

L. M. (JUVENILE)

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU J & CHEDA AJ
BULAWAYO 22 OCTOBER 2012 & 7 FEBRUARY 2013

K. Ngwenya for appellant
Miss S. Ndlovu for the respondent

Criminal Appeal

NDOU J: This is an appeal against sentence only. The appellant attends a conventional boarding school i.e. Cyrene High School where he is doing form three. The appellant was convicted and sentenced by a Bulawayo Regional Magistrate of two counts of rape. The sexual assaults were perpetrated on two female minors aged four years and six years respectively. The offences were committed at the same place, one after the other and therefore close in space and time. At the time when the appellant committed the offence he was on school holidayS and residing at a relative's place. A probation officer had placed before the court *a quo* a detailed report on the appellant's family relationships, education, background, personality, traits, circumstances surrounding the commission of the offence, attitude towards the offence, the victim, motivational analysis, prognosis, treatment plan and had made recommendations on how best to deal with appellant. The probation officer had observed and concluded that:

- (a) The appellant lacked proper guidance;
- (b) The appellant was of broken parentage;
- (c) The family set up was dysfunctional;
- (d) The appellant was deserving of sympathy than condemnation;
- (e) The commission of the offences was "spontaneous and serious";
- (f) The appellant was remorseful;
- (g) The appellant was experimental with a tendency to put into effect what he saw on television; and
- (h) The appellant would not likely commit a similar offence as he had been frightened about the offences.

Accordingly, the probation officer had recommended that the charges be withdrawn before plea and that the appellant be placed under supervision of a probation officer. Detailed submissions in mitigation were placed before the trial court and of note were evidence of

Nkululeko Ndlovu a business consultant, a professional and family man who undertook to take over the guardianship and upkeep of the appellant, having learnt of the appellant's predicament. Nkululeko Ndlovu is an uncle to the appellant. He further undertook to, at his own expense, secure a professional psychologist or counselor to ensure the reformation and rehabilitation of the appellant. The trial magistrate had other ideas. She disregarded the recommendations of the probation officer. She also disregarded efforts by the appellant's uncle to assist with his reformation and rehabilitation. Instead, the trial magistrate sentenced him to be placed at a state reformatory i.e North Court Training Institute, Mount Hampden, Harare for a period of three years in terms of section 351 as read with section 352 (A) of the Criminal Procedure and Evidence Act [Chapter 9:07]. The appellant was thus lodged in a conventional prison in which he mixed with adult convicts pending transfer to Harare. At the behest of the appellant, this court intervened under case number HCB 107/12 and ordered the removal of the appellant from Khami Prison to Luveve Remand Home pending transfer to Harare. Under cover of case number HC 1366/12 this court further stayed the execution of appellant's sentence and the appellant was released back to school pending his appeal against sentence. The reasoning by the trial magistrate overlooked the fact that the appellant was just a child when he committed the offences. Further, two victims were both his close relatives. He abused them at the same time, on the same day and at about the same time. To conceal his deeds, the appellant gave his victims sweets. The trial magistrate failed to give due consideration and weight to the fact that the appellant's behaviour was driven by mere experimenting and excitement of youth. In *S v Five* 1988 (2) ZLR 168 (SC) DUMBUTSHENA CJ state

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“... it is a matter notorious enough for judicial notice to be taken, that at no time in life, other than in youth, are sexual passions more easily aroused. At the same time, callow youth lack insight, and experience and therefore more readily acts in a foolish manner than a mature person ...” – see also *S v Julius* GS 269-80 and *S v Gwaranda* 1981 (2) ZLR 17.

The trial court disregarded the probation officer's report regarding the management of the appellant without good and sufficient reasons for doing so. This is a misdirection – *S v Tendai & Anor* 1998 (2) ZLR 423 (H). In the *Tendai* – case the court emphasized the importance of not only the probation officer's opinion in formulating a scheme of management for a juvenile offender, but also the involvement of the juvenile's family, education authorities in efforts to rehabilitate the offender.

For no good and sufficient reasons the court *a quo* spurned the uncle's efforts. Once the trial court opined that appellant's conduct required a deterrent sentence it fell off focus and lost the judicial vision and objective i.e to sentence a juvenile in order to facilitate and achieve its reformation and rehabilitation. It was apparent that our penal institutions are critically constrained as the appellant had to be kept in prison with adult prisoners pending transfer to Harare. The court did not investigate how long the appellant would be in adult

prison custody before being transferred to the North Court Training Institute. The trial magistrate's reasons for sentence are scant and do not evince that she struck a right balance between the aggravatory and mitigatory factors.

The state rightly conceded that the appeal has merit.

Accordingly, the appeal against sentence is upheld. The sentence imposed by the court *a quo* on 19 April 2012 is set side and substituted with the following:

"The accused is sentenced to 6 cuts with a rattan cane to be administered by a designated officer of Bulawayo Prison. In addition the accused is placed under supervision of a probation officer of Department of Social Services, Plumtree."

Cheda AJ I agree

Phulu & Ncube, appellant's legal practitioners

Criminal Division, Attorney General's Office respondent's legal practitioners