

ADVANCE MASARA

versus

THE STATE

HIGH COURT OF ZIMBABWE  
MAWADZE J, MAFUSIRE J.  
MASVINGO, 1 NOVEMBER, 2017 & 31 JANUARY 2018

### **Criminal Appeal**

*R. Fambasayi*, for the appellant  
*M. Tembo* for the respondent

MAWADZE J: On 1 November 2017 after hearing arguments from counsel we dismissed this appeal for lack of merit. The reasons for the dismissal were given ex tempore.

On 28 November, 2017 counsel for the appellant wrote to the registrar requesting for the written reasons for dismissing the appeal. These are they;

The 17-year-old appellant was convicted on his own plea of guilty by the Senior Regional Magistrate, Chiredzi for contravening s 65 (1) of the Criminal Law Codification and Reform, Act) [*Chapter 9:23*] which relates to rape. The appellant sexually molested a 10-year-old complainant.

Both the appellant and the complainant reside in the same village in Uswaushava, Triangle, Masvingo and are neighbours.

The agreed facts are that on 12 May 2017 the appellant approached the complainant in the grazing area where the 10-year-old complainant was herding cattle with her 3-year-old cousin. The appellant held the complainant by the arm and pulled her to a nearby field. At the field the appellant forced the complainant to the ground and removed her pants. In turn appellant removed his trousers and pants. The appellant proceeded to tie a cloth around the

complainant's mouth in order to prevent her from crying or raising any alarm. Thereafter he proceeded to ravish her in the presence of the 3 year old child. The appellant then left the scene. Later that day the complainant made a report to her grandmother who had returned from the fields. The appellant was apprehended by local villagers on the same day but managed to escape as he was being taken to the police station. However, police subsequently arrested him the same day.

As already said the appellant was duly convicted as per the procedure provided for in s 271(2)(b) of the Criminal Procedure and Evidence Act [*Cap 9:07*].

The court a quo in the absence of a probation officer's report proceeded to adduce evidence from the appellant's mother in a pre-sentence inquiry. The appellant's mother pointed out that the appellant was in Form 2 although he was supposed to be in Form 4 because he had repeated the grades. She pointed out that the appellant's criminal conduct was rather out of character as she was surprised by the appellant's behaviour.

The medical report produced during the trial showed that the hymen of the 10-year-old complainant was torn. It is clear that penile penetration as agreed to by the appellant was effected.

The appellant was sentenced to 6 years imprisonment of which 2 years imprisonment were suspended for 5 years on the usual conditions of good behaviour thus leaving an effective term of 4 years imprisonment.

Aggrieved by this sentence the appellant lodged this appeal against sentence.

The grounds of appeal are couched as follows;

“*GROUND*S OF APPEAL”

- 1. The court aquo erred in imposing a custodial sentence and ruling out a consideration of corporal punishment coupled with a suspended sentence.*
- 2. The court a quo erred in sentencing a juvenile without a Probation Officer's report and professional opinion outlining the personal circumstances of the individual child offender.*

3. *The reasons of the court a quo induced (sic) a sense of shock in sentencing the accused person aged seventeen (17) years as an adult and not a child offender deserving adequate protection by the courts.*

*WHEREFORE appellant prays that the sentence be set aside and replaced with sentence of corporal punishment coupled with a wholly suspended sentence (sic)''*

The appellant at the time of hearing the appeal was on bail pending appeal, although he had had a short stint in prison.

In his oral submissions counsel for appellant *Mr Fambasayi* went to town about the alleged omissions by the court *a quo*. *Mr Fambasayi* submitted the court *a quo* failed to take into account the well enshrined principle or concept of the best interests of the child (the accused). Reference was made extensively to the provisions in our Constitution and various international conventions dealing with the rights of children in conflict with the criminal law.

We were not persuaded that the court *a quo* erred in proceeding to finalise this matter without the Probation Officer's report. The learned Senior Regional Magistrate should in fact be commended for being innovative by calling the appellant's mother and adduce relevant evidence on the personal circumstances of the appellant. As a result, this matter was expeditiously dealt with rather than waiting for a long time pending the availability of the Probation Officer's report. Judicial notice should be taken of the fact that there are real constraints faced by the courts in obtaining such reports leading to inordinate delays in finalising criminal cases. Where appropriate this can be solved by being resourceful and proactive as was done by the learned Senior Regional Magistrate. The bottom line is whether the trial court has carried out a meaningful pre-sentence inquiry to equip itself with sufficient information to properly sentence the accused without committing an injustice. The mere absence of a Probation Officer's report *per se* does not constitute a misdirection or miscarriage of justice. *In casu* the personal circumstances of the appellant were well canvassed and we find no misdirection on the part of the trial court.

It is not correct as the respondent (the state) had wrongly conceded that the appellant was treated as an adult. Maybe both counsel were put on the wrong scent by what the learned Senior Regional Magistrate said in the reasons for sentence. The relevant part reads as follows:

*“I do not believe corporal punishment will reform you. I believe a short prison term will teach you a good lesson to other boys out there now that you are close to 18 years. I do not believe treating you like a juvenile will save (sic) any good lesson. You should be treated like an adult (sic).”*

The mumbled pronouncements by the learned Senior Regional Magistrate are unfortunate. This should not however detract from the fact that the appellant was not treated as an adult. A number of observations inform this finding. The appellant’s mother was called to assist the court in the pre-sentence inquiry as there was no Probation Officer’s report. What is even more pertinent is that the sentence imposed by the trial court is way below the sentences normally imposed in rape matters where adult men who sexually abuse minor children like the 10-year-old complainant. The sentences are well above 10 years imprisonment. A proper assessment of all the factors clearly show that the appellant was not treated as an adult.

We were not persuaded by the argument that this matter raises any constitutional issues. Indeed, s 81 of our Constitution, deals with the rights of children and emphasises in s 81(2) that a child’s best interests are paramount in every matter concerning the child. The same goes for various international conventions dealing with the rights of children. What escaped the mind of counsel for appellant is that *in casu* the sentencing court was grappling with the competing interests of the appellant (being the abuser) and the complainant (the abused 10-year-old child). It is not the appellant’s rights which are paramount. The rights of the victim are equally if not more important especially a 10-year-old girl.

The simple question which arises in this matter is what is the appropriate sentence for a 17 year old who sexually abused a 10 year old girl in a rather brutal and violent manner? In the case of *S v Zaranyika & Ors* 1995 (1) ZLR 158 (H) BARTLET J. in a very detailed review judgment grappled with this question. In fact, this case gives very useful guidelines in dealing with accused persons of appellant’s age convicted of raping minor children like the complainant.

There are a number of aggravating factors in this case which elevate the appellant’s moral blameworthiness. The offence of rape itself is inherently a very serious offence. The age difference between the appellant and the complainant is not negligible. The offence was committed in a cruel and brutal fashion. The 10-year-old complainant was not only dragged to the fields but had to be gagged by having her mouth tied with a cloth to ensure she would not

raise alarm while she was being raped. The appellant's conduct cannot be described as some boyish prank.

It is not a rule cast in stone that all accused persons below the age of 18 years should be sentenced to corporal punishment for committing an offense like rape regardless of the circumstances of each case. There is nothing to suggest that the trial court improperly exercised its discretion in this matter.

It is for these reasons that we found that the appeal in respect of sentence lacked merit. Accordingly, we dismissed the appeal.

Mafusire J. agrees.....

*Legal Resources Foundation*, counsel for the appellant

*National Prosecuting Authority*, counsel for the respondent