

THE STATE
versus
PETER WASIWO

HIGH COURT OF ZIMBABWE
DUBE JP
HARARE, 28 September 2024 & 16 October 2024

Criminal Review Judgment

DUBE JP

1. This review raises questions about the role of victim impact statements in the sentencing process and what the effect of the court's failure to consider the impact of a crime on a victim and consider appropriately the aggravating features is.
2. Following receipt of a letter of complaint by the father of the complainant in this matter, I decided, in the exercise of my review powers, to examine the proceedings in this matter. The complainant's father has alleged impropriety on the part of the trial magistrate and raised concerns about the manner in which the criminal trial was handled. The accusations are that the accused paid a bribe to the trial magistrate to lure the court into imposing a non-custodial sentence. He states in his letter of complaint that the payment of a bribe brought about the imposition of a wholly suspended sentence coupled with a fine which sentence he criticizes as being lenient.
3. Following conviction and sentence of the accused person, the record of proceedings was placed before a regional magistrate who scrutinised the proceedings. The regional magistrate opined that the sentence imposed is too lenient and nonetheless confirmed the proceedings as being in accordance with real and substantial justice. Faced with the complaint, I resolved to review the proceedings in terms of s29 (4) of the High Court Act, [*Chapter 7:06*] which stipulates as follows:

“29 (4) Subject to rules of court, the powers conferred by subsections (1) and (2) may be exercised whenever it comes to the notice of the High Court or a judge of the High Court that any criminal proceedings of any inferior court or tribunal are not in accordance with real and substantial justice, notwithstanding that such proceedings are not the subject of an application to the High Court and have not been submitted to the High Court or the judge for review.”

4. Section 29(4) allows a judge of the High Court, whenever it has come to his notice that any criminal proceedings are not in accordance with real and substantial justice, notwithstanding that such proceedings are not the subject of an application to the High Court and have not been submitted to the High Court or the judge for review, to intervene and exercise his or her review powers. The review must be in the interests of justice. The powers reposed upon me in terms of this section are limited to a determination of whether the proceedings were conducted in accordance with real and substantial justice. Where a regional magistrate has confirmed proceedings on scrutiny, this is not a bar to the court exercising its powers in terms of s29(4). The corruption allegations levelled against the trial magistrate cannot be ventilated by way of criminal review and instead call for administrative intervention by the Judicial Service Commission in terms of the legal framework and structures available. For these reasons, I will confine myself to the four corners of the record of proceedings.
5. The brief allegations against the accused were as follows: The accused person aged 68 years, appeared before an Epworth Magistrate facing a charge of “indecent assault” as defined in s 67 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], the Criminal Code. The accused and witness are neighbours and known to each other. One early morning the complainant, a 12-year-old female child was waiting for a taxi to take her to school when the accused approached her. He greeted her and asked her what grade she was in. The complainant told him that she was in grade 7 at a local primary school. The accused got hold of complainant’s hand and went on to hold her waist, fondled her breast and kissed her on the right chin without her consent. At that time, the taxi driver arrived and the accused went away. The complainant reported the matter culminating in the arrest of the accused. The accused pleaded not guilty to the charge and was convicted and sentenced after a full trial. Nothing turns on the conviction which is proper and is accordingly confirmed. That being the case, this review will zero in on the propriety of the sentence imposed only.
6. The accused was sentenced as follows:

“The court considered a fine and felt that it will trivialise the offence and community service will be too harsh a sentence considering the age of the complainant. The court considered that a suspended sentence will deter the offender from committing the same offence.

The court felt that community service will meet the justice of the case. Offender is sentenced to: 5 months imprisonment wholly suspended for 5 years on condition the offender does not

during that period commit any offence of a sexual nature for which upon conviction is sentenced to imprisonment without the option of a fine”

7. I enquired from the Prosecutor-General if the sentence is supported. The comments of the Prosecutor General are as follows:

“The Prosecutor – General does not support the sentence imposed by the trial magistrate.

