EUGIENE MHLANGA
versus
THE STATE

HIGH COURT OF ZIMBABWE
BERE AND MAKONESE JJ
BULAWAYO 19 OCTOBER 2015 AND 11 FEBRUARY 2016

Criminal Appeal

C. Dube for the appellant
Ms N. Ndlovu for the respondent

MAKONESE J: On 19 October 2015 the appellant argued his appeal against sentence only in the above matter. We dismissed the appeal. We have now been asked to furnish our reasons for judgment. The following are our reasons.

The appellant appeared before a magistrate sitting at Bulawayo facing one count of indecent assault as defined in section 67 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The appellant was convicted on his own plea of guilty and was sentenced to 18 months imprisonment of which 6 months was suspended on the usual conditions. The effective custodial sentence was 12 months.

The appellant filed a Notice of Appeal against sentence only. He argued that there was a gross irregularity, misdirection or abuse of judicial function resulting in a "disturbingly inappropriate sentence being imposed. It was contended in particular that the trial magistrate ought to have imposed a non-custodial sentence in the form of community service.

The brief facts of the matter are that on 27 January 2014 and at around 2200 hours, at house number V50 Mzilikazi, Bulawayo the appellant approached the complainant in the kitchen and fondled her breasts several times. The accused then placed his hand under the complainant's dress and fondled her private parts. The complainant was 13 years old at the time and was attending Form one. The complainant was not amused by the accused's conduct and reported the matter to her school teacher leading to the arrest of the accused. It is to be noted that accused is a family friend and neighbour to the complainant.

The trial court found that the mitigating features of the case were far outweighed by the aggravating features and considered that a custodial sentence was appropriate. The trial court's reasons for sentence are stated as follows:

> *"In arriving at an appropriate sentence this court has to put into account what the accused person said in mitigation, the aggravatory features and the concerns of the community at large.*
>
> *The accused person pleaded guilty to the charge and showed genuine remorse for what he had done. He is also a first offender who is a family man and is employed. If incarcerated he will lose his job and his family will suffer.*
>
> *However the offence the accused perpetrated is made more serious in that he did not only fondle the complainant's breasts but her private parts as well. What is disturbing is that the complainant is only 13 years and in Form one and grew in the eyes of the accused. Our young girls need to be protected from the depravations slations of the accused and his ilk (sic). Society view in day light a married man who sexually abuses young children and the courts should side with the society by giving custodial terms wherever appropriate. Accused person's moral blameworthiness is on high ground."*(sic)

It is a well-established principle of our law that sentencing is the discretion of the trial court and that it is not for the appeal court to interfere with the sentencing court merely on the grounds that it could have passed a sentence somewhat different from that imposed by the court *a quo*. See, *S* v *Nhumwa* SC 40/88.

It is my view that that the trial magistrate gave well-thought out and detailed reasons in arriving at a sentence it deemed appropriate. The sentence imposed was proper in the circumstances considering that the twenty eight year old appellant was regarded as family and regarded complainant's father as an uncle. The complainant trusted the appellant who instead violated her instead of being protective towards her. The appellant is a married man who out of lust and nothing else sought to abuse a child of thirteen years by exposing her to sexual acts at a young age. A custodial sentence was appropriate to reflect the seriousness of this offence. Appellant's moral blameworthiness is on the high scale as he was well known to the complainant who practically grew up in his eyes. Appellant was supposed to be protective towards her and was expected not to turn sexual predator.

I am aware that the court in the case of *S* v *Shariwa* HB 37/03 held that a failure to consider community service in cases where the court has imposed a sentence of 24 months or

less amounts to a misdirection. I hold the view that where a trial court considers a matter to be serious and warranting a custodial sentence and pronounces his reasons for sentence justifying the imposition of a custodial sentence, the approach, on appeal should be to raise the following factors:

1. Is the offence serious?
2. Is the sentence imposed manifestly excessive so as to induce a sense of shock?
3. Did the trial court misdirect itself in its approach to sentence?
4. Is the sentence in line with cases of a similar nature?

In my view, in this case there was no misdirection on the part of the trial court in its approach to sentence. See, *Sibanda* v *The State* HC 54/15 and *Zulu* v *The State* HC 52/03.

The court in the *Zulu* case *(supra),* stated *obiter* that had the matter been properly prosecuted and it was proved that in addition to fondling the breasts, the appellant had lifted the complainant's skirt and touched her legs, it would not have hesitated in imposing a custodial sentence. Although these sentiments were made *obiter by* the court, in the present case, the appellant fondled the complainant's breasts several times before fondling her private parts. This is a serious violation of the complaint and amounts to child sexual abuse. The appellant was a married man and 15 years older than the complainant. This court as the upper guardian of minors, must be seen as affording real protection to the vulnerable group of the young girl child by imposing custodial sentences on those who choose to violate the rights of young persons.

In the circumstances I can see no basis for interfering with the sentence imposed by the court *a quo.* For these reasons the appeal against sentence was dismissed.

Mcijo, Dube and Partners, appellant's legal practitioner
National Prosecuting Authority, respondent; s legal practitioners

Bere J……..agrees