THE STATE

Versus

LOVEMORE IMBAYARWO

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 9 MAY 2013

Criminal Review

MAKONESE J: The above matter was placed before me for review. On perusing the record I addressed a minute to the trial magistrate and asked him to explain why he had decided to take the 2 counts of rape and robbery as one for the purposes of sentence.

The learned Magistrate's response is as follows:

> *''It is true that the charges and the essential elements of Rape and Robbery are different.*
> *In taking the 2 counts as one for the purposes of sentence here, I predominantly considered the closeness of time and space, in committing both rape and the robbery, by the accused person. In essence, the 2 different offences, were committed simultaneously, so to speak. I stand guided, though.''*

On the face of it the learned Magistrate's explanation seems reasonable and straight forward. A careful reading of the record of proceedings, however, reveals that there are fundamental difficulties in the learned Magistrates' approach to sentence in this matter.

The accused was arraigned before the Regional Magistrate at Gweru on two counts of rape and robbery. On the first count the allegation was that

accused contravened section 65(1) (a)(b) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The accused was sentenced as follows:

> "Both counts taken as one for purposes of sentence – 20 years imprisonment, of which 3 years imprisonment is suspended for 5 years on condition accused is not, within that period convicted of the offences of Rape or Robbery, upon which conviction, he shall be sentenced to imprisonment without the option of a fine.
> Effective prison term- 17 years."

The accused initially tendered a plea of guilty on the first count but when the essential elements were being put to him he changed his tune and told the court that he was forced by the people who arrested him to admit to the charge of rape. The accused went on the state that he had consexual sexual intercourse with the complaint. The matter went into a full trial and the accused was convicted on both counts.

The brief facts of the matter are that on the day in question the complainant a 23 year old young married woman who was pregnant at the time was at Musengi Bobby show Farm outside Gweru visiting her husband. Around 6-7pm her husband left home going to fetch some water from an aunt who was a neighbour. After complainant had had her supper she went outside the house to relieve herself in an outside toilet. As she got out of the house she saw a man standing outside. The person who turned out to be the accused person enquired into the whereabouts of the complainant's husband. The accused said he had brought some tobacco for the complainant's husband. As complainant was trying to explain that she had no knowledge about the issue, accused suddenly grabbed her by the arm and threw her down and started throttling her by the neck. Accused lifted complainant up and carried her away from the house and placed her on the ground. Accused then proceeded to rape the complainant once. Accused briefly took complainant's pant but

handed it back to her. Accused threatened to kill complainant if she told anyone about the rape.

The complainant then testified as follows regarding the NOKIA 1202 cellphone: (page 4 of the handwritten record)

> *''He ordered me not to tell anyone and I promised so. <u>He had taken my phone which I pleaded for only to get a line.</u> He ordered me not to run home, instead I ran straight to my aunt's where my husband should have been.'' (emphasis added)*

The accused was arrested later that night and the complainant positively identified him. Accused's premises were searched and the NOKIA cellphone was recovered. Evidence was led to show that the cellphone belonged to the complainant's husband.

The accused's defence was properly rejected by the trial court as it was patently false. There was nothing to substantiate his claims of consexual sexual intercourse with the complainant.

In this matter therefore, nothing turns on the conviction on the first count of rape. It is the conviction on the second count and the approach to sentence adopted by the learned Magistrate which creates difficulties.

On the facts of the case as narrated above I found it difficult to justify, the robbery charge. The complainant's evidence is to the effect that the accused took the NOKIA Cellphone and later removed the sim card and handed it back to the complainant. At best, in my view, the evidence led on the aspect of the cellphone is sufficient to establish theft of the cellphone by the accused. It is instructive to note that the charge on the second count of ''robbery'' is crafted as follows:-

> ''*In that on the 31st day of January 2013 and at Mr Musengi Bobby Show Farm, Guimea Fowl, Gweru LOVEMORE IMBAYARWO a male adult <u>stole one NOKIA 1202 CELLPHONE THE PROPERTY OF CLEMENTINE MARECHA</u>*

using violence or threats of violence immediately before or at the time he took the property in order to induce CLEMENTINE MARECHA who had lawful control over the cellphone to relinquish her control over it'' (emphasis added)

My view is that not enough evidence was placed before the trial Magistrate as to the manner of the taking of the cellphone. The issue is dealt with casually by the complainant when she testified when she said ''I pleaded with him to give me back the phone …'' There is no doubt that the complainant did not give the cell phone to the accused voluntarily but the manner in which the cellphone was taken by accused is not ventilated by the evidence. It is logical to reason that the accused took the cellphone without the owner's consent and therefore he stole the cellphone. I am not convinced that the essential elements of robbery were established on the evidence led. I also point out here that section 129(1) of the Criminal Law (Codification and Reform) Act provides as follows:

"(1) The taking, dealing with, using or keeping of property by means of a threat of evidence shall not constitute robbery unless the threat is of immediate violence, that is to say, is a threat that violence will be used immediately if control over the property is not surrendered.

(2) Nothing in this section shall prevent a person who uses a threat of future violence to obtain control over property from being charged with extortion.''

In casu as I have stated above the circumstances under which the cellphone was surrendered are not clear from the evidence and therefore a conviction of robbery is unsafe. I am satisfied, however that the facts support a conviction of theft of the cellphone.

The learned trial Magistrate treated both counts as one for the purposes of sentence. In his reasoning he says he predominantly considered the

closeness of time and space in the commission of the offences by the accused. Herein lies the problem. In the event that the court on review or appeal sets aside one of the two counts, the court is then forced to apply a value judgment and use its wide discretion to decide the appropriate sentence in respect of the count whose conviction is upheld on review or appeal. Whilst I agree that there is no rule forbidding the treating of closely connected offences as one for the purposes of sentence, ideally this is not advisable or desirable in respect of serious offences such as rape and robbery. Both offences usually attract lengthy prison sentences and as such the proper approach is to impose separate sentences for each count. In the instant case both the state outline and the complainant's own evidence on oath do not specifically reveal that any violence or threats of evidence preceding the taking of the cellphone. The evidence clearly shows that after the rape the accused stole cellphone. Complainant asked for her sim-card back and accused handed over the sim-card. With due respect to the learned Magistrate, the approach he adopted in sentencing is usually correct where the offences are not serious. In the case of *S v Banda* 1984 (1) ZLR at page 96.

WADDINGTON, J, stated that before counts are treated as one for sentence, there should be some relationship between them. He went on to say that it is wrong to treat as one for sentence counts which are separated in time and place. It is also inappropriate to impose individual sentences on individual counts in order to arrive at an appropriate aggregate sentence. Each count should be treated separately on its own merits.

In casu, the rape count has to be treated separately on its own merits. The aggravating factors, especially the violence used in the perpetration of the

unlawful sexual intercourse and the fact that the complainant was visibily pregnant have to be viewed separately from the taking of the cellphone.

Having found that the conviction on the count of rape is proper and that the accused should have been convicted of theft of the cellphone, instead of robbery, this court is at large on the issue of sentence. In the result I make the following order:

(1) The conviction on the charge of rape is confirmed and the accused is sentenced to 12 years imprisonment with labour.

(2) The conviction on the case of robbery is set aside.

(3) The accused is convicted of theft of a cellphone and is sentenced to 6 months imprisonment with labour.

KAMOCHA J agrees.....