

THE STATE  
versus  
OLIVER KAWODZA

HIGH COURT OF ZIMBABWE  
CHITAPI & WAMAMBO JJ  
HARARE, 4 October, 2018

### **Review Judgment**

CHITAPI J: The proceedings in this matter were placed before me on automatic review in term of s 57 (1) (a) of the Magistrates Court Act, [*Chapter 7:10*]. On reading through the record of proceedings I reached the conclusion that the sentence imposed by the court *a quo* was in all the circumstances of the case so disturbingly and shockingly excessive as not to accord with real and substantial justice and that to leave it extant would result in a miscarriage of justice. I determined that the sentence merited that the court should exercise its powers given in s 29 (2) (b) (ii) of the High Court Act, which permits a reviewing judge with the concurrence of another judge to reduce the sentence of the inferior court and substitute it with a different sentence from the one imposed.

The record of proceedings shows that the accused appeared before the Regional Magistrate for Eastern Division at Bindura on 26 June, 2018 charged with the offence of rape as defined in s 65 (1) of the Criminal Law (Codification and Reform Act, [*Chapter 9:23*]). The accused's age was given as 20 years. It was alleged that he committed the rape upon a 12 year old female juvenile at Chikukwa Village Madziwa on 25 March, 2018 in that he had forced sexual intercourse with the juvenile without her consent. The accused pleaded not guilty but was convicted of the lesser offence of having extra marital sexual intercourse with a young person in contravention of s 70 (1) (a) of the Criminal Law (Codification and Reform) Act. He was sentenced to 5 years imprisonment with 2 years of that sentence suspended for 5 years on conditions of future good behaviour.

The facts of the case were that the accused and the complainant resided at different homesteads in the same village called Chikuwa, Chief Matumba, Madziwa. The accused was not employed but the complainant was a grade 7 pupil at a local school. On the fateful day, the complainant was in the company of her friend coming from the local dam around 7.00pm when

they met up with the accused within the precincts of the village. The complainant's sister parted ways with the friend and the accused followed after the complainant.

It was further alleged that the complainant started to run away after noticing that the accused was following her. The accused person caught up with the complainant and felled her to the ground. He closed the complainant's mouth with his right hand to stop her from screaming whilst he also removed his trousers. The accused raised the complainant's skirt and removed her pants. He then had forced sexual intercourse with the complainant. The complainant bled from her private parts and stained her pant. The accused thereafter held back the complainant from going to her home until the two were seen together by complainant's grandmother who was then looking for the complainant. The accused person ran away on seeing the complainant's grandmother. The matter was talked over between the accuseds and complainant's relatives and it ended up being reported as a rape case to the police and hence the prosecution

At his trial, the accused denied being at the scene of the crime. He proffered an alibi to the effect that at the time of the alleged offence, he was at his employer's residence curing tobacco. The alibi was dismissed by the trial court as false. The complainant was found to have been an unreliable witness because she *inter-alia* gave conflicting accounts of how she met with the accused and how the alleged rape was perpetrated upon her.

The trial court found that the encounter between the accused and the complainant did not happen by chance but was pre-planned. The complainant's grandmother had testified that she saw the accused and the complainant standing and in an embrace before the accused took flight. The complainant in one of her changed stories told the grandmother that the accused had been proposing love to her, an assertion which the trial court found to be improbable because the alleged courtship was said to have lasted two hours. The two hours were reckoned from the time that the complainant's friend had separated with her at 7.00 pm up to 9.00 when the complainant was seen with the accused in an embrace.

On examination of the complainant, her pant was blood stained. On the subsequent medical examination done on 27 March, 2018, at Bindura Provincial Hospital, evidence of recent sexual penetration was confirmed. The issue which the trial court had to answer was whether the sexual penetration was secondary to an act of rape or consensual sexual activity. The trial court on the facts and probabilities concluded that the accused and the complainant had engage in consensual sexual intercourse and were in love. The court thus acquitted the accused on the charge of rape. As regards the competent verdict, of contravening s 70 (1) (a)

of the Criminal Law Codification & Reform) Act, the trial court found that the complainant's age was not put into issue and her birth certificate was produced by consent. She was born on 13 August, 2005. The sexual escapade with the accused therefore occurred some 5 months shy of the complainant's thirteen birthday. The complainant was doing grade 6 and the trial court visually noted from her body stature that she could not be anything but a young person or a person below 16 years. A young person is of course a girl or boy below 16 years according to the definition given in s 61 of the Criminal Law (Codification & Reform) Act.

