HB 24/18
HCA 56/17

SYDNEY NDEBELE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE & MOYO JJ
BULAWAYO 12 FEBRUARY 2018

Criminal Appeal

E. Mandipa, for the appellant
Ms N. Ndlovu, for the respondent

MAKONESE J: It is a fairly established principle of our law that sentences must be fair and just. Where a prison sentence is the only appropriate punishment, the length of such term of imprisonment must be carefully weighed against the circumstances of the case and the personal circumstances of an accused.

As a general rule, where a mature adult male commits the offence of having sexual intercourse with a minor in contravention of section 70(1)(a) of the Criminal Law (Codification and Reform) Act (Chapter 9:23), imprisonment is called for, unless there are compelling reasons for not imposing a custodial sentence. The age difference between the accused person and the complainant is of paramount significance in respect of the sentence to be imposed, amongst other factors.

The appellant appeared before a magistrate sitting at Gweru Magistrates' Court facing 3 counts of having sexual intercourse with a minor. He pleaded guilty to all 3 counts and was consequently sentenced to 5 years imprisonment of which 1 year was suspended for a period of 5 years on the usual conditions of future good conduct. The effective sentence was 4 years imprisonment. The appellant appeals against sentence.

In his grounds of appeal, the appellant raised the following issues:

(a) the court *a quo* erred in imposing a sentence of 4 effective years imprisonment and that such sentence is severe and induces a sense of shock.

(b) the court erred in failing to give due weight to the mitigating features pertaining to the case, more particularly that the appellant was a first offender who pleaded guilty.

(c) the court *a quo* erred in making a finding that a sentence of community service and a fine would send a wrong signal to the public.

(d) the court *a quo* erred in not imposing any other lessor sentence in the circumstances.

The state has conceded that although a prison sentence was indeed appropriate in the circumstances of this case, the effective custodial sentence of 4 years imprisonment is rather harsh, warranting interference by this court.

The learned magistrate in the court *a quo* provided detailed and extensive reasons for imposing an effective custodial of sentence of 4 years imprisonment. I set out hereunder the full reasons that motivated the learned magistrate to adopt the attitude and stance he took:

"In assessing the appropriate sentence I will consider that:

(1) Accused pleaded guilty showing contrition and was candid and open with the complainant, the court, the state and the police at large in avoiding a protracted trial. Accused did not waste the court's time. It is for this reason that a plea of guilty must be recognized and rewarded for its effective, prompt, expeditious and efficient administration of justice. Out of the accused's mouth, the court was able to arrive at a conviction.
(2) Moreso, accused is a first offender to whom there is an emphatic general policy to the effect that wherever possible, first offenders should not be sent to prison for fear of being contaminated by hardened and determined criminals. Imprisonment has various deleterious effects, ranging from regulation of one's personal life to personal liberty.
(3) Coupled to this, accused is married and he has 3 minor children, who are aged 5 years, 2 years and 1 year 6 months. He is the breadwinner to the family.
(4) Accused is also employed as a caretaker and he looks after his mother. Employment these days, though he earns $100 per month is an essential commodity which if lost is difficult to regain".

Accused is a grade 2 drop out who said he did not know that it was an offence to fall in love with a child under 16 years. Accused is a simple and unsophisticated person who hails in a society where woman who move at night are regarded loose. However, this offence is on the increase and there is need for personal and general deterrence.
Accused is aged 44 years, whilst the minor child is aged 14 years. He is 30 years older than the victim. There is no genuine love that existed between accused and the victim. Accused knew that the victim was young enough not to appreciate love or the sexual intercourse that is why he said that when she grows up he intended to marry her. The age disparity is substantial and what existed between accused and the minor child was child exploitation and manipulation if not gross abuse.

In casu, complainant's character is that she is not loose as accused spent 4 weeks to have his love proposal accepted after he proposed love to her. Accused's insinuation that she is a flirt or promiscuous is not corroborated by his submission that he spent 4 weeks to have sexual intercourse with her after she accepted his love proposal.

Though she is not a virgin, her inordinate delay to accept accused's love proposal and her further inordinate delay in having sexual intercourse with accused after accepting the love proposal, clearly demonstrates that she is a girl of good virtue and character.

What aggravates the offence is that the victim is not nearly 16 years old, she is attending school and accused is married, coupled with the fact that he is more mature than the complainant. Her age is 14 years old and accused knew her appearance was not ripe to engage in sexual intercourse, with her, that is why he wanted to marry her after growing up.

