THE STATE
versus
ELISHA VIRIMAI

HIGH COURT OF ZIMBABWE
MAFUSIRE & MUSHORE JJ
HARARE, 23 March 2016 and 27 April 2016

Criminal Review

MUSHORE J: The accused was charged with having contravened s 70 (1) (a) of the Criminal Codification and Reform Act [*Chapter 9:23*]; having sexual intercourse with a young person. In this case the complainant was aged 14 years when intercourse took place. Accused is twice the age of the complainant at 28 years of age. He is a soldier with the Zimbabwe Defence Forces and according to the State Outline sometime in July 2015, the accused and the complainant began having consensual sexual relations on a number of occasions. In fact in the State Outline the state describes the two as boyfriend and girlfriend. Their sexual relationship came to an abrupt end when the complainant's sister discovered that they were seeing each other and a report was made to the Police where after complainant was medically examined and it was confirmed that indeed intercourse had taken place.

The accused was prosecuted and was convicted on his own plea of guilt and subsequently sentenced to pay a fine of $US300-00/ or to serve 2 (two) months imprisonment if he defaulted in payment of the fine. In addition he was given a 2 (two) month wholly suspended sentence of 5 (five) years on conditions of good behaviour.

The record was placed before me for review. My immediate sense was that in the totality of the record itself, the sentence imposed was manifestly lenient given the facts outlined by the State in its State Outline. I then examined the Magistrates reasons for sentence in order to further my assessment of the sentence which I paraphrase as follows:-

> "Mitigation
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> Accused person is a first offender. As a matter of policy such offenders are treated with leniency to enable them to reform.
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> He pleaded guilty and saved the court's time and resources. A plea of guilty also shows contrition on the part of the accused person.

Accused person is employed formally as a soldier. As a first offender a sentence that interferes with his employment will not be appropriate. A community service sentence would have been appropriate but accused works from Monday to Sunday.

Aggravation

Accused person committed a serious offence of having sexual intercourse with a young person. Such young children are vulnerable members of society and should be protected by our courts. Stiffer and deterrent penalties are therefore called for. Prevalence of the offence is another aggravating factor. A clear message is to be sent out to the public that courts do not condone such behaviour.

The complainant is now married yet she has not yet turned 16 years. The current behaviour might have been caused by pre-mature extra-marital intercourse. It also shows that complainant sees herself as someone who needs guidance. Her parents or guardians appear to be failing."

I cannot quite make out how a sentence of a fine of US$300-00 and 2 months suspended on the usual conditions has the desired effect emanating from the reasons which I have itemised as being *(and in my own words):*

- Sending a strong message to the public that sexual intercourse with young persons will not be condoned by the courts; and
- Protecting the vulnerable members of our society
- Deterring would be offenders from this type of infraction.

The payment of a fine is hardly punitive and a low fine such as the one imposed in the instant case is less so. Whilst an accused person may find it difficult to raise the money required for the payment of a fine, the difficulty which the accused will face is fleeting and will not serve to etch itself into his memory and this is more so in the present set of circumstances because the fine is extremely low. The punitive value of a low fine is so negligible as to be insufficient in deterring a would-be offender in a moment of weakness or madness. I cannot therefore reconcile the statement made by the Magistrate *a quo* that there is a deterrent factor to the sentence imposed. If the Magistrate intended that the suspended term serve as a deterrent, then and in that event can it really be safe to assume that the accused would think twice for the next five years before sexually violating a young person? I do not think so particularly given the fact that in the current case accused knew prior to having sexual intercourse with the complainant that complainant was only 14 years of age. As a soldier he would have appreciated the unlawfulness of his actions before he nevertheless decided to proceed to offend. A fine of US$300-00 is nowhere near being a deterrent to the accused and to would be offenders. I am convinced that a determined first or repeat offender

would simply bite-the- bullet so to speak and go on to commit this type of offence in the hopes that they get away with it with a 'nothing to lose' *[colloq.]* attitude.

Further the court *a quo's* deliberations on community service were incomprehensible given the fact that community service can take place after hours or at other times even where an offender is employed. I am perturbed at the manner by which the magistrate tiptoed around the accused so as not to inconvenience him because in so doing the magistrate seemed to have forgotten the punitive aspect of sentencing. To my mind and taking into account the fact that it appears, rightly or wrongly, that the accused subsequently married the 14 year old complainant, the justices of the matter would have been served if the accused were to be made an example of.

The higher courts have been offering guidance to trial magistrates when it comes to sentencing in such cases in the hope that trial courts address the issue of disparity in sentencing and prevalence of these offences, both of which have continued to dog the courts.