Whilst it is admitted that sentencing is pre-eminently the discretion of a trial court, the same discretion can, however, be interfered with by Superior Courts where it has been exercised capriciously or irrationally,

See: *State vs Shepherd Shamba and Others* HH 65/18
and: *State vs Chimbo* HH 56/15

In *casu*, the Prosecutor – General considers that the trial court grossly misdirected itself in the sentence it imposed for the following reasons;

- i) Whilst the trial court found the age difference between accused and the complainant to be huge, it being 56 years between them, it nevertheless paid lip service to this fact by not reflecting it in the sentence that it eventually imposed.
- ii) Whilst acknowledging that 1st offenders should be spared imprisonment unless there are exceptional circumstances the trial court, however, ignored the existence of such exceptional circumstances in this case, especially the age difference between the parties.
- iii) Section 67(2) of the Code, for the purpose of determining sentence directs the court to have regard to the same factors imposed on a person convicted of rape under Section 65(2) among which are the age of the complainant, the extent of physical and psychological injury inflicted on the victim and the age of the accused, among others.
- iv) The trial court in its sentencing also ignored the fact that accused resides in the same neighborhood with the complainant which has an adverse effect of traumatizing the complainant.
- v) In the circumstances, an appropriate sentence would have been a short and sharp custodial sentence.
- vi) The matter is therefore appealable.”

8. Indecent assault is defined in s 67 of the Criminal Code as follows:

“67 Indecent assault

- (1) A person who—
 - (a) being a male person—
 - (i) commits upon a female person any act involving physical contact that would be regarded by a reasonable person to be an indecent act, other than sexual intercourse or anal sexual intercourse or other act involving the penetration of any part of the female person’s body or of his own body; or

- (ii)
 - (b)
 - (i) or
 - (ii) commits upon a female person any act involving physical contact that would be regarded by a reasonable person to be an indecent act, other than any act involving the penetration of any part of the other female person's body or of her own body; with indecent intent and knowing that the other person has not consented to it or realising that there is a real risk or possibility that the other person may not have consented to it, shall be guilty of indecent assault and liable to a fine not exceeding level seven or imprisonment for a period not exceeding two years or both.
- (2) For the purpose of determining the sentence to be imposed upon a person convicted of indecent assault, a court shall have regard to the same factors as are mentioned in connection with determining the sentence to be imposed upon a person convicted of rape in subsection (2) of section *sixty-five*, in addition to any other relevant factors and circumstances.”
9. The offence of indecent assault covers a wide range of conduct which includes sexual touching, kissing, forced removal of clothes or any other act involving the penetration of any part of the female person's body or of his own body committed with indecent intent and knowing that the other person has not consented to it or realising that there is a real risk or possibility that the other person may not have consented to it.
 10. The penalty section of the charged section prescribes a fine not exceeding level seven or imprisonment for a period not exceeding two years or to both such fine and imprisonment. In coming up with appropriate sentences, courts use a combination of legislative provisions, sentencing guidelines, information about sentences in cases of a similar nature and judicial discretion. The Criminal Procedure (Sentencing Guidelines) Regulations, S.I 146 of 2023 serve as a framework with which judges should work and follow during the sentencing process and are a vital part to the process. The Sentencing Guidelines provide for a presumptive sentence of 12 months imprisonment. The presumptive sentences set a starting point for sentences but allow departures on just cause. In addition, they list some of the aggravating features associated with the offence of indecent assault. The aggravating features prioritise protection of the victim and the severity of the offence. Mitigating features are also listed. The factors which a court may consider in assessing sentence are not limited to those listed in the guidelines and may consider additional factors influencing the sentence to be imposed.
 11. The starting point for a sentencing court is to identify the mitigating and aggravating features of the offence that may justify a departure from the presumptive sentence. The court should balance the aggravating features against the mitigating features in order to

come up with an appropriate sentence. The general approach to sentencing is that where aggravating circumstances are found to exist, maximum sentences are called for. Maximum sentences serve to indicate the seriousness of the offence thereby justifying imposition of stringent sentences. The court also considers the personal circumstances of the accused that explain his or her behaviour or justify a reduced sentence. Mitigating features have the effect of reducing the culpability of an offender and minimize the severity of the sentence to be imposed. A fine is imposed in appropriate circumstances with imprisonment being reserved for bad or very serious cases of indecent assault. The court must exercise its discretion to balance all the factors attaching to an offence, the victim and to the offender.

12. The Sentencing Guidelines provide the procedure to be followed in sentencing offenders as follows:

“12. Pre-sentencing hearing

- (1) Prior to sentencing an offender, a court shall inquire into and investigate the following—
- (a) the characteristics of the offender including his or her social background;
 - (b) the characteristics of the victim(s) of the offence including the impact of the offence on such victim(s);
 - (c) the probability of the offender committing a similar or other offences;
 - (d) the desirability or need to protect the victim(s) or society from the offender; and
 - (e) the ability of the offender to make restitution to the victim(s) or to society.”

13. The Sentencing Guidelines were integrated into the criminal justice system and make provision for victim impact statements. A victim impact statement is a statement from the victim of crime or his or her representative who may be a family member who shares the impact the crime has had on the victim or his or her family.

14. In *S v Sixpence* HH 567/23, the court described a victim impact statement as a statement that serves to inform the court about the direct consequences of the offence. A victim impact statement is beneficial to the court as it gives broad insight into the personal impact of the crime on the victim, be it physical, emotional, psychological, social, financial and health impact which must be taken into account in assessing an appropriate sentence. The victim impact statement is critical in assessing the victim’s experiences, harm caused and culpability of the accused. The court must have an understanding of how the offence has affected the victim’s life. The statement may be submitted orally or in writing. To ensure

fairness and balance in the proceedings, the accused should be accorded the right to respond to the victim impact statement. Information gathered assists the court to come up with a sentence that correctly reflects the harm flowing as a consequence of the offence to the complainant and sometimes society as a whole. Victim impact statements give a voice to victims of crime.

15. Section 12 of the Sentencing Guidelines enjoins a sentencing court to inquire and investigate a number of factors to aid it in coming up with an appropriate sentence. In *Sixpence*, (supra) the court correctly pointed out the binding nature of the guidelines and said the following of the obligatory nature of s12 of the Sentencing Guidelines:

“More importantly s 12(1) requires a court to inquire into and investigate particular issues. Once again, it must follow that if a court fails to do so, it would have committed a gross irregularity which can be a ground for the vacation of its proceedings. The words inquire and investigate are generally regarded as synonymous but they have their differences. The distinctions are heightened where both words are used at once in a statute like in s 12 of the Guidelines. In relation to sentencing, an inquiry on one hand, usually refers to a general solicitation for information conducted to gather superficial data about a subject. An investigation on the other, is an elaborate and comprehensive analysis of a specific issue. The purpose of an investigation is to discover or expose facts or information about that particular issue in a bid to reveal the cause of the criminal behaviour or to analyse if the particular circumstances surrounding the crime are linked to its occurrence. Unlike an inquiry an investigation extends to other activities such as collecting and examining evidence and interviewing witnesses among other activities. Put simply an inquiry entails requesting for information, while an investigation is an in-depth examination of a specific issue to find out the cause of a problem. S 12 requires both the inquiry and the investigation to be carried out. In other words, the court must request information and at the same time carry out a detailed assessment of the issues listed in the provision.”

16. The use of the words “shall enquire into and investigate” are directory and oblige the court to follow the instruction to the book. A formal enquiry or examination of the impact on a victim of the offence is important and must be made. The enquiry and or investigation entails gathering information, hearing evidence and considering facts. The requirements of s12 make it peremptory to lead evidence on the impact the offence had on the victim and assess sentence based on such impact. Ignoring the impact of the crime on the victim amounts to a procedural irregularity and a miscarriage of justice. Such failure affects the fairness of the trial and may in an appropriate case lead to the proceedings being set aside, remitted for the accused to be sentenced afresh or confirmation of proceedings being declined.

