**THE STATE**

**Versus**

**NGONIDZASHE NKOMO HCBCR 1186/24**

**THE STATE**

**Versus**

**NQOBANI NYATHI HCBCR 2814/24**

**THE STATE**

**Versus**

**SYDNEY SIBANDA HCBCR 2664/24**

IN THE HIGH COURT OF ZIMBABWE

NDLOVU J

BULAWAYO 28 OCTOBER 2024

**Criminal Review**

**NDLOVU J:** These 3 matters have been dealt with in one judgment as they raise the same issue. They were placed before me on automatic review in terms of *section 57* of the *Magistrates Court Act, Chapter 7:10*

***NGONIDZASHE NKOMO:***

He appeared before the Regional Magistrate sitting at Plumtree charged with **Attempted Rape** in contravention of s65 as read with s189 of the Criminal Law (Codification and Reform) Act, [Chapter 9:23] ***[the*** ***Code].*** The allegations against him were that on 15 February 2024 in the afternoon he met the complainant, aged 7 years, coming from School with two other children. The accused chased the other two children away and ordered the complainant to remain behind. He then ordered the complainant to bend down. He removed her panty to the knee level. The complainant escaped the imminent rape by bolting away while the accused was in the process of unzipping his trousers. At the material time, he was 20 years old. He pleaded guilty to the charges and was sentenced to 15 years imprisonment. He is a first-time offender.

***NQOBANI NYATHI.***

He also appeared at the Regional Court at Plumtree but before a different Regional Magistrate. He was charged with **Attempted Rape**. At the time of the commission of the offence, he was 30 years old. The allegations were that on 7 October 2023, the offender went to the 23-year-old complainant’s homestead and knocked at her bedroom window telling her that he wanted to have time with her. His proposal was turned down by the complainant. Undeterred, the offender forcibly entered the complainant’s room and dragged her out and to the field. In the field, he undressed the pregnant complainant and inserted his fingers into her vagina as she struggled with him. While at that, one Ndlovu arrived at the scene and the offender fled away. He pleaded guilty to the charges and was sentenced to 15 years imprisonment. He is a first-time offender.

***SYDNEY SIBANDA***

He was 22 years old when he committed the offences. He appeared before the Regional Magistrate in Bulawayo charged with **[1]** **Attempted Rape** and **[2]** **Criminal Insult** as defined in *s95[1][a]* of the *Code.* Nothing of concern arises out of Count 2 and the proceedings therein are duly confirmed.

***COUNT 1:***

The allegations were that on the 7th of October 2023, the offender followed the 15-year-old complainant who was from a traditional ceremony and proposed love to her. His proposal was spurned. He then tripped the complainant to the ground, undressed her, lowered his trousers and went on top of her. The complainant bit him as he was unzipping his trousers whereupon he fell and she escaped. He pleaded not guilty and was sentenced to 18 years imprisonment of which 3 years imprisonment were suspended on the usual conditions of good conduct. He is a first-time offender.

The convictions in all 3 cases are unassailable. However the same cannot be said about the sentence imposed on each offender.

*S65* as amended by *s3* of the *Criminal Law Code Amendment 10/23* provides that:

***“Section 65 (“Rape”)(4) 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 –***

1. ***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***
2. ***if there are no aggravating circumstances to a period of not less than five (5) years and not more than fifteen (15) years”.***

It is trite in our law that a conviction for committing an attempt to commit a principal crime makes an offender liable to be punished to the same extent as having been convicted of committing the principal crime. *S*192 of the Code refers. It is equally trite that in our jurisdiction, notwithstanding the aforesaid position of the law, our Courts from time immemorial have always punished those convicted of having attempted to commit an offence to a lesser degree of punishment compared to those who stood convicted of having committed the full crime. This hallowed approach answers to nothing else other than common sense. The moral blameworthiness of an attempted murderer is less than that of an actual murderer, simply because the latter has terminated a person’s life, a feat not achieved by the former notwithstanding his intention and his failure in that enterprise. *Chapter V PART 1* of the Sentencing Guidelines *S,I 146/23* bears testimony to this position.

 In the 3 cases, the trial magistrates found aggravating circumstances to be existing. Logically they had to then look to the penalty provided for rape committed in aggravating circumstances. It is life imprisonment or any definite period of imprisonment of not less than fifteen years.

The question, however, is whether the 15 years are an effective 15 years imprisonment. The legislature did not say so in the enactment. If it intended to make 15 years a minimum mandatory sentence it would have stated so as it did in some statutes or sections of the Code. For instance, *s114* of the *Code* provides for a minimum mandatory sentence on a conviction of stock theft unless special circumstances exist and *s128* of the *Parks and Wildlife Act, Chapter 20:14* does the same for a conviction of possession of ivory or any trophy of rhinoceros or any other specially protected animal.

The legislature is presumed to be aware of the laws of the country.

*S 65* of the Code does not follow the construction of its counterpart *s114* or *s128* of the Parks and Wildlife Act. There is no mention of special circumstances in *s65* of the *Code*. In my view, while the court starts at 15 years there is nothing to stop it from suspending the whole or part of such sentence where such suspension is justified by the facts and circumstances of the case.

I fully associate myself with the reasoning and decision in *State* v *Matibeki* HB-76/24 and respectfully hold a different view from the decision in *State* v *T G* and *State* v *Chimatya* HH-51/24.

The 3 convicted offenders committed serious offences. However, they committed Attempted Rape and not Rape. The legislature did not say none of it shall be suspended, precedent is that an attempt to commit a crime is punished less than the commission of the full crime. Appropriate penalties are appreciated and called for at all times. The public must have confidence in and an appreciation of how offenders are punished. Put differently, the courts must pass sentences that make sense from a simple point of logic to an average citizen. Not to differentiate the punishment one gets for raping and one gets for attempting to rape can hardly make sense let alone build the trust and confidence in the judicial system in the eyes of the members of the public the Courts serve.

Suspending part of the prison term is not a reduction of sentence. It serves to shepherd one ‘s future conduct. The offender’s good behaviour in future is a win-win for everyone. It gives justice to wear a human face. It enables the penalty to fit the crime, the offender and the interests of society. In any case, a punishment that is not blended with a sufficient measure of mercy is wanting in civilization. A measure of mercy is an element of justice.

The sentences meted out to the 3 offenders are therefore not in accordance with real and substantial justice because the trial courts seem to have erroneously thought, that the law did not allow them to suspend a portion of the 15 years. They must accordingly be vacated. The convictions in all the 3 cases are confirmed. The sentence imposed in each case is set aside and substituted with the following:

***NGONIDZASHE NKOMO:***

15 years imprisonment of which 5 years 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 a term of imprisonment without the option of a fine. ***Effective: 10 years imprisonment.***

***NQOBANI NYATHI:***

15 years imprisonment of which 8 years 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 a term of imprisonment without the option of a fine.

 ***Effective: 7 years imprisonment.***

***SYDNEY SIBANDA:***

***COUNT 1***. 15 years imprisonment of which 6 years 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 a term of imprisonment without the option of a fine.

***Effective 9 years imprisonment.***

***ORDER:*** The 9 Months Imprisonment in ***Count 2*** shall run concurrently with the 9 Years imprisonment in ***Count 1.***

Each offender must be recalled and be advised of the outcome of this Review.

 NDLOVU J ………………………

DUBE J ………………………. I agree