THE STATE
versus
WALLACE KUFANDADA
and
TAKUDZWA PEPUKAI

HIGH COURT OF ZIMBABWE
MUREMBA & MUTEVEDZI JJ
HARARE, 6 June 2024

Criminal Review Judgment

MUREMBA J: The two accused persons Wallace Kufandada and Takudzwa Pepukai who are male persons aged 21 years and 18 years respectively were charged with robbery as defined in section 126 (1) and rape as defined in section 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (The Criminal Law Code). They both pleaded not guilty to the charges. Despite their protestations, they were both convicted of the first count of robbery. The first accused was also convicted of the second count of rape, whilst the second accused was acquitted of that count.

Clearly, what befell the complainant in this case cannot be wished on anybody. The facts of the matter are horrendous. They are that the complainant and the accused persons all resided in the neighbourhood of Nyatsime in Chitungwiza. At the material time, the complainant was a young woman of 27 years. After peacefully retiring to bed with her husband and their six children, she could have never imagined the hell which the night became. It was on 7 September 2023 around 2200 hours. The two accused persons in the company of one Eddy NFPK and three other male hoodlums whom the complainant did not know descended on her residence and stormed into the house by forcibly opening the door to the cabin which the family used as their house. The occupants were all asleep. The ages of the couple's six children ranged from two and half years to nine years. The accused persons and their marauding accomplices demanded cash from the complainant and her husband. In order to induce submission, they assaulted the husband. Whilst the others used open hands to assault the complainant's husband, the first accused wielded an axe with which he attempted to strike him. At that point, the complainant's husband in an act of shameless and unmitigated cowardice bolted out of the house leaving his family at the mercy of the thugs. He fled into a nearby mountain where he hid for hours on end. In his own testimony he said he only returned after

more than four hours. Meanwhile, in the house, the robbers assaulted the complainant. She was forced to also flee the house. She vainly sought help from a neighbour. She was worried about the safety of her children. She rushed to the house of a member of the neighbourhood watch committee to whom she narrated her ordeal. Unfortunately, the member was preoccupied with another matter that had just been reported to him and his colleagues. It involved a boy who was suspected of being a thief. He had been apprehended by members of the public. To compound her woes and in a move which turned tragic, the neighbourhood watch committee member advised the complainant to go back to her home with promises that they would attend at her place soon after dealing with the suspected thief.

The complainant complied. When she arrived home the intruders had left but as soon as she entered the house, three of them returned. They were the first accused, Eddy NFPK and another who was not known to the complainant and her children. The second accused was not with them. What followed was heart-rending. The three robbers not only all raped her but did so in barbaric fashion. In her testimony, the complainant narrated that the first accused ordered her to take off all her clothes. She complied. She said he had brought with him condoms which he distributed to his colleagues. He warned them to prepare for sexual intercourse with her. He then lowered his trousers, put on the condom and had sexual intercourse with her in full view of his two colleagues and the glare of all the children. As the first accused was raping her, one of his colleagues was holding a torch illuminating the scene. When the first accused was done raping the complainant, he ordered Eddy NFPK to take his turn to rape her. Eddy gleefully took his turn. Once again, the hideous act was perpetrated in full view of the children and the other accomplices. After Eddy NFPK was done, the unknown accomplice also took his turn to rape her. Needless to state, the unconscionable act was again spectated by the children. All in all, the complainant was raped seven times as they took turns. During the various rape episodes, none of the rapists would finish the sexual act. They interrupted each other now and again with the two spectator accomplices ordering the one in the act to dismount to afford them opportunity to also pleasure themselves. Things then turned when the first accused had just mounted the complainant and was raping her for his third time. Two members of the neighbourhood watch committee who had promised to attend at the complainant's place arrived. The first accused and his accomplices fled from the scene upon hearing the voices of members of the neighbourhood watch committee. The complainant who only knew the second accused's place of residence led the members of the neighbourhood watch committee to that place. When the second accused was arrested, he in turn led to the arrest of the first accused.

It was the evidence of the complainant and her husband that after the whole ordeal, they discovered that the accused persons and their accomplices had stolen from their house, two cell phones namely a *Huawei Honour* and an *Itel,* the complainant's birth certificate, the complainant's husband's birth certificate and national identity document. The *Itel* cell phone was later recovered at Eddy NFPK's place of residence, but he was not located. The value of the stolen cell phones was USD108.00 and the value of the Itel cell phone that was recovered is USD $8.00. The complainant said that the accused persons stole these items at the time both herself and her husband had run away from their house after they had been assaulted. This explains why the learned regional magistrate convicted both accused persons of robbery and acquitted the second accused person of rape. The second accused had been present at the time the items were stolen. However, after the robbery and after leaving the complainant's residence, the second accused did not return with the gang. That fact distanced him from the first accused and the other accomplices' rape of the complainant. I am satisfied that the convictions of both accused persons of robbery; the conviction of the first accused of rape and the acquittal of the second accused of that charge were proper. I hereby confirm them as being in accordance with real and substantial justice.

What causes disquiet are the sentences that were imposed on the accused persons. For the offence of robbery, the accused persons were each sentenced to 10 years' imprisonment of which 4 years' imprisonment was suspended on condition of future good behaviour. Each accused was left with an effective 6 years' imprisonment. For the offence of rape, the first accused person was sentenced to 20 years' imprisonment of which 4 years' imprisonment was suspended on condition of future good behaviour, leaving him with an effective 16 years' imprisonment. The sentence in count one was then ordered to run concurrently with the sentence in count two. This means that for the two offences the first accused person is serving an effective 16 years' imprisonment. The second accused is serving a mere 6 years' imprisonment. The sentences are manifestly lenient so as to induce a sense of shock.

For the offence of robbery committed in aggravating circumstances, the penalty under s 126 (2) (a) of the Code is imprisonment for life or any definite period of imprisonment. In other forms of robbery, the penalty is a fine not exceeding level fourteen or not exceeding twice the value of the property that forms the subject of the charge, whichever is the greater; or imprisonment not exceeding 50 years. In terms of the sentencing guidelines in S.I 146/2023, the presumptive penalty is 20 years' imprisonment if the robbery was committed in aggravating circumstances. In other circumstances the presumptive penalty is 6 months' imprisonment. In

terms of s 126 (3) of the Code, a robbery is committed in aggravating circumstances if the convict or his or her accomplice possessed a firearm or a dangerous weapon; or inflicted or threatened to inflict serious bodily injury upon any person; or killed a person during the commission of the offence. In terms of the sentencing guidelines, a robbery is committed in aggravating circumstances if high value goods or sums were stolen or targeted; or if serious injury was inflicted or threatened; or if a person died. In the circumstances of the present case the learned regional magistrate determined that the robbery was committed in aggravating circumstances. Her finding was based on the fact that the accused persons were armed with an axe which is a dangerous weapon and that they had threatened to inflict serious bodily injury on the complainant's husband with the axe. The learned regional magistrate also stated that the assault on the complainant and her husband took place in full view of their children who must have been traumatised to see both their parents whom they looked up to for protection, being battered and defenceless. She also took note that the offence was premeditated as the accused persons proceeded to the complainant's house at night, armed with a dangerous weapon and attacked her and her husband. The learned regional magistrate said that there was not much mitigation in favour of the accused persons except that they were youthful first offenders, 21 years and 18 years old respectively. She said that imprisonment was inescapable in this case, but she indicated that she was going to deduct a portion of the sentence that she was going to impose on the basis of the mitigating factors in favour of the accused persons. It is on this basis that she went on to impose 10 years' imprisonment and suspended 4 years on condition of future good behaviour.

I queried with the learned regional magistrate why she imposed a sentence of 10 years' imprisonment and went on to suspend almost half of it on condition of future good behaviour in light of the presumptive penalty of 20 years' imprisonment for a robbery committed in aggravating circumstances. In response she said that in light of her maximum jurisdiction of 12 years' imprisonment in robbery cases as a regional magistrate notwithstanding the presumptive penalty of 20 years imprisonment, she could not sentence the accused persons to a period exceeding 12 years' imprisonment. She went on to say that she settled for 10 years' imprisonment because of the principle that maximum sentences should be reserved for the worst cases. She said that the present case was not the worst case of robbery hence she did not impose her maximum jurisdiction of 12 years' imprisonment. The learned regional magistrate further stated that she was guided by the sentencing trends from the decided cases she referred to in her sentencing judgment. She said that she suspended 4 years of the 10 years'

imprisonment having considered the youthfulness of the accused persons. She added that she was of the view that the sentence should be more rehabilitative in light of the accused persons' tender ages.

I hasten to point out that the explanation that the learned regional magistrate gave in response to my query is not contained in her sentencing judgment. In a sentencing judgment, a magistrate should address several key elements regarding the sentence imposed on an accused or offender, especially in relation to the presumptive penalty. In the structure of the sentencing judgment as provided for in the sentencing guidelines in S.I 146/2023, a judicial officer should explain his or her sentence. The judicial officer should clearly articulate the reasons for the sentence imposed, including how it aligns with the legal framework and sentencing guidelines. He/she must detail the factors that were considered, such as the nature and gravity of the offence, the circumstances of the offender, the applicable presumptive penalty and any aggravating or mitigating circumstances. If the sentence deviates from the presumptive penalty, the judicial officer must provide a thorough justification for the departure. He or she must explain why the presumptive penalty was deemed inappropriate in the specific case, considering the legal and factual context. This includes explaining that they have no jurisdiction to impose the presumptive penalty. The judicial officer should not assume that the readers know that they have no jurisdiction to impose the presumptive penalty in the particular matter. He/she must discuss how they balanced the need for punishment, deterrence, rehabilitation, and protection of the public in arriving at the sentence. They should address the proportionality of the sentence in relation to the offence and the offender's role. Specific mention should be made of any mitigating factors (such as youthfulness, first-time offender status, remorse, etc.) and how they influenced the sentence. Similarly, any aggravating factors such as use of a weapon, harm to victims, etc, should be detailed and their impact on the sentence explained. The judicial officer should ensure that the sentence is consistent with the sentencing guidelines. Any deviation from these guidelines should be justified with clear and compelling reasons. In essence, the sentencing judgment should be a comprehensive document that provides transparency and accountability for the sentencing decision, ensuring that justice is not only done but is seen to be done. It should allow anyone reading the sentencing judgment to understand the basis of the sentence and how it fits within the broader legal system. Magistrates should not believe that they write sentencing judgments to satisfy reviewing judges. The sentencing judgment like any other judgment must benefit everyone particularly the parties involved, other people /stakeholders who may have an interest in the

case and the general public. Viewed from that narrative, it becomes illogical for a magistrate to explain his/her reasoning for the imposition of a particular penalty to a reviewing judge when such explanation is conspicuous by its absence from the sentencing judgment.

In the present case, the learned regional magistrate was alive to the presumptive penalty of 20 years' imprisonment for a robbery committed in aggravating circumstances. She however omitted to explain her deviation from that presumptive penalty. She simply made mention of the presumptive penalty and went on to refer to authorities that were decided before the new sentencing regime came into effect. In arbitrary fashion she proceeded to impose 10 years' imprisonment. A regional magistrate has jurisdiction to impose a maximum of 12 years' imprisonment in robbery cases. The question which begs answers is why did the magistrate not impose the full 12-year sentence considering that the presumptive penalty is 20 years' imprisonment for robbery committed in aggravating circumstances? The point I make is that if the learned regional magistrate had jurisdiction to impose 20 years' imprisonment, this is a case where she should have imposed 20 years because it is a robbery which was committed in aggravating circumstances. It is understandable that her sentencing power was limited by her jurisdiction which only allows her to impose a maximum 12 years imprisonment in robbery cases. With the jurisdiction of 12 years, the learned regional magistrate had the authority to impose a more severe sentence but chose not to do so without explanation. It was only in response to my query that she explained that she settled for 10 years' imprisonment because maximum sentences should be reserved for the worst cases and that she was also guided by the sentencing trends from the cases she referred to in her sentencing judgment. Her response is a matter of concern as it shows a complete disregard of the sentencing guidelines that came into force on 8 August 2023. Given that the newly enacted sentencing guidelines provide for presumptive penalties that exceed the jurisdiction of magistrates in some cases, magistrates should take great care in applying the principle that maximum sentences should be reserved for the most severe cases. Applying this principle in cases where the maximum jurisdiction of a magistrate falls below the presumptive penalty of the offence clearly results in the imposition of sentences that do not align with the sentencing guidelines and are way below the presumptive penalties.

Another critical issue that is worth considering is the role of *stare decisis* in sentencing offenders in light of the new sentencing guidelines. *Stare decisis* refers to the principle of following established legal precedents. Courts rely on previous authorities to guide their decisions in similar cases. The introduction of sentencing guidelines in a legal jurisdiction that

previously lacked such guidelines is likely to result in new sentencing trends. New sentencing trends emerge as the guidelines aim to bring more consistency and predictability to sentencing, reducing disparities for similar offences. This means that old sentencing trends and sentencing ranges have to be re-evaluated in light of the new guidelines, leading to a shift in the approach to sentencing. This can lead to the questioning of the role of legal precedent. While past cases may have set certain precedents, new guidelines can supersede these, more so in view of the fact that the sentencing guidelines aim to correct perceived imbalances or injustices in the old system. Past cases may still serve as a reference point, but judicial officers should give more weight to the new guidelines. Judicial officers should consider whether the existing precedents align with the sentencing guidelines. If they do, *stare decisis* should be followed. However, if the guidelines significantly depart from previous practice, judicial officers may need to reevaluate their approach. Therefore, the introduction of the sentencing guidelines is a significant change that should reshape the landscape of sentencing in our jurisdiction. The overall effect is a move towards a more structured and uniform sentencing process that aligns with the current values and goals of our legal system. Current laws and guidelines take precedence over past trends. It is not proper for a judicial officer to continue with old sentencing trends which are not consistent with new sentencing guidelines.

In *casu* I consider the sentence of 10 years' imprisonment with 4 years suspended on condition of future good behaviour to be manifestly lenient in the face of the presumptive penalty of 20 years' imprisonment. With the learned regional magistrate's jurisdiction of 12 years' imprisonment, she should have started off at 12 years' imprisonment. From there she should have considered any mitigating or aggravating circumstances that warranted a departure from that sentence. She also needed to consider the victim impact statements. In the circumstances of this case there were eight victims: the complainant, her husband and their six children. A victim impact statement plays a significant role in the sentencing of criminal offenders as it allows victims of crime to express, in their own words, the emotional, physical, and financial impact they have experienced due to the offence committed against them. These statements can be either written or oral. Written statements are submitted to the National Prosecuting Authority and become part of the pre-sentence inquiry provided to the judicial officer before sentencing. Oral statements allow victims to directly address the court during the sentencing hearing, providing a voice and personal context to the crime. The influence of victim impact statements on sentencing is that they help judicial officers understand the human cost of the crime and its effects on the victim(s) and their loved ones. The statements have an

influence on the aggravating and mitigating circumstances of a case. In respect of the aggravating circumstances, victim impact statements highlight the severity of harm suffered by the victim. This can aggravate the offence in the eyes of the court. For instance, if the victim describes significant emotional trauma, physical injuries, or financial losses, the court may view the offence more harshly. Conversely, in respect of the mitigating circumstances, victim impact statements can reveal mitigating factors. If the offender shows remorse, makes amends, or demonstrates effort towards rehabilitation, the victim impact statement might provide context for leniency. The court weighs these factors alongside the severity of the crime. Victim impact statements therefore strike a balance between justice and compassion. They allow victims to participate in the sentencing process, promoting transparency and empathy. Judicial officers should therefore consider these statements while ensuring fairness and adhering to legal guidelines. In summary, it can be said that victim impact statements provide a human perspective, influencing sentencing decisions by shedding light on the real-world consequences of criminal acts. They contribute to a more holistic understanding of the case, considering both aggravating and mitigating factors.

What is conspicuous in this case is the absence of victim impact statements from the whole record. The learned regional magistrate also made no reference to such yet s 12(1) b) of the sentencing guidelines provides that prior to sentencing an offender, a court shall inquire into and investigate the characteristics of the victim(s) of the offence including the impact of the offence on such victim(s). So, in sentencing the accused persons the learned regional magistrate did not consider the effects of the robbery on the complainant and her family. This was a misdirection. In suspending 4 years' imprisonment from the 10 years' imprisonment imposed, the learned regional magistrate said that she considered the youthfulness of the accused persons. She said that she was of the view that the sentence should be more rehabilitative in light of the accused persons' tender ages. The suspended sentence constitutes almost half of the sentence imposed. So, from the presumptive penalty of 20 years' imprisonment, the accused persons were each left with an effective prison term of 6 years. The penalty is undeniably unjust. The presumptive penalty of 20 years' imprisonment is the standard penalty which serves as a baseline for the severity of the offence. The effective penalty amounts to less than one-third of the presumptive penalty. Such a significant reduction undermines the purpose of having presumptive penalties. Presumptive penalties aim to ensure consistency and proportionality in sentencing. In this case, the deviation from the presumptive

penalty renders it ineffective. The disparity between the presumptive penalty and the effective sentence highlights a grave injustice.

The consideration of youthfulness as a mitigatory factor in sentencing is a complex issue because the court has to balance the potential for rehabilitation and the severity of the crime. In general, youthfulness can be a significant mitigating factor because young offenders may not fully appreciate the consequences of their actions due to their lack of maturity and life experience. This is particularly relevant for first-time offenders who may have greater potential for rehabilitation. However, the extent to which youthfulness can mitigate a sentence also depends on the nature of the crime and the presence of aggravating factors. In *casu,* the offenders were convicted of robbery which is by nature a serious offence. Robbery involves the taking of another person's property by force or threat. The crime must occur in the victim's presence. The combination of force, intimidation, and the direct impact on victims makes robbery a grave offence in the eyes of the law. What makes the case worse in the present case is that it was committed in aggravating circumstances. There was premeditation on the part of the perpetrators; the use of a dangerous weapon – an axe; the presence of multiple perpetrators - six; the offence was committed at night at 2200hours, and it involved breaking into a home, and resulted in physical harm and psychological trauma to the victims, including young children. While the accused persons' youthfulness and status as first-time offenders could be considered mitigating factors, the severity and impact of their actions, particularly the trauma inflicted on the children, should have limited the extent to which their sentences could be reduced from the presumptive penalty. The accused persons committed a grave offence and to make matters worse, the two accused persons were the ring leaders during the commission of the robbery. They are the ones who assaulted the complainant's husband. The second accused struck him with an open hand on the face. The complainant's husband sustained a ruptured eardrum. This means that the second accused used severe force to assault him. The first accused then attempted to strike him with an axe. It is fortunate that the complainant's husband managed to hold the first accused's hand, pushed him away and managed to escape from the house. Had he not escaped he would have been struck with the axe. The accused persons went on to assault the complainant who had remained in the house. She was also forced to abandon her children. The assault taking place in full view of the couple's children must have traumatized the children. The children were very young and when their parents ran away, they remained with the intruders. This must have further traumatised them. The absence of victim impact statements in the record indicates a missed opportunity by the court to fully understand the

impact of the crime on the victims, which is an important consideration in sentencing as per the sentencing guidelines.

Robbery is a very prevalent offence in this jurisdiction. The prevalence of a particular crime in a jurisdiction can influence sentencing, as higher rates of certain crimes may lead to calls for more stringent penalties to serve as a deterrent. In the Sunday Mail of the 9th of October 2022, it was reported that,

> "Data from the Zimbabwe National Statistics Agency (ZimStat) shows there were 9,364 cases of robbery (931 armed) in 2020, and 9,515 similar cases (1,120 armed) were recorded the following year. This translates to an average of about 25 cases of robbery occurring daily."
> See Sunday Mail 9 October 2022, 19 000 robberies, 3 500 murders rock Zim | The Sunday Mail accessed on 1 June 2024.

These statistics clearly show that there has been an upsurge in the violent crime of robbery in recent years. Given this context, this jurisdiction is seeking to address and deter the crime of robbery effectively as evidenced by the harsh presumptive penalty. The rampant nature of robbery offences warrants a less lenient approach to sentencing, even when mitigating factors like youthfulness are present. This is why I question the decision by the learned regional magistrate to impose 10 years' imprisonment and suspend 4 years thereof in light of the presumptive penalty of 20 years' imprisonment. By not imposing 12 years when she had jurisdiction to do so, and by suspending a significant portion of the sentence she imposed on condition of future good behaviour, the magistrate's approach was overly lenient. Her sentencing decision did not adequately reflect the severity of the offence, the aggravating circumstances and the presumptive penalty. It raises concerns about the balance between mitigating factors and the need for appropriate punishment in cases of robbery committed in aggravating circumstances. Let me hasten to point out that if the presumptive penalty is beyond the jurisdiction of a magistrate in a particular case, and the magistrate is of the view that the appropriate sentence is beyond his or her jurisdiction, he or she should consider stopping the trial and referring the matter to this court for sentencing of the offender(s) in terms of s 54 (2) of the Magistrates Court Act [*Chapter 9:10*]. However, a lasting solution would be for the legislature to increase the sentencing jurisdiction of magistrates in order to keep up with the recently enacted sentencing guidelines and the emerging sentencing trends.

Considering the highly aggravatory factors in the case, the magistrate placed undue emphasis on the youthfulness of the accused persons and the fact that the accused persons were first offenders. While it is essential to consider mitigating factors, the emphasis on the

two mitigating factors was disproportionate to the highly aggravatory factors. A 12-year prison sentence without any suspension would have been just, despite considering the mitigating factors of youthfulness and that the accused persons were first time offenders. This is because I observe that 12 years itself was already way below the presumptive penalty specified in the guidelines. Given that 12 years was the maximum that the trial magistrate could impose, there was no need to suspend any portion of it. There is no rule which requires a portion of every penalty imposed to be suspended. It is the discretion of a court to do so. The following are some of the key considerations. The severity of the crime committed - less serious offences may be more likely to receive suspended sentences; the offender's criminal history - previous convictions (the offender's overall criminal record). First-time offenders or those with minimal prior offences may be considered for suspension; individual circumstances - the court considers the offender's personal circumstances such as age, health, family situation, and employment status; any factors that reduce the offender's culpability (e.g., cooperation with authorities, remorse); and the potential impact of a suspended sentence on deterring future criminal behaviour and facilitating rehabilitation. Each case is unique, and judicial officers should exercise discretion judiciously in determining whether to suspend part of the penalty or not.

In respect of the charge of rape three issues arise. Evidence which was led from the complainant shows that the first accused was the ring leader. He is the one who influenced his two accomplices to rape her. He produced condoms which he distributed to them as he told them to prepare to rape the complainant. He was the first to mount the complainant and rape her in full view of her children and his accomplices. As he was raping her, one of the accomplices was holding a torch illuminating the scene. He then ordered his accomplices to take their turns in raping the complainant. When the complainant and the children wanted to cry out, he would threaten them with an axe. The first issue that arises is that the complainant was raped seven times by the first accused and his two accomplices. Considering the circumstances of the rape and the role that the first accused played in having the complainant raped by his accomplices, the first accused should have been charged with seven counts of rape and not one count as what happened. In terms of s 195 of the Criminal Law Code, he participated or assisted in the other four counts of rape that were committed by his accomplices. On his own he raped the complainant three times. While it is the responsibility of prosecution to draft the charge and the State outline, the magistrate should have, in the interests of justice, queried with the prosecutor before trial commenced, why only one count was being preferred. This would have enabled the prosecutor to amend the charge. Whilst the State outline does not

disclose all the seven counts, it makes reference to only four counts with the first accused being alleged to have raped the complainant twice. If the learned magistrate had queried why the accused was being charged with only one count when the State outline was disclosing four counts, the prosecutor would have interviewed the complainant and the other witnesses on how many times she was raped before commencing trial. The failure by the State to charge the first accused with seven counts of rape resulted in a grave injustice to the complainant who was the victim of several counts of rape at the instance of the first accused.

The second issue that arises is that after convicting the first accused and making a finding that the rape was committed in aggravating circumstances, the learned regional magistrate sentenced the first accused to 20' years imprisonment. A new form of penalties was brought in by s 3 of the Criminal Law (Codification and Reform) Amendment Act no. 10 of 2023 (the Amendment) which amended s 65 of the Criminal law Code in relation to the sentences for the crime of rape. It provides as follows:

> **3 Amendment of section 65 of [Chapter. 9:23]**
> Section 65 ("Rape") (4) of the principal Act is amended by the repeal of the resuming words in subsection (1) and the substitution of—
> "shall be guilty of rape and liable—
> (i) if the crime was committed in aggravating circumstances as described in subsection (2) (that is to say if there is a finding adverse to the accused on any one or more of those factors), to life imprisonment or any definite period of imprisonment of not less than fifteen years; or
> (ii) if there are no aggravating circumstances, to a period of not less than five (5) years and not more than fifteen (15) years."

The penalty provision means that if the rape is committed under aggravating circumstances (detailed in subsection (2)), the perpetrator is liable to life imprisonment or a minimum of fifteen years' imprisonment. If there are no aggravating circumstances, the sentence ranges from a minimum of five years to a maximum of fifteen years. Put differently, the amendment creates a minimum mandatory sentence of fifteen years imprisonment for rape committed in aggravating circumstances and a minimum mandatory sentence of five years and a maximum of fifteen years' imprisonment for rape committed in non-aggravating circumstances. In the circumstances of the present case the learned regional magistrate correctly found that the rape that was perpetrated by the first accused on the complainant was committed in aggravating circumstances. I have no issues with the sentence of 20 years' imprisonment that she imposed on the first accused. However, she misdirected herself when

she then went on to suspend 4 years of the sentence. She should not have suspended any portion of the sentence. In terms of s 358(2) of the CPEA when a court convicts a person of an offence specified in the Eighth Schedule, it is not permitted to suspend it. Offences that fall under the Eighth Schedule include any offence in respect of which any enactment imposes a minimum sentence. Section 65 of the Criminal Law Code provides for minimum sentences as it provides for minimum mandatory sentences of 5 years and 15 years imprisonment. This court has previously made similar pronouncements in the case of *S* v *TG* (redacted*) and Another* HH 51/23

The third issue that arises is that the learned magistrate ordered the sentence for the robbery charge to run concurrently with the sentence for the rape charge. In terms of s 19 (1) of the sentencing guidelines, *"The discretion to impose concurrent or consecutive sentences lies with the court having regard to the principle of totality."* The principle of totality refers to a fundamental guideline that courts follow when sentencing an offender for multiple offences or when sentencing an offender who is already serving an existing sentence. The principle of totality aims to ensure that the overall sentence reflects all the offender's offending behaviour and is both just and proportionate. It considers the totality of the offences committed by the individual. Sentences can be structured as either concurrent (to be served simultaneously) or consecutive (to be served one after the other). There is no rigid rule on how sentences should be structured, but the principle of totality guides the decision. When sentencing for multiple offences, the court follows these steps: consider the sentence for each individual offence, referring to relevant sentencing guidelines; determine whether the case calls for concurrent or consecutive sentences; and test the overall sentence against the requirement that it is just and proportionate to the offending as a whole. Concurrent sentences are often appropriate when offences arise from the same incident or facts, or there is a series of similar offences, especially when committed against the same person. The lead sentence (if concurrent) should reflect the overall criminality involved. If sentences are consecutive, simply adding notional single sentences may not result in a just and proportionate overall sentence. Some downward adjustment is usually required. If sentences are concurrent, upward adjustment may be needed to adequately reflect the overall offending. The principle of totality ensures that the total sentence considers all aspects of the offender's behaviour and results in a fair and balanced outcome. In the circumstances of the present case, the first accused was convicted of two very serious offences of robbery and rape which were both committed in aggravating circumstances. Considering that the learned regional magistrate had imposed an unduly lenient sentence for

the robbery charge and had also gone on to wrongly suspend a portion of the rape sentence, she misdirected herself in ordering the sentences for the two offences to run concurrently. The end result was an overall sentence that did not reflect all the offending behaviour of the first accused, his culpability, the aggravating factors and the overall harm caused to the complainant and her family. The overall sentence was not just and proportionate. While the court has the discretion to decide whether sentences should be concurrent or consecutive, the discretion should be exercised judiciously. There should be some rationale in exercising that discretion. In the rape charge the court proceeded to sentence the first accused in the absence of the victim impact statement. The complainant was not given the opportunity to tell the court how being raped seven times in front of her six children and two strangers affected her and her children. The complainant is a married woman. It is not known how the rape affected her marriage. It is not even known how the whole family is coping after this whole ordeal. The complainant's side of the story was never heard. Even the husband was not given an opportunity to tell the court how the rape also affected him and his marriage. If the learned regional magistrate had heard the victims' side of the story, she might have thought twice before ordering the sentences for the rape and the robbery to run concurrently. It was a misdirection to make such an order without allowing the victims to participate in the sentencing process. This is more so if regard is given to the ages of the six children. They are infants and toddlers. Yet they were all compelled to watch the gangsters rape their mother. Noone can even begin to imagine what trauma the children went through. They may require professional psychological assistance to recover from that. The trial magistrate must have explored these issues. If she had, it would have better informed her sentencing. Her approach did not promote transparency and empathy. She did not promote the principle of fairness and she failed to adhere to the sentencing guidelines. She proceeded to sentence the first accused without a full understanding of the case. Her understanding was one sided as she just considered the youthfulness of the first accused and decided that he did not deserve a very long custodial sentence.

In view of the foregoing, I will withhold my certificate in respect to the first charge of robbery. I am unable to certify the sentence as being in accordance with real and substantial justice. In respect to the charge of rape, the sentence imposed by the trial magistrate is unlawful given the issues already raised. In equal measure the trial magistrate's discretion to order that the sentences run concurrently was exercised arbitrarily. I have already shown that doing so would result in the first accused person, who for all intents and purposes was the brains behind the heinous crimes, serving a sentence which in the end would portray him as a saint in the face

of his inhuman conduct. As such, both the order for the sentences to run concurrently and the sentence for the rape cannot be allowed to stand. I hereby set aside the sentence of "20 years' imprisonment of which 4 years' imprisonment is suspended for 5 years on condition the offender does not within that period commit any offence of a sexual nature and for which upon conviction he is sentenced to imprisonment without the option of paying a fine." The sentence is substituted with the following:

'20 years' imprisonment.'

This sentence shall run consecutively with the sentence imposed in count 1. **For the avoidance of doubt, the sentence in count 1 is the sentence that the learned regional magistrate imposed on the accused** (This is the sentence that I have refused to certify as being in accordance with real and substantial justice).

The learned regional magistrate should recall the first accused from prison and advise him of his corrected sentence.

MUTEVEDZI J: I am in complete agreement not only with the orders that my sister MUREMBA J made but also with the views she expresses regarding both the approach to sentencing and the sentences that were ultimately imposed by the trial regional magistrate. They could not have been put in any better way. I wish to add a few things all in support of her findings.

I observe that in her response to the review query, the learned regional magistrate said she imposed 10 years' imprisonment and suspended almost half of it because she thought the maximum penalties were reserved for the worst cases. That response betrays a grave misunderstanding on her part. The illusion appears to emanate from a failure to appreciate the interconnectedness between the robbery and the rape(s). The circumstances are such that the robbery is inseparable from the sickening rape that was subsequently committed by the first accused and his sidekicks. It would therefore be disingenuous to accept that the robbery and the rape(s) were divorced from each other. If the robbery led to several counts of rape being committed in the gruesome manner that my learned sister vividly described above, then it is naturally elevated to the realm of the worst cases. The two crimes aggravate each other.

I must emphasise that the sections of the Code which create particular offences and provide the penalties must, in this new sentencing regime, always be read together with the sentencing guidelines. In turn the provisions in the sentencing guidelines themselves should

not be viewed as silos. I will demonstrate why this is necessary. Section 126 (3) of the Code lists only three instances which aggravate a robbery. They are that the accused or his accomplice(s) used a firearm or a dangerous weapon; that he or she inflicted or threatened to inflict serious bodily harm upon any person; or killed a person - in which case they would be charged with the crime of murder anyway. If care is not taken, a judicial officer may confine himself or herself to the three yet the sentencing guidelines in more ways than one, provide an avenue for a sentencing court to find additional aggravating factors. In the third schedule to the sentencing guidelines, against the offence of robbery appears another list for that purpose. More importantly, a court must always have regard to the general aggravating factors listed under s 8 of the sentencing guidelines. It lists a whole range of generic aggravating factors whose applicability a court must assess on a case-by-case basis. It means for every crime which requires a determination of whether or not it was committed in aggravating circumstances, a sentencing court has three sources namely the particular provision in the Code, the specific aggravating factors listed against the offence in the third schedule to the sentencing guidelines and the all-encompassing s 8 in the guidelines. In addition, the proviso to s 8 of the guidelines is emphatic that:

> "For the avoidance of doubt, it is declared that the circumstances enumerated in sections *eight* and *nine* as being aggravating or mitigating are not exhaustive, and that a court may find other circumstances in which any offence is committed to be either aggravating or mitigating…"

I interpret the above provision to mean that a court is allowed to find other aggravating circumstances outside those that are listed in legislation. It is the reason why I indicated above that committing two or more grievous crimes in one fell-swoop serves to aggravate each of the offences. It is why in the main judgment MUREMBA J easily extended these principles and determined that:

> "There was premeditation on the part of the perpetrators; the use of a dangerous weapon – an axe; the presence of multiple perpetrators - six; the offence was committed at night at 2200 hours, and it involved breaking into a home, and resulted in physical harm and psychological trauma to the victims, including young children."

Magistrates must note therefore, that they are not confined to the few aggravating factors listed in the provisions indicated above. If the trial magistrate in this case had paid regard to those cradles of aggravating circumstances for the crime of robbery, she would not have taken it as just another armed robbery because several other aggravating factors appear therein. For instance, that children were affected means the robbers targeted, harmed and prejudiced vulnerable victims. It is also apparent that the offence was committed with repeated,

gratuitous violence and or cruelty. I also note from the record of proceedings that the first accused had on a previous occasion actually proposed love to the complainant. She rebuffed the proposal advising him that she was a married woman. It could not have been a coincidence therefore that the accused and his gang raided her place, stole and raped her with him as the provocateur. Both the robbery and the rape could therefore be taken as a means of getting back at the complainant for rejecting the first accused's preposterous advances. In the circumstances, I cannot conceptualise anything else that can make a robbery worse than where a robber not only assaults his victims, induces so much fear in them that the patriarch flees into the mountains but also takes turns with his gangsters to repeatedly sexually ravage and humiliate a woman in front of her very young children.

When the law recommends that maximum sentences must be reserved for the worst cases that admonition does not speak to the maximum jurisdiction of the judicial officer handling the case. The maximum penalty for a robbery committed in aggravating circumstances is not 12 years as the learned regional magistrate may have thought. Instead, it is life imprisonment. It is because the upper limit has been pitched so high that the guidelines provide 20 years imprisonment as the median penalty. I sincerely hope that the recommendation to refer offenders for sentencing by the High Court in terms of s 54 (2) of the Magistrates Court Act [*Chapter 9:10*] in cases where regional magistrates genuinely believe that their sentencing powers will not be adequate is taken seriously if the courts are to remain the bulwark of society as envisaged.

MUREMBA J ……..

MUTEVEDZI J……..