The conviction is proper and cannot be faulted. It accords with real and substantial justice and is accordingly confirmed. The same cannot however be said of the sentence. The starting point is to underline that I am mindful of the trite proposition of the law that sentence is eminently a function of and to be exercised by the trial court in the exercise of its discretion. However, where the court on review considers that upon a consideration of all the pertinent facts and the law, the sentence imposed is so disproportionate and shocking that no reasonable court could have imposed, it will be proper for this court to disturb the sentence. The same can be said in circumstances where the disparity between the sentence imposed and that which this court could have imposed is such that interference is justifiably called for.

In my view, the trial court placed undue weight on the need to deter older men from engaging in sexual intercourse with minors. The magistrate reasoned that because the rationale behind s 70 was to discourage sexual intercourse by older men with minor girls, a deterrent message had to be sent to the community to desist from such conduct and instead to go for older women because "they are many". It is important to underline that general deterrence does not occur in a vacuum. It is very easy to reason and conclude that, deterrent sentences are necessary. The question to be asked is, what considerations would have given risen to the court to decide to deter would be offenders. The court should ask itself whether such crimes are on the increase and if so, what information has been placed before it from which the court acted upon to conclude that deterrent sentences are called for to curb the proliferation of such offences. From the record, the prosecutor did not make submissions in aggravation. He did not place any information before the court from which the court was justified to pass a sentence weighing heavily on and informed by the need for deterrence.

It is important for trial courts to appreciate that, when considering the element of general deterrence, the court should not rely on conjecture as to the proliferation or incidences of the particular offence. There must be placed before the court some factual material from which the court can infer or conclude that the offence is prevalent. In such a case, the court

justifiably plays its part by imposing deterrent sentence which will make like-minded offenders to reflect or think twice before committing the particular species of offence. With individual deterrence, the court inter-alia considers previous convictions of the accused and whether the accused is a danger to society. Where the need for individual deterrence is great and justified, the court will then impose a lengthy sentence because among other considerations, society will be better protected with the convict safely locked away for a long while.

The case of *Director of Public Prosecutions KwaZulu-Natal v Ngoco & Ors* 2009 (2) SACR 361 (SCA) is authority for the proposition that when assessing sentence, a court must adopt a balanced approach. The balanced approach entails that, the sentencer should consider the effect of the sentence on both the offender and society. An appropriate sentence is one that meets the justifiable expectations of the community. In my reasoning, the societal interests are met if the sentence imposed accords with that provided for in the statute following conviction for the offence. Reasons must be given to justify the level of sentence imposed. As stated in *S v Zinn* 1969 (2) SA J 37 (A) the court must in exercising its discretion in sentencing consider and weigh in balance, the nature of the crime, the interests of the offender and the interests of society. A judicious balance between all relevant factors which impact on the exercise of discretion in sentencing will be achieved if no one element is unduly accentuated or over emphasised over others.

The trial court recorded that it took into account the accused's age and paid "special attention to the need for him to have hope that he will come back into society and continue his life". As a general rule, when courts impose sentences, they do not consider that the prisoner should come back into society or perish in prison. Courts pass appropriate sentences in line with the triad expounded in *Zinn's* case. If the offence merits life imprisonment or the death sentence as the law may prescribe, it should not be the concern of the court that the offender should or should not re-join society.