From the investigation I made the offence was committed in aggravatory circumstances. See *S* v *Mutowo* 1997 (1) ZLR 87; *S* v *Nare* 1983 (2) ZLR 135

In casu, this case is distinguishable from the following cases where the magistrate did not make an investigation and interrogation about the age, appearance, character of the complainant and the circumstances in which the offence was committed. See *S* v *Tshuma* HB-70-13; S v James 1998 (1) ZLR 424

Sexual abuse of children is viewed by the court in serious and grave light. Sexual abuse of children by its nature, extent and content mars or eradicates the future prospect of a girl child, who looks to the court as salvation from abuse exploitation and manipulation.

A sentence of community service and a fine will send a wrong message to the public. An effective term of imprisonment is called for: *S* v *Nyirenda* HB-86-03; *S* v *Mbulawa* 2006 (2) ZLR 58 and *S* v *Ginandi* HB-55-12.

Accused's blameworthiness is high."

It is clear that the learned magistrate explored the decided cases and came to the conclusion that only a term of imprisonment was appropriate. I affirm that where sexual intercourse with a young person is committed by a mature person and where the age difference between the accused and complainant is wide, the only appropriate sentence is a term of imprisonment. In certain instances, however, trial magistrates tend to overplay the aggravating circumstances of the offence, without taking into proper consideration, the mitigating features of the case.

In *Mayogo & Ors* v *A-G* HH 181-04 the court held that in sentencing convicted offenders, trial magistrates and judges have a wide discretion. The net result is that both the reviewing and appeal courts will not lightly interfere with the exercise of such discretion in the absence of irregularity of misdirection.

In *S* v *Nhumwa* SC-40-88, the court held that it is not for the appeal court to interfere with the discretion of the sentencing court merely on the grounds that it might have passed a sentence somewhat different from that imposed by the court *a quo*. If the sentence complies with the relevant principles even if it is severe than the one which the appeal court would have imposed sitting as a court of first instances, the appeal court will not interfere with the sentencing discretion of the trial court.

In the instant case, the court a quo sentenced appellant to 5 years imprisonment with 1 year suspended for 5 years for 3 counts of having sexual intercourse with a young person. The approach to sentencing in such cases was laid down in *S* v *Nyirenda* HB-86-03. The court in that matter laid down that the court should have regard to such factors:

(a) the age of the complainant
(b) appearance and character of the complainant
(c) age of the accused
(d) circumstances under which the offence was committed.

In this matter the appellant was aged 44 years whilst the complainant was 14 years old. The age disparity between the appellant and the complainant is huge. This factor alone is aggravatory. The courts have a duty to protect young girls against sexual predators. In *S* v *Nyirenda (supra)* the court decided that a sentence in the region of 2 years imprisonment would have been in order in a case where the complainant was aged 15 years while the accused was aged 37 years. The same sentiments were expressed in *S* v *Onisimo Girandi* HB-55-02, where the court expressed the view that, while emphasizing the need to sent a signal to society that courts will descend heavily on child sexual offenders, the court held that a sentence of not less than 2 years imprisonment was appropriate.

It is my view that, although the magistrate gave extensive and detailed reasons for sentence, he did not give due weight to the fact that appellant pleaded guilty and was a first offender. See *S* v *Sidat* 1997 (1) ZLR 487 (S) where the Supreme Court held as follows:

> *"a plea of guilty must be recognized for what is a valuable contribution towards the effective and efficient administration of justice. It must be clear to offenders that a plea of guilty, while not absolving them, is something which will be rewarded. Otherwise, again, why plead guilty."*

I am satisfied that an analysis of the reasons for sentence outlined by the learned magistrate in the court *a quo* reveals that he fell into the trap of failing to give due weight to the plea of guilty tendered by the appellant, who was a first offender. That led to a misdirection on his approach to sentence. This is certainly not one of those cases where a lengthy prison sentence was called for. This court observes that the learned magistrate placed too much emphasis on the principle of general deterrence resulting in an unjust sentence.

This court is, therefore at large as regards sentence.

In the result the following order is made.

1. The appeal against sentence succeeds.
2. The sentence of the court a quo is set side and substituted with the following:

"Accused is sentenced to 3 years imprisonment, of which 1 year is suspended for 5 years on condition accused, is not within that period sentenced to an offence of a sexual nature and for which upon conviction accused is sentenced to a term of imprisonment without the option of a fine."

Moyo J ……..I agree

Gundu & Dube c/o Dube-Tachiona & Tsvangirai, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners