THE STATE
versus
EDWARD TSINGANO

HIGH COURT OF ZIMBABWE
MUTEMA J
HARARE, 28 October, 2011

Criminal Review

MUTEMA J: The accused person is a 17 year old juvenile first offender. He is an orphan doing Form 3 at Majaha Secondary School. He was residing with his senile grandmother. He pleaded not guilty to raping a 14 year old complainant who is his friend's niece. He initially went to the kitchen hut where the complainant and her siblings were to put up for the night and when asked what he wanted he bolted out without saying anything. He later returned after the complainant and her siblings had fallen asleep, opened the door, entered, throttled the complainant and raped her.

Accused was correctly convicted of rape. The probation officer recommended

"a corrective and rehabilitative sentence in terms of s 358 2(*sic*)(b)". The relevant statute is not stated but presumably it must be the Criminal Procedure and Evidence Act [*Cap 9:07*]. Section 358(2)(b) of that Act provides for the passing of sentence but ordering 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 her reasons for sentence the learned regional magistrate did not say why she disregarded the probation officer's recommendation. The sole allusion to the probation officer's report reads:-

> "The Probation Officer's report shows that the accused is a delinquent child who lacks parental guidance".

I am alive to the fact that the court is not bound by the recommendation of a probation officer but this does not mean that a court should or can dismiss such recommendation off hand without giving reasons for disregarding it. Probation Officers are well –trained professionals in their field and their recommendations ought to be accorded due weight unless they are clearly out of sync.

But even so, reasons should be proferred why a court has decided not to take the recommendation on board.

The learned regional magistrate was correct to disregard the probation officer's recommendation but should have given reasons therefor. In view of the seriousness of the offence, the determination/resilience exhibited by the accused and the violence that was employed in its perpetration, it is not plain whether the recommendation in terms of the cited section referred to a wholly suspended or partly suspended sentence. Probation Officers must not be vague in their recommendations – they are enjoined to nail their colours to the mast and stipulate what it is exactly they think should be the sentence to be meted out instead of giving a vague and generalised recommendation.

The learned regional magistrate said she was very much alive to the sentencing approach highlighted in the case of *S v Zaranyika & Ors* 1995(1) ZLR 270(H) but felt a custodial sentence appropriate in sending a correct message to like-minded persons though accused would not be sentenced as an adult. She then proceeded to sentence accused to:-

> "9 years imprisonment of which 2 years is suspended for 5 years on condition during that period accused does not commit any offence of a sexual nature for which he is sentenced to imprisonment without the option of a fine".

This sentence, apart from inducing a sense of shock, offends against all known tenets of civilised justice. I cannot comprehend the rationale behind the learned trial regional magistrate's decision to ruin the 17 year old form 3 orphan's education and transform him into a veritable criminal instead of rehabilitating him. In this regard I can do no more that respectfully associate myself with BARTLETT J's salutary warning in the Zaranyika case *supra* at p 273 where he said that against the appropriate increase in the severity of sentences imposed for rape needs to be balanced the consideration of the age of the offender.

In this regard the learned judge went on to quote the words of KORSAH JA in *S v Muguti & Anor* S – 218-92 at pp 2-3 when dealing with rapists aged 18 and 17 years respectively, where the victims were aged 5 and 8 years. He said:

> "However, the effective sentence of seven years is the sentence usually imposed on more mature male culprits for this offence. Youth, the world over, has always been considered, where a person does not act out of inherent wickedness, as a strong mitigatory factor for all crimes. This is because youthfulness is associated with immaturity, thoughtlessness and a lack of experience of life. It is, therefore, odious to impose the same penalty as would be justified in the case of a mature offender on a youthful offender.

> While it may be for the benefit of a youthful offender that he be punished so as to reduce him to a sober frame of mind and make him appreciate the seriousness with which society views his conduct, such punishment must be geared principally towards the correction of the youth in the hope of preventing him from ruining his life. With regard to mature offenders, the sentencing principles are directed more towards retribution and deterrence rather than any hope of correction"

And in *S v Green* HB -177-87 MUCHECHETERE J (as he then was) in dealing with a 17 year old who had attempted to rape a 4 year old, observed that:-

> "Although the offence he committed was brutal and degrading, it is usual for first offenders who are under the age of 18 years to be sentenced to a correction of cuts in rape cases unless there are aggravating factors".

Also, CHIDYAUSIKU J's (as he then was) comments in *S v Malanga* HH 218-93 are apposite. He said:

> "In my view, a 16 year old juvenile should never be sentenced to an effective prison terms unless the offence is so serious that only such a sentence can be justified for the offence….. (To) send such an accused young offender to prison where he is bound to mix with the worst elements of our society is a gross error of judgment. Elementary common sense and the need for rehabilitation demands a different approach…"

Whilst acknowledging that rape is a serious offence and is disturbingly prevalent and also that *in casu* the accused showed perseverance and determination in the commission of the offence, I am constrained to hold that it was, in view of accused's age and personal circumstances, a gross error of judgment to sentence him to an effective term of imprisonment let alone one of 7 years. Elementary common sense and the need for rehabilitation demanded a different sentencing approach such as the common moderate correction of cuts coupled with a wholly suspended term of imprisonment to enable the accused to carry on with his education and be rehabilitated. There was absolutely no justification for brutalising him by incarceration.

Magistrates are well advised not to get emotional when it comes to sentencing lest judicious discretion gets easily clouded by such emotion.

The hapless accused was imprisoned on 4 July, 2011. He has already served nearly 4 months behind bars. While this is unfortunate, it cannot be undone. The sentence imposed by the regional magistrate cannot be allowed to stand. It is hereby set aside and substituted with the following:-

> The accused is sentenced to 3 years imprisonment the whole of which is suspended for 5 years on condition accused does not during that period, commit any offence of a

sexual nature of and for which he is sentenced to imprisonment without the option of a fine.

The accused person is entitled to his immediate release and a warrant for his immediate liberation is hereby issued.

KUDYA J: agrees ……..