

TAKUDZWA KASAWAYA
versus
THE STATE

HIGH COURT OF ZIMBABWE
FOROMA & KWENDA JJ
HARARE, 17 January 2022

Criminal Appeal

Applicant in Person
T Mapfuwa for the respondent

FOROMA J: This is an appeal against the sentences imposed on the appellant on a conviction for rape by the regional Magistrates Court sitting at Murewa on 29 April 2019. Appellant was granted condonation by the High Court for the late noting of an appeal against sentence only. His application for condonation of his late noting an appeal against conviction was dismissed.

In his notice of appeal against sentence the appellant raised 4 grounds of appeal in two of which he complained that (1) the sentence imposed was too excessive in the circumstances (2) the court erred when it failed to reward the fact that appellant was a first offender. The 3rd and 4th grounds address conviction which appellant could not properly appeal against as his application for condonation of his late appeal against conviction had been dismissed.

Appellant referred the court to the case of *State v Tirivanhu Ndoziva* HH 43/11 which he argued had a sentence of 20 years imprisonment for a conviction on 2 counts of rape of two complainants aged 4 and 8 years reduced on appeal to 10 years imprisonment 2 years of which were suspended for 5 years on condition of good behaviour.

The state opposed the appeal arguing that the court *a quo* did not misdirect itself in passing an effective sentence of 16 years imprisonment in the circumstances of this case where:

- (1) The appellant was twice the complaints age.
- (2) The offence was aggravated by the fact that appellant threatened to stab complainant with a knife.

(3) Appellant who was complainant's uncle abused the trust placed on him by the complainant and her relatives in that instead of protecting the complainant from sexual abuse appellant turned into an abuser himself.

The case of *State v Tirivanhu Ndoziva (supra)* which appellant referred to us in support of his argument that the sentence imposed on him was excessive is clearly distinguishable from the one *in casu*. The appeal court in Tirivanhu Ndoziva case treated the appellant who was 21 years as a young person at the time of committing the offences and that he did not use gratuitous violence on complainants to induce submission. Unlike in this case where the appellant was 26 years old and as submitted by the State, threatened to stab the complainant with a knife and considering that the appellant was complainant's relative (uncle) the abuse of trust (rape of complainant) was gross and extremely aggravating.

In the case of *Ramushu & Ors v The State SC 25/93* the Supreme Court held as follows: "But in every appeal against sentence save where it is vitiated by irregularity or misdirection the guiding principle is that sentence is pre-eminently a matter for the discretion of the trial court and the appellate court should be careful not to erode such discretion. The propriety of a sentence attacked on the ground of being excessive should only be altered if it is viewed as being disturbingly inappropriate". In a number of cases it has been ruled that an appeal court will only interfere with a sentence passed by a court *a quo* if it is proved to have been a result of a misdirection or irregularity unless it is so harsh as to induce a sense of shock. In other words an appellate court is not entitled to interfere with a sentence of the lower court simply because it is described as severe or harsh as it is in the nature of a sentence of imprisonment to be so. Before a sentence can justify interference other than on the basis of irregularity or misdirection it has to pass the threshold of harshness or severity that is when it warrants the description that it is so severe and harsh that it induces a sense of shock. The court found the sentence that appellant complained about to be within the range of sentences imposed in cases of rape committed in aggravating circumstances as found by the court *a quo* in this matter as urged by the prosecution herein above .

The reasons for sentence canvassed by the court *a quo* reflect that the court took into account that appellant was a first offender. We accordingly were not convinced that there was any irregularity or misdirection committed by the magistrate in his assessment of the appropriate sentence. For the foregoing reasons we had no basis for interfering with the sentence and accordingly dismissed the appeal.

Foroma J:.....

Kwenda J:..... Agrees

Applicant in person
National Prosecuting Authority, respondent's legal practitioner