

THE STATE

Versus

SANDILE SITHOLE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 5 August 2024

Criminal review

DUBE-BANDA J:

[1] This is a review at the instance of the presiding regional magistrate. The offender was charged with the crime of rape as defined in s 65 as read with s 64 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] (Criminal Code). It being alleged that on 23 August 2022 the offender unlawfully and knowingly had sexual intercourse once with the complainant, a female juvenile aged 6 years who at law is deemed incapable of consenting to sexual intercourse. The offender pleaded guilty and was duly convicted and sentenced to 17 years imprisonment of which 2 years were suspended for 5 years on the usual conditions of good conduct.

[2] The offender was sentenced in terms of s 65 of the Criminal Code as amended by s 3 of the Criminal Law (Codification and Reform) Amendment Act, 2023. After sentence the trial magistrate realized that the offender committed this offence before the amendment came into effect and that the empowering provision does not have retrospective effect. The magistrate referred this matter to this court for corrective action.

The facts

[3] According to the Outline of the State case, the complainant is a juvenile aged 6 years doing ECD “B” at a primary school. The offender is a male juvenile aged 16 years doing Form 1 at a secondary school. The complainant and the offender are cousins. On 23 August 2022 at around 1400 hours, the complainant’s mother left the complainant and other children to attend a funeral. One Sithole arrived at the homestead and asked the complainant to go and collect something from the homestead where the offender stayed. After a long time without the complainant returning, Sithole decided to follow the complainant. He found the offender on

top of the complainant having sexual intercourse with her. The matter was reported to the police and the offender was subsequently arrested.

[4] The offender pleaded guilty to the charge. It is clear that the plea was an unequivocal admission of guilt. The offender admitted all the essential elements, and every material fact alleged in the charge. Nothing turns on conviction. It is the sentence that is subject to this review.

[5] The offender was sentenced in terms of s 3 of the Criminal Law (Codification and Reform) Amendment Act, 2023 which says:

Amendment of section 65 of Cap. 9:23

“Section 65 (“Rape”)(4) of the principal Act is amended by the repeal of the resuming words in subsection (1) and the substitution of—

“shall be guilty of rape and liable—

- (i) if the crime was committed in aggravating circumstances as described in subsection (2) (that is to say if there is a finding adverse to the accused on any one or more of those factors), to life imprisonment or any definite period of imprisonment of not less than fifteen years; or
- (ii) (ii) if there are no aggravating circumstances, to a period of not less than five (5) years and not more than fifteen (15) years.”.

[6] Section 3 of the Criminal Law (Codification and Reform) Amendment Act, 2023 was Gazetted on 14 July 2023. The offence was committed on 23 August 2022. The amendment had not yet been enacted into law at the time the of the commission of the offence. It hardly needs stating that in terms of the common law, a statute enacted after the occurrence of an event does not apply retrospectively, unless otherwise provided. See *S and Another v Acting Regional Court Magistrate, Boksburg*, 2011 (2) SACR 247 (CC). Consequently, it is well established principle in our legal system that retrospective application of punishments are prohibited. The right to a fair trial is a fundamental right which is guaranteed in the Constitution. See *S v Mloyi* 2020 (1) ZLR 1239 (H) at 1246. Obviously, the prohibition of retrospectivity in criminal matters is pertinent to the right to a fair trial and it seeks to guard against miscarriage of justice through arbitrary prosecution, conviction and penalties. Therefore, s 3 does not have a retrospective effect and has no application in this case.

[7] The offender was sentenced in terms of a law that had not been gazetted at the time of the commission of the offence. Therefore, the resultant sentence is not in terms of the requirements of the law, and it violates the offender's right to a fair trial. It is for these reasons that the sentence of the trial court is not in accordance with real and substantial justice and cannot be allowed to stand. I do not think that any useful purpose would be served by referring the matter to the trial court for sentence. All the facts and material relevant to sentence are before me, and I can sentence the offender. This is allowed s 29(2)(a)(ii) of the High Court Act [Chapter 7:06].

[8] In considering an appropriate sentence it is necessary to examine the circumstances of the offence intensively and attempt to determine the exact degree of seriousness of the offence in respect of which the offender has been found guilty, as well his personal circumstances and the interests of the community. It is, ultimately, often a matter of reconciling competing interests in order to ensure a fair and just sentence. An appropriate balance must be struck. A sentencing court has a duty to impose an appropriate sentence according to long-standing principles of punishment and judicial discretion. See *S v Zinn* [1969 (2) SA 537 (A)]. In *S v Van Loggenberg* 2012 (1) SACR 462 the court said that a sentence has five important functions, it must act as a general deterrent, in other words, it must deter other members of the community from committing such acts or thinking that the price of wrongdoing is worthwhile; it must act as a specific deterrent, in other words, it must deter this individual from being tempted to act in such a manner ever again; it must enable the possibility of correction, unless this is very clearly not likely; it must be protective of society, in other words, society must be protected from those who do it harm; it must serve society's desire for retribution, in other words, society's outrage at serious wrongdoing must be placated. This resonates with the objective of sentencing codified in of s 6 of the Sentencing Guidelines, that a sentence must be rehabilitative; retribution; deterrent; protection or prevention; restitution and compensation. The Sentencing Guidelines underscore that all sentences must meet the proportionality test, in that the sentence imposed should be the least onerous sanction appropriate in the circumstances; it must also meet the equality test meaning that it should be consistent with sentences imposed on other offenders for similar offences committed in similar circumstances; and must also meet the totality test meaning that the nature and combined duration of the sentence imposed and any other sentences imposed on the offender should not be excessive. A sentence must be appropriate, based on the circumstances of the case. It must not be too light or too severe.

[9] At the time of the commission of this offence, the offender was 16 years old, and at the time of sentence he was aged 17. In terms of s 3 of the Criminal Procedure (Sentencing Guidelines) Regulations, 2023 a child means any person under the age of eighteen years. It is trite that in the sentencing of a child, every court must take into account the provisions of s 81 of the Constitution as read with 21 of the Sentencing Guidelines) Regulations, 2023 that the best interests of the child are paramount in every matter concerning them. It is on account of this constitutional right that a custodial sentence can be imposed on a child only as a matter of last resort and for the shortest appropriate period of time.

[10] In deciding on an appropriate sentence, I factor into the equation that the offender is a child. See *S v Zaranyika and Others* 1995 (1) ZLR 270 (H) at 271-272. He is a first offender and he readily admitted the charge and pleaded guilty. His plea of guilty should be given serious consideration. See *S v Hunda and Another* 2010 (1) ZLR 387 (H). The probation report mentioned that he is remorseful and is unlikely to re-offend and he has positive prospects for rehabilitation. Further at the time of sentence he was doing Form 3 at Nswazi High School. His father died and his mother relocated to South Africa. He is cared for by relatives. It is noteworthy that the probation officer who prepared a pre-sentence report opined that the offender is less likely to commit a similar offence. I take the view that on account of his age, the offender had a level of immaturity at the time of commission of the offence.

[11] On the other hand, the offender committed the offence of rape. Rape is one of the most invasive and horrendous criminal acts. It is traumatic, worse when committed against a child of 6 years. This is a case of betrayal. The accused breached the trust of the complainant. The complainant's vulnerability due to age was exploited. He was also in a position of authority relative to the complainant and he abused that position to commit this offence. The medical report shows that the complainant suffered injuries arising from this offence, and was in pain during the examination, and she was bruised on her private parts. In *S v Siziba* 2020 (1) ZLR 481 (H) at 482 the court said "rape is a serious and reprehensible offence and when perpetrated on a child of the complainant's age (she was aged 10) by a 19 year old, the seriousness assumes even greater proportions and the sentence must reflect this." See *S v Marongwe* HH-67-88.

[12] The offender was 16 years old at the time of the commission of this offence, he was a child but should have known better. He penetrated sexually a child aged 6 years. Davis J in *S v Jansen* 1999 (2) SACR 376 (CC) at 378 g-379 stated thus:

“Rape of a child is appalling and perverse abuse of male power. It strikes a blow at the very core of our claim to be a civilised society The community is entitled to demand that those who perform such perverse acts of terror be adequately punished and that the punishment reflect the societal censure. It is utterly terrifying that we live in a society where children cannot play in the streets in any safety; where children are unable to grow up in the kind of climate which they should be able to demand in any decent society, namely, in freedom and without, fear. In short, our children must be able to develop their lives in an atmosphere which behoves any society which aspires to be an open and democratic one based on freedom, dignity and equality, the very touchstones of our Constitution.”

[13] As stated above, a disturbing feature of this case is that the rape was committed against a child, and the offender was much older than her. Having had regard to the personal circumstances of the accused, the seriousness of the crime, the interests of the community and those of the minor child, I am satisfied that the sentence to be imposed must send out a strong message to would be offenders that rape of minor children is a serious violation of the child's body, mind and soul. It shall be treated by the courts in a manner that will demonstrate that this unlawful conduct should not be tolerated. I agree with KABASA J in *S v Siziba* 2020 (1) ZLR 481 (H) that for the crime of rape committed by a juvenile, imprisonment is unavoidable, but its length must be carefully considered. In *S v Siziba (supra)* in a similar case it was suggested that a sentence in the region of six years with one and a half to two years suspended on the usual conditions would be appropriate. I agree.

[14] Despite the presence of mitigating factors mentioned above, I am of the view that the aggravating factors call for a sentence of direct imprisonment. In the circumstances, I order as follows:

- i. The conviction be and is hereby confirmed.
- ii. The sentence of the trial court is reviewed and set aside and substituted with the following:

“The offender is sentenced to 6 years imprisonment of which 2 years imprisonment is suspended for 5 years on condition offender does not within that period commit any

offence involving an offence of a sexual nature for which if convicted will be sentenced to imprisonment without an option of a fine. Effective sentence 4 years imprisonment.”

DUBE-BANDA J

NDLOVU J I AGREE