

THE STATE
versus
GABRIEL MWALE

HIGH COURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE, 23 May 2023

Criminal Appeal

Appellant in person
C Muchemwa, for the respondent

ZHOU J: This is an appeal against sentence imposed on the appellant following his conviction on one count of rape as defined in s 65 of the code and one count of robbery as defined in s 126 of the code. In respect of the rape count, the appellant was sentenced to 18 years imprisonment. He was sentenced to 6 years imprisonment on the robbery charge.

From the total of 24 years imprisonment the court *a quo* suspended 5 years leaving an effective 19 years imprisonment. The suspension was on the condition that the appellant does not commit an offence of a sexual nature and also involving dishonesty for which he is sentenced to imprisonment without the option of a fine.

The appellant takes issue with the sentence imposed on essentially one ground, that having regard to the mitigating factors, the sentence induces a sense of shock. He also makes the point that the court *a quo* ought to have ordered the sentences to run concurrently.

Sentencing is a matter within the discretion of the trial court. The appellate court does not readily interfere with the exercise of such discretion in the absence of evidence that it was not exercised judicially having regard to all the circumstances of the case. The exercise of discretion would be improper, for instance, if the sentencing court applies wrong principles or fails to take into account relevant principles, or where the overall sentence is so excessive that it induces a sense of shock in the sense of it being out of line with the sentences imposed in similar cases.

In this case we do not find any improper exercise of discretion. The court *a quo* considered all the mitigating factors, including that the appellant was a first offender with a wife and child to look after, that he takes care of his mother, and that he had an injury on his leg which, though serious was unconnected to the case. The aggravating features of this case are serious, in that the appellant took advantage of a stranded lady to commit two very serious offences. The complainant mistook the appellant for a good Samaritan who had offered to escort her to her parents' residence. Instead of doing that the appellant led the complainant into a bushy area where he raped her and robbed her of her belongings. Given the manner in which this offence was committed, the sentences of 18 years for the rape and 6 years for the robbery cannot be said to induce a sense of shock. We note, too, that none of the property stolen by the appellant during the robbery was recovered. The failure to order that the sentences run concurrently is not a misdirection given that these are 2 distinct offences. There was no improper exercise of discretion in this respect. For these reasons, the appeal against sentence is without merit.

We note however that in imposing the condition for the suspended portion of the sentences, the court *a quo* included two distinct conditions conjunctively, and did not distinguish the condition applicable to each of the 2 offences which the appellant was convicted of. We thus interfere with the sentence only to the extent that the suspensions must be separated for the two offences. Further, the condition for suspending the period of imprisonment on the robbery case must not be dishonesty, but violence, as was conceded by Mr Muchemwa for the respondent.

In the result, IT IS ORDERED THAT:

1. The appeal against sentence be and is hereby dismissed.
2. The sentences imposed are altered to read as follows:

“Count 1: 18 years imprisonment of which 3 years imprisonment is suspended for 5 years on condition that during that period the accused does not commit an offence of a sexual nature for which he is sentenced to imprisonment without the option of a fine or community service.

Count 2: 6 years imprisonment of which 2 years imprisonment is suspended for 5 years on condition that during that period the appellant does not commit an offence involving violence upon the person of another for which he is sentenced to imprisonment without the option of a fine or community service.”

Total effective: 19 years imprisonment.

For the record, the sentences are to run consecutively.”

ZHOU J:.....

CHIKOWERO J: Agrees.....

National Prosecuting Authority, respondent’s legal practitioners