THE STATE
Versus
OBVIOUS TSHUMA **HCBCR 942/24**

THE STATE
Versus
THULANI NYATHI **HCBCR 2837/24**

THE STATE
Versus
ARTWELL MOYO **HCBCR 313/24**

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 12 AUGUST 2024

Criminal Review

These 3 matters have been dealt with in one judgment as they raise the same issues. The first two matters were placed before me on automatic review whilst the third matter was placed before Ndlovu J.

I propose to refer to the offenders by their names for ease of reference. Obvious appeared before the court *a quo* at Plumtree Magistrates Court charged with 2 counts of aggravated indecent assault as defined in s66(1)(a) (ii) as read with s64 (1) of the Criminal Law (Codification and Reform) Act, [Chapter 9:23]. The allegations are that on 25 August 2023 at around 10:00 hours the 15 year old offender was left with the complainant, an 8 year old girl. He lowered his trousers and instructed the child to open her mouth which she did before he inserted his penis into her mouth.

On that same day he proceeded to where the second complainant who had also been left in his custody, lowered his trousers and forced the 3 year old girl to open her mouth before inserting his penis therein.

The offender pleaded guilty to both counts and was duly convicted. He was sentenced to 15 years imprisonment on each count. The sentences in both counts were ordered to run concurrently. He is to serve an effective 15 years imprisonment.

Thulani, a 14 year old boy appeared before the regional court sitting at Gwanda charged with rape as defined in s65 of the Criminal Law Code. The allegations are that on 6 October 2023 at around 10:00 hours the complainant who was aged 4 and was a neighbour to the

offender went to the offender's home and the two proceeded to the river to fetch water. The offender invited the 4 year old child to accompany him to a hill where he thereafter invited her to lie down facing upwards. He undressed her and proceeded to have sexual intercourse with her. The child told the offender's grandmother when they returned home. Thulani pleaded guilty and was duly convicted. He was sentenced to 17 years imprisonment of which 2 years were suspended for 5 years on the usual condition of good behavior. He is to serve an effective 15 years.

Artwell appeared before the same regional magistrate who convicted and sentenced Obvious. Artwell pleaded guilty and was duly convicted of rape. The allegations were that on 26 August 2023 at Farai Ndebele's homestead, the offender followed the complainant to her home where she had gone to do household chores. The complainant was the offender's 12 year old cousin. The two had been watering the garden together before the complainant went home to sweep the house. The offender asked for water and was told to fetch some from the kitchen. He did and went back to where the complainant was, grabbed her and made her lie on the bed before undressing her. He then had sexual intercourse with her. Following the conviction he was sentenced to 15 years imprisonment.

The convictions in all 3 cases are unassailable. The issue which exercised my mind is the sentence imposed on all three offenders.

The court in all three cases correctly articulated the provisions of s65 as amended by s3 of the Criminal Law Code Amendment 10/23 which provides that:

> "Section 65 ("Rape") of the principal Act is amended by the repeal of the resuming words in subsection (1) and 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 these 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".

Obvious was convicted of aggravated indecent assault and s66(1)(b)(ii) of the Criminal Law Code provides that on a conviction of aggravated indecent assault the offender shall be liable to the same penalty as is provided for rape. The aggravating circumstances provided for in s65(2) include, among others, the age of the person raped. In all 3 cases the complainants

were young children aged 8, 4, 4 and 12. They are vulnerable due to their very tender ages. The finding of aggravating circumstances can therefore not be faulted.

With such a finding the trial court had no option but to look to the penalty provided for rape committed in aggravating circumstances. The sentence is life imprisonment or any definite period of imprisonment of not less than fifteen years.

Before this amendment regional magistrates could exercise their discretion, depending on the circumstances, and impose sentences of as little as 4 years up to as much as 20 years imprisonment which is their jurisdictional maximum. However, with the amendment the starting point is 15 years where any one of the aggravating circumstances listed in ss2 of s65 exist.

The learned magistrates articulated the mitigatory as well as the aggravatory circumstances. They also had the benefit of probation officers' reports. Whilst such reports were important in showing the personal circumstances of each of the offenders, the probation officers' recommendations of the postponement of passing of sentence in terms of s358 (2) (a) of the Criminal Procedure and Evidence Act Chapter 9:07, a caution and discharge in terms of s358(2)(d) and the postponement of passing of sentence for each of the three offenders were recommendations which the trial court justifiably rejected as such recommendations failed to appreciate the specific penalty provision which the trial court was enjoined to follow.

The issue however, is whether the "not less than 15 years" speaks to an effective 15 years which ought not to be suspended either in part or wholly? I hold the view that if the legislature intended to make 15 years a minimum mandatory sentence which is not to be suspended if the net result would be a sentence of less than 15 years effective then it would have stated so.

I am fortified in saying so when regard is had to those statutes which provide for the imposition of minimum mandatory sentences. Section 114 of the Criminal Law Code provides for a minimum mandatory sentence on a conviction of stock theft unless special circumstances exist in which case a sentence less than that minimum mandatory sentence may be imposed.

"s114(3) provides that –

> "If a person convicted of stock theft involving any bovine or equine animal stolen in the circumstances described in paragraph (a) or (b) of subsection (2) satisfies the court that there are special circumstances peculiar to the case, which circumstances shall be

recorded by the court, why the penalty provided under paragraph (e) of subsection (2) shall not be imposed, the convicted person shall be liable to the penalty provided under paragraph (f) of subsection (2)".

S114(2) (e) provides that unless special circumstances exist the person shall be liable to imprisonment of not less than nine years or more than twenty-five years.

S114(4) goes on to specifically state that:

"A court sentencing a person under paragraph (e) of subsection (2) –

(a) To the minimum sentence of imprisonment of nine years, shall not order that the operation of the whole or any part of the sentence be suspended."

Equally s60 A (3) (a) and (b) of the Electricity Act, [Chapter 13:19] provides for a minimum mandatory sentence of 10 years unless there exist special circumstances.

Section 60 A (5) goes on to state that such minimum mandatory sentence shall not be suspended either in part or wholly if the effect of such suspension is that the convicted person will serve a period of less than ten years.

Section 128 of the Parks and Wildlife Act, Chapter 20:14 also provides for a minimum mandatory sentence of 9 years on a conviction of possession of ivory or any trophy of rhinocerous or any other specially protected animal, unless special circumstances exist.

S 128 (2) specifically states that -

"where no special circumstances are found by a court as mentioned in the proviso to subsection (1), no portion of a sentence imposed in terms of subsection (1) shall be suspended by the court if the effect of such suspension is that the convicted person will serve less than nine years imprisonment."

Section 89 of the Postal and Telecommunications Act [Chapter 12:05] also provides for a minimum mandatory sentence of not less than 10 years on a conviction of tampering, destroying, injuring or removing of telecommunication lines unless special circumstances exist justifying a departure from the imposition of such minimum mandatory sentence.

S89 (9) goes on to state: -

"A court sentencing a person to imprisonment under subsection (4) or (5) shall not order the suspension of any part of the sentence if the effect of such order is that the convicted person will serve a sentence of less than ten years …"

The explicit expression of the fact that the minimum mandatory sentence shall be the effective sentence to be served makes it clear that such minimum mandatory sentence shall be served. This is not so with s65. Granted the court starts at 15 years but there is nothing to stop such court from suspending the whole or part of such sentence where such suspension is justified.

I can do no more than cite with approval DUBE-BANDA J in *State* v *Matibeki* HB-76/24 where the learned judge had this to say:

> "it is important to determine whether s65 provides for a minimum mandatory sentence. This is so because the 8th Schedule to the Criminal Procedure and Evidence Act [Chapter 7:09] prohibits a suspension of sentence for any offence in respect of which any enactment imposes a minimum sentence and any conspiracy incitement or attempt to commit any such offence. The question is whether s65 of the Criminal Law Code provides for a minimum mandatory sentence. I make the immediate observation that where the legislature provides a minimum mandatory sentence it says so in clear and unambigous language and provides for the canvassing of special circumstances to take care of deserving cases. Section 65 merely decrees a sentence to be imposed on offenders convicted of the offence of rape. It does not prescribe for a minimum mandatory sentence."

I could not agree more. It is for these same reasons that I respectfully hold a different view to the decision in *The State* v *T G* and *State* v *Chimatya* HH-51-24.

The legislature is presumed to be aware of the laws of the country. It is therefore aware that s63 of the Criminal Law Code provides that:

> "The irrebuttable presumption or rule of law that a boy under the age of fourteen years is incapable of sexual intercourse shall not apply in Zimbabwe in relation to boys who have reached the age of twelve years."

