THE STATE **HCBCR 5192/24**
versus
BANELE SIBANDA

THE STATE **HCBCR 5559/24**
Versus
NICHOLAS NDLOVU

HIGH COURT OF ZIMBABWE
MUTEVEDZI & NDLOVU JJ
BULAWAYO 27 NOVEMBER 2024

Criminal review

MUTEVEDZI J: The issues which I discuss in this judgment are likely to open a Pandora's box. That box, in Greek mythology was a habitat of all the evils of the world. The wickedness was allegedly released when a woman called Pandora, overtaken by curiosity opened the box which had been left in the custody of her husband. But at the same time the box also contained hope which did not escape when it was unlocked. Unlike the proverbial can of worms which represents problems only, the Pandora's box epitomises inquisitiveness and aspiration for understanding but which can lead to both unwelcome consequences on one hand and desirable results on the other. It is my hope that only the positives will prevail after this endeavour. [1]

[1] In relation to the cases at hand, it was out of either sheer luck or Divine intervention that *Banele Sibanda* did not rape the complainant his cousin who was nine (9) years old at the time. She had been left in his custody whilst the mother went to Church. He called her into his room on the pretext that he wanted her to pack some clothes. When she entered the room, he seized her, threw her onto some blankets, forcibly removed her under garments and rode on top of her. He had at the time he undressed her, simultaneously taken off his own clothes and underwear. His monster was erect. But before he could proceed further, the complainant's twin brothers burst into the room. They alarmed *Banele* who jumped off

[1] Some of these views were accessed from https://en.wikipedia.org/wiki/Pandora's_box#cite_; Accessed on 26 November 2024

the complainant and ordered her out of the room. One thing led to the other until a report which led to his arrest was made. He was arraigned before the court of a regional magistrate for his trial. He protested his innocence but the evidence was just overwhelming. He was duly convicted and sentenced to:

> "15 years imprisonment of which 6 years imprisonment is suspended for 5 years on condition the offender does not within that period, commit any offence of a sexual nature for which when convicted he is sentenced to imprisonment without the option of a fine."

[2] In the case of *Nicholas Ndlovu,* the attempted rape was equally brazen. He met the complainant a fourteen-year-old girl who was on her way to school. He told the girl that he wanted to have sexual intercourse wither. She refused. He then grabbed her and dragged her into nearby shrubs. The complainant raised alarm. Passengers in a commuter omnibus which was passing by the road heard her cries for help. When they disembarked to assist the girl, the offender took to his heels. They gave chase and apprehended him. He was tried in the same regional court as Banele Sibanda. He got almost the same punishment which once more was couched as follows:

> "15 years imprisonment of which 7 years imprisonment is suspended for 5 years on condition the offender does not within that period, commit any offence of a sexual nature for which when convicted he is sentenced to imprisonment without the option of a fine."

[3] Subsequently, the records of proceedings were placed before me for review in terms of s 57(1) of the Magistrates Court Act [Chapter 7:10]. I have decided to combine the two reviews because the issues which arise therefrom are the same. