THE STATE
versus
LOVEMORE WHITE

HIGH COURT OF ZIMBABWE
CHITAPI & MUSITHU JJ
HARARE, 19 October 2021

**Criminal Review**

MUSITHU J: The accused person was charged with four counts of rape as defined in s 65(1)(a) and (b) of the Criminal Law (Codification) and Reform) Act.[1] The circumstances in respect of the four counts as amplified in the outline of the State case were as follows.

Count one:

> "1. The accused person in this case is **LOVEMORE WHITE** a male adult aged 35 years residing at Chawafambira Plot 10 Lot 10, Twoboy, Marondera and is employed at the same farm.
> 2. The complainant in this case is **TADIWANASHE DICK** a female juvenile aged 14 years residing at Plot 10, Lot 10, Twoboy, Marondera.
> 3. The accused person and the complainant are uncle and niece.
> 4. On an unknown date to the prosecutor but during the month of December 2020 the accused entered into the kitchen where the complainant sleep purporting to lit his cigarettes. The complainant then fell asleep leaving the accused person smoking his cigarette.
> 5. After sometime the complainant felt that someone was caressing her and she woke up and realized that it was the accused person. The complainant questioned the accused person and accused person told her that he wanted to make her his wife. The complainant denied to be accused's wife and the accused left the room.
> 6. The accused person came later, entered into complainant's blankets and he lifted complainant's night dress and removed her pant. The accused person removed her trousers and told the complainant to lay on her back. He lifted complainant's legs up and he came on top of the complainant and inserted his penis in complainant's vagina. The complainant bled.
> 7. The complainant did not divulge the matter to anyone.
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> Count two
>
> 1. ……
> 2. ……..
> 3. ……..
> 4. On a date unknown to the prosecutor but in the month of January 2021 the accused person's wife had gone to a funeral. During the night the accused person came into the kitchen, he removed complainant's pant and he laid the complainant on her back and removed his short trousers. The accused person produced his penis and inserted into complainant's vagina there

[1] [*Chapter 9:23*]

by having sexual intercourse with the complainant without her consent. After the sexual intercourse the accused person went away and promised to come back.

5. The complainant did not disclose the matter to anyone.

Count three

1. ……..
2. ……
3. ……..
4. On the same date as per count two the accused person came back in the kitchen, he removed his pants and put it on the pillow. The accused person knelt raised complainant's legs who was sleeping facing upwards. He inserted his penis in complainant's vagina and he had sexual intercourse with the complainant.
5. The complainant did not tell anyone.

Count four

1. ……
2. ……
3. ……
4. On a date unknown to the prosecutor but in the month of March 2021 the accused person's wife had gone to clinic and she did not come back. The accused person went into the kitchen where the complainant was sleeping and he asked the complainant to have sexual intercourse with him. The complainant removed her pant and the accused person removed his pant and the accused person came on top of the complainant, inserted his penis in complainant's vagina and had sexual intercourse with the complainant.
5. The following morning the complainant told her friend Violet Muruzvi that whenever accused's wife is away the accused comes to sleep in the kitchen.
6. Matter came to light on March 21 when Tendai Katete suspected that the complainant was pregnant and she took her to the nearest clinic and she was found pregnant. Tendai Katete interviewed her and she disclosed that she was sexually abused by her uncle.
7. The complainant was medically examined.
8. The accused person acted unlawfully."

The accused person pleaded not guilty to all the counts. He was however convicted on all the counts after a full trial. The court sentenced him as follows:

"Count 1 – 18 years imprisonment.
Count 2 and 3 taken as one for sentence

- 18 years imprisonment.

Count 4 -18 years imprisonment.

- Of the total 54 years imprisonment 6 years imprisonment is suspended for 5 years on condition accused person does not within that period commit an offence involving sexual nature as an element for which upon conviction he will be sentenced to a prison term without the option of a fine.
- Effective 48 years imprisonment."

While I find the conviction to have been properly reached based on the evidence that was placed before the court, it is the sentence that I find somewhat to be on the steep side. In assessing

the sentence, the court considered the mitigatory factors submitted by the accused person and found that they were outweighed by the aggravating circumstances. What the court found aggravating was that: the offence was committed on four occasions until the complainant fell pregnant; the accused person was the biological young brother to the complainant's mother. He was entrusted with the custody of his niece, but he abused that trust; the complainant took advantage of his position and the vulnerability of the complainant who now appeared more like a caged animal; the complainant suffered and bled on two occasions; the accused had inflicted irreparable psychological damage on the complainant.

The manner in which the offences were committed indeed shows elaborate planning on the part of the accused. He would pounce when his wife was away. Be that as it may, the sentence imposed does not accord with the general sentencing trends set by superior courts in cases of this nature. While it is accepted that an appropriate sentence involves an exercise of discretion on the part of the sentencing court, the lower court should, in the exercise of that discretion endeavour to relate to and be guided by the precedents set by superior courts.

As a starting point it is perhaps useful to highlight the views expressed by KAMOCHA J in *S* v *Ndlovu*[2]. In that case a 43 year old accused had been charged with five counts of raping his biological daughters aged between seven and four years. The four year olds were twins. He was sentenced to 20 years for each count leaving him with a total prison term of 100 years. The sentence in one count was made to run concurrently with another involving the same complainant. A further 20 years was suspended on conditions of future good behaviour. The total effective sentence was accordingly 40 years.

In reviewing the sentence, KAMOCHA J noted that while life imprisonment is indeed the maximum sentence permissible for rape under the criminal code, it should be reserved for the worst examples of the crime. He further noted that the worst crime against the person is that of murder which attracts a death penalty, unless there are extenuating circumstances. In those cases where the death penalty was not warranted, the sentence imposed was generally between 14 and 20 years. The learned judge also noted that in cases of attempted murder, the sentence rarely exceeded 10 years. While accepting that the crime of rape had a traumatizing effect on the victim,

[2] 2012 (1) ZLR 393

the learned judge reasoned that a sentence of 20 years for a single count of rape was excessive. This is what he said:

> "It seems to me that a sentence of 20 years on a single count of rape is completely out of steps with sentences imposed in respect of other crimes against a person as outlined above. It seems to me that rape should also attract a sentence from 5 to 10 years. Only the very bad cases of rape should attract a sentence beyond ten years and the worst ones should attract imprisonment for life.
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> Since the court was initially dealing with five counts of rape it should have borne in mind the cumulative effect of the sentences on the five counts and imposed a sentence which is not so excessive as to induce a sense of shock".(Underlining for emphasis).

The court reduced the sentences on the three counts for which it found him to have been properly convicted to six years per count, giving a total of 18 years. In *S* v *Chirembwe*[3], TSANGA J though agreeing with the KAMOCHA J approach in the *Ndlovu* case, held some reservations with the approach as it did not take into account the implications of sexual violence on the enjoyment of constitutional rights by women and girls. In the review judgment in which TAGU J concurred, the learned Judge held as follows:

> "The yardstick by KAMOCHA J is somewhat useful in so far as it purports to give a bench mark figure of what should constitute a starting point when sentencing multiple counts of rape. However, akin to comparing oranges to apples as fruits in the same basket, it seems to me to skirt the point of the vast implications of sexual violence for the enjoyment of a range of fundamental rights for women and girls. In my opinion, an informed assessment of the sentence to be imposed in cases such as this cannot be reached without utilising an engendered approach to this area of criminal law, as well as engaging a constitutional and human rights perspective."

The court's view was that a sentencing court must not ignore the infringement of the fundamental constitutional rights of the victims, which are occasioned caused by these types of violent crimes. In other words, the court is behoved to take a balanced approach to sentencing. The court does not only look at the circumstances of the accused person. It must also consider the interests of the victim and society at large, which broadly speaking, are encapsulated under the generic and widely used appellation, "the interests of justice". Though that term is widely used mostly in the criminal justice delivery sphere, it is rarely unpacked by the courts for one to readily decipher what amounts to the "interests of justice". The concept is very subjective and considerations will obviously vary depending on the circumstances of each case.

[3] [2015] ZWHHC 162

Superior courts have always been alive to the need to avoid imposing a sentence that induces a sense of shock to society. Thus in *S* v *Chirembwe*[4], TSANGA J expressed the following words of caution:

> "The convictions in my view are proper but the sentence induces more than a sense of shock to the point of being ridiculous given that no one lives to 290 years and none of it runs concurrently. As such much of it serves no purpose other than being of shock value. As stated in *S* v *Mukome* 2008 (2) ZLR 83 (H) the competing interests of society and the accused persons must be balanced in arriving at a desirable sentence. While deterrence is a valid consideration, the view expressed in *S* v *Nemakuru* 2009 (2) ZLR 179 (H) that in sentencing, judicial officers must avoid giving the impression that a sentence is a tag which society must read for it to be deterred seems apt in this instance."

Similar sentiments had been expressed by GUVAVA J (as she then was) in *Anele Sifuya* v S[5], when she remarked as follows:

> "In *S* v *Chikanga* SC-123-93 the Supreme Court commented that it knew of no reported case in South Africa or Zimbabwe, whether for only one offence or more where a man has been sentence to more than 25 years imprisonment. The court took the view that life imprisonment rarely exceeds 16 years in Zimbabwe and by statute more than one term of life imprisonment is served concurrently. The sentence imposed in this case was in excess of the outer limit generally accepted by the courts in this jurisdiction."

In *S v Nyathi*[6], a review judgment by NDOU J, a 30 year old was charged of ten counts of rape of his juvenile daughter. He was convicted after a lengthy trial the greater part of which he was legally represented. He was sentenced as follows:

> "Count 1 and 2 as one – 10 years imprisonment
> Count 3 – 7 years imprisonment
> Counts 4 to 8 – 10 years imprisonment
> Count 9 – 7 years imprisonment
> Count 10 – 10 years imprisonment
> Further count 3 ordered to run concurrently with counts 1 and 2. Count 9 to run concurrently with counts 4 to 8. Total 30 years imprisonment."

The learned judge remarked as follows:

> *"In casu*, the sentence of 30 years imprisonment is well above the outer limit calling for interference. The sentence imposed here is so excessive that it is viewed as being disturbingly inappropriate. Whilst accepting that sentence is pre-eminently a matter for the discretion of the trial court I find that the exercise of such discretion *in casu*, was tainted with misdirection."

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[4] *Supra.*
[5] HH-77-02
[6] *S v Nyathi* 2003 (1) ZLR 587

The court went on to set aside the sentence and substituted it with the following:

> "Counts 1 and 2 treated as one – 10 years imprisonment
> Count 3 – 7 years imprisonment
> Count 4 to 8 treated as one – 10 years imprisonment
> Count 9 – 7 years imprisonment
> Count 10 – 8 years imprisonment
> It is ordered that the sentences in counts 1 and 2, 3, 4 to 8 and 9 are to run concurrently. Effective sentence is 18 years imprisonment."

*S* v *Ndlovu*[7] the view was expressed on review that ordinarily the sentence for rape should not exceed the sentence for murder or culpable homicide.

A few other examples would still suffice in asserting the attitude of superior courts to sentencing in cases of this nature.

In *S* v *Ncube*[8] the accused was convicted of two counts of raping a 12 year old after dragging her into some bushes. He was sentenced to 12 years imprisonment of which 4 years imprisonment was conditionally suspended, leaving an effective sentence of 8 years. His appeal against sentence was dismissed. In *S* v *Mafuwa*[9] a 40 year old teacher raped a 4 year old pre-school child after luring her to his office. After the incident, the appellant threatened to cut her head off with a knife if she disclosed the offence to anyone. He also influenced her to lie that she had been raped by school pupils, if anyone asked her about the incident. After the rape, the complainant went home and reported the incident to her mother. The mother examined her and reported the rape to the police after noticing some bruising on her private parts. The accused person was sentenced to 12 years imprisonment of which 3 years' imprisonment were conditionally suspended, leaving an effective sentence of 9 years.

In *S* v *Nemukuya*[10] a 59 year old raped his 12 year old grand-daughter. He threatened her with death if she reported the rape to anyone. Her report within the family circles was not taken seriously. The matter was only reported to the police much later. The trial magistrate sentenced him to 18 years' imprisonment of which 4 years were suspended. On appeal, the court substituted a sentence of 12 years' imprisonment with 4 years suspended, leaving an effective 8 year sentence. In *S* v *Murehwa*[11] the accused was convicted of 2 counts of

[7] 2012 (1) ZLR 393
[8] HB-136-17
[9] HH-664-17
[10] HH-102-09
[11] HH-41-04

raping a 9 year old school girl on her way from school. He was sentenced to 7 years imprisonment on each count. Of the total of 14 years imprisonment, 4 years were conditionally suspended, leaving an effective sentence of 10 years. This sentence was confirmed on appeal.

In *S* v *Tafirenyika*[12] a 70 year old man raped an 11 year old girl. He was sentenced to 15 years imprisonment of which 7 years were suspended on the usual conditions, leaving an effective 8 year jail term. The accused was married to the girl's aunt, and the girl was staying at their house. After the rape he threatened to throw her into a crocodile infested pool if she divulged the rape. The appeal against sentence was dismissed.

In *S* v *Mpande*[13] the accused raped a 3 year old girl left in his care and infected her with syphilis. The accused abused the trust of both the complainant and her grandmother who was his employer. He was sentenced him to 18 years imprisonment of which 3 years was conditionally suspended, leaving an effective sentence of 15 years. His appeal against sentence was dismissed. In *S* v *Nyathi*[14] the accused person forcibly raped his 16 year-old daughter 10 times over a period of 18 months. The lower court imposed an effective total sentence of 30 years' imprisonment. On review, the court considered this sentence to be excessive and reduced it to an effective total sentence of 18 years' imprisonment. [15]

In assessing an appropriate sentence, the court is not oblivious to the need to consider the peculiarities of each case. There is no one size fits all approach as it were. *In casu*, although the offence was serious bearing in mind the age of the complainant relative to that of the accused person, and further aggravated by the fact that the complainant fell pregnant, the circumstances of the case cannot be said to be the worst of their kind. There are worst cases where the offence has been committed in rather ghoulish and diabolical circumstances, justifying the imposition of a sentence in excess of the outer limit generally accepted by the courts.

After considering the authorities which are cited above, it does appear to me that a lesser sentence would adequately achieve the intended result, being the imposition of a penalty that takes into account the seriousness of the offence, the circumstances of its commission, the accused's

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[12] HH-441-13
[13] HH-43-11
[14] 2003 (1) ZLR 587 (H)
[15] See also G. Feltoe: *'Also The Sentencing of Sexual Offenders*', University of Zimbabwe Law Journal, 2019 at page 181.

own circumstances and the interests of society. It must always be kept in mind that the purpose of punishment is not to break an accused person's sense of purpose and a feeling of wellbeing. Wherever possible, society expects the accused to be justly punished and reintegrated back into society.

What emerges from the authorities cited above is that a sentencing court will impose an effective sentence in excess of 10 years for a single count of rape in exceptional circumstances. Though the circumstances of the cited cases are different from the present, the court considered the sentence of 18 years on each count to have been on the extremely high side. The sentence cannot therefore stand. For the foregoing reasons, while confirming the conviction of the accused person, I find that the sentence was not in accordance with real and substantial justice.

Accordingly, it is ordered as follows:

1. The conviction of the accused persons is confirmed.
2. The sentence imposed on the accused person by the trial Magistrate is hereby set aside and substituted with the following:

   "The accused person is sentenced as follows:
   - Count 1 – 10 years imprisonment.
   - Counts 2 and 3 taken as one for purposes of sentence, 10 years imprisonment.
   - Count 4 – 10 years imprisonment.
   - Of the total 30 years imprisonment, 7 years imprisonment is suspended for five years on condition the accused does not within that period commit any offence of a sexual nature for which upon conviction, the accused is sentenced to a term of imprisonment without the option of a fine
   - Effective 23 years imprisonment"

**CHITAPI J agrees**: ……