Boys as young as 14 are therefore capable of having sexual intercourse and where such is against the consent of the other party or where as in the 3 cases under consideration, the children are of an age where they are incapable of consenting to sexual intercourse, they therefore commit rape. Are we therefore to conclude that the legislature in its wisdom meant to have 12, 13, 14, 15 and 16 year olds incarcerated to periods that are more than their years of birth? We have in these cases a 15 year old sentenced to a term of imprisonment which is equal to his age, a 14 year old sentenced to a term of imprisonment 3 years more than his age and a 16 year old to a term of imprisonment just a year less than his age.

Granted the 3 convicted juveniles committed serious offences but it has been said time without number that it is odious to impose the same penalty of imprisonment on a juvenile

which would otherwise be appropriate for a more mature offender. The sentence has to be as far as is possible rehabilitative for at such a young age, such offenders have bright prospects of reforming and proving themselves as assets to society. That chance should not be taken away from them by the imposition of a sentence that breaks them.

The sentencing of young offenders must be cognisant of the immaturity of youth (*S* v *Zaranyika & Ors* 1995 (1) ZLR 270 (H); *S* v *Hunda & Anor* 2010 (1) ZLR 387 (H); *S* v *Mavasa* 2010 (1) ZLR 28 (H))

I would equate it to "judicial barbarism" where the judicial system finds nothing amiss in sentencing a 14, 15 and 16 year old to sentences of 15 – 17 years as happened *in casu.*

The amelioration of the harshness of the "not less than 15 years" lies in the fact that the legislature did not say none of it shall be suspended so that the offender is left with less than an effective 15 years to serve.

I am aware that a meaningful suspension of the sentence would entail a large portion of the sentence hanging over the offender's head such that in the event of re-offending that suspended sentence coupled with the sentence to be imposed for the further infraction would result in a very long term of imprisonment. This is the least of my concern. If a young offender who commits rape is spared a lengthy effective term of imprisonment and fails to appreciate that resulting in re-offending during the running of the period of suspension, they can only have themselves to blame.

The sentences would have been appropriate given the heinous nature of rape especially against young innocent children but we must never lose sight of the fact that although older than their victims, these offenders are also children.

Suspending part of the prison term allows justice to wear a human face thereby allowing the penalty to fit the crime, the offender and be fair to society (*S Rabie* 1975 (R) SA 855*; S* v *Harrington* 1988 (2) ZLR 344).

A sentence whose effect is to completely destroy the offender serves no useful purpose. The children must be made aware that what they did was wrong but taking a sledge hammer to squash a fly is counter-productive. A day in prison can be a lifetime for a first offender, even a mature one. It can only be devastating for a youthful offender who is left bewildered at the

harshness of it and would tend to create resentment in the justice system, hardening a child whose chances of reforming are all but extinguished by the imposition of such a harsh sentence.

I must just pause and make the point that these children often find themselves in this predicament as a result of trying to experiment after watching pornography on their smart phones, as was the case with Obvious. Whilst these gadgets may be necessary for their school work their use must be strictly monitored by their guardians or parents, otherwise we risk the danger of creating a future generation of perverts.

The sentences meted out to the 3 offenders are however not in accordance with real and substantial justice to the extent that nothing was suspended from the 15 years and a horrendous 17 years was meted out on a 14 year old with 2 years suspended. One gets the impression that the court considered, erroneously so, that as long as the sentence was more than 15 years and a portion suspended that would ameliorate the shocking effect of the 17 years imposed on a 14 year old.

That said the convictions in all 3 cases are confirmed. The sentence is set aside in respect of Thulani whilst for Obvious and Artwell they are altered in order to allow for suspension of part of the sentence. An effective term of imprisonment is however unavoidable for all three.

The 3 are accordingly sentenced as follows:

Obvious - 1st count - 15 years imprisonment of which 10 years is suspended for 5 years on condition the accused does not within that period commit any offence of a sexual nature and for which upon conviction he is sentenced to a term of imprisonment without the option of a fine.

-Count 2 - 15 years imprisonment of which 10 years is suspended for 5 years on condition (the same condition as that on the first count)

The sentences are to be served concurrently.

Thulani - 15 years imprisonment of which 11 years is suspended for 5 years on condition … (same condition)

Effective - 4 years imprisonment

Artwell - 15 years imprisonment of which 9 years is suspended for 5 years on condition … (same condition)

Effective - 6 years imprisonment

Kabasa J ……

Ndlovu J ……. I agree