THE STATE

VERSUS

LEARNMORE DUBE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 10 MAY 2012

Review Judgment

MAKONESE J: The accused person is aged 19 years. He was convicted of four (4) counts of aggravated indecent assault in contravention of section 66(1) (a) (ii) of the Criminal Law (Codification and Reform Act) [Chapter 9:23] hereinafter referred to as "the Act", by a Regional magistrate sitting at Hwange. He was convicted of a further two (2) counts of rape in contravention of section 65 of the Act. Nothing turns on the convictions in this matter. The accused was sentenced on each of the six (6) counts to 6 years imprisonment, resulting in a total of 36 years imprisonment.

In all counts, the individual sentences of six (6) years imprisonment imposed is appropriate but the cumulative effect of the sentence is so severe as to call for interference.

The brief facts of the matter are that in respect of counts 1-4, the accused unlawfully had anal sexual intercourse with a male juvenile aged 15 years in the period extending from December 2010 and January 2011. The unlawful acts occurred on four different dates and at different locations. In all the instances, the accused person threatened the complainant with death if he refused to participate in these unnatural sexual acts. The accused told his victim that he would hang himself after killing the complainant. In respect of counts 5 and 6 the accused person raped a female juvenile aged 11 years on two different occasions. The accused person pleaded not guilty to the charges in relation to counts 1 to 4 but pleaded guilty in respect of counts 5 and 6.

In her reasons for sentence the learned Regional magistrate noted that the accused had traumatized the young complainants and had wanted to satisfy his sexual appetite from both

sexes. She concluded that a lengthy custodial sentence was appropriate in the circumstances to send a message to society that the courts will protect both young girls and boys against sexual predators such as the accused person.

I agree that a lengthy custodial sentence is called for in this matter, but it is the approach to sentence, which I find to have led to an excessive sentence being imposed in all the circumstances of the case.

In the case of *State vs Tichawanda Fambai* HB 16/09, NDOU J, held that where the cumulative effect of a sentence is too excessive this will call for interference. The learned judge referred to the case of:

S v Hassim 1976(2) PH H58 (N) and *S v Nyathi* HB 60/03. In the case of *S v Sherman* SC 117/84 McNALLY JA remarked:

> "How does one begin to measure the outer limit of a sentence in a case of this magnitude? One may say that even murder with actual intent often attracts a sentence of 16-18 years. One may ask what sentence would be appropriate where a quarter of a million dollars is stolen and nothing recovered? What sentence would be appropriate where two or six million dollars is involved? This consideration and suggestion suggest to me that a twenty year sentence for a crime of dishonesty unaccompanied by violence must be approaching the outer limit of what any court in this jurisdiction would impose for such crimes."

In *casu,* the accused person is aged 19 years. An effective sentence of 36 years means in effect that the greater part of his adult life will be spent in prison. There can be no doubt that a sentence of 6 years imprisonment for each of the individual counts for the offences was appropriate. In this case of the total 36 years imprisonment there was no suspended sentence resulting in an effective sentence of 36 years imprisonment.

In the case of *S v Magwenzi* 1994 (1) ZLR 442, CHIDYAUSIKU J, as he then was, observed that where a man forcibly sodomises another, it is no different from rape. The act is degrading, if not more so because it is unnatural. Where the complainant is of tender years, he is likely to be traumatised and corrupted.

In *S v Chayisa* HH 17/04, CHINHENGO J held that although the Criminal Procedure and Evidence Act [Chapter 9:07] does not make provision for the imposition of globular sentences

on persons convicted of several offences, there has been judicial approval of the approach and it is routinely resorted to by our courts. In deciding whether or not to pass a globular sentence on a person convicted of several counts, a judicial officer must be guided by the following factors, which are not exhaustive:

(1) the offences are the same or of a similar nature

(2) the offences are closely linked in time

(3) the offences arise out of the same transaction

In *casu* the offences occurred around the same period are similar in nature. A total effective sentence of 36 years is disturbingly so excessive, so as to warrant interference. The learned magistrate misdirected herself on the question of sentence and I am therefore at large as regards sentence see the case of *S v Sidat* 1997(1) ZLR 487 and *S v Coetzee* 1970(4) SA 83 (RA).

In the light of the above, I accordingly confirm the conviction on all counts. I, however, set aside the sentence by the trial court and the following is substituted:

"Count 1- 4: 8 years imprisonment
Count 5and 6: 8 years imprisonment."

Makonese J.....

Ndou J.....agrees