C SIPHIWE MAPHOSA

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA AND CHEDA JJ
BULAWAYO 20 JUNE 2011 AND 8 DECEMBER 2011

Appellant in person
Mr K. Ndlovu for respondent

Appeal

CHEDA J: This is an appeal against sentence only imposed by the Regional Magistrate Court sitting in Bulawayo.

On the 24th November 2009 appellant together with her accomplice, one Sibuthene Ndlovu aged 24 years were charged with five (5) counts of contravening section 65(1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] (Rape). They pleaded not guilty to all counts but were however convicted and sentenced as follows:

"Each: Count 1-2= 10 years imprisonment –
Counts 3-4= 20 years imprisonment.
Total: 30 years imprisonment of which 5 years imprisonment was suspended for 5 years on the customary conditions of good behaviour.
Effective: - 25 years imprisonment.

The facts as outlined by the state are that between the 15th September 2009 and 19th September 2009 complainant was subjected to rape by Sibuthene Ndlovu [hereinafter referred to as "Ndlovu"] with the assistance of the appellant.

Appellant and complainant are related as aunt and niece respectively. Ndlovu was employed as a herdboy in the neighbourhood. Both appellant and complainant were staying with one Monica Ndlovu who is their grandmother. Appellant though at the time was at Monica Ndlovu's homestead, she was infact residing elsewhere and had at the relevant period

visited Monica Ndlovu's homestead. Monica Ndlovu had left for Bulawayo and asked appellant to remain looking after complainant at her homestead.

On the 15th September 2009 while appellant and complainant were asleep, Ndlovu came and called appellant outside. She went outside and they talked. After a while, appellant came and asked the complainant to accompany her where Ndlovu was and she obliged. Upon arrival appellant told Ndlovu that he had brought him a wife referring to the complainant. Appellant asked complainant to comply. Ndlovu then held complainant by the arm, led her out of the homestead and forcibly had sexual intercourse with her.

The following day, Ndlovu again came at night, made a similar request to appellant who then forced complainant to accompany Ndlovu. Ndlovu again forced the complainant to engage in unlawful sexual intercourse.

On counts 3, 4, and 5 Ndlovu came to where appellant and complainant were sleeping in a hut, he knocked on the door and was let in by appellant.

On all the three occasions appellant would first have sexual intercourse with Ndlovu in the presence of complainant. After finishing the act, she would lift complainant onto the bed and thereafter force her to have unlawful sexual intercourse with Ndlovu in her presence.

The offence came to light when Monica Ndlovu returned and noticed that complainant was limping. She took her to the clinic for a medical examination and a report was compiled which indicated that indeed penetration was effected. A report was then made to the police. Both appellant and her accomplice, Ndlovu were subsequently arrested. They were charged, tried, convicted and sentenced as stated above.

Appellant is a self actor. Her argument is that the sentence imposed by the court a quo was very harsh.

In assessing a suitable sentence, the courts' approach has always been to consider the effect of the sentence on the offender, but, most importantly the accused's moral blameworthiness, see *S v Goodson* 1976 (2) PH H 169(R).

The appellant was left with the complainant as her guardian as her grandmother (Monica Ndlovu) was away, she was, therefore, in a position of *loco parentis* on the

complainant. Instead of parenting complainant, she introduced and exposed her to highly immoral practices which have all the hallmarks of sexual perversion at a tender age. Complainant was far too young to be exposed to such nefarious sexual activities. Appellant involved complainant in her sexual orgies against her will. This conduct must have injured complainant's dignitas. I fail to understand why appellant chose to abuse the complainant in this manner. It is for that reason that I hold the view, that, her moral blameworthiness is very high. Her conduct was indeed of such a reprehensible nature that it merits severe punishment.

Appellant has asked this court to disturb the sentence imposed as she views it as being unduly harsh in the circumstances.

The general rule with regards to sentences is that, the appeal court is slow to upset a sentence by the court a quo as that is the domain of the trial court unless it was arrived at without the correct application of well known legal principles governing sentencing. It can also interfere, where, the sentence by the appeal court was arrived at as a result of improper motives or the sentence is completely out of step with decided cases applicable in the circumstances. The appeal court can also interfere if the sentence is so outrageous in the circumstances to an extent that it shakes the conscience of a reasonable man. In my opinion it is not the case here.

It is trite that these courts will invariably consider closely related offences as one for the purposes of sentence or closely related counts to run concurrently with each other. However, there is no fixed rule which compels a judicial officer to do so. This, infac,t has been the position in our legal system for a longtime, see *R v Malela* 1967 RLR 359 (A).

In that case Beadle CJ at page 360 stated;

> "The ultimate test in every case in considering the propriety of the sentences imposed on a number of related counts, it (sic) is whether or not the aggregate sentence imposed on all is reasonable in relation to the culpability of the accused."

Therefore, while, there is no mathematical formula for calculating sentences, courts will always take into serious consideration the seriousness and gravity of the offence together with the personal circumstances of the offender in order to arrive at an equitable sentence.

I am not persuaded to agree with appellant that the sentence imposed on her is shocking in the circumstances to an extent of justifying interference by this court. Appellant's conduct left an indelible mark on the complainant. Therefore, this sentence is designed to curb appellant's prurience.

The sentence imposed is clearly adequate, if anything she should have been sentenced to an effective 30 years imprisonment.

The appeal is accordingly dismissed.

Kamocha J ..... I agree

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