17. The severity of sentences in indecent assault cases involving children depends on factors such as the age of the complainant and the severity of the assault. Where a victim is a young girl of tender age the more likely that a more stringent sentence will be meted out. The thrust is that children must be protected by the courts. The age disparity between the complainant and the offender is a serious aggravating factor. An offence should be treated as aggravated when the victim is either very old or very young. A large age disparity between the offender and the victim constitutes an aggravating factor. Where there is a small age disparity between the victim and perpetrator, the courts are generally much more lenient. Mature men are expected to act more responsibly and have increased control of their sexual drive. Where the victim knew the offender prior to the offence, that acts as aggravation. The lack of consent on the part of the victim also has a bearing on the sentence to be imposed.
18. Sentence is purely a matter for the discretion of the court. The Sentencing Guidelines do not completely take away a court's discretion. A review court will only interfere with the sentence of a trial court where it finds an error in law or fact in the proceedings, or where a sentence is manifestly lenient and shocks the conscience, or is unreasonable, or where there is procedural irregularity, or where it is shown to have abused its discretion and where a sentence is inconsistent with established sentencing principles. A sentence that fails to consider relevant factors is liable to be set aside.
19. In *casu*, the trial court imposed a wholly suspended sentence with conditions attached to it. A wholly suspended sentence is one of imprisonment but entails that the accused will not have to serve the sentence in prison. The suspension of the sentence is conditional with the sentence remaining in effect for 5 years. A wholly suspended imprisonment sentence imposed with conditions has implications in the future. The accused must not commit an offence of a sexual nature in the next five years. Where the conditions of the suspended sentence are breached and the accused commits an offence of a sexual nature during the said period for which he is sentenced to imprisonment without the option of a fine, the suspended sentence is brought into effect. Essentially there will be an additional imprisonment for a repeated offence.
20. The phrase, "without the option of a fine" means that imprisonment is mandatory upon a conviction of an offence of a sexual nature within the next five years. The accused has a sentence hanging over his head which has the effect of guarding his future conduct .A

suspended sentence emphasizes the importance of rehabilitation and deterrence. It is factually incorrect that the accused's sentence is coupled with payment of a fine.

21. The trial court failed to consider the impact the crime had on the youthful complainant and give sufficient weight to the aggravating features of the case. As a consequence, the sentence imposed is not in line with sentences imposed in cases of a similar nature. In *S v Gift Ngirazi* HH 172/23, a 36-year-old accused male indecently assaulted a 15-year-old female by holding her, fondled her breasts. She did not resist. He was sentenced to 30 months imprisonment of which 4 months imprisonment was suspended for 5 years on condition accused does not within that period commit an offence involving indecent assault or of a sexual nature for which upon conviction accused is sentenced to imprisonment without the option of a fine. On review, the sentence was set aside and substituted with a sentence of 6 months imprisonment wholly suspended for 3 years on condition that the accused does not within that period commit an offence involving indecent assault or an offence of a sexual nature for which upon conviction is sentenced to imprisonment without the option of a fine. The age gap was 21 years.
22. In *Thandanani Moyo v The State* HB01/21, a teacher indecently assaulted the complainant, a 14-year-old girl by fondling her breasts and touching her thighs. The complainant was a Form 1 pupil at the material time and the appellant was her English teacher and acting deputy headmaster at complainant's school. His age was not stated. He stood in a position of trust to the complainant. He was sentenced to 36 months imprisonment of which 12 months imprisonment was suspended for 5 years on the usual conditions and the remaining 24 months was suspended on condition the appellant performed community service. On appeal, the sentence was set aside and substituted with one of 24 months imprisonment of which 6 months imprisonment was suspended for 5 years on condition the accused does not during that period, commit any offence involving indecency whereupon conviction he shall be sentenced to imprisonment without the option of a fine. The remaining 18 months imprisonment was suspended on condition of community service.
23. The *Moyo* and *Ngirazi* cases were decided before the Sentencing Guidelines were introduced which make the consideration of the impact of the crime on the victim obligatory on the part of the trial court. In none of the two cases was the impact of the crime on the victims considered. What distinguishes this case from the *Moyo* and *Ngirazi* cases is the age disparities between the accused persons and complainants which were shorter.

