HB 187/18
HCA 143/16
X REF GWR 214/16

ISHEUNESU DZINGISO

Versus

THE STATE

IN TH HIGH COURT OF ZIMBABWE
MAKONESE & MABHIKWA JJ
BULAWAYO 16 JULY 2018

Criminal Appeal

MAKONESE J: There is not the slightest doubt that the appellant's conduct at Meadows Farm, Gweru on the night of 13th September 2016 was most reprehensible and deserving of the most severe censure by the court *a quo*. The appellant violently broke into the complainant's house, violently assaulted her and sexually ravaged her both vaginally and anally. The appellant subjected the 68 year old complainant to a nightmare. Appellant poked his fingers into the complainant's genitalia, pinched her, slapped her and bruised her. The doctor's report makes sad reading. There was evidence of bleeding from the complainant's genitalia. There were fresh bruises on the external genitalia and bruises on the anal region. The complainant's face was bruised from physical assaults and head butts. She was described by the doctor as physically and emotionally drained. She was traumatized.

The appellant appeared before the Regional Magistrate sitting at Gweru on the 19th September 2016 facing one count of unlawful entry as defined in section 131 of the Criminal Law (Codification and Reform) Act (Chapter 9:23). He also faced one count of assault as defined under section 89 of the Criminal Code. Further, the appellant faced five counts of rape as defined in section 65 of the Criminal Code. The first two counts were treated as one for the purposes of sentence and appellant was sentenced to 10 years imprisonment on each count totaling 50 years imprisonment. Appellant was therefore sentenced to an aggregate of 60 years imprisonment of which 10 years was suspended for 15 years on the usual condition of future good conduct. The effective sentence was 50 years imprisonment.

The appeal in this matter is against sentence only.

The brief facts are that on the night in question at Plot 49 Meadows Farm, Gweru, the appellant unlawfully entered the complainant's house around 23:30 hours and assaulted the complainant with clenched fists on the face several times. He head butted the complainant until she felt dizzy and fell down. He then proceeded to rape the complainant five timers, three times vaginally and twice anally. The accused immediately fell into a deep slumber. The complainant sneaked out of her room to alert the neighbours of her ordeal. The appellant was apprehended when he was still in the complainant's house, asleep. On these facts the, appellant was convicted and sentenced as outlined above.

The appellant was dissatisfied with the sentence imposed by the court *a quo*, arguing that the sentence was manifestly excessive. The state has conceded that the sentence is rather harsh and excessive.

The appellant contends that a custodial sentence of 50 years is too harsh and excessive to the extent that it induces a sense of shock. The appellant argues that the learned magistrate erred in failing to consider the principle that punishment must fit both the criminal and the crime, and be fair both to the state and the accused, and that sentence must be blended with a measure of mercy.

The learned trial magistrate responded in the following terms to the notice of appeal:

"The trial court could have taken the 5 counts of rape as one for the purposes of sentence, in its own discretion.

See reasons for sentence.

But even if that were done, accused would still not receive an effective prison term of 6 years as proposed by appellant's counsel. That would have been unconscionable injustice to the victim and the society, at large.

Accused's behaviour was not barbaric and heartless, indeed. He deserved a most severe criminal sanction, here at least 25 years effective imprisonment and 50 years, as he got."

I do detect that there was some recognition by the learned trial magistrate that the sentence was indeed too harsh and excessive. In his own words, the trial magistrate reflects that at least 25 years would have been an appropriate sentence. What cannot be doubted is that this was a barbaric, brutal and violent attack on a defenceless woman. Not only did the appellant brutalise the complainant by physically assaulting her. He sexually abused the complainant vaginally and anally. This was a vile and inexcusable act. The complainant's dignity was violated. She sustained physical injury on her face and her genitalia. A lengthy prison sentence was called for.

The accused person was aged 26 years at the time of the commission of the offence. He is single and has no children. He survived on odd jobs at farms realising $400 per month. Inspite of the seriousness of the offence the sentencing process must be a rational one. An over-emphasis on the seriousness of the offence may lead to an unduly harsh sentence. The sentencing magistrate must exercise his sentencing discretion without the overbearing influence of emotion. The sentencing magistrate must not over play the interests of society. Punishment must not be purely retributive but reformative. The penalty imposed must be commensurate to the offender. An accused person must not be visited with a sentence to the extent of being broken. This is what seems to have occurred in this matter. The court erred in not treating the five counts of rape as one for the purpose of sentence. That position is settled in our law. In *S* v *Sawyer* 1999 (2) ZLR 390 (H) at page 393C the court stated this principle in the following terms:

> *"On the other hand, where different counts are closely related to one another in some way, then it is not permissible, but often preferable, to treat separate counts collectively for sentence. For instance, where different offences are committed together as part of the same criminal activity or where identical or similar offences are committed individually over a period of time but as one part of an ongoing cause of conduct or collective sentence will generally be appropriate."*

It is trite that sentencing is entirely the discretion of the sentencing court and that this court will only interfere with the discretion of a lower court, where such discretion is not exercised judicially. It is clear that although a lengthy sentence was inevitable, the tariff approach adopted by the trial magistrate, resulted in a manifestly excessive sentence. The trial

magistrate to his credit does acknowledge this in his response to the notice of appeal. In a similar matter *David Nhomboka* v *The State* HB80/17, this court dealt with a matter whose facts bear close resemblance to this matter. In that matter the appellant appeared before a Regional Magistrate at Gokwe facing four counts of rape. He was sentenced to 10 years on each count, leaving him with a total sentence of 40 years imprisonment, with 2 years suspended on conditions of good behaviour. The effective sentence of 38 years was held to be wholly inappropriate. The four counts of rape were treated as one for the purposes of sentence and the sentence of 40 years was substituted with an effective sentence of 20 years.

I reiterate that the general principle in sentencing an accused who is facing multiple counts a was set out in *S* v *Chawasarira* 1991 (1) ZLR 66(H), wherein SMITH J stated at page 69D-E that:

> *"Separate punishment should, save in exceptional cases, be imposed for each separate charge. One globular sentence for two or more offences should only be considered where the offences are of the same or similar in nature and are closely linked in point of time. If these two requirements are not satisfied, then a separate sentence must be imposed in respect of each offence."*

In *S* v *Andson Ndlovu* HB-104/12 where the accused was charged with five counts of raping his biological daughters, aged 7 and twins aged 4 years the trial court sentenced the accused to 20 years in respect of each count and the aggregate sentence was 100 years imprisonment. On review the judge set aside the sentence. Two counts were set aside as the convictions on those counts were improper, of the three remaining counts, the court set aside the sentenced and substituted it with 6 years for each count resulting in an effective sentence of 18 years imprisonment.

See also *State* v *Rabson Dube & Stephane Sibanda* HB-57-10; *S* v *Makurira* 1975 (3) SA 83 (R); *S* v *Nyathi* 2003 (1) ZLR 587 (H); S *v Sherman* SC/117/84 and *Joseph Chirwa v S* HH79/94.

In the case of *S* v *Sparks* 1972 (3) SA 396 (A) the court reaffirmed the principle that punishment should fit the criminal as well as the crime, be fair to the state and to the accused and be blended with a measure of mercy. The sentence must not have the effect of breaking the offender.

It must be noted that too harsh a punishment serves neither the interests of justice nor those of society, neither does one that is too lenient. There should be a weighing and even balancing of all factors that have to be taken into consideration. That approach will result in a just and fair sentence. I have already indicated that the learned magistrate erred in imposing separate sentences for each of the five counts of rape. That resulted in a cumulative and globular sentence of 50 years imprisonment. This was a misdirection on the part of the sentencing magistrate. This court is therefore at large as regards sentence. All the five counts of rape were committed in one single criminal episode.

In the result, and accordingly the appeal is upheld, the sentence of the court *a quo* is set aside and substituted with the following:

1. Counts 1 and 2 treated as one for the purpose of sentence, accused is sentenced to 24 months imprisonment of which 6 months is suspended for five years on condition of future good conduct. **Effective sentence: 18 months imprisonment**.
2. Counts 3 to 7 treated as one for purposes of sentence, accused is sentenced to 25 years imprisonment of which 4 years is suspended on condition accused is not within that period convicted of the offence of rape and for which upon conviction, accused is sentenced to imprisonment without the option of a fine.

   Effective sentence: 21 years imprisonment
3. The sentences are to run concurrently.

Mabhikwa J ……. I agree