DAVIES DZINOREVA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & WAMAMBO JJ
HARARE, 5 July 2018 & 30 January 2019

**Criminal Appeal**

*T.T.G Musarurwa*, for the appellant
*R. Chikosha*, for the respondent

WAMAMBO J: The appellant was convicted of two counts of contravening s 65 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (rape) after a trial. He was sentenced as follows:

Count one – 15 years imprisonment

Count two – 15 years imprisonment

Of the 30 years imprisonment 5 years were suspended for 5 years on condition of good behaviour. 5 years in count one were ordered to run concurrently with the sentence in count two. The total effective sentence is 20 years imprisonment.

In the notice of appeal appellant raised a number of grounds against both conviction and sentence. Before us Mr *Musarurwa* the legal practitioner representing the appellant abandoned the appeal against conviction and argued only against the sentence imposed.

The facts are as follows:-

The two counts of rape were committed against the same juvenile complainant who was aged 9 at the time of the commission of the offences.

The state outline reflects that appellant and the complainant were boyfriend and girlfriend. It goes further to allege that in both counts the two started by romancing and then had sexual intercourse. How a 9 year old girl could be a girlfriend to the 30 year old appellant and how the two could romance boggles the mind. The state outline clearly missed the point of law that sexual intercourse with a 9 year old could never be between a boyfriend and girlfriend. Worse still that there could be any romancing between a 30 year old man and the innocent 9

year old girl. It should be elementary for a Prosecutor representing the state in the Regional Court that sexual intercourse with a girl below twelve years is rape. Section 70 (4) of the Criminal Law Codification and Reform) Act, [*Chapter 9:23*] reads as follows:-

> "For the avoidance of doubt—
> (a) The competent charge against a person who—
> (i) Has sexual intercourse with a female person below the age of twelve years, shall be rape ----------"

Like every case of rape, the facts reveal a most sad chain of events. It also reveals how the sexual predator ensnares his victims. In this case the sexual predator is a paedophile, intent on having unlawful sexual intercourse with the young, vulnerable and easily enticed because of their young age. Complainant's evidence is that she was attending grade four when she was sent by her mother to buy bread at the tuckshop. After purchasing the bread, appellant the tuckshop owner cum sales person indicated he loved her to which she responded that she loved him too. Appellant requested that after leaving the bread at home she should return to him which she did.

Appellant invited complainant into his tuckshop where he had unlawful and unprotected sexual intercourse with her. According to complainant she did not tell her mother of what appellant had done to her because she believed he was her boyfriend.

A few days later she went to appellant's tuckshop to collect her change of 20 cents. She was in the company of her two friends. Appellant apparently too desirous to have sexual intercourse with complainant and not realising that the presence of her two friends nearby would later cause him problems invited complainant into his tuckshop and again ravaged her. Complainant's friends were curious enough as to peep through and saw what was happening. Upon getting home complainant's friends made a report of what they had observed complainant and appellant doing in the tuckshop resulting in the arrest of appellant.

Complainant was medically examined and the medical report reflects that she had raptures on her private parts, had tears on her hymen and that penetration was definite.

In *Tichafa Muhomba* v *The State* SC 57/2013 MALABA DCJ (as he then was), said the following at p 9.

> "The allegation in this case is that the sentence imposed is unduly harsh and induces a sense of shock. In *S* v *Mkombo* HB 140-10 at p 3 of the cycostyled judgment it was held that:
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> "The position of our law is that in sentencing a convicted person, the sentencing court has discretion in assessing an appropriate sentence. That discretion must be exercised judiciously having regard to both the factors in mitigation and in aggravation. For an appellate tribunal to

> interfere with the trial court's sentencing discretion there should be a misdirection see *S* v *Chiweshe* 1996 (1) ZLR 425 (H) at 429D, *S* v *Ramushu and Ors* S-25/93.
>
> It is not enough for the appellant to argue that the sentence imposed is too severe because that alone is not a misdirection and the appellate court would not interfere with a sentence merely because it would have come up with a different sentence."

The Supreme Court went on to confirm a sentence of twenty (20) years imprisonment of which three (3) years were suspended on conditions.

At pp 10-11 the Supreme Court continued as follows:

> "In *S* v *Nyamimba* 2002 (2) ZLR, 607 it was held that complainants in sexual cases are traumatised by the act of rape.
>
> It is trite that an appeal court will only interfere with the discretion of a trial court where the sentence is disturbingly inappropriate or where the discretion of a trial court in respect to sentence has been exercised capriciously or upon a wrong principle."

Also see *S* v *Sidat* 1997 (1) ZLR 487 (SC)

It goes without saying that the offence of rape is very serious. No wonder the legislature in its wisdom saw it fit that a rapist is "liable to imprisonment for life or any definite period of imprisonment" as provided for in s 65 (1) of the Criminal Law (Codification and Reform Act [*Chapter 9:23*].

The wave of rape cases is indeed disturbing. Most of the rapists target the young and vulnerable. Women are mostly targeted and they are no longer safe in our community. Young innocent girls are pounced upon by most unscrupulous mature men for their selfish ends traumatizing them and disturbing their innocent livelihoods.

In this case appellant raped complainant twice in circumstances of premeditation for the first time and recklessly without fear of being caught when he raped her when her friends were just outside the tuckshop.

In *Kufa Benedict Mafuwa* HH 664/17 MUSHORE J said at page 5:-

> "I feel it is necessary to mention in passing that although there is a growing sense of alarm as to the prevalence of these child abuse cases, I sense that society as a whole is also becoming de-sensitised as to the gravity of these offences. In a recent article published in Vol 1 of the Zimbabwe Electronic Journal 1/2016 Professor Geoff Feltoe aptly refers to the pandemic of sexual offences perpetrated upon children as the "evil of abuse". He repeats the call for an urgent call for stricter measures to curb the scourge upon vulnerable minors including the possibility of establishing a National Register of Sex Offenders requiring accused persons, who are convicted of such offences to be registered in a data base"

In this case appellant raped complainant twice. Appellant was a mature man at 30 years old while complainant was a 9 year old school girl. Appellant clearly took advantage of

complainant's tender age and his position as a tuck shop owner in the community where complainant lived.

In the reasons for sentence and the response to the Notice of appeal the Trial Court clearly applied sentencing principles judiciously. We are unable to find any reasons at law to dislodge the sentence. The sentence passed is in the vicinity of other related decided cases. See *Albert Mudyambanje* v *The State* HH 49/17, *Rassel Masenga* v *The State* HH 456/14 and *Saul Mukarati* v *The State* HH 312/14.

In the result we dismiss the appeal in its entirety.

HUNGWE J: *agrees*…….

*Bachi Mzawazi and Associates*, appellants' legal practitioners
*National Prosecuting Authority*, respondent's legal practitioners