HB 195/16
HCA 233/15

LIZARD SIBANDA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE & TAKUVA JJ
BULAWAYO 11 JULY 2016

Criminal Appeal

Appellant in person
Miss S. Ndlovu for the respondent

MAKONESE J: The appellant appeared before a Regional Magistrate as Bulawayo facing 3 counts of rape as defined in section 65 of the Criminal Law Codification and Reform Act (Chapter 9:23). The appellant pleaded guilty and was duly convicted and sentenced to 15 years imprisonment for each count bringing the total sentence to 45 years imprisonment of which 5 years imprisonment was suspended on the usual conditions of good behaviour.

The appellant was dissatisfied with the sentence and lodged this appeal arguing that the sentence was manifestly excessive. The appellant further argued that the approach to sentence adopted by the magistrate was improper in that the trial magistrate adopted the tariff approach and imposed an effective sentence on each count separately when the 3 counts of rape were committed in the space of two days on consecutive dates. These counts, the appellant argued ought to have been taken as one for purposes of sentence, alternatively the sentences in respect of these counts should have been ordered to run concurrently. The 3 counts were committed within the same month of November 2007.

The general approach regarding sentence with regard to separate counts is that a sentence should be imposed in respect of each count. One globular sentence for two or more counts should only be considered where the offences are the same or similar in nature and are closely linked in point of time. If these two requirements are not satisfied then a separate sentence must be imposed in respect of each offence. See the case of *S* v *Chawasarira* 1991 (1) ZLR 67 (H).

In this matter SMITH J expressed this sentencing principle at page 69 as follows:

> "Separate punishment should save in exceptional cases, be imposed for each separate charge. One globular sentence for two or more offences should only be considered where the offences are of the same or similar nature and are closely linked in point of time."

In the instant case the appellant used the same modus operandi in raping the complainant. On all counts, the appellant entered the complainant's room, whilst she was sleeping, before proceeding to ravish her. The offences are similar and are closely linked in point of time and place, particularly regarding the first two counts. These 2 counts should have been treated as one for the purpose of sentence. The overall sentence for each count led to the imposition of a wholly inappropriate sentence in all the circumstances of the case. The overall sentence is unduly harsh and excessive.

Whilst I observe that these courts generally do not interfere with the sentencing discretion of trial courts, it is the duty of this court to exercise its power to ensure that unduly harsh and excessive sentences are not imposed so as to break an offender. In general, sentences in respect of all criminal offenders should be rehabilitative and not punitive. On the one hand the societal expectations must be met by imposing fair and just sentences. In *S* v *Nkosi* 1965 (2) SA 414 (C) at page 415 BANKS J pointed that although in South Africa globular sentences had in a number of cases received judicial approval, *The Practice in England* was to enter judgment and sentence separately on each count. At p 415 – 416 he said:

> "In the vast majority of cases no practical advantage results from imposing a globular sentence. A reasonable sentence can usually be determined by deciding upon a reasonable sentence for each offence and then by scaling down the sentence if the cumulative effect renders the total unreasonable. An exception would seem to arise in cases where it is decided to impose a reformatory sentence or a sentence of whipping and there may be other such cases. …"

It would seem, therefore, that had the trial court scaled down the individual sentences on each count, he would not have got himself in a pickle, where the ultimate sentence became unduly excessive.

In the case of *Taruvinga* v *The State* HH-37-89 it was held that, there is no fixed rule which requires a judicial officer to treat a multiplicity of counts as one for the purposes of sentence but it is established practice that before a judicial officer can treat those counts as one for the purpose of sentence, there has to be some close affinity between those counts in the manner or time in which the offences were committed.

In my view, although in rape cases, the normal approach is to treat each count as one separately for the purpose of sentence for the simple reason that if on appeal or review a count of rape is set aside, the sentence relating to that individual count will automatically be set aside.

I must observe that trial magistrates should always approach the issue of sentence objectively, without expressing an emotional tone. The learned magistrate was clearly upset and angry at the appellant's behaviour. In sentencing the appellant, the trial magistrate stated:

> *"... you were married to her mother (complainant's step mother) and you have four children with her one of whom is still an infant. This shows therefore that you are enjoying conjugal rights with your wife, hence there was no reason whatsoever for you to have intruded into the 16 year old's bedroom to sexually abuse her without her consent. She regarded you as a father and obviously trusted you. You betrayed that rust to the extent that she has to run away from home. You must have made her stay at home unbearable. At 16 years old, she is still a child in her formative years who still needed her parent's guidance in overcoming challenges in her life. Instead you yourself became a challenge in her life. You say you started to have sexual intercourse with her just a week after her mother left to visit her grandmother. She only managed to stop the abuse by running away. One wonders what would have happened if she had not taken steps to extricate herself from the abusive environment which you created for her. You exposed complainant to the contraction of sexually transmitted diseases and worse still in today's world of HIV and AIDS. Instead of providing her with a protective home, home became her hell. You did not just do it once but three times until she could not stand it anymore. <u>You are a man who does not deserve to be around, especially female children. You did not show any respect for either your wife</u> or your step daughter and the other sibling with whom she is sleeping. <u>For you conduct it is only deserving that you be removed from society</u> for a very long time to show society's revulsion at what you did. This will serve to deter other would be like minded persons from your area ...."* (emphasis mine)

With these words the trial magistrate sentenced the appellant to a total of 45 years imprisonment with 5 years suspended. This court views the sentence as unduly harsh and excessive.

In *State* v *Shariwa* 2003 (1) ZLR 314 (H) the court held that a convicted person should not be visited with punishment to the point of being broken. The court should not be over influenced by the seriousness of the type of offence and fail to pay sufficient attention to other factors which are of no less important in the actual cases before them.

I would point out that in this matter, the court ought to have exercised its sentencing discretion by scaling the sentence on each individual count. The resultant overall sentence would have remained within the normal range of sentences for rape cases. It is the view of this court that the effective sentence imposed by the court *a quo* is so excessive as to induce a sense of shock. This court is entitled to interfere with the sentence.

In the result, and accordingly the court makes the following order.

1. The conviction is hereby confirmed
2. The sentence is set aside and substituted with the following:
   "Counts 1, 2 and 3 taken as one for sentence. Accused is sentenced to 20 years imprisonment of which 5 years is suspended for 5 years on condition accused is not within that period convicted of an offence of a sexual nature and for which he is sentenced to imprisonment without the option of a fine."

Takuva J ……. I agree

National Prosecuting Authority, respondent's legal practitioners