THE STATE
versus
PANASHE MARIMBA (A Juvenile)

HIGH COURT OF ZIMBABWE
MUZENDA & MUNGWARI JJ
MUTARE, 3 March 2023

Criminal review

MUNGWARI J: The accused, who for purposes of this judgment I shall refer to as PM because he is a juvenile and his identity needs to be protected appeared before the regional magistrate's court charged with the crime of raping a mentally incapacitated person in contravention of s 65(1) as read with s 64(3) of the Criminal law (Codification and Reform) Act [*Chapter 9:23*] (Code). The accused pleaded not guilty and was convicted after a contested trial. He was unrepresented.

The facts which grounded his conviction are as follows: On 26 September 2021, the accused, then only 15 years old, grabbed the complainant who was his 16 year old mentally disordered neighbor when she was tending the fields. He pushed her on to the ground and had sexual intercourse with her. The complainant was, all that time screaming in protest. Her mother who was fetching firewood nearby ran in the direction of the screams. She caught the accused red handed whilst he was perched on top of the complainant. She pulled him off the complainant and hit him with a fist once. The accused took to his heels and made good his escape. The complainant was medically examined. The doctor confirmed that she had been penetrated. In his defence the accused stated that the complainant was his girlfriend. He did not know that she was intellectually handicapped. He added that their sexual intercourse was consensual and that she had only screamed after sensing the imminent approach of her mother.

In a well-reasoned judgment the trial court made findings of fact which cannot be faulted. Nothing therefore turns on the conviction.

In its reasons for sentence, the court described the accused's background in a few sentences in the following manner:

> "I note from the probationer's report that you are orphaned and you stay with your grandmother. You dropped out of school in grade seven and you are currently not engaged in anything meaningful or useful. The findings of the probation officer have been noted in terms of your behavior in the community where you reside."

The trial court's terse description of the accused's personal circumstances must have influenced it to underplay their importance in sentencing him. It is not clear why that was so because a perusal of the record shows that the probation officer availed to the court a complete background picture of the accused. It details in graphic terms, that the accused was born and grew up under particularly difficult circumstances. He is an orphan who was apparently born with the human immuno deficiency virus commonly referred to as HIV. His father is not known but the mother died in 2013. He stays with his aged grandparents Benson and Lucia. The grandmother is visually impaired. Contrary to the simplistic view which the trial court took that the accused is a grade seven drop out the report explains that he left school because the complainant's mother threatened to attack him with a machete. The accused faces stigmatization in the community he lives in because of his HIV status. His cognitive ability is indicated in the report as being very low. The probation officer further stated that the stigma due to his health and his low thinking capacity may have driven him very close to the complainant who is described in the medical report as mentally slow. They both are unable to form meaningful relationships. In addition the court was also advised that the accused stays in a growth point called Hauna. It is notorious for deviant behavior particularly amongst adolescent children. Under the circumstances, it is possible the accused succumbed to peer pressure.

All of these issues were red flags which the trial court ought to have paid attention to. It did not. In aggravation, the court emphasized the accused person's HIV status and that he knew about his condition and the consequences which could result from having sexual intercourse with another person. The magistrate also adverted to authorities which make the point about the difficulties which courts face in sentencing juvenile offenders convicted of rape. Without stating any of them, the court simply said it had taken a variety of aspects from those cases in arriving at the appropriate sentence. That approach is unhelpful. A person who is in the position of the accused cannot be expected to pick a copy of the decision in *S* v *Zaranyika and Ors* 1995(1) ZLR 270, read and understand the principles of sentencing therein. The accused is entitled to know why he/she has been sentenced to a particular penalty. The court

was therefore obligated to paraphrase the aspects it relied on and explain them to the accused. Rounding of its reasons for sentence, the trial court put it thus:

> "Whilst I would have considered a non-custodial sentence because you are a juvenile I have chosen to take a path where I treat you as a mature young person who knew what he was doing. In respect of the 1st count you are sentenced to 6 years imprisonment of which 2 years imprisonment is suspended for 5 years on condition accused does not within that period commit any offence of any sexual nature. In respect of being HIV positive you are sentenced to 10 years imprisonment. That means you have a total effective of 14 years imprisonment."

Needless to say the accused was resultantly sentenced as follows:

> "6 years imprisonment, 2 years imprisonment is suspended on condition accused does not commit any offence involving an element of any sexual nature for which when accused will be sentenced to imprisonment the option of a fine. In addition 10 years' imprisonment.
>
> **Total effective 14 years imprisonment"**

The above sentence is clearly incompetent. Even if it were not juxtaposed against the above circumstances it would have been grossly disproportionate. It was arrived at using the wrong principles of sentencing. A juvenile accused person who has a chronic and possibly terminal illness, lives under difficult circumstances and is of very low cognitive ability must be the last person that a court would want to treat as a mature person. To reach such a conclusion given the accused's background defies logic. That concern is however, in my view, less problematic. The concerns which follow appear to me more fundamental.

Having been born with the HIV virus he had exposed the complainant to the virus with the sexual act. The medical report is silent on whether or not he infected the complainant. Nonetheless the exposure itself meant that the accused would be sentenced pursuant to s80 of the Code.

I have already indicated that the sentence is incompetent. That a trial court cannot impose two prison terms for the same offence is a banal concept. See the cases of *S* v *Chipxere* HH 314-83 and *S* v *Sibanda* HB 36-88. In this case, the accused faced a single count of rape but in her reasons for sentence the trial magistrate, for reasons not so clear entangled herself and stated that the court was sentencing the accused for the first count and also in respect of being HIV positive. I suspect however that the confusion arose from the procedure provided under s 80 of the Criminal Law Code. The trial magistrate however did not make any reference to it. That provision states the following:

> **80 Sentence for certain crimes where accused is infected with HIV**
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> (1) Where a person is convicted of—

(a) rape; or

(b) aggravated indecent assault; or

(c) sexual intercourse or performing an indecent act with a young person, involving any penetration of any part of his or her or another person's body that incurs a risk of transmission of HIV;

and it is proved that, at the time of the commission of the crime, the convicted person was infected with HIV, whether or not he or she was aware of his or her infection, he or she shall be sentenced to imprisonment for a period of not less than ten years:

Provided that—

(i) notwithstanding s 192, this subsection shall not apply to an incitement or conspiracy to commit any crime referred to in para (a), (b) or (c), nor to an attempt to commit any such crime unless the attempt involved any penetration of any part of the body of the convicted person or of another person's body that incurs a risk of transmission of HIV;

(ii) (ii) if a person convicted of any crime referred to in para (a), (b) or (c) satisfies the court that there are special circumstances peculiar to the case, which circumstances shall be recorded by the court, why the penalty provided under this subsection should not be imposed, the convicted person shall be liable to the penalty provided under s 65, 66 or 70 as the case may be.

My understanding of s 80 is that it is a provision which simply provides for the procedure and the sentences which may be imposed where a court convicts an accused of any of the offences specified thereunder and it is proved that the accused's conduct carried the risk of infecting the victim of the crime with HIV. The onus is on prosecution to prove that the accused at the time he committed the offence was infected with the human immunodeficiency virus which is a type of virus that causes a condition called acquired immunodeficiency syndrome whose acronym is AIDS. It does not create an offence distinct from the sexual offences provided under Division B of Part 111 of the Criminal Law Code. The offence relating to deliberate transmission of HIV which existed as a separate crime in s 79 of the Code was repealed by s 54 of Act 1 of 2022. It is not permissible therefore for a court to sentence an accused first for the commission of the crime of rape and then proceed to impose a second sentence for the risk of infecting his victim with HIV.

As is apparent from the provision, the prosecutor only needs to avail proof to the court that the convicted person was infected with HIV at the time of the commission of the offence. Once he does that it is presumed that the accused was aware of his HIV status at the material time. The mandatory minimum sentence which is prescribed must necessarily kick in. The accused can only escape the minimum mandatory sentence if he/she satisfies the court that special circumstances peculiar to the case exist warranting the court to depart from the imposition of the mandatory penalty. In the event that the accused establishes the existence of

special circumstances the trial court's sentencing discretion in terms of s 65 is restored. The regional magistrate in that case would sentence the juvenile accused as she would ordinarily do in a rape matter. In this case the trial court made the finding that the accused had not proved the existence of special circumstances. If that was correct it was then bound by the sentencing regime under s 80 and not but under s 65. It could not resort to both.

I now turn to deal with the question of special circumstances.

The record of proceedings shows that after convicting the accused, the trial magistrate carefully explained to the accused, the purpose of mitigation. The court then dealt with the mitigation by the accused and the submissions in aggravation by the public prosecutor. The following issues which were in point form were recorded as the accused's mitigation.

- Aged 17 years old
- I dropped out of school at grade 7
- I stay with my grandmother
- Both my parents are deceased
- I have nothing else to say.

After the state's address in aggravation, the court explained special circumstances in the following manner:

> "The charge that you are facing warrants the court to impose an additional sentence of 10 years imprisonment since you are HIV positive/were HIV positive at the time you had intercourse with the complainant. However the mandatory 10 years will not be imposed by the court if you highlight to the court any special reasons /factors or circumstances that are peculiar to the offence that will warrant this court to deviate from the penalty. You can highlight factors eg whether you were forced by someone to engage in sexual intercourse with the complainant or any other reason you deem fit."

The accused stated the following in his response to the court's explanation:

> "I was advised I was born with the virus and since then I have been taking medication for HIV. I was advised if I fall for a girl I must open up and go for testing together. We were advised to have protected sexual intercourse. I was advised that if girl is not willing we must not engage. If I default I have problems."

The prosecutor then stood up and responded as follows:

> "The accused's submissions do not amount to special circumstances. The circumstances are such that he was expected to inform the other party of his status. He was advised of the steps to take if he decides to engage. The fact that he was born with HIV is not special. It's ordinary and from our view there are no special circumstances. We pray that the mandatory penalty be imposed."

In an extremely terse manner, the court the ruled on the issue by simply saying:

No special circumstances exists"

The approach is flawed. First, the canvassing of special circumstances must precede mitigation. The logic behind that order is not difficult to see. Without special circumstances, the accused faces the risk of being sentenced to the minimum mandatory sentence which is ordinarily more severe than the ordinary sentence that can be imposed. Focus must therefore be more on an accused addressing the court on those circumstances than on ordinary mitigation. See the cases of *S* v *Mbewe 1998(1) ZLR* and the case of *S* v *Stephen Kambuzuma HH175/2015* for that proposition.

Second, the failure by the trial court itself to understand what it was dealing with betrays its lack of appreciation of what special circumstances are. As indicated above, the court erroneously started from the premises that the mandatory 10 years imprisonment were an additional sentence to the one imposable for the charge of rape. It was, as the magistrate put it, a "sentence for being HIV positive". In explaining special circumstances the same mistake was emphasized. Amongst the duties which a magistrate bears towards an unrepresented accused is the duty to record in detail the court's explanation to the accused. A magistrate must always bear in mind that it is a court of record and is by no means the last court in criminal matters. Magistrates must therefore be aware that when matters go on automatic review such as in this case or their decisions are appealed against, the superior court dealing with the matter will not call the trial magistrate to appear and testify. The record of proceedings must speak for itself. The proper recording of the explanation given on special circumstances would therefore vindicate the trial court. In the explanation, the court must demonstrate its understanding of special circumstances. If the trial magistrate does not understand what constitutes special circumstances then there is no way he/she can be expected to impart that understanding to an unrepresented accused. Where the explanation is inadequate that will amount to no explanation. Where the explanation is flawed an unrepresented accused cannot be expected to properly and successfully address the court on the issue. It is the reason why in this case the accused happily prattled on about his mitigatory circumstances believing them to be special circumstances. The explanation of special circumstances to this unrepresented 17 year old accused was far from satisfactory. It rendered nugatory the purposes of explaining special circumstances.

The correct approach is that the court must first determine in which context the legislature has provided for special circumstances. There are three scenarios which can arise. Special circumstances may be peculiar to the commission of the offence. They may be peculiar

to the case or to the offender. Which scenario is applicable is found in the language used by lawmakers in a particular Act. Where the legislature says *"special circumstances peculiar to the case"* as *in casu*, the implication is a broader interpretation of the issue. That would include circumstances that relate to the way the offence was committed and the personal circumstances of the offender which should be special in nature. MUREMBA J dealt with the issue in the case of *S* v *Stephen Kambuzuma*(supra) where she cited with approval the remarks of BEADLE J in the case of *R* v *DA Costa Silva* 1956 92) SA 173 (SR) that:

> "There is, to my mind, some difference between 'a circumstance of the case' and 'a circumstance of the offence'. The Court is here dealing with the quantum of punishment, and in making a decision on this I think that **any fact which might legitimately be considered as an aggravating or mitigating feature of the case must be regarded as 'a circumstance of the case', even though it may not be 'a circumstance of the offence'**. An example might perhaps best illustrate this point. If a very elderly man who is suffering from some chronic disease which requires special diet and specialised medical treatment were convicted of driving a car whilst not insured against third party risks, and if it were shown that a sentence of imprisonment would be likely to cause his death, it seems to me that this would be a proper factor which the court could take into account in imposing a sentence of a fine instead of a sentence of imprisonment, although it would be a circumstance 'special' to the offender, and not 'special to the offence'."

A judicial officer must not therefore be quick to discard an accused's submissions on special circumstances without understanding the context in which the question of special circumstances arises.

In this case the essence of the trial court's explanation is that the accused was simply told that he risked being sentenced to an additional 10 years imprisonment if he failed to give any special circumstances. There was no explanation as to what special circumstances are. The repetition of the technical terms used in the statute does not help. It defeats the whole purpose of an explanation. Even defining the phrase special circumstances may not always be helpful. A court must be alive to what an explanation is. In that regard I can do no better than advert to the conclusion which MUTEVEDZI J arrived at in the case of *S* v *Yeukai Graham Mutero* HH 173/23 when he said:

> "… The distinction between a definition and an explanation is that a definition is a statement expressing the essential nature of something whereas an explanation is an account intended to make something clearer." (Underlining is mine for emphasis).

Commendably the trial court in this instance resorted to an illustration in its bid to explain the concept to the accused. It gave an example of the nature of the special circumstances expected to be availed by him. The danger was that the illustration was given without an explanation preceding it. The accused clearly understood the example to be asking him to provide an explanation of why he committed the offence. That explanation was deficient in that it amounted to one aspect of special circumstances i.e. those surrounding the commission of the offence. It left out the accused's personal circumstances in a context where they were equally appropriate. That amounted to a narrow interpretation of special circumstances.

A possible but certainly not the only way to explain special circumstances peculiar to the case would in my opinion, be to advise an accused that they refer to the actions and personal situation of the accused or the conditions under which he/she committed the crime which are unusual, uncustomary, unanticipated or extra ordinary. As held in *S* v *Mugangavari* 1984 (1) ZLR 80(S) in its explanation the court may add that a number of factors taken cumulatively may constitute special circumstances.

I may also hasten to say that magistrates must not down play the importance of, especially in fully contested trials, explaining special circumstances at the commencement of trial. It is important to ensure that in the course of the trial the accuse remains conscious of the responsibility he has if convicted to adduce special circumstances in order to avoid the minimum mandatory sentence. In cases where an accused is unrepresented, a court must not ignore aspects which would have come up during trial which may work to show the existence of special circumstances simply because an accused has not mentioned that in his address to the court on special circumstances. In this case, the court restricted the accused's special circumstances to the few lines which he stated in his address on the issue. The court was required to go back into the evidence before it and look at everything holistically before making a determination. The court cannot adopt an armchair approach. Magistrates are reminded that the process of explaining, canvassing recording special circumstances to unrepresented accused persons takes the form of an inquiry where the court plays an active role. For instance if we agree that cognitive psychology is not a medical but a behavioral subject which probation officers are qualified to speak on ,then it means that the court must have paid due regard to the probation officer's report which forms part of the record of proceedings. The accused told the court that he had consensual sexual intercourse with complainant. He was not aware that the complainant was mentally disordered. I agree that the court rejected his version of events and gave its reasons for that rejection. The magistrate however ignored a very crucial aspect raised

in the probation officer's report which could have gone a long way in contributing to the existence of special circumstances. The accused's cognitive ability was very low. Cognition refers to the span of mental or thought processes which influence the acquisition, storage, manipulation and retrieval of information in or from a person's mind. The accused committed the offence, in circumstances where his mental ability to appreciate that the complainant was mentally disordered may have been at the lowest level. Once that was accepted it follows that he was barely sane himself.

The accused further confirmed that he knew he was HIV positive at the time of the offence because he was born with the disease. He explained what he understood and had been told about his medical condition. He also explained what he was told that in instances where he wanted to have sexual intercourse with his girlfriend he had to use protection. That again was a critical point. The magistrate did not bother to find out if indeed the accused used protection during the sexual intercourse. Once again it is admitted that the use of a condom or other protection mechanism if there is any, may not on its own be enough to constitute special circumstances but as indicated above, that taken together with others may amount to special circumstances.

The accused was ostracized in the community he lived in because of his HIV status. A juvenile accused who was born with the virus must surely be viewed differently from a promiscuous adult man who deliberately or recklessly acquired the disease. A court resorting to this s 80 must allow an unrepresented accused to explain the circumstances under which he acquired the virus if he knows.

The accused was 15 years old at the time of commission of the offence. He was 17 at the time he was convicted and sentenced. I observe that there are conflicting decisions on the reckoning of the accused's ages for purposes of sentencing in cases where he/she commits an offence when he/she is younger than his age at the time of sentencing. In this case however, whichever time the court took as the time of reckoning of his age he remained a juvenile. A long line of decided cases stipulate that the court must regard how it deals with such offenders as management of juvenile offenders as opposed to punishing or sentencing them. MAKARAU JP (as she then was) in the case of *The State* v *Moffat Mavasa* HH 13/2010 held that:

> "The use of such language, which is deliberate, highlights the differences in approach that a court should take when dealing with juvenile offenders as opposed to adult offenders."

In my view, a low cognitive disability (which does not amount to mental illness because if it did, the accused would be entitled to that defence) an acute or chronic condition or a life threatening condition such as HIV which was contracted at birth through no fault of the accused; a belief that the complainant was his girlfriend and had consented to sexual intercourse (which again falls short of being a defence); the lack of proper parental guidance; being resident in a community where juvenile delinquency of a sexual nature is rampant; peer pressure, stigmatization as a result of his health condition and the age of the accused taken cumulatively certainly makes the circumstances surrounding this case unusual and in that regard amount to special circumstances.

In conclusion, the inquiry on special circumstances ends with the court's ruling. A ruling in judicial work, entails a court's decision on a matter presented to it by the parties on an interlocutory issue which arises from and within the proceedings of the substantive case. The only difference with a judgment is that a judgment is the final decision of the court which disposes the substance of the case. The similarity is that both a judgment and a ruling must be supported by the court's reasons. In this instance, the ruling is in a single line. It is just that *"there are no special circumstances."* That was made following an exhortation by the prosecutor for the court to rule so. One would be forgiven therefore to think that the magistrate was mimicking the prosecutor. There was need for the court to properly give its reasons why it rejected the accused's submissions in relation to special circumstances just in the same way it must give reasons where it finds the existence of the same.

Disposition

In conclusion the inevitable finding that I make is that the trial court misdirected itself by imposing two prison sentences for one offence rendering the sentence incompetent. It further misdirected itself in finding that there are were no special circumstances in this case. That misdirection arose because of the magistrate's failure to properly appreciate and consequently to properly explain to the unrepresented accused what special circumstances are. The failure was compounded by the trial court's lack of appreciation that more often than not the existence of special circumstances should not be viewed as isolated factors because a combination of various factors may amount to special circumstances which are peculiar to the case. In addition she did not give reasons for her finding that there were no special circumstances. In the sentence in which she had unfettered discretion, she failed to take into

account the principles which guide the management of juvenile offenders as opposed to an approach fixated on punishing or sentencing them.

For the above reasons the trial court's sentence cannot stand. It calls for interference. I have already found that indeed special circumstances existed in this case. That sets me at large to impose a sentence other than the minimum mandatory under s 80 of the Criminal Law Code.

In the premises, IT IS ORDERED THAT:

1. The conviction of the accused be and is hereby confirmed as being in accordance with real and substantial justice
2. The sentence imposed on the accused be and is hereby set aside in its entirety and is substituted with the following:

   3 years imprisonment wholly suspended for 5 years on condition accused does not within that period commit any offence of a sexual nature and for which upon conviction he will be sentenced to imprisonment without the option to a fine.

   In order to assist in his reintegration into society it is ordered that he be placed under the supervision, counselling and guidance of Mutasa Social welfare commencing immediately and terminating when he turns 18 years on 13 December 2023.

3. The accused is entitled to his immediate release. The Registrar of the High court Mutare is instructed to ensure that a warrant of liberation is directed to the prison authorities.

MUNGWARI J……..

MUZENDA J……..Agrees