In *S* v *Nare* 1883 (2) ZLR 135, Gubbay and Korsah JJ's, as they were then, provided guidance by way of a check list to be used in assessing sentence in cases such as the current one, and in so doing referred to a decision by Beadle CJ in *R* v *Sava* 1967 RLR 367 when they said:

> "In *R* v *Sava*, {*supra*}, Beadle CJ at 368 suggested a general, but nonetheless useful guide in the determination of the seriousness of this offence. It is to have regard to (a) the age, appearance and character of the complainant; (b) the age of the accused; and (c) the circumstances under which the offence was committed".

In the *Nare* case, *supra,* at p 137 G-H the *ratio decidendi* of the offence was explained as follows:-

> "The rationale of this offence is to protect immature females from voluntarily engaging in sexual intercourse on account of a lack of capacity to appreciate the implications involved and the possibility that psychic or physical injury may be suffered. That protection is achieved not by punishing the female, but rather the male partner, who in effect is assumed to have been responsible for inducing her to engage in sexual relations"

At p 138 of the *Nare* case, Gubbay and Korsah JJ then elaborated upon the guiding factors proposed by Beadle CJ in *R* v *Sava,* [which I shall refer to as "***the Beadle guide***" for ease of reference] for consideration by trial courts when dealing with sexual offences committed against young persons as follows:-

> "The offence is mitigated where for instance-
>
> (i) The complainant is of loose morals; or
> (ii) She enticed the accused to have intercourse; or

(iii) The accused and the complainant were genuinely in love; or
(iv) She was nearly 16 years old; or
(v) The accused is a simple and unsophisticated person for a community in which the law is not well known; or
(vi) He is a youth; or
(vii) He *bona fide* believed the complainant to be of age.

On the other hand the offence is aggravated where-

(i) Accused is much older and mature than the complainant; or
(ii) She is just above the legal age of consent; or
(iii) The accused has relevant previous convictions"

Beadle's guide has been successful in providing sentencing courts with the manner in which they ought to introspect when they assess sentences for this type of offence, but by all accounts even with the guide in use, trial magistrates seem to impose sentences which vary from a broad spectrum with some being excessively lenient and others very severe. The disparity is worrisome. Further, because the *Beadle guide* is fairly subjective in that it weighs up the aggravating and mitigating factors peculiar to the offence, the offender and the victim, a stark disparity in sentences for this offence is evident.

In *S* v *Mutowo* 1997 (1) ZLR 87 Gillespie J was reviewing a sentence imposed by a lower court in which he ultimately interfered with, having found that the sentence was too harsh in the circumstances of that matter. Gillespie J applied his interpretation of the *Beadle's guide (supra)* to the facts of the case under his review before making the following observation [pp 90 [C] that:-

> "Despite the logic of these considerations, *{Beadle's Guide}* there remains a troubling disparity in punishments actually imposed"

Mutema J in *S* v *Tshuma HB* 70/13 also focused entirely on the victim and the offender and the assessments criteria attendant to them before coming to his own determination to free the accused and pronounce that the custodial sentence was too harsh a penalty to have been imposed on the offender.

I hold the very strong view that the decided cases have not approached sentencing in an all embracing sense in that so much attention has been paid to the crime, and the offender that the interests of society have been looked into rather superficially. Because the issue of prevalence remains troublesome, I believe that there should be equal focus on the interests of the society to bring about the justices of the matter.

In *S* v *Zinn* 1969 (1) SA 537 (AD) Rumphf JA emphasised that it is incumbent for a sentencing court to apply its mind to what he described as being *"the triad consisting of the*

crime, the offender and the interests of society. " when considering sentence. In the *Zinn* case, at p 540 G the appeal court gave guidance as follows:-

> "It then becomes the task of this Court to impose the sentence which it thinks is suitable in the circumstances. What has to be considered is the triad consisting of the crime, the offender and the interests of society"

It is my considered view that the rationale behind weighing in the interests of society is to bring some sense of uniformity in a sentence to be imposed for a particular offence. In some instances the legislature has provided a sense of uniformity in sentence by legislating minimum mandatory sentences which has the effect of limiting the discretionary powers of a trial court except with regards to the trial court finding out whether special circumstances exist which would justify the trial court's departure from the legislated minimum mandated sentence. Mandatory sentences are essentially public interest driven and they significantly address the disparity of sentencing and if severe enough they are extremely effective in addressing prevalence issues if they are recommended judiciously. Although there are no severe minimum mandatory sentences legislated for s 70 (1) (a) crimes, that may very well be an avenue to explore with a view to aiding sentencing courts in handing down relevant sentences. However in the absence of such peremptory legislated mandatory sentences and because the sentencing court's discretion remains fairly wide, it becomes the duty of the sentencing court to apply its mind to and address the interests of society in addition to the criteria adopted in the abovementioned decided cases {*supra}* before arriving at a sentence.

Turning back to the current case, I do not believe that the low fine of US$300-00 is public interest driven. As I mentioned earlier in my comments it hardly constitutes a punitive inconvenience to the accused who in any event is gainfully employed.

The same has to apply to the suspended sentence. Two months suspended on condition of good behaviour is wholly inadequate. The suspended sentence is supposed to operate as a guarantee to members of the public that in that instance safeguards have been put into place to ensure that the accused will not offend, or at least for the duration of the suspended term. In my view the desired effect of a suspended sentence, if it is to be effective is to *firstly* provide the public at large with a sense that real and substantial justice has taken place in the matter for which such a sentence has been imposed and; *secondly* to provide the public with a feeling that the severity of the deterrent sentence will help reduce the incidents of that crime occurring within that community; and *thirdly* to operate as a reminder to the accused that if he offends, he will be punished not only for the repeat offence but also the one

which carries the suspended sentence; and *lastly* to provide a real sense of protection to any victim. If a sentencing court were to apply their minds to any or all of these latter considerations, then such a court would be positioned to pass a sentence which would be most effective in ensuring its role to deter would be offenders as well as deterring the accused from repeating the offence. To that end when a trial court considers suspending a portion of the sentence, to serve as a deterrent, the mathematical computation of the suspended sentence would not pertain to the accused only, but must also reflect that the court is taking the safety of the public into account. Thus the court must approach the issue with both a subjective and an objective assessment.

In the instant matter, I gained the impression that the trial court merely acknowledged that public policy reasons existed for imposing a deterrent sentence but that the reasons given were simply narrated for the record and that they were not carried into effect in the sentencing itself.

It is thus of little surprise that the ills which are being propagated in society where young persons are interfered with immorally, unlawfully and sexually show no signs of abating are not being attended to because little or no application of the third prong of the triad (interests of society) has been applied and carried through in the sentence in this jurisdiction.

In the current case the sentence is not reflective of the duty placed upon the courts when sentencing such offenders to avert the propensity to commit these crimes and thereby eliminate an ailment that is bedevilling our society with respect to child marriages. It is therefore incumbent upon this court as the Upper Guardian of Minors to safeguard minors in that regard although more is called for in the lower courts as adverted to above.

Magistrates are required to apply their minds not only to the crime and the offender but also to the third part of the triad (see *Zinn* case (*supra*)) which is to apply their minds properly to the interests of society, or put differently public policy considerations. To this end a sentencing court ought to pose a series of questions such as;-

(a) is the sentence to be applied offer sufficient deterrence in view of the current prevalence of the offence in the society;

(b) does the sentence to be applied properly address the concerns of the society that the courts are serious about addressing the concerns of the public; and

(c) is the court properly discharging its obligation to protect vulnerable members of society?

If a sentencing court poses questions such as these in assessing sentence and then applies them to the facts before it in order to address these concerns (of course in addition to applying its mind to the two other parts of the triad as discussed above) there are bound to be many more instances where the sentencing will be an effective way part of addressing issues that affect that particular society or public which is being affected by the crime complained of.

Very often when providing the reasons that have been considered before arriving at a particular sentence, the sentencing courts parrot catch phrases such as "*These crimes are on the increase"* or "*the courts must protect the public from these types of offenders"* or "*a clear message must be sent to the public*, etc." and yet the resultant sentence bears no reflection of such considerations having seriously been taken into account. Unless a sentencing court actually applies its mind to address those issues, that sentencing court must refrain from adopting a "parrot-fashion" approach to sentencing, because the presumption is that a sentencing court has properly considered the areas of concern which it announces that it has paid due regard to and considered.

Further if indeed the courts in a particular society apply their discretion to matters that are affecting the public within that society, there is bound to be some uniformity in sentencing.

In the instant matter, I have already concluded that the interests of society, although announced by the court *a quo* were not carried through to the sentence. They remain empty threats or in the reverse empty promises. The accused in this matter is a soldier who owes a duty of care to the society and in particular the vulnerable members of society and yet he chose to take advantage of and corrupted a vulnerable young girl and brought dishonour to the uniform of the national defence forces of the country. A substantial custodial term of imprisonment would have been appropriate without the option of a fine and a portion of the custodial sentence suspended for five years on grounds of good behaviour. The option of accused performing community service should never have entered into the mind of the magistrate for public policy reasons.

In the result and having concluded that the sentence imposed is both manifestly and shockingly lenient, I duly withhold my certificate.

MUSHORE J……..

MAFUSIRE J (agrees)…….