In *S v Chakamoga* and *S v Banda* HH 47/16, being two cases reviewed under one judgment, the impression is created that the court laid down a minimum sentence of 3 years imprisonment for convictions of contravening s 70 (1) of the Criminal Law (Codification and Reform) Act. To the extent that the judgment may be construed as laying down a minimum sentence, one is constrained to read it as applicable to facts of the two cases and must be distinguished whenever the facts of a particular case under consideration are dissimilar to those of the two cases. I am fortified in my respectful disagreement with any insinuation that a minimum sentence may be imposed for a contravention of s 70 (1) (a) by the fact that the

provision carries a penalty section. It is this penalty provision which the court should have regard to when assessing and imposing sentence. The penalty provision provides that on conviction for the offence, the offender shall be “liable to a fine not exceeding level twelve or imprisonment not exceeding 10 years or both.”

In the interpretation of the sentence provision, it decrees the imposition of a fine first or in the second part, imprisonment. In such a case, the sentencer is given a discretion to consider between imposing a fine or imprisonment or both. There are therefore other options available to imprisonment. A sentencer should not just pick on an option without at least discounting the other options for reasons that should be given.

*In casu*, the trial court did not consider the option of a lesser penalty of a fine. The question which then arises on review is, “why if the sentence provisions provide for the option of a fine did the trial magistrate not consider that option and discount it for reasons given as being inappropriate?” The provision of the option of a fine in a legislation pre-supposes that in an appropriate case, the legislature considered a fine as an appropriate penalty. It is a gross misdirection on the part of the sentencer to overlook the fine option especially so as it is provided for as the first option before the option of imprisonment. It follows as well that, where a misdirection manifests itself on record, that part of proceedings to which the misdirection relates cannot be said to accord with real and substantial justice. The omission to consider the appropriateness or otherwise of the lesser penalty of a fine has in this case resulted *inter-alia* in a miscarriage of justice.

The accused was employed earning \$65-00 per month and had \$200.00 in savings. His incarceration meant the loss of his employment. Employment has become such a scarce commodity that once lost, it is very difficult to get another job especially for the unskilled worker like the accused. The trial court did not take into account that the complainant herself, albeit, a juvenile, was lacking in virtue and lied to her grandmother and the court. She was not any better as a liar than the accused who gave a false alibi that he was at work yet he was engaging in consensual extra-marital sex with the complainant as properly found by the trial court. Whilst society will not countenance the conduct of the accused, it equally frowns upon the character and behaviour of the complainant.

The most aggravating feature in this case was the age discrepancy between the accused and the complainant, being 7 years plus some months. The discrepancy is not however so great as to cause alarm and despondency by societal standards when one takes into consideration that the accused at 20 years old was still a very youthful first offender. The position would otherwise

have been more aggravating had the accused been a family person and much older than 20 years. Consideration must also be had to the fact that, the maximum prison term provided as a penalty for the offence is 10 years. The 5 years imposed by the trial court is half the maximum sentence which can be imposed. In my view, such magnitude of a sentence should be reserved for fairly bad cases and the present case is not such a case. I am in respectful disagreement with the trial magistrate when he considered a term of imprisonment of 5 years with portion suspended as not “inordinately high to such an extent of destroying his life and hopes”. Every judicial officer is aware of a plethora of case authority by this court and the Supreme Court that imprisonment is a rigorous form of punishment which should be imposed as a last resort where other alternative options of punishment which can competently be imposed for an offence charged are considered inappropriate for reasons which should be given by the sentencer. In this regard the instructive judgment of UCHENA J (as he then was) in *S v Hunda & Another* HH 124/10 is a must read for all magistrates and remains persuasive authority for this court to follow in extrapolating sentencing guidelines in cases which compare to the present one..

In the result, the following order is made on review

1. The conviction of the accused for contravening s 70 (1) (a) of the Criminal Law Codification and Reform Act, [*Chapter 9:23*] (having extra marital intercourse with a minor) is confirmed.
2. The sentence imposed on the accused is hereby set aside and substituted with the following sentence:  
6 months imprisonment of which 3 months is suspended for 3 years on condition the accused is not convicted of any offence involving having sexual intercourse or performing any indecent acts with a young person in contravention of s 70 of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*]

WAMAMBO J: agrees.....