

THE STATE
versus
TG (redacted)
and
THE STATE
versus
VICTOR CHIMATYA

HIGH COURT OF ZIMBABWE
KWENDA & MUTEVEDZI JJ
HARARE, 1 February 2024

Criminal Review

MUTEVEDZI J: The two cases under review, illustrate once again that the tribulation of minimum mandatory sentencing will for a long time to come remain an albatross on the necks of judicial officers. No amount of criticism or demonstration of the inefficacy of minimum mandatory sentences appears to deter legislatures from prescribing the nadir of punishments which judicial officers can impose on certain types of offenders and offences. Arguments against mandatory sentencing abound. Fortunately, they do not form part of the discourse in this judgment. But for instance, those who take a paler view of the concept like former Australian Director of Public Prosecutions for NSW, Professor Nicholas Cowdery QC insist that minimum mandatory sentences take away the discretion of courts. He once famously attacked it on the basis that:

“It is not possible for the relevant sentencing considerations to be identified accurately and comprehensively in advance of the offending (as Parliament would have to do in order to be able to fix just sentences in legislation). There must be left scope for discretion, to be exercised in a judicial fashion (and not arbitrarily or capriciously). The alternative is not justice. The difficulty arises because mandatory sentences are imposed by the legislature before particular offences have been committed and all the facts and circumstances are known. That is, Parliament imposes a penalty for events that it cannot necessarily foresee.”¹

My understanding of his argument was that the legislature cannot foretell or predict if a prescribed punishment, intended to be a one size fits all, will be an appropriate one for the innumerable circumstances which can arise in the commission of a specified crime. Despite

¹ Nicholas Cowdery QC, ‘Some aspects of Sentencing’, (Speech delivered at Legal Studies Association 2007 Conference, 23 March 2007, Sydney) p. 17

this attendant pitfall, legislatures across many jurisdictions unfortunately still view these narratives as posturing by judiciaries and those that are anti-mandatory penalties.

In a recent judgment, this court per MAWADZE J in the case of *S v Joshua Musisinyani and Tanaka Mudamburi* HMA 46/23 took a swipe at the indiscriminate nature of minimum mandatory sentences. The learned judge made the point that there will always be deserving cases which require the courts to deviate from minimum mandatory penalties. Without making any definitive finding because he had not had the benefit of full argument on the issues, His LORDSHIP went on to suggest that legislation which prescribes such penalties especially on children may be found to be in conflict with ss 19(1) and 53 of the Constitution of Zimbabwe, 2013 which emphasise the best interests of children and freedom from torture or cruel, inhuman or degrading treatment or punishment respectively. Such views cannot be gainsaid particularly if juxtaposed against the import of s 81 of the Constitution which dictates that every child has the right not to be detained except as a measure of last resort and if detained to be so detained for the shortest appropriate period; that children are entitled to adequate protection by the courts and especially by this court which is designated as their upper guardian. I am persuaded to associate myself with those observations and wish to add that minimum mandatory sentences especially those that fall into the species which does not allow a court to find avenues of distinguishing special cases from the rest may, if properly challenged not pass the constitutionality test. I emphasise the condition if ‘properly challenged’ because like my learned brother pointed in *S v Joshua Musisinyani* (supra) a declaration that s 3 of the Criminal Law (Codification and Reform) Amendment Act, No. 10/2023 (hereinafter Amendment Act No. 10/2023) which is the source of strife in this judgment contravenes the provisions of the Constitution specified above is not possible without the benefit of exhaustive argument. As a result MAWADZE J in the referenced case refrained from deciding the matter on the basis of the constitutional invalidity of the impugned provision. He resorted to other considerations which I will deal with later in the judgment.

I now turn to the review proceedings before me.

The two records of proceedings in issue here were separately placed before me for review in terms of s 57 (1) of the Magistrates’ Court Act [*Chapter 7:10*]. They are both bedevilled by irregularities which stem from a misreading of s 3 of the Amendment No. 10/2023 which amended s 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Code) regarding the sentences which courts may impose on an offender

following a conviction of rape. I will shortly illustrate how the two magistrates misconstrued the law after putting the issues into context.

In the Case of the *State v TG (TG)* the allegations were that the offender, a juvenile aged seventeen (17) years had, during the month of August 2023 raped a five (5) year old girl. He took advantage of the absence of the girl's parents from home to perpetrate the crime. At his trial he pleaded guilty and was duly convicted. That conviction is unassailable. The offender was subsequently sentenced as follows:

“5 years imprisonment wholly suspended on condition accused does not within that period commit any offence of a sexual nature for which upon conviction, will be sentenced to imprisonment without the option of a fine.”

In the case of *S v Victor Chimatya (Victor)*, the offender, a forty five (45) year old man was convicted of raping his neighbour's eleven year old daughter. He pleaded not guilty but was convicted after a contested trial. The evidence accepted by the trial court left no reasonable doubt that he committed the offence. He was slapped with the following sentence:

“20 years imprisonment.”

As stated above, I took no umbrage against the convictions. They are both unquestionable. I therefore certify them as being in accordance with real and substantial justice. It is the sentence in the *TG* case and the process of arriving at the sentence in *Victor's* case that I found irregular.

In *TG*, the trial regional magistrate appeared to commence her sentencing judgment from a correct understanding of the law when she remarked that:

“The statutory penalty for the charge of rape is life imprisonment or any definite period of imprisonment of not less than 15 years if committed in aggravating circumstances. If the offence is committed in mitigatory circumstances. A sentence of not less than 5 years is to be imposed.” (Sic)

She however suddenly stumbled and was unable to replicate the perfect start when she then made reference to the presumptive penalties which are stated in third schedule to the Criminal Procedure (Sentencing Guidelines) Regulations, 2023 (the guidelines) under the crime of rape. In her own words she stated:

“SI 146/23 sentencing guidelines also provide for a presumptive penalty of 20 years imprisonment where the offence is committed in aggravatory circumstances. It provides for a minimum presumptive penalty of 10 years imprisonment where minimum physical force is used and they minor physical injury to victim.” (Sic)

The above conception of the relevant law is wrong for two reasons. The first is that when Amendment Act No. 10/2023 became law on 14 July 2023, the Judicial Conference on Sentencing Guidelines had earlier passed a resolution approving the sentencing guidelines in the form they appeared in before the effective date of the Amendment. Those presumptive penalties were then enacted together with the rest of the guidelines on 8 August 2023. My view is that the presumptive penalties as indicated under the crime of rape in the third schedule to the guidelines did not take account of the new sentences and sentencing regime brought about by Act No. 10/2023. They are therefore misleading in that they were not formulated with the new sentences in mind. Magistrates must not follow them. In fact it is recommended that those tasked with the responsibility to revise the law must attend to the necessary amendments without further delay. Secondly, the guidelines do not speak to **maximum** and **minimum** presumptive penalties. They simply refer to presumptive penalties. I can do no more than refer to this court's decision in *S v Blessed Sixpence and others* HH 567/23 for a comprehensive explanation of what constitutes a presumptive penalty.

The above indiscretions aside, what however appears more important to me is the way s 65 (4) of the Code is now couched and must be read after the amendment which provides as follows:

“3 Amendment of section 65 of [Chapter. 9:23]

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.”.

In obiter utterances, I remarked in *Blessed Sixpence* (supra) that the new s 65(4) of the Code was predicated on the same construction which is apparent in s 47(4) of the same Act, a provision which deals with the sentencing of offenders convicted of murder. Both ss 65(4) and 47(4) create a novel form of minimum mandatory sentences which does not permit a court to find special circumstances in order for it to deviate from the prescribed minimum mandatory sentence. What s 65(4) does is to require a court convicting an offender of the crime of rape to make a determination on whether or not the offence was committed in aggravating

circumstances before undertaking any other assessment. That must always be the court's first inquiry because it is the presence or absence of aggravating circumstances which determines the court's course of action in sentencing the offender. Where a court finds one or more of the factors alluded to under subsection (2) of s 65, it must as a rule, find that the crime was committed in aggravating conditions. Where that is so, the court has no choice but to sentence the offender to a minimum 15 years imprisonment. The factors which constitute aggravation as listed in the provision are:

- a. "The age of the person raped
- b. The degree of force or violence used in the rape
- c. The extent of physical and psychological injury inflicted upon the person raped
- d. The number of persons who took part in the rape
- e. The age of the person who committed the rape
- f. Whether or not any weapon was used in the commission of the rape
- g. Whether the person committing the rape was related to the person raped in any of the degrees mention in subsection (2) of s 75
- h. Whether the person committing the rape was the parent of guardian of, or in a position of authority over the person raped
- i. Whether the person committing the rape was infected with a sexually transmitted disease at the time of the rape"

The above aggravating features seem to me self-explanatory. In this case for instance, the victim of the rape was five (5) years old. I presume that by making reference to the age of the person raped the intention of the legislature was to beseech the courts to take a dim view of offenders who abuse victims in those categories generally deemed as vulnerable. The groups which are accepted to belong to that category in terms of age are young children below the age of eighteen years and the elderly constituted by persons above seventy years. Where an offender raped a child as young as five years, there is no escaping that the offence gravitates into the realm of those committed in aggravating circumstances. In *casu*, the trial magistrate acknowledged the age of the victim. She nonetheless did not think it prudent to find that the crime had been committed in aggravating circumstances as required by law ostensibly by reason of the age of the offender who was seventeen years at the time he was sentenced. Admittedly he was a child in his own right. His age triggered the special care with which he must be treated as earlier discussed. The reasoning is that it does not do society any good for a child to be sentenced to imprisonment for the lengthy periods which are introduced by Amendment Act No. 10/23 but sadly, my comprehension of the factors in s 65(2) is that they are not designed to be mitigation. They are intended to make an offender's situation worse. A court cannot therefore turn to the 'age of offender factor' in s 65(2) for purposes of reducing

the convict's moral blameworthiness. The trial magistrate in this case made that mistake. She thought that the offender's age could reduce his moral turpitude. To support her view she made reference to numerous authorities most of which obviously predated Amendment No. 10/23 and could not assist me because they had no citations. The trial court therefore used the age of the offender factor wrongly. What it did is not permissible. S 3 of Amendment Act No. 10/2023 changed the factors listed under s 65(2) from mere circumstances which a court was obligated to look at in determining sentence and made the same **aggravating circumstances**. The difference in the construction of the earlier subsection and the amended one is pertinent. In its original form s 65(2) read:

“(2) For purposes of determining the sentence to be imposed upon a person convicted of rape, a court shall have regard to the following factors...”

Critically, whilst in that earlier version the provision left it to the discretion of the court to determine whether to regard each of the factors as aggravating or mitigating the crime the amendment unequivocally stipulates that 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.)”

It must follow that the general factors which influenced the sentences of rape before the amendment clearly mutated into considerations which make an offender's situation worse. It equally must follow therefore that none of the factors listed under s 65(2) can be viewed as being favourable to the offender. The presence of any one or more of them serves to aggravate his punishment. He must be sentenced to either life imprisonment or a determinate period in jail which is not less than fifteen years.

I have already pointed that the victim of this rape was a young child. In fact she was an infant. The trial court ignored that aggravating circumstance. It was swayed by the age of the offender. My view is accorded credence by the extensive reference which the magistrate made to s 21(1) of the guidelines which details the considerations which have to be made where the offender is a child. The factors listed in that section are of general application. They are generic and applicable to children generally when they commit crimes which carry general sentences. They do not apply where a child has been convicted of an offence where a minimum mandatory sentence is prescribed. Further, the sentencing guidelines are subsidiary legislation. They

cannot supersede Acts of parliament. Needless to say, s 65 of the Code therefore takes precedence over s 21 of the guidelines. As will be demonstrated below, to me it does not matter that the offender is a child, once it is found that the offence was committed in aggravating circumstances, sad and immoral as it sounds, the minimum fifteen years imprisonment must be imposed.

Imagining that I were prepared to condone the failure by the magistrate to make a finding that the offence was committed in aggravating circumstances as required by law, the problems which beset the sentence imposed are compounded by yet another irregularity. Section 65(4)(ii) provides that where the offence of rape was not committed in aggravating circumstances the offender shall be liable to imprisonment for a period of **not less than five(5) years** and not more than fifteen (15) years. I read that provision to mean that the law creates a second layer of a minimum mandatory sentence of five years with a maximum cap of fifteen years. In *Joshua Musisinyani* (supra) this court decided the two matters on two grounds. In the first one it found that penile penetration of the victim had not been sufficiently proved and overturned the conviction. The sentence therefore automatically fell aside. In the second case, MAWADZE J correctly observed that the rape had occurred earlier than the advent of Amendment Act No. 10/2023 whose provisions did not have retrospective effect. The current penalties could therefore not apply to the offender's case. I am however aware of the court's sentiments which I acknowledge were expressed as *obiter* that the law may not have been intended to prohibit the suspension of the minimum mandatory sentence of five years if it is imposed on a child offender. It is on that aspect that I respectfully hold a different opinion. My conviction is that it is not possible for an offender of whatever age, convicted of rape not to go to prison under the current law. Put bluntly it is wrong for a magistrate to convict anyone (including children) of rape and spare them imprisonment. That seemingly incomprehensible conclusion stems from the rule of law that it is not permissible to suspend the whole or a portion of a minimum mandatory sentence. Both the fifteen years (where the crime is aggravated) and the five years (in other cases) are minimum mandatory sentences. The postponement of passing of sentence and the imposition and suspension of a prison term on conditions are not processes where courts just exercise their discretion as they deem fit. They are regulated by law. For instance the suspension of a term of imprisonment imposed on an offender is governed by s 358(2) (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (The Criminal Procedure & Evidence Act) which provides as follows:

“(2) When a person is convicted by any court of any offence other than an offence specified in the Eighth Schedule, it may—

(a) ...

(b) pass sentence, but order the operation of the whole or any part of the sentence to be suspended for a period not exceeding five years on such conditions as the court may specify in the order” (My underlining for emphasis)

The court is therefore given carte blanche in respect of suspending the whole or any portion of a term of imprisonment it would have imposed on an offender. The only time it cannot suspend the entire or a portion of the sentence of imprisonment is when the offence in question is one that is listed under schedule eight of the CP & E Act. See the case of *S v World Kera and Another* HH 425 /22. The eighth schedule states that:

“EIGHTH SCHEDULE (SECTION 358)

OFFENCES IN RELATION TO WHICH POSTPONEMENT OR SUSPENSION OF SENTENCE, OR DISCHARGE WITH CAUTION OR REPRIMAND, IS NOT PERMITTED

1. Murder, other than the murder by a woman of her newly born child.
2. Any conspiracy or incitement to commit murder.
3. Any offence in respect of which any enactment imposes a minimum sentence and any conspiracy, incitement or attempt to commit any such offence.” (underlining is my emphasis)

I have already found that s 65(4) of the Code imposes two veneers of minimum mandatory sentences for the crime of rape. The first one is a minimum fifteen years imprisonment where the rape is committed in aggravating circumstances. The second is a minimum five years imprisonment where the offence is not committed in aggravating circumstances. In either case, the whole or a portion of the sentence imposed **cannot** be suspended. I also made a finding in earlier passages of this judgment that the regime of rape sentences is similar to that of murder. In that regard authorities that deal with the sentencing of murder cases equally apply to rape obviously with the necessary changes particularly the severity of penalties and the factors which constitute aggravation. In that regard see the cases of *S v Pritchard Zimondi* HH 179/15 and *S v Emelda Marazani* HH 212/23 among others. In the present case, the trial magistrate chose to suspend the prison term she imposed on the offender in its entirety. The law proscribes such course. By dint of that illegality the sentence is rendered incompetent.

In *Victor's* case, after convicting the offender, whom I must mention is erroneously referred to as the accused throughout the sentencing judgment, the trial magistrate after impressively canvassing the issues that are required at the pre-sentencing hearing stage made an about turn and dealt with extraneous considerations. At p10 of the record of proceedings under the pre-sentencing hearing and supposedly in an explanation of special circumstances to the offender the following exchange occurred between the trial court and the offender:

“Special circumstances

Rape has a minimum mandatory sentence of 15 years imprisonment where there are no special circumstances. Special circumstances are those facts/circumstances out of the norm, out of the ordinary that made you commit the offence. If found there will be no minimum mandatory sentence passed on you.

Q. Why did you commit the offence?

A. I am just been convicted because children used to play and seat in my room. I never ever touched child's clothing- No special circumstance.” (Sic)

In her sentencing judgment she once more dealt with the issue of special circumstances among others in the following manner:

“The Criminal Law Codification and Reform Act provides for a sentence of life imprisonment or any definite period of imprisonment of not less than 15 years if committed in aggravating circumstances. The presumptive penalty provided for in statutory instrument 146 of 2023 provides for 20 years imprisonment. S 65(2) of the Criminal law (Codification and Reform) Act provides for a number of factors that the court must take into consideration. The established sentencing trends is the younger the child, the more serious the offence, and the longer the period of imprisonment. No special circumstances.” (Sic)

I could not really make much sense of what the trial court intended to say from the above excerpts. From the bits and pieces which I picked I note that I have already explained how the factors listed under s 65(2) must be applied. I have already equally emphasised that the presumptive penalties for the crime of rape which appear in the third schedule to the guidelines must be ignored because they were included before the enactment of Amendment Act No. 10/2023. My concern relates to the magistrate's finding that there were no special circumstances in this case. The offender's answer to the question whether he had comprehended the trial court's explanation on special circumstances illustrates that he had not understood anything. He appeared confused. That notwithstanding, it is also not clear why the regional magistrate opted to deal with special circumstances in the first place. Had there been a requirement to make a finding on special circumstances, I doubt that the proceedings would have passed the test given the inadequacies in the magistrate's explanation and the corresponding unintelligible response from the offender. Fortuitously, it was not necessary to

give that explanation. As stated in the *Joshua Musisinyani* case the class of mandatory sentencing which Amendment Act No. 10/23 introduced is what I would call the absolute or indiscriminate one. It does not accord the court opportunity to find special circumstances or reasons to depart from the mandatory penalty. Once again I am tempted to make an analogy between s 47(4) of the Code and Amendment Act 10/2023 to make this point clearer. Previously the death sentence was mandatory unless the court found the existence of extenuating circumstances. It meant that the court had a positive duty to inquire into the issue of extenuation. In terms of s 47(4) that is no longer the case. The court must impose death or either of life imprisonment or a term of imprisonment not below twenty (20) years if it finds the existence of any of the factors which constitute aggravation that are listed in s 47(2). Similarly, most provisions which impose minimum mandatory sentences impose a positive duty on a court to determine the existence or absence of special circumstances or special reasons to enable it to deviate from the specified punishment. Section 3 of Amendment Act No. 10/2023 does the opposite. It directs the court to look for the presence of aggravating factors. Once one or more is found, the inquiry ends there and the mandatory penalty kicks in. It is therefore futile for a court to canvass the issue of special circumstances because even if it were to find any, such considerations cannot be used to displace the existence of aggravating circumstances. In reality it would be an irregularity in the proceedings were the court not to impose the mandatory punishment on the basis of having found special circumstances.

In the present case, the trial magistrate committed that error. She fortunately did not find any such circumstances and resorted to the minimum mandatory sentence. The question which arises is whether or not the proceedings are vitiated by the superfluous explanation of special circumstances. I think not. The unnecessary and needless account of special circumstances would not have caused any injustice to the offender because as stated, their presence or absence had no relevance to the question of aggravating circumstances which the court correctly observed were in abundance in this case. The offender and the victim's families were related; he had sexual intercourse with the minor not once but on several occasions; he attempted to obstruct the course of justice by persuading the complainant's mother to withdraw the case and even more critically, he is a forty-five year old man who abused an eleven year old girl. The difference between their ages is a lifetime.

Earlier and in passing, I expressed my opinion about the arguments around the concept of minimum mandatory sentences just like my brother judge did in the *Musisinyani* case. I wish

to add that my further view is that until and unless the constitutionality of Amendment Act No. 10/23 is properly raised in the courts and that challenge is successful s 3 of the Amendment Act remains law which binds every judicial officer. Everyone convicted of rape must be imprisoned either for a minimum fifteen years or a minimum five years depending on the existence or otherwise of aggravating factors in the commission of the crime. Worse still, even if this court were, in a proper case and after fuller argument, to declare the constitutional invalidity of Amendment Act No. 10/2023 that declaration would be of no force or effect until it is confirmed by the Constitutional Court given the requirements of s 175(1) of the Constitution. If it was the intention of the legislature that children below the age of eighteen years must not be covered by the minimum mandatory sentences introduced by the amendment, that intention does not appear from the provision. It cannot possibly be given life by the courts because the courts do not act against the intentions of parliament. See the case of *S v Tsitsi Maura* HH 178/17. As it stands Amendment Act No. 10/2023 obliges judicial officers to obey its indiscriminate command to imprison children in the same way as adults following a conviction of the crime of rape. The situation can only be salvaged if Parliament acts with urgency in relooking at s 3 of the Amendment Act.

Disposition

In the case of *S v TG* the trial court's decision to suspend the entirety of the sentence imposed on the offender is, by virtue of s 358(2) as read with the Eighth Schedule to the Criminal Procedure & Evidence Act unlawful. The sentence is therefore incompetent. For reasons that I stated in paragraphs above I find that despite the indiscretions committed by the trial magistrate in *S v Victor Chimatya*, the transgressions did not prejudice the offender. In the circumstances the sentence imposed still meets the threshold of being in accordance with real and substantial justice.

It is therefore ordered as follows:

1. The convictions in both cases are confirmed as being in accordance with real and substantial justice
2. The sentence in the case of *S v Victor Chimatya* is also confirmed as being in accordance with real and substantial justice.

3. The sentence imposed on the offender in *S v TG* is set aside and the matter is remitted to the trail magistrate to resentence the offender in accordance with the guidelines given in s 65(4) of the Criminal Law Code

KWENDA JAGREES