TICHAONA TSHUMA
and
BRIAN CHIYANGWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO AND CHINAMORA JJ
HARARE, 29 September 2021

Criminal Appeal

Appellants, in person
KH Kunaka, for the respondent

CHIKOWERO J:

Introduction

This is an appeal against sentence only.

Proceedings *a quo*

The appellants and one other were, on 31 May 2006, convicted of one count of robbery and six counts of rape.

Each was sentenced to 12 years imprisonment in respect of the robbery charge and to 10 years imprisonment on each of the six counts of rape. The court ordered that the sentence on the first three counts of rape was to run concurrently with the sentence imposed on the last three counts of that offence. The sentence concluded with these words:

> "Of the total 72 years imprisonment, 12 years imprisonment is suspended for 5 years on condition the accused persons do not within that period, commit any offence involving violence on the person of another or dishonesty or any offence involving unlawful sexual intercourse for which upon conviction the accused persons are sentenced to a term of imprisonment without the option of a fine. Effective sentence is 30 years imprisonment."

All three pleaded not guilty to all the counts. Their defence outlines read:

> "I found these goods in possession of other people from whom we took. We were only arrested whilst selling those goods."

The respondent closed its case after leading evidence from the three complainants and the investigating officer. We shall refer to the complainants as "the husband" "the wife" and "the daughter."

On opening his defence case, the second accused person (who has not appealed) admitted that he had committed all the offences charged. The court canvased the facts and essential elements of the offences. It was satisfied that the second accused person had correctly and understandingly admitted the charges, the facts and the essential elements and proceeded to convict him as charged.

As if on cue, the appellants also admitted that they had committed the robbery. The court took each of them through the facts and essential elements at the end of which it altered their pleas to guilty and convicted them accordingly.

What remained in issue was whether the appellants had committed the six counts of rape. The alleged victims were the wife and the daughter with three counts apiece perpetrated on the persons of those two.

At the end of the trial the court convicted both appellants of all the six counts of rape. It found the three complainants to have been credible witnesses, that the medical reports lend credence to the testimony of the wife and daughter having been raped and that the appellants had no real defences at all. Their explanations that the complainants mistakenly identified them as the rapists were dismissed as being beyond all reasonable doubt false. The court found that the complainants had been in close physical contact with the appellants. The former were testifying only two weeks after the offences were committed.

In respect of the charge of robbery the admitted facts were these. The appellants and their accomplice had, on 17 May, 2006 and at the complainants' house in Harare, scaled over the security fence, burst into the lounge while armed with a crow bar and two pistols, pointed firearms at their victims, ordered everybody to lie down on their stomachs, demanded money, struck the husband (who, in a pool of blood, fell unconscious) and proceeded to rob the complainants of goods worth about $2 billion of which goods worth around $1,6 billion was recovered. In fact, the property stolen was:

- Two laptop computers
- One hard drive

- One camera
- One telephoto lens
- One memory stick
- Two cellphones
- Three pairs sports shoes
- Six pairs jeans
- Five bags
- One football kit
- Three shirts
- One sweater
- Three gold rings
- One diamond ring
- Four gold chains
- One silver broach
- Two shorts
- One denim skirt
- One pair binoculars
- Z$15 million
- 150 pounds sterling
- R3 500.

The appellants and their accomplice used cables to tie the victims' hands behind their backs after which they force-marched the wife and the daughter, separately, into the main and spare bedrooms where the three stole the cash. Thereafter, the wife was again taken to the main bedroom where the three stole the jewellery.

We have already noted that the second accused ultimately admitted that he had raped the complainants, was convicted and sentenced on those six counts as well as on the robbery charge. We reiterate that he has not appealed.

As regards the appellants, the court found that they had taken turns to rape the mother and the daughter. This was gang rape during the course of which the following things had happened.

A gun was placed on the mother's leg, she was ordered to make some coital movements, was so terrified that she had no option but to profess that she enjoyed the sexual intercourse, a finger was thrust into the daughter's pant, the plea that she be not hurt was met with an assault and one of the appellants tore the daughter's pants before proceeding to rape her. In addition, the daughter was forced to kiss one of the rapists during the commission of the offence and both women's hands were tied at the back throughout their ordeals.

At the end of it all, the husband, still unconscious, was dragged to the lobby between the bedrooms, his wife and daughter made to join him there, all three tied together hands and legs, the lights switched off, doors locked and the appellants as well as their partner in crime vanished from the scene.

Having managed to free her legs, the daughter pressed the alarm using her nose. The domestic workers appeared but could not render assistance because the door to the house was locked. It was only after an hour that some security company personnel arrived, broke down the door and untied the complainants resulting in a friend rushing the victims to hospital.

The grounds of appeal and analysis of the appeal

The first four grounds of appeal raise one issue. Each appellant complains that he was sentenced on six counts of rape yet the evidence proved that he committed two counts of that offence. Neither appellant has appealed against conviction. Each was convicted of six counts of rape and sentenced accordingly. In these circumstances, it follows that the first four grounds of appeal are misplaced. We struck them out.

The remaining ground of appeal relates to the sentence on the count of robbery and the six counts of rape. It is contended that the 72 years imprisonment, even though 12 years imprisonment was suspended is, in our own words, manifestly harsh and excessive as to induce a sense of shock.

It is necessary that we comment on the sentence before determining the issue raised in the foregoing ground of appeal.

The sentence is not only incompetent but wrong. It is improper for a trial court to combine sentences for different statutory offences. See *State* v *Kunaka* HH 814/15. The court combined the sentences for the robbery and the rape counts and then proceeded to suspend 12 years on the conditions that we have already spelt out. Those conditions are *anomalous* because they relate to

different offences. Even then, a reading of the sentence reveals that there was a miscalculation of the total sentence. 72 years is an incorrect figure by way of the total period of imprisonment before any portion was suspended. These errors arose from the court's approach in sentencing. It ought to have imposed a stand-alone sentence in respect of the robbery count and, if it found it suitable, suspended a portion of that sentence on the usual condition of good behavior. Thereafter, it could have sentenced separately for the counts of rape. In this respect, it was still open to the court, if it found it justified, to impose a sentence on each appellant in respect of each of the six counts of rape, ordered the sentence on any of those counts to run concurrently with the others and, if the result yielded a harsh sentence, to go on to suspend a portion of the overall sentence on suitable conditions.

Does the sentence induce a sense of shock? In mitigation, the court considered that the appellants are first offenders, altered their pleas on the robbery charge to that of guilty , was cognizant of their personal circumstances and that part of the property was recovered . As against them, the following were found to be aggravatory. Armed robbery and rape are serious and prevalent offences. The first complainant was struck on the head, fell unconscious and the appellants and their accomplice proceeded to ransack his house and sexually ravish this victim's wife and daughter. The gang was in possession of dangerous weapons. They planned and carefully executed these offences, in movie-like style. They not only robbed the complainants but went a step further by gang-raping mother and daughter. The court found this to be both barbaric and a complete disregard of human life. They exposed the women in question to the risk of contracting the virus which causes the dreaded disease, AIDS. The court took the view that the appellants are a danger not only to society but to themselves. A lengthy period of imprisonment would make not only the appellants but other would-be offenders realize that crime does not pay and to respect other people's rights to property and human dignity.

Ms Kunaka supported the sentence on the basis that relevant factors were considered and that a lengthy custodial sentence was inevitable since the aggravating factors outweighed the mitigation. Indeed, this is a very bad case of robbery and rape.

However, we took the view that the sentence imposed for the robbery charge does not reflect that both appellants were first offenders who, ultimately, pleaded guilty to that offence. It seemed to us also that the fact of recovery of more than half of the property stolen appears not to

be recognized in the sentence imposed *a quo*. It is as if the sentence was imposed pursuant to a full trial. This, coupled with the gross misdirection in combining sentences for two different offences and proceeding to suspend a portion thereof on unrelated conditions invited interference at our hands.

The latter consideration swayed us to interfere also with the sentence in respect of the rape counts. It is true that the gang rape of mother and daughter in the course of robbery is a despicable offence.

In 2006, there was nothing shocking in a sentence of 10years imprisonment on conviction for a single count of rape in circumstances such as we were faced with in this appeal. Despite the fact that the court ordered the sentences in three of the counts to run concurrently with those in the other three, and suspended portion thereof the overall sentence still remained disturbingly inappropriate when regard is had to the fact that the six counts were committed on the same day in the course of what was in practical terms a single criminal enterprise. See *State* v *Nyathi* 2003 (1) ZLR 587 (H).

Having rendered an *ex tempore* judgment at the hearing of the appeal the above are our detailed reasons for allowing the appeal.

Disposition

We ordered that:

1. The appeal against sentence be and is allowed in respect of each appellant
2. The sentence imposed *a quo* on each appellant is set aside and substituted with the following:

   Each Accused:

   "Count 1: 12 years imprisonment of which 5 years imprisonment is suspended for 5 years on condition the accused does not within that period commit any offence involving violence on the person or property of another or dishonesty and for which upon conviction the accused is sentenced to a term of imprisonment without the option of a fine

   Effective: 7 years Imprisonment

Counts 2-7: 10 years imprisonment on each count.

The sentence on counts 2 to 4 is to run concurrently with that on counts 5-7.

Of the total 30 years imprisonment 10 years imprisonment is suspended for 5 years on condition the accused does not within that period commit any offence involving unlawful sexual intercourse for which he would be sentenced to a term of imprisonment without the option of a fine.

Effective: 20 years Imprisonment."

CHINAMORA J agrees……..

The National Prosecuting Authority, respondent's legal practitioners