopt in order to come up with a fair punishment, the remarks by MALABA J (as he then was) in *State* v *Tsibo Ndlovu* HB 14-96 that:-

> "It is also well to remember that too harsh a sentence is as ineffective and unjust as is a sentence that is too lenient," are opposite

So too are the remarks by HOLMES JA in *State* v *Rabie* 1975 (4) SA 855 (A) at 861 D where he said:-

> "Then there is the approach of mercy or compassion or plain humanity. It has nothing in common with maudlin sympathy for the accused. While recognizing that fair punishment may sometimes have to be robust, mercy is a balanced and humane quality of thought which tempers one's approach when considering the basic factors of letting the punishment fit the criminal as well as the crime and being fair to society, see *State* v *Narker and Another* 1975 (1) SA 583 (AD) at 586 D."

Whilst the youthfulness of a 19 year old is an important consideration, it ought to be weighed against the gravity of the offence he committed and more important, the age of the child. The accused was almost twice the complainant's age. Youthfulness should not be allowed to obscure the seriousness of the offence and where the offence committed is a serious one courts should not shirk from sending youthful offenders to jail. (S v Nigel Fanuel Mapfuma HC-B-41-90)

In *State* v *Edwin Dino Hunda and Another* HH 124-2010, UCHENA J (as he then was) considered as excessive a punishment of 15 years imprisonment imposed on a 17 and 18 year

old who were convicted on their own pleas of guilty to unlawful entry and theft. He had this to say:-

> "The sentences on their own are not appropriate for young first offenders aged 17 and 18 years respectively. Their pleas of guilty should have been given serious consideration. The rigors of imprisonment on young offenders should have had the effect of reducing the sentence to be imposed and the total effective sentence."

The foregoing however must be understood in the proper context. The offence was unlawful entry and theft committed under circumstances the learned judge described as "circumstantial" in that the juveniles happened to find car keys after breaking into the complainant's home and so stole, *inter alia*, the car. They had however not set out to steal a car.

The learned judge cited, with approval, BARTLETT J's decision regarding the sentencing of accused persons of a youthful age.

In *State* v *Zaranyika and Others* 1995 (1) ZLR 270 (HC) at 271-272 BARTLETT J dealing with the sentencing of accused persons of accused's age said:-

> "Normally a juvenile should never be sent to prison unless the offence is so serious that only a prison sentence can be justified. In prison he is bound to mix with the worst elements of society. It is a sad reflection on Zimbabwean Society that the level of serious offences committed by persons in the 17-18 year age group is markedly
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> increasing. Factors such as the high percentage of the population under the age of 18 and the dismal employment prospects are undoubtedly large causative factors.
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> Rapes committed by young offenders are regrettably becoming more and more commonplace. The prevalence and need for deterrence of such offences are relevant considerations but have their limitations. It is not possible to justify imposing more and more severe sentences on the grounds of prevalence.
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> …….
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> While Zimbabwe would not want to be a nation where young rapists are not treated with appropriate severity, it would not want to be a nation where 17 and 18 year olds are treated as fully mature adults and sent to prison for many years for offences such as rape."

I agree with the comments by BARTLETT J. Rape is in my view a more serious offence than unlawful entry, and of equal seriousness, with theft of a motor vehicle. I am therefore

persuaded that in the absence of corporal punishment, imprisonment is unavoidable, but its length must be carefully considered."

The foregoing holds true *in casu.* Rape is indeed a serious offence and in the absence of corporal punishment (not that it will be applicable in this case where the accused is 19 and more importantly it is no longer an available option as it was declared unconstitutional (see State v Willard Chokuramba and 2 Others CCZ10/19), imprisonment is unavoidable.

At page 4 of the judgment, UCHENA J continued as follows:-

"In *State* v *Tendai and Another* (Juveniles) 1998 (2) ZLR (HC) at page 429 GILLESPIE J, commenting on the sentencing of juveniles of about the accused's age said;

In *State* v *Zaranyika and Others*, this court, through BARTLETT J, attempted to bring some rationality to the difficult area of sentencing offenders aged 17-19 years. Such persons were not normally beaten – corporal punishment cannot be imposed upon persons 18 years and above. After a careful review of authorities on the principle of imprisonment for young offenders and of precedents in sentencing, the learned judge concluded:

> "While Zimbabwe would not want to be a nation where rapists of the accused's age are not dealt with appropriate severity, it would also not, to my mind, want to be a nation where 17 to 18 year olds are treated as fully grown mature adults and sent to prison for many years for offences such as rape. As I have previously indicated, a balance needs to be drawn."

The learned judge drew the balance in the four cases before him by recommending sentences of 5 to 6 years imprisonment, with 1 ½ or 2 ½ years suspended – in the case of rapes of girl children by 17 and 18 year olds, and a sentence of 5 years, all of which was suspended, in the case of a similar offence by a 15 year old where institutionalization would have been appropriate but could not be put in place. These sentences replaced punishment of 6 to 10 years, which had been imposed by the magistrates concerned."

Cases of rape of young girls have not abated. Whilst this in itself is no reason to continuously increase sentences, it however makes it important to mete out sentences which properly reflect the seriousness of this scourge.

At 19 the accused should have known better. The 10 year old girl must have trusted him and he ought to have treated her as his young sister, not to ravish her as he did. The learned Regional Magistrate was more concerned with the accused's circumstances at the expense of the victim who equally deserves protection. Whilst the consideration of the accused's future prospects was required it ought not to have over shadowed the harm his conduct caused to the young girl.

An effective term of imprisonment was called for. The wholly suspended 4 year term of imprisonment is, in my view, just maudlin sympathy for the accused and not mercy shown in the process of exercising "a balanced and humane quality of thought" with a view to arriving at an appropriate sentence.

The appropriate sentence should have been in the region of 6 years with 1 ½ - 2 years suspended on the usual conditions.

I find myself unable to confirm these proceedings as in accordance with real and substantial justice and accordingly withhold my certicate.