1. THE STATE CRB MUT R118/16
versus
RONALD CHIMBO

2. THE STATE CRB MUT R143/16
versus
BESTON NADOLO

HIGH COURT OF ZIMBABWE
TAGU & CHITAPI JJ
HARARE, 6 March 2017

Criminal Review

CHITAPI J: The above matters were placed before me on automatic review in terms of s 57 (1) and (4) of the Magistrates' Court Act, [*Chapter 7:10*]. I have decided to consolidate the reviews because the cases were heard before the same regional magistrate. Both the accused were charged with and convicted of the offences of rape as defined in s 65 (1) (a) and (b) of the Criminal Law Codification and Reform Act, [*Chapter 9:23*]. In respect of Beston Nadolo he faced a further charge of robbery as defined in s 126 of the same Act. Both accused were convicted after contested trials. The comments which I wish to make in relation to the proceedings are similar in that they related to the issue of assessment of sentence. I do not have any qualms with the convictions of the accused.

In the case of Ronald Chimbo, he was convicted of having raped an 11 year old juvenile in June 2013 at Manyengavana village, Chief Zimunya, Mutare. The brief facts of the case were that the accused unlawfully entered the bedroom of a house where the complainant was sleeping with her older sister. The accused gained entry through a broken window. He then had forced sexual intercourse with the juvenile around 2:00am. The complainant screamed out. The complainant's aunt who was sleeping in the next bedroom woke up and rushed to the complainant's rescue. The accused however escaped apprehension. Unfortunately for him, in the rush to escape, he left his slippers behind.

The accused denied the charge and in particular he denied having raped the complainant. He alleged that the complainant could have been raped by someone else. The complainant reported the sexual assault upon her to her aunt but the matter was swept under

the carpet by the aunt to protect the accused who was a friend to the aunt's husband. The accused reportedly paid some money to the complainant's aunt to buy her non-disclosure of the incident. The complainant was a very unfortunate rape victim because her uncle also allegedly raped her subsequent to the rape by the accused.

Despite the accused's protestations and denial of having committed the *actus reus*, he was convicted on the charge. I have already indicated that the conviction appears to be proper. I shall therefore not dwell on it unduly. It is however material to state that the prosecutor adduced evidence of the estimated age of the complainant. The evidence was in the form of an affidavit prepared by a qualified government dentist who estimated the complainant's age as at 28 June, 2016 when he examined the complainant to be between 13 and 14 years old. The accused consented to the production of the affidavit. Given this evidence, the complainant would have been aged between 10 and 11 years old when the accused ravished her. The accused was aged 43 years old meaning that the difference in the ages of the accused and the complainant was between 30 and 31 years old. The accused was sentenced to 18 years imprisonment with 2 years suspended for 5 years on condition of future good behaviour.

The record shows the following in regard to sentence as recorded by the learned regional magistrate

> "MITIGATION
>
> - Aged 43 years
> - Not employed
> - No money on person
> - No savings
> - No assets of value
> - Married with 6 children
> - That is all
>
> SENTENCE
>
> The accused is aged 43 years. He is a first offender. The accused raped the complainant who was aged 11 years at the time. Rape is a serious offence and it suffices to say that upon conviction a lengthy custodial sentence is a matter of course.
>
> 18 years imprisonment of which 2 years imprisonment is suspended for 5 years on condition that during this period accused does not commit any offence involving sexual assault for which he is convicted and sentenced to imprisonment without the option of a fine"

With respect to Beston Nadolo, he was charged with one count of robbery and another count of rape respectively as defined in ss 126 and 65 of the Criminal Law

Codification and Reform Act. He was convicted on both counts and sentenced to 2 years and 18 years respectively, the 2 year sentence being made to run concurrently with the 18 year sentence.

The brief facts of the charges against this accused was that he was aged 37 years old and the complainant was aged 24 years old. The two are unemployed and did not know each other. The accused and complainant stayed in the adjourning suburbs described as Areas 15 and 16 Dangamvura respectively. On 22 November, 2015, the complainant whose husband had gone to work retired to bed around 23 00hrs after locking all doors and closing all windows to the house. In the dead of the night around 0200hours the accused used unknown means to gain access into the complainant house.

Whilst in the house, the accused proceeded to where the complainant was sleeping and woke her up. He demanded for money. The complainant in fear got up and opened her wardrobe. She retrieved US$20.00 therefrom and gave it to the accused. The accused lit the screen of his cellphone and the complainant was able to recognize him. The accused was not content with the US$20-00 and demanded that the complainant surrenders her phone as well. The complainant lifted her pillow to reveal her phone and the accused took the phone. The accused was waving a knife to threaten the complainant.

The accused next ordered the complainant to lie on her bed. The complainant initially refused to do so. She instead woke up her baby child who was on the bed and induced the baby to cry in the hope that the baby's cries could alert someone to come to her aid. Nobody came. The accused continued to threaten the complainant and she complied and lay on the bed. The accused forcibly removed the complainant's pants and raped her. He then left with the phone and the US$20-00.

The complainant identified the accused as her assailant at an identification parade on 8 December, 2015. On being identified the accused retorted that he was in prison when the complainant was raped. The alibi was proven to be false. The accused also queried if the complainant had tested HIV positive since the accused was HIV positive.

Evidence was also led from the complainant's landlady who confirmed that the complainant had raised alarm in the early hours of the date of the incident. She went to the cottage to investigate to find out what the problem was. She was given a report by the complainant that a person whom the complainant could identify if she saw him had broken into the cottage, demanded money and her phone and raped her. The witness confirmed the complainant's report to her that the latter had reportedly handed over US$20-00 and her

phone to the intruder under duress as the intruder was welding a knife and threatening her with it. The witness accompanied the complainant to the police station where the complainant reported her ordeal.

The learned magistrate was satisfied with the testimony of the complainant and the landlady. Evidence was also led of how the identification made was conducted. The learned magistrate disbelieved the accused's defence and convicted him.

The record shows the following in relation to sentence

"MITIGATION

- Aged 30 years
- Divorcee
- 3 children
- Have no money on person
- No savings
- No assets of value that is all

SENTENCE

The accused is 30 years

He was treated as a first offender

Divorcee with 3 children

The accused entered the complainant's house at night using some unorthodox means. He robbed the complainant of cash US$20 as well as her cellphone. He went on to rape the complainant after threatening to stab the complainant if she resisted.

Both offences by the accused are serious offences.

Count (1) – 2 years imprisonment

Count (2) – 18 years imprisonment

Sentence in count 1 is to run concurrently with sentence in count (2).

Total Effective sentence: 18 years."

The manner in which the learned regional magistrate dealt with the question of sentence shows a perfunctory approach. He just glossed over this most important aspect of the proceedings. The assessment and passing of sentence following conviction requires a judicial officer or sentencer to consider all the facts relevant to sentence in a particular case painstakingly and meticulously. Sentencing is arguably the most difficult part of a trial judicial officer's function in a criminal trial especially in cases where the judicial officer is required to exercise a discretion.

The purposes of sentencing are varied. In the main however, they include considerations such as individual deterrence, general deterrence, societal protection, retribution and reform. This review judgment does not intend to be a treatise or lecture on the purposes of sentence but to be a reminder to judicial officers of the importance of giving adequate and comprehensive reasons for sentence. This is most important where the court is dealing with a serious crime as in the cases under review. A review or appeal court will not lightly interfere with a trial court's sentence because every judicial officer presiding a criminal trial will ordinary be given a discretion to decide on what sentence to impose. The Criminal Law (Codification & Reform) Act, [*Chapter 9:23*] does not only create offences but it also provides for a range of sentence within which the trial court should exercise its discretion to come up with what court considers to be an appropriate sentence in a given case. The exercise of the discretion on sentence forms one aspect of judicial independence.

In S v *Ramushu & Ors* SC 25/93 GUBBAY CJ stated as follows:

> "… in every appeal against sentence, save where it is vitiated by irregularity or misdirection, the guiding principle to be applied is that sentence is pre-eminently a matter for the discretion of the trial court and that appellate courts should be careful not to erode such discretion …"

Propriety of a sentence

The fact that a trial court has discretion as to sentence is therefore an entrenched, trite and well recognised principle of law. A judicious discretion cannot properly be exercised by a judicial officer where there is a paucity of material facts on which to ponder, weigh and exercise an informed discretion. The lack of material evidence on which to assess sentence is what concerned me when I read the records of proceedings. It was not surprising therefore that the learned regional magistrate gave scanty reasons for sentence. For example in the case of *S* v *Ronald Chimbo*, the magistrate stated that it sufficed that rape being a serious offence, "a lengthy custodial sentence is a matter of course." There is of course no tariff sentence for rape and for a judicial officer to lay as a rule of thumb that a rape conviction is always visited with a lengthy custodial sentence as a matter of course amounts to a misdirection which affects negatively the exercise of a judicial discretion. Such an approach shows that the sentencer already has a mindset yet each case should be dealt with on its own facts.

Section 65 of the Criminal Law (Codification and Reform) Act provides as follows:

> "65 Rape
> (1) If a male person knowingly has sexual intercourse or anal sexual intercourse with a female person and, at the time of the intercourse-
> (a) the female person has not consented to it; and

(b) he knows that she has not consented to it or realises that there is a real risk or possibility that she may not have consented to it;
he shall be guilty of rape and liable to imprisonment for life or any shorter period.
(2) For the purpose of determining the sentence to be imposed upon a person convicted of rape, a court shall have regard to the following factors, in addition to any other relevant factors and circumstances-
(a) the age of the person raped;
(b) the degree of force or violence used in the rape;
(c) the extent of physical and psychological injury inflicted upon the person raped;
(d) the number of persons who took part in the rape;
(e) the age of the person who committed the rape;
(f) whether or not any weapon was used in the commission of the rape;
(g) whether the person committing the rape was related to the person raped in any of the degrees mentioned in subsection (2) of section seventy-five;
(h) whether the person committing the rape was the parent or guardian of, or in a position off authority over, the person raped;
(i) whether the person committing the rape was infected with a sexually transmitted disease at the time of the rape."

There is no gain in saying that the offence of rape is viewed as a very serious offence. This is underlined in the penalty provision which provides for life imprisonment or any shorter period. It is the determination of what length of imprisonment between the two variants which must occupy the mind of the sentencer. Section 65 (2) enjoins the sentencer to have regard to the factors outlined therein in addition to any other factors which can be properly taken into account. In the cases on review the factors mentioned in s 65 (2) were not considered. In the case of *S* v *Beston Nadolo*, the magistrate made a cursory mention that the accused threatened to stab the complainant if she resisted. The degree and duration of the force was not mentioned. The use of a knife was not mentioned. The physical and psychological injury suffered by the complainant was not mentioned. The same goes for the age differences. It is therefore not clear whether the magistrate took into account these factors.

In the case of *S* v *Ronald Chimbo*, there is no indication as to the weight which was placed on the fact that there was a 32 year difference in ages between the accused and the complainant. The fact that the 11 year old juvenile complainant was an orphan to whom the accused stood in *loco parentis* was not taken into account. The same goes for the degrees of violence or force and the extent of the physical and psychological trauma suffered by the complainant.

This court has had occasion to review two cases where the accused persons who were 30 years old and more raped complainants who were about half the accused's ages. CHAREWA J with the concurrence of TSANGA J in *S* v *Shephered Banda* and *S* v *Everton Chakamoga* HH 47/16 bemoaned that judicial officers did not appear to be mindful of s 327

(6) of the Constitution which requires that in the interpretation of the law, international conventions to which Zimbabwe is a signatory be given effect. In a well-researched judgment, the learned judge gave some guidelines on sentencing offenders who rape young females. She directed that the judgment be circulated to all magistrates. The learned magistrate who dealt with the cases under renew herein is directed to that judgment for guidance.

I am not sure whether it was coincidence that in the two matters whose facts are different, the magistrate considered as appropriate a sentence of 18 years for rape before suspending a portion or ordering it to run concurrently with another. I should caution judicial officers against adopting a tariff approach to sentencing for a particular offence. The tendency to impose a sentence within the judicial officers self-created tariff easily happens when as in the cases *in casu*, the peculiar features of each case and the offender are not considered in depth.

In view of the fact that I am not satisfied that the learned regional magistrate properly took into account all the relevant facts which he was required or expected to consider in assessing sentence, I am not able to hold that he exercised his discretion judiciously. This notwithstanding, considering the nature of the offences and the evidence I do not however think that the magistrates shortcomings resulted in a substantial miscarriage of justice as would justify that I disturb the sentence. I will in withholding my certificate in regards to how the process of sentence was arrived at, hand down this judgment as a guide to the magistrate concerned and his peers who may not be properly advised on how to go about the process of assessing sentence in rape cases in particular and any other cases generally to be guided accordingly.

TAGU J agrees ……..