TAURAI BIKAUSI
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE, 23 January 2023

Criminal Appeal

Appellant in person
F I Nyahunzi, for the respondent

CHIKOWERO J:

1. This is an appeal against sentence only.
2. The appellant was convicted of rape as defined in S 65(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was sentenced to twenty years imprisonment of which three years imprisonment was suspended for 5 years on the usual conditions of good behaviour, to leave an effective custodial term of seventeen years imprisonment.
3. The trial court rejected the appellant's defence that the act of sexual intercourse was consensual. Aggrieved with the conviction and sentence the appellant sought leave to appeal the conviction and sentence out of time and a certificate to prosecute such appeal in person. He was granted leave and the certificate only in respect of the appeal against the sentence.
4. The appellant's grounds of appeal raise only one issue, namely that the sentence imposed is manifestly harsh and excessive as to induce a sense of shock. He contends that a more moderate sentence should have been imposed because he was a first offender. He submitted that a greater portion of the sentence should have been suspended in line with the need to reform him since he was a first offender.

5. Sentencing discretion reposes in the trial court. There are limited circumstances in which an appellate court will interfere with that discretion. This is the law, both in South Africa and in our own jurisdiction. In South Africa, the position is captured in *S* v *de Jager* and Another 1965 (2) SA 616 (A) at 682-9 where Holmes JA said:

> "It would not appear to be sufficiently realised that a Court of appeal does not have a general discretion to ameliorate the sentences of the trial Court. The matter is governed by principle. It is the trial court which had the discretion, and a court of appeal cannot interfere unless the discretion was not judicially exercised, that is to say, unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court could have imposed it. In this latter regard, an accepted test is whether the sentence induces a sense of shock, that is to say, if there is a striking disparity between the sentence passed and that which the court of appeal would have imposed. It should therefore be recognised that appellate jurisdiction to interfere with punishment is not discretionary but on the contrary, is very limited"

This is the guiding principle in this country as underscored in a number of decisions including *S* v *Nhumwa* S 40/88; *S* v *Ramushu* and ors S 25/93 and *S* v *Mundowa* 1998 (2) ZLR 392 (H).

6. The appellant was as self- styled prophet of Ruvheneko Apostolic Sect Church based in Crowborough, Harare. In August 2018 the church was blessed with a new convert. This was the twenty –six year old complainant, a married woman. As she was attending an only women service the appellant appeared. He prophesied that her husband was not the first person to have sexual intercourse with her, hence her misfortunes. A month later he phoned the complainant. He started that the holy spirit was leading him to pray for her on a mountain- top. She was to bring salt, cooking oil, a lemon and a clay pot. for use during the prayer session.

7. In September 2018 the parties then met in Harare City Centre whereupon the complainant paid the fare as the parties boarded a Bindura bound commuter omnibus. They disembarked at Christon Bank in Mazowe whereupon the complaint queried the absence of other congregants. The appellant lied that they were on their way. Cellphone in hand, he pretended to be communicating with them whereupon he reassured the complainant that they would join the duo at the mountain top. Thus misled, the

complainant was left at the mercy of the appellant. The two found their way to the top of the mountain. This was around 11pm.

7. He spread a red and white cloth on the ground. He asked her to kneel on the cloth. She complied. He told her that she had incisions on her body, which needed to be removed. He ordered her to take out the "prayer items". These were the cooking oil, salt, clay pot and lemon. He ordered her to undress.
8. Noting that she was shy to strip naked, he assured her that he was acting on instructions from the holy spirit. Complainant undressed. He cut the lemon into two. He mixed the salt and cooking oil. Dipping the lemon into the mixture, he rubbed the complainant on the feet, knees, thighs and breast. He instructed her to lie on her stomach whereupon he rubbed her buttocks
9. Done with the rubbing, he asked the complainant to stand up, which she did, holding the clay pot. He took the red and white cloth, put some black substance in the pot and ignited fire without using a match stick. He instructed her to break the clay pot. She did. He uttered words to the effect that the holy spirt was now on him and since he was now in the realm of the spirit, he had observed that her grandmother had entered into a covenant sealed through a cousin raping the complainant. He asked her to kneel down again so that he would pray for her to reverse the covenant .While on her knees he told her that the holy spirit had instructed him to have sexual intercourse with her so that his semen would cleanse her of the evil spirits cast upon her life by the covenant. While she was still clouded by fear and confusion, the appellant pushed the complainant to the ground and raped her. She wrestled with him, freed herself and ran down the mountain, naked. Since she had grabbed her clothes before taking flight, she dressed upon noticing that she had outpaced the appellant. As there was a considerable distance to the bus stop the appellant caught up with her whereupon he assured her that what he had done to her meant that her financial woes were over. The complainant did not respond. The pair boarded a commuter omnibus to Harare. She paid her fare. She had given the appellant his fare for the round trip before the pair left for Bindura. Troubled by her conscience, the complainant confided to a colleague only after some considerable period of time, then disclosed the offence to her husband and made a police report.
10. The rape was perpetrated in the above circumstances.
11. Section 65(1) of the Criminal Law Code provides that the sentence for rape shall be life imprisonment or any definite period of imprisonment. There is no provision for a non

– custodial sentence. Community service, a fine, caution and discharge, among others, are not competent penalties for rape.

12. Section 65(2) of the same code reads as follows:

"For the purpose of determining the sentence to be imposed upon a person convicted of rape a court shall have regard to the following factors, in addition to any other relevant factors and circumstances:

a. The age of the person raped;
b. The degree of force or violence used in the rape;
c. The extent of physical and psychological injury inflicted upon the person raped;
d. …
e. The age of the person who committed the rape;
f. Whether or not any weapon was used in the commission of the rape;
g. ….
h. Whether the person committing the rape was the parent or guardian of, or in a position of authority over, the person raped;
i. Whether the person committing the rape was infected with a sexually transmitted disease at the time of the rape"

13. We are satisfied that the trial court considered the provisions of s 65 (2) of the Code in assessing an appropriate sentence. .
14. While the complainant was twenty – six years old at the time of the commission of the offence, the appellant was much older, at thirty – nine years old. There was the not insubstantial age difference of thirteen years between the offender and the victim. The appellant was much more mature than the complainant. This was agrravatory.
15. The appellant was in a position of authority over the complainant. He was a so – called prophet while she was a new congregant at the church. He took advantage of her desperate situation. He prophesied that her husband was not the first person to carnally know her. This prompted her to reveal that her cousin had raped her while she was in Grade three. She had believed in the so called prophecy, hence he gained her confidence. Armed with this information, he advised her that he had to cast the evil spirits from her on a mountain top.

16. We agree with the trial court that the appellant premeditated the commission of the offence. He singled out the naïve and desperate new convert and preyed on her. We have already recounted the execution of the plan from the time that he appeared at the only women service, the instruction to purchase the " prayer items," the trip to the mountain top in Mazowe, the lies that other congregants were coming and the elaborate but dubious cleansing ceremony immediately before the appellant pounced on the terrified and confused complainant. There was deceit on the part of the appellant through and through. He devised and executed an elaborate plan to isolate the complainant and rape her.
17. The offence was committed under cover of darkness. He violated the complainant's privacy and dignity by playing on her psychology to undress before him. He employed the combination of confusion and fear wrought by the bizarre act of igniting a fire without using either a match stick or lighter to immediately announce that what he called the holy spirit had instructed him to indulge in sexual intercourse with her to break the evil covenant on her life. While she was still confounded by this, the appellant threw himself on the complainant and proceeded to ravish her.
18. Having referred to *Gumbura* v *S* SC 78/14, the Court observed that the appellant resorted to the *quasi mystical* force of religious dogma to overwhelm the complainant. It noted that the offence of rape committed by self – styled prophets was on the ascendancy in this jurisdiction-, with women being sexually abused in the name of religion. It was mindful of the clamour by the national government and civil society to eradicate all forms of violence against women. We understand this to mean that the court was cognisant of its role to protect vulnerable members of society, who included women in the church, from sexual predators masquerading as prophets. There was nothing wrong in the court assessing sentence on the basis that the appellant was a wolf in sheep's clothing.
19. The trial court observed that the complainant was still traumatised. She told the Court that she was no longer enjoying her conjugal rights even though she continued being intimate with her husband. She ended up disclosing the rape to her spouse because of the trauma she was going through.
20. By raping a married woman the appellant put his victim's marriage at risk. There was the danger that the husband could have read adultery into the act, considering that he had warned her not to join an apostolic sect.

21. Married women, in our culture, deserve respect. The appellant himself was a married father of four.

    He had no reason to debase the complainant, and the institution of marriage, by committing this offence. That the offence was committed during what was thought to be a prayer session, on a cloth, supposed "holy", atop a holy mountain, elevated the moral blameworthiness of the appellant. It tended to cast true worshippers in bad light.

    22. The learned magistrate was mindful of the gravity of the offence of rape. He took the view that it blighted the lives of the victim, her family and was an attack on societal values. We cannot but agree. The seriousness of this offence is evident from the stiff penalties that the lawmaker has provided for. Non – custodial sentences have been excluded. The maximum penalty is life imprisonment. The message from the society, through the Legislature, is that persons convicted of rape, depending on the circumstances, must be removed from mainstream society for the remainder of their lives failing which suitably deterrent custodial sentences must be visited on them. Mr Nyahunzi referred us to *S* v *Chamu* SC 165/95 wherein the Court, per MCNALLY JA observed that:

> " All cases of rape are horrible and sentences for rape have been increasing over the years."

The indignation of the courts and the need to correctly reflect that in sentences for rape are manifest in his LORDSHIP'S utterance.

23. We are satisfied that the court considered the appellant's age, his status as a first offender and his other personal circumstances. Indeed, the aggravating circumstances far outweighed the mitigating factors. The sentencing discretion reposed in that court. It imposed a sentence which it regarded as meeting the justice of the case. It suspended a portion of that sentence on suitable conditions since the appellant was a first offender. The length of a suspended portion of a sentence is in the discretion of the sentencing Court. If we were in the position of the trial court we would not have passed a sentence markedly different from that imposed by that court. The sentence meted out on the appellant cannot be described as disturbingly in appropriate by reason of its severity. It was nothing more that the appellant deserved.

24. In the result the appeal be and is dismissed.

CHIKOWERO J……

ZHOU J…… I agree

The National Prosecuting Authority, respondent's legal practitioners.