Pertinent is that the suspended sentences in these cases were lengthier than in this instance. In the *Moyo case* a suspended sentence was imposed on condition of performance of community service making the sentence more stringent.

24. The reason why the court failed to come up with an appropriate sentence is attributable to a number of factors. The trial court paid insufficient regard to all the aggravating circumstances of this case. Indecent assault perpetrated on children of extreme youth is a very serious offence. What makes this offence even more serious is that the offence was committed against a 12-year-old female which factor is indicative of the vulnerability of the child. The accused exploited the innocence of the child.
25. Whilst the court considered as aggravatory the fact that there was a wide age difference between the victim and the accused, it nevertheless paid lip service to this fact by not reflecting this factor sufficiently in the sentence that it eventually imposed. The age disparity of 56 years needed to be reflected in the sentence imposed. The variance between the ages of the accused and his victim reveals a significant power imbalance. The accused invaded the complainant's space by his conduct. Whilst appreciating that it is not the worst case of indecent assault, the finding that the complainant was kissed and had her breast fondled, gives the offence an element of sexual abuse and sexual intent. The court failed to consider that the complainant was not a consenting party and that the two were known to each other and were from the same neighbourhood which factors aggravate the offence.
26. As it stands no one knows the basis of the sentence imposed. The trial failed to provide logical reasons for imposing the sentence it came up with. The court's reasons for its sentence are somewhat confusing and contradictory. There is an inconsistency between the sentence the court intended to impose and the actual sentence imposed. The court initially discounted community service on the basis that it would be too harsh a sentence considering the age of the accused. In its conclusion the court states that community service will meet the justice of the case and yet it did not impose community service on the accused. The appearance is that that the court intended to impose community service but did not do so.
27. The sentencing process was flawed resulting in a sentence incompatible with the Sentencing Guidelines being imposed. The court did not have sufficient information on the impact of the crime on the victim when it assessed sentence. No doubt the record of proceedings lacks detailed information about the harm experienced by the victim, in particular the social, emotional and psychological harm suffered. The possibility of

psychological impact is real. The failure to enquire into and investigate the impact the crime had on the complainant amounts to a gross procedural irregularity. The court stated in the sentencing judgment that the victim told the court that she was traumatised by the experience yet there is nothing on record to support that finding. The trial court paid lip service to the requirement to assess the impact of the offence on the victim as required by the law.

28. The prosecution not having led oral evidence on the impact of the crime during the complainant's testimony, the trial court ought to have inquired into and investigated the impact of the crime on the complainant thereby appropriately equipping itself to impose an appropriate sentence. The failure to consider the impact of the crime on the complainant led to inadequate sentencing and a manifestly lenient sentence which shocks the conscience.
29. The conduct complained of is repugnant and accused's moral blameworthiness very high. Sentences for indecent assault ought to reflect societal disapproval of the offence. In future, a short stiff effective imprisonment sentence in the region of 12 months imprisonment or an order to perform community service and/or with an additional conditionally suspended imprisonment term would be appropriate in a case such as this. I agree with the regional magistrate that the sentence imposed by the trial court is on the lenient side.
30. The trial court's failure to inquire and investigate into the impact of the crime on the complainant and consider pertinent aggravating features of the offence is a misdirection which undermined the fairness of the sentencing process and resulted in it being ill equipped to consider an appropriate sentence. In view of the foregoing, the conviction is confirmed. I must conclude that the sentencing proceedings are not in accordance with real and substantial justice. I am compelled to withdraw my certificate.

DUBE JP: