

JAMPION MPANDE

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU AND MATHONSI JJ
BULAWAYO 20 JUNE 2011 AND 27 OCTOBER 2011

Appellant in person
Mr E. Mungoni for the respondent

Criminal Appeal

MATHONSI J: The appellant was arraigned before the Regional Magistrate at Bulawayo on a charge of rape the allegations being that during the month of August 2010 he had raped the complainant aged 3 years at a plot in Maraposa Insuza.

Despite the appellant's plea of not guilty the trial court convicted him of one count of rape and sentenced him to 18 years imprisonment of which 3 years was suspended for 5 years on the usual condition of future good behaviour. Not happy with his conviction and sentence the appellant made an application for leave to prosecute an appeal against both the conviction and sentence. He was only granted leave to appeal against sentence. It is that appeal which is the subject of this judgment.

In his address to the court; the appellant, who appeared in person, concentrated on his unhappiness with his conviction and did not say much about the sentence imposed upon him. Asked if he had anything to say in respect of the sentence, the appellant could only say that the reason why he lodged the appeal was for the court to assess an appropriate sentence. This was therefore not helpful at all.

Section 65(1) of the Criminal Law (Codification and Reform) Act, [Chapter 9:23] provides that a person convicted of rape shall be liable to imprisonment for life or any shorter period. What the court is required to consider in arriving at an appropriate sentence for rape is set out in subsection (2) of section 65 which provides:

“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 75;
- (h) whether the person committing the rape was the parent or guardian of, or in a position of 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.”

It is clear therefore that the sentencing court has a wide discretion in sentencing a person convicted of rape and can indeed sentence the person up to life imprisonment. The court also has regard to a range of factors in considering sentence.

The appellant raped a child aged 3 years and infected her with syphilis, a sexually transmitted infection. The child had been left in his care when he attacked it. He had been employed as a herdboys. The trial court noted that what aggravated the appellant’s case was the fact that he was “in a protective relationship with complainant.” The appellant therefore abused the trust of both the complainant and her grandmother who employed the appellant. That together with the age of the child made this “a very bad case of sexual abuse.”

I totally agree with the trial magistrate. In fact the appellant must consider himself extremely lucky that he did not get a harsher sentence. What he got was more on the lenient side.

The sentencing court has a discretion in assessing sentence and the appeal court will only interfere with that sentencing discretion where there is a misdirection or the sentence imposed is manifestly excessive. *S v Chiweshe* 1996(1) ZLR 425 (H) at 429 D; *S v Ramushu* S – 25-93; *S v Nhumwa* S -40-88; and *Mkombo v The state* HB 140/10.

In the present case it has not been shown that the sentence imposed is vitiated by a misdirection and in a case such as the present where the relevant statute prescribes, a higher sentence than the one imposed, it can only mean that the appeal is hopelessly without merit.

It is for these reasons that at the hearing we dismissed the appeal.

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

Ndou J agrees.....