ANESU MHARAPARA
versus
THE STATE [2]

HIGH COURT OF ZIMBABWE
MAWADZE J & MAFUSIRE J
MASVINGO, 7 June 2017 & 11 August 2017

Criminal appeal

Mr *L. Mhungu*, for the appellant
Mr *B.E. Mathose*, for the respondent

MAFUSIRE J:

[1] This was an appeal against sentence only. We heard argument and reserved judgment. This now is our judgment.

[2] In the court *a quo* the appellant was not represented. He was convicted on his own plea of guilty for having sexual intercourse with a young person in contravention of s 70[1][*a*] of the Criminal Law [Codification and Reform] Act, *Cap 9:23* ["***the Code***"]. He was sentenced to thirty-six [36] months imprisonment of which six [6] months imprisonment was suspended on the usual condition of good behaviour. The effective sentence was thirty [30] months imprisonment.

[3] Shocked by the sentence, the appellant engaged counsel and appealed. Virtually all the material facts were common cause. The appeal solely turns on the law as it applies to the facts.

[4] At the time of the offence the appellant was twenty-one [21] years old. The complainant was a girl aged fifteen [15] years. They were lovers. Sexual intercourse was consensual. It happened on several occasions. The complainant fell pregnant and subsequently gave birth. But the appellant was already married with two children.

[5] After the complainant had given birth, the appellant found alternative lodgings for her and her child. He was looking after them. It was said that arrangement was acceptable to the complainant's parents. Thus, the people dependant on the appellant were his wife and two children, then the complainant and her child.

[6] The lower court justified the sentence largely on the review judgment of this court in *Banda v State, Sate v Chakamoga*[1]. It said the sentence was commensurate with the directive given in that judgment. In part, the judgment of the lower court read as follows:

> "As stated in **S v Banda, S v Chakamoga** HH-47, grown up men who have sex with such minors have been escaping with very lenient non-custodial sentences as if the courts were encouraging such conduct. The superior courts have emphasised on the need for lengthy jail terms as a way of curbing further exploitation of young girls. I have therefore settled for 36 months imprisonment term with 6 months suspended on good behaviour as prescribed in the above-cited case."

[7] In this appeal, the predominant factor was whether or not a non-custodial sentence was appropriate, given both the mitigating factors and the aggravating circumstances, all of which were common cause. The *Banda/Chakamoga* judgment assumed overriding importance in arguments by both parties.

[8] Mr *Mhungu*, for the appellant, argued, among other things, that the magistrate had misdirected himself by assuming that the *Banda/Chakamoga* judgment had prescribed a mandatory minimum sentence for all offences of this nature, and that all he had to do was merely to pluck out from that judgment the presumptive mandatory sentence and plant it in his own judgment, without regard to the individual circumstances of the case.

[9] On the other hand Mr *Mathose*, for the respondent, submitted that sentencing trends in a crime of this nature were in a state of transition. He argued that there had been a marked paradigm shift by this court in recent years on its treatment of sentencing for this sort of crime, with fervent calls for much stiffer penalties than before.

[1] HH 47-16

[10] Mr *Mhungu* argued that an appropriate sentence, given the overwhelming mitigating features of the case, would be a reasonable term of imprisonment with a portion suspended on condition of good behaviour, and the rest converted to community service.

[11] On the other hand Mr *Mathose*, whilst conceding much of the mitigating factors, except the one about the appellant having allegedly married the complainant, which he said was actually aggravating, given the unlawfulness of child marriages in this country, especially in the advent of the judgment of the Constitutional Court in *Mudzuri & Anor v Minister of Justice, Legal & Parliamentary Affairs N.O. & Ors*[2], nonetheless argued that the appeal against sentence was unmeritorious because the magistrate had not gone out of the range of sentences usually meted out for this offence.

[12] Mr *Mathose* also conceded that the *Banda/Chakamoga* judgment did not prescribe any mandatory minimum sentence, or take away a court's discretion to impose a sentence it considers appropriate in any given situation. However, he argued, that judgment merely serves to emphasise the need for effective deterrent sentences. Courts must be seen to be doing their part in giving legal effect to the aspirations of the Constitutional provisions and the several international conventions on children's rights.

[13] In our view, the *Banda/Chakamoga* judgment was a sharp rebuke by this court against the tendency to impose lenient sentences in an offence of this nature. It also spoke strongly against the tendency to regard as mitigating, the fact that the offender goes on to marry his victim. It was said in that judgment, and others on the point, the fact of marrying an under-age girl, following the commission of the offence, is actually aggravating.

[14] The judgment also went on to question other stereotypes manifest in certain sentencing trends, particularly the issue of consent. It was the unequivocal view of the learned judge[3] that it is a misnomer to regard that an impressionable and immature girl-child

[2] CCZ 12-15
[3] CHAREWA J, with TSANGA J agreeing

can be said to "consent" to sexual intercourse. Rather, she is just a victim of manipulation by much older male sexual predators.

[15] We note in passing that consensual intercourse with a girl between twelve [12] years and sixteen [16] years is an offence under s 70[1] of the Code[4]. The old name for this crime, before codification of the criminal law, was statutory rape. Absent consent, or if the girl is 12 years or under, then it becomes rape, comparatively a far more serious offence.

[16] *Banda/Chakamoga*, were two unrelated cases that were dealt with under one review judgment given the similarities of the facts. The accused persons were male persons more than thirty [30] years of age each. The complainants were two girls, fifteen [15] years old each. Sexual intercourse had been consensual. Both girls had fallen pregnant. The one accused had gone on to take the complainant as his wife. The other had gone on to give the complainant a total of three dollars [$3]. Both accused persons were convicted by the same magistrate. He sentenced them to twenty-four [24] months imprisonment. Of those, twelve [12] months imprisonment was suspended on condition of good behaviour. The effective sentence was twelve [12] months imprisonment.

[17] The learned judge considered that the sentences were too lenient. She noted that the aggravating features included the risk of the young girls dying during delivery, given their underdeveloped body parts; being saddled with children of their own when they themselves were still children; the interference with their normal development; being made pregnant by men who were already married and therefore hardly starved of sex; one of the girls being forced into a putative marriage; the male offenders being more than twice the girls' ages, and so on.

[18] After considering the Constitution, some regional and international conventions on children's rights to which Zimbabwe is a signatory, the judge implored that judicial officers should pass exemplary sentences to reflect the gravity of the offence and to give legal fulfilment to the intent of the Constitution and those conventions.

[4] As read with s 64[1]

[19] On what should have been the appropriate sentences in those cases, the learned judge had this to say:

> "When the aggravating features considered by the magistrate are considered together with additional issues I am urging judicial officers to take into account when considering reasons for sentencing, and following on from *S v Onismo Girandi* [*supra*][5], I would add that an effective sentence of not less than three years should be imposed, on an incremental basis for those accused who are twice the victims' ages, are married with children of their own, and impregnate the young persons or infect them with sexually transmitted diseases other than HIV."

[20] In our view, sentencing is undoubtedly a complex exercise. It is a balancing act between the interests of the accused and those of society. From time to time jurists have espoused brilliant philosophies around sentencing. Guidelines have been developed. The legislature sometimes weighs in with mandatory minimum sentences for certain offences.

[21] However, there are certain fundamentals in all these philosophies or principles. One of them is that the penalty must fit the crime. The interests of the offender must be balanced against those of justice. It is not right that someone who has wronged society should go scot free, or escape with a trivial sentence. But at the same time, he should not be punished beyond what his misdeed deserves. Punishment should be less retributive and more rehabilitative.

[22] There are more such philosophies or principles. But at the end of the day, after everything else has been considered and said, the judicial officer comes down to the hard facts before him; to the individual circumstances of the people before him – the offender and the victim. He cannot be dogmatic about anything. There is no room for an approach that is purely mathematical. A slavish adherence to precedence is manifestly injudicious.

[5] HB 55-12

[23] In *S v Nare*[6] GUBBAY J, as he then was, said the rationale for the offence of having sexual intercourse with a young person is the need to protect immature females from voluntarily engaging in sexual intercourse. They lack the capacity to appreciate the implications involved, and the possibility that they may suffer psychic or physical injury.

[24] But in our view, the rationale is much broader. Having sexual intercourse with a young person falls under a section of the Code that is titled "*Sexual crimes* ***and crimes against morality***" [our emphasis]. Thus, it is against morality for a man to have extra marital intercourse with a girl 16 years of age and below. It is therefore for the preservation of society's sense of morality that the offence exists. The pre-existing reference in the Code to "extra marital intercourse" has probably become tautologous in the advent of the new Constitution and the *Mudzuri* judgment above. It is not possible for a man to contract a valid marriage with a girl 16 years of age or under.

[25] Because of the obligations imposed by the social contract that exists between the society at large and the judiciary, as represented by the judicial officer; and because of his training and the oath of office that he took, a judicial officer, by the nature of the sentence that he passes, and the reasons he gives, among other things, gives expression to, and pronounces the values of society at a point in time.

[26] Morality is an abstract concept. It may vary from place to place, group to group and even from time to time. A paedophile community, for example, or a satanic cult could not care less if under-age girls were ravaged daily. But for an average normal Zimbabwean community, at this point in time, we consider that what is at the core of the notion of morality is the separation of right from wrong; good from bad; virtuous from vile; blameless from sinful; chaste from unchaste; upright from wicked, and so on.

[27] At the end of the day, it all comes down to a value judgment. As was said in *Munorwei v Muza & Ors*[7], a judicial officer called upon to give a value judgment is guided by his own notion of justice and fair play. He is guided by the norms and sense of values

[6] 1983 [2] ZLR 135
[7] HH 804-15

generally prevailing in a society. He makes an objective assessment: see *S v Chidodo & Anor*[8].

[28] The judicial officer, among other things, weighs the extent to which society has been outraged by the offence, given its sense of morality as understood by him, and pronounces a sentence that he thinks sufficiently atones for the offender's misdeeds, but is at the same time careful to avoid destroying the offender, unless the offence is one that calls for capital punishment.

[29] Under s 70[1][*a*] of the Code, the sentence that is prescribed for this offence is a fine not exceeding level 12, i.e. two thousand dollars [$2 000], or imprisonment for a period not exceeding ten [10] years, or both. This is quite stiff. But the *Banda/Chakamoga* judgment should not be understood as having prescribed any mandatory sentence. It is an exhortation to judicial officers to pass meaningful, realistic and proper sentences.

[30] The *Banda/Chakamoga* judgment was written against a background of some disturbingly lenient sentences passed by some magistrates' courts. Concerns had been raised in several other review judgments. For example, in *S v Virima*[9], MUSHORE J, decrying the prevalence of inappropriately lenient sentences, said in part:

> "I am perturbed at the manner [in] which the magistrate tiptoed around the accused so as not to inconvenience him. … [T]aking into account the fact that it appears, rightly or wrongly, that the accused subsequently married the 14 year old complainant, the justices of the matter would have been served if the accused were to be made an example of. …. The option of the accused performing community service should never have entered into the mind of the magistrate for public policy reasons."

[31] In *S v Chigogo*[10] TSANGA J said:

> "The continued lenient attitude towards grown up men who abuse young girls and then get off lightly with their offence on the basis of "intended marriage" of the complainant is not in consonance with the spirit of the constitution in discouraging marriage of girls below the age of 18."

[8] 1988 [1] ZLR 299 [H]
[9] HH 251-16
[10] HH 943-15

[32] In *S v Matare*[11] a thirty-six [36] year old married man had sexual intercourse with a 16 year old girl on several occasions. He escaped with a paltry eighteen [18] months imprisonment all of which was suspended for good behaviour and community service. The magistrate inexplicably went out of his way to find mitigating circumstances, which practically were non-existent, and unbelievably ignored glaring aggravating features, including evidence of complete moral decay of the girl at the hands of the accused. In part, I wrote as follows:

> "There was no evidence of any remorse [by the accused]. On the contrary, he denied any wrongdoing right up to conviction. In fact, he claimed, quite incredibly, that the young girl had seduced him. He claimed she would sneak into his room and fondle him. That, coming from a man of 36 years, and coupled with the other factors highlighted below, should have outraged the trial court."

[33] There are many other such cases. In the present case, we consider that the magistrate misdirected himself by assuming or implying that his discretion to consider an appropriate sentence had been taken away. In every case the sentencing court must always consider the aggravating features and balance them against the mitigating circumstances, and impose what it considers to be an appropriate sentence.

[34] Despite the fervent calls for stiffer penalties in the form of long jail terms, which we support, we consider that in the circumstances of this case, the kind of sentence meted out in the court *a quo* serves no useful purpose to anyone. The complainant and her child would themselves suffer more. The appellant's own wife and children would also suffer. Although collateral damage of this sort is sometimes unavoidable, in this case it could be minimised.

[35] Sending the appellant to jail under the circumstances of this case is a multiple-edged sword. There was no evidence placed before us of any social or family support for the complainant and her child. On the contrary, the appellant accepted his error. He accepted his responsibility. He took it upon himself to look after both the child born out of the illicit affair, and the complainant as well.

[11] HH 410-16

[36] It would make no sense, just for the sake of precedence and deterrence, to send the appellant to jail and, in the process, destroy him; destroy the complainant; destroy her child; destroy his own family; unnecessarily crowd out the fiscal space, and add onto the over-crowdedness in the country's prisons.

[37] It might be that the appellant arranged some marital union of some sort with the complainant and or her parents so as to have unfettered access to the complainant, possibly for his sexual gratification. *Banda/Chakamoga*, and the other cases referred to before, have considered that kind of arrangement as an aggravating circumstance. The *Mudzuri* case has said it is contrary to the Constitution. But to send the appellant to jail for these reasons is akin to throwing away the bathwater with the baby.

[38] In our view, the provisions of the Constitution against child marriages, and the judgment in the *Mudzuri* case are both aspirational. The law aspires that every community in Zimbabwe should reach the ideal situation envisaged therein. And judicial officers must at all times be conscious of the need to reflect these aspirations by the nature of the sentences that they may pronounce in any given case.

[40] However, the dilemma that the judicial officer often faces, is the absence of any useful information on, for example, the social support systems in place for the girl-child who is a victim of sexual abuse, and, as in this case, her child.

[41] Furthermore, there is often no information regarding the level of social development and awareness of the community the offender and or the complainant come from in order to *inter alia* assess the level of social guilt or moral blameworthiness of the offender. In *S v Nare, supra*, one of the factors considered as mitigatory in a crime of this nature is where the accused is a simple and unsophisticated person from a community in which this type of offence is not well known, or, we would add, condoned.

[42] Considering that the complainant's parents did not seem repulsed by the appellant staying with their daughter as his second wife, despite the illegality of such a union under the law, we can only give the appellant the benefit of the doubt that the

community was not that sophisticated. During submissions, we even enquired that if everyone seemed satisfied with the arrangement, how then did the offence come to light?

[43] All in all, we consider that in this case the mitigatory features outweigh the aggravating circumstances. Some of the mitigatory features listed in *S v Nare*, and which are present in this case, include:

- where the complainant and the accused are genuinely in love [in this case they were];
- where the complainant is nearly 16 years old [in this case the complainant was only 8 months shy of her 16th birthday when the offence was committed];
- where the accused is a youth [at 21 years of age, the appellant was scarcely an adult].

[44] We have already considered that the appellant did not run away from his responsibility by ditching the complainant and her child. This is a huge mitigatory feature.

[45] This is a case where sentencing should be rehabilitative rather than retributive. It is a case where community service is by all accounts more sensible and more useful than gaol. In the circumstances, the appeal is allowed. The sentence of the court *a quo* is hereby set aside in its entirety and substituted with the following:

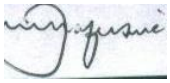
- Thirty [30] months imprisonment of which four [6] months imprisonment is suspended for five [5] years on condition that during this period the accused is not convicted of any offence involving violence for which he is sentenced to imprisonment without the option of a fine.
- The remaining twenty-four [24] months imprisonment is suspended on condition that the accused completes six [600] hundred hours of community service at Birchenough Bridge Hospital, Chief Chamutsa, Buhera, on the following terms:

  [i] The community service shall start on Monday, 14 August 2017;

  [ii] The community service must be performed between the hours of 08:00 hours to 13:00 hours and from 14:00 hours to 16:00 hours each Monday to Friday which is not a public holiday, to the satisfaction of the person in charge at the said institution who may, for good cause, grant the accused leave of absence.

Any such leave of absence shall not count as part of the community service to be completed.

11 August 2017



Hon Mawadze J: I agree _____

Mhungu & Associates, legal practitioners for the appellant
National Prosecuting Authority, legal practitioners for the respondent