

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 30 May 2024

Criminal review

DUBE-BANDA J:

[1] This is a matter that was placed before me on automatic review. The offender was charged with the crime of rape in terms of s 64(2) as read with s 65 as amended in the Criminal Law (Codification and Reform) Act [Chapter 9:23] (Criminal Law Code). It being alleged that during the period between March and August 2023 he had unlawful sexual intercourse several times with the complainant a female juvenile aged 12 years, who at law was incapable of giving consent to sexual intercourse and unable to understand the nature and possible consequences of the conduct and to give informed consent.

[2] The offender pleaded guilty to the charge and was duly convicted. The trial court found that in the reading of s 65(1) of the Criminal Law Code the offence was committed in aggravating circumstances in that the complainant was a twelve-year-old child. In sentencing the accused the court took into account s 81(2) of the Constitution of Zimbabwe which says the child's best interest are paramount in every matter concerning the child. The offender was 18 years at the time of the commission of the offence, and the court considered the fact that he was a child a mitigating factor and sentenced him to 5 years imprisonment.

[3] Nothing turns of the conviction. It is proper and in accordance with the requirements of the law. It is the sentence that I take issue with.

[4] The inquiry into the sentence must start with the penalty provision in an offence of rape committed in aggravating circumstances. Section 65 of the Criminal Law Code as amended in 3 of the Criminal Law (Codification and Reform) Amendment No. 10/2023 says:

Section 65 ("Rape") (4) of the principal Act is amended by the repeal of the resuming words in subsection (1) and the substitution of— "shall be guilty of rape and liable—
(i) if the crime was committed in aggravating circumstances as described in subsection
(2) (that is to say if there is a finding adverse to the accused on any one or more of those

factors), to life imprisonment or any definite period of imprisonment of not less than fifteen years; or
(ii) if there are no aggravating circumstances, to a period of not less than five (5) years and not more than fifteen (15) years.”.

[5] In *casu* the trial court found that the offence was committed against a child aged twelve years, and concluded that the rape was committed in aggravating circumstances. The issue that arises is whether it was competent for the trial court to sentence the accused to anything outside life imprisonment or any definite period of imprisonment of not less than fifteen years. The court justified a departure from the penalty prescribed in the penalty provision on the basis that the accused was also a child. He was eighteen years at the time. The court noted that taking into account s 81(2) of the Constitution which says a child’s best interest are paramount in every matter concerning a child, and concluded that it was not going to be in the best interest of the accused to sentence him to 15 years imprisonment.

[6] I take the view that it was not competent for the trial court to escalate the issue of sentencing of the accused to a constitutional issue. It is not. I accept that s 46(2) of the Constitution says when interpreting any legislation every court, tribunal or forum must promote the spirit, purport and objects of the Declaration of Rights. The court must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom. In my view s 46 (2) requires that the Declaration of Rights must be applied indirectly where it cannot be applied directly. Having made this observation, I note that s 46(2) does not permit a court to by-pass a clear and unambiguous penalty provision by reaching a constitutional issue. First, one must consider the presumption of constitutional validity of legislation, and then come to the conclusion that s 65 as amended is constitutionally valid. See *Zimbabwe Electoral Commission (2) The Chairperson of the Zimbabwe Electoral Commission v The Commissioner General Zimbabwe Republic Police & 19 Ors* CCZ 3/14. Secondly, reaching the constitution when there is a clear and unambiguous legislation which answers the issue at hand is hit by the principle of subsidiarity. See *S v Mhlungu and Others* 1995(7) BCLR 793 (CC) where the court said:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue that is the course which should be followed.”

See *Magurure v Cargo Carriers International Hauliers (Pvt) Ltd* CCZ 15/16; *Majome v Zimbabwe Broadcasting Corporation & Ors* 2016 (2) ZLR 27 (CC); *Moyo v Chacha & Ors* 2017 (2) ZLR 142 (CC). Therefore, s 81(2) of the Constitution had neither direct nor indirect application to the issue that was before the trial court. The issue was simply answerable by resort to s 65 of the Criminal law Code and no further.

[7] For completeness, I turn to s 351(2) of the Criminal Procedure and Evidence Act [Chapter 9:07] which says a court before which a person under the age of nineteen years has been convicted of any offence may, instead of imposing a punishment of a fine or imprisonment for that offence, order that he shall be taken before a children's court and dealt with in terms of the Children's Act [Chapter 5:06]. A reading of this provision suggests that it applies to a juvenile convicted of the crime of rape, because it says who has been "convicted of any offence." First an attempt must be made to read the s 351(2) of the CP & E Act and s 65 as amended together in an effort to reconcile them. See *Wendywood Development (Pty) Ltd v Rieger* 1971(3) SA 28 (A); *Shozi v Minister of Justice, Kwazulu* 1992 (2) SA 338 (NPD) 343. In this case a reconciliation is impossible. By operation of law the latter of the two provisions i.e., s 65 of the Criminal Law Code must prevail. Therefore, a court that has convicted a juvenile for rape must look to the provisions of s 65 for for sentence and nowhere else.

[8] Section 65 as amended enjoins the court to make a finding whether or not the offence was committed in aggravating circumstances. In a case where the offence was committed in aggravating circumstances the sentence is life imprisonment or any definite period of imprisonment of not less than fifteen years. If it was not committed in aggravating circumstances, to a period of not less than five (5) years and not more than fifteen (15) years. The penalty provision does not exclude from its operation juveniles convicted for the crime of rape. In essence it means a juvenile convicted of rape committed in aggravating circumstances may be sentenced to life imprisonment or imprisonment not less than fifteen years. And a juvenile convicted of rape not committed in aggravating circumstances may be sentenced to a period of not less than five years and not more that fifteen years. Therefore, a court that has convicted a juvenile for rape must look to the provisions of s 65 of the Criminal Law Code as amended for sentence.

[9] Lastly, I consider the question whether a court sentencing an offender convicted of rape must consider suspending the whole or part of the sentence. I must state upfront that I have had the benefit of reading the judgment in *The State v TG (redacted)* and *The State v Chimatya* HH 51/24 and regrettably I am unable to agree with the conclusion that it is unlawful for a court to suspend the whole or part of the sentence imposed in terms of s 65 of the Criminal Law Code. I do not share the approach and reasoning that lead to that conclusion. Accordingly, it is necessary for me to set out the approach and reasoning that has led me to the conclusion I have reached in this matter. That a court may suspend the whole or part of the sentence imposed on an offender in terms of s 65 of the Criminal Law Code.

[10] Back to the question, it is important first to determine whether s 65 provides for minimum mandatory sentences. This is so because the 8th Schedule to the Criminal Procedure & Evidence Act [Chapter 7:09] prohibits a suspension of sentence for any offence in respect of which any enactment imposes a minimum sentence and any conspiracy, incitement or attempt to commit any such offence. The question is whether s 65 of the Criminal Law Code provides for a minimum mandatory sentence? I make the immediate observation that where the legislature prescribes a minimum mandatory sentence it says so in clear and unambiguous language and provides for the canvassing of special circumstances to take care of deserving cases. Section 65 merely decrees a sentence to be imposed on offenders convicted of the offence of rape. It does not prescribe for a minimum mandatory sentence.

[11] The legislature whenever it provides for a minimum mandatory sentence makes provision for the canvassing of special circumstances for the purposes of ameliorating the harshness of such a sentence in deserving cases. The legislature could not have prescribed sentences of 15 and 5 years imprisonment respectively without leaving a window open for ameliorating of such sentences in deserving cases. The Legislature is presumed to have acted within the parameters of the law. If the legislature intended that no part of the sentence be suspended it would have said so in clear language. This is what it has done with other pieces of legislation that provide for minimum mandatory sentences. In s 114 (4) of the Criminal law Code it is clear that a court sentencing a person for stock theft to the minimum sentence of imprisonment of nine years, shall not order that the operation of the whole or any part of the sentence be suspended. Section 128 (2) of the Parks and Wildlife Act [Chapter 20: 14] provides in clear language that where no special circumstances are found by a court, no portion of a sentence shall be suspended if

the effect of such suspension is that the convicted person will serve in the case of a first conviction, less than nine years imprisonment; and in the case of a second or subsequent conviction, less than eleven years. Section 368(4) of the Mines and Minerals Act is clear that any person who contravenes subsection (1), (2) or (3) shall be guilty of an offence and liable if there are no special circumstances in the particular case, to imprisonment for a period of not less than two years. And it also makes clear that a court sentencing a person who has failed to show special circumstances shall not order that the operation of the whole or any part of the sentence be suspended. Section 65 provides no prohibition for the suspension of a sentence imposed on convicted person. The phrase “definite period of imprisonment” cannot be read to mean an “effective term of imprisonment.” To do so is tantamount to reading more into the provision than what it unambiguously states. Imprisonment of not less than 15 years is not to be construed as a minimum mandatory sentence. It is not. In fact, a suspended sentence is no less a term of definite imprisonment. My view is that a court sentencing an offender convicted of rape must consider suspending the operation of the whole sentence or part thereof. I take it that failure to even consider whether the justice of the case requires the whole or part of the sentence to be suspended is an irregularity so gross that the resultant sentence cannot be permitted to stand. It is not in accordance with real and substantial justice as required by the law.

[12] In *casu* the trial court having found that the rape was committed in aggravating circumstances it had to sentence the offender to life imprisonment or any definite period of imprisonment of not less than fifteen years. And it needs to be considered whether the whole or part of the sentence should be suspended. My view is that the sentence meted out on the accused is not in accordance with real and substantial justice. In the circumstances, I order as follows:

- i. The conviction is confirmed as being in accordance with real and substantial justice as required by the law.
- ii. The sentence imposed on the offender is reviewed and set aside and the matter is remitted to the trial magistrate to re-sentence the offender in accordance with the law.

Kabasa J:Agrees