

THE STATE
versus
TALENT RWAPUNGA

HIGH COURT OF ZIMBABWE
FOROMA & KWENDA JJ
HARARE, 27 August 2021

Criminal Review

FOROMA J: This matter came before me on automatic review from the Regional Magistrates Court. The accused was charged with 2 counts as follows count (1) contravening s 65 of the Criminal Law (Codification & Reform) Act [*Chapter 9:23*] i.e. to say rape (ii). Contravention of s 70 of the Criminal Law (Codification & Reform) Act [*Chapter 9:23*] i.e. having sexual intercourse with a young person. Accused pleaded guilty to both counts which the court recorded to have been accepted in terms of s 271(2)(b) which although not recorded has come to be a reference to the Criminal Procedure & Evidence Act [*Chapter 9: 07*]. Accused was convicted of the charge in count 1 after the court established that accused's plea was an irrevocable admission of guilty i.e. after admitting the factual allegations by the State and accepting his conduct constituted a commission of the essential elements of the offence as explained to him by the magistrate. The record reflects that in regard to count 2 accused denied that he knew that complainant was under the age of 16 years resulting in his plea of guilty being altered to not guilty. The court would have proceeded to a full trial in respect of count 2 but for the withdrawal after plea of the 2nd count by the prosecution.

The record shows that the accused was found guilty of rape (count 1) as pleaded and that count 2 was withdrawn before plea, which obviously was incorrect as the charge was withdrawn after plea thus entitling accused to a verdict of not guilty. Immediately after pronouncing the verdict on count 1 the public prosecutor informed the court that accused had no previous

convictions and applied to produce the HIV results which results indicated that the accused had tested positive to HIV.

The record also shows that after production of HIV test results accused addressed the court in mitigation and the prosecutor addressed the court in aggravation wherein he emphasized *inter alia* that the accused was well aware before raping the complainant without any protection that he was HIV positive. The public prosecutor implored the court to impose a stiff exemplary penalty beyond the mandatory sentence as a deterrent to would be like minded would be offenders. The court sentenced the accused to 20 years imprisonment 3 years of which were suspended for 5 years on condition of good behavior. What concerned me in this matter was not the apparently stiff penalty which the accused well deserved but an omission to follow statutory provisions in sentencing the accused. Section 80(1)(c) of the Criminal Law (Codification & Reform) Act requires that in sentencing a person convicted of sexual assault i.e. rape or sexual intercourse with a young person the court should impose a minimum mandatory imprisonment period of 10 years unless the accused satisfies the court that there are special circumstances that justify a departure from applying the mandatory minimum sentence.

In *casu* the court *a quo* neither explained to the accused the need to address it on any special circumstances that he thought existed which would if found to exist protect him from being sentenced to a mandatory term of imprisonment. As the court did not invite accused to address it on special circumstances it is clear that the accused who was unrepresented did not get the benefit of the statutory provisions granting an escape route from the mandatory sentence provision. When I asked the magistrate as to why the record did not show that the accused had been invited to address the court on special circumstances the learned Acting Regional Magistrate's explanation betrayed ignorance of the statutory provision. The provisions of s 80(1)(c) of the Criminal Law (Codification & Reform) Act [Chapter 9:23] need to be reproduced here to demonstrate their significance in sentencing persons convicted of offences involving sexual assault. It reads as follows

“Section 80(1) where a person is convicted of

- (a) rape
- (b) aggravated indecent assault or
- (c) sexual intercourse or performing an indecent act with a young person involving any penetration of any part of his or her or another person's body that incurs a risk of transmission of HIV and it is proved that at the time of the commission of the crime

the convicted person was infected with HIV whether or not he or she was aware of his or her infection he shall be sentenced to imprisonment for a period of not less than ten years.

Provided that –

- (i) ...
- (ii) if a person convicted of any crime referred to in paras (a), (b) or (c) satisfies the court that there are special circumstances peculiar to the case which circumstances shall be recorded by the court why the penalty provided under this subsection should not be imposed the convicted person shall be liable to the penalty provided under ss 65, 66, or 70 as the case may be.”

Compliance with these provisions is mandatory and a failure to comply with same renders the sentence a nullity no matter how aggravating the circumstances as the accused will not have been afforded a fair trial which is his constitutional right— See *State v E Mangwende* HH 695/20.

The sentence in this matter was a nullity and is accordingly set aside. The matter is referred to the court *a quo* for the offender to be sentenced afresh after giving him an opportunity to address the court on special circumstances after the court has properly explained to the offender the meaning of special circumstances and how special circumstances are distinguished from ordinary mitigation.

The magistrate will have to record fully any address on special circumstances and the court’s finding on special circumstances before revisiting the sentence if need be.

FOROMA J.....

KWENDA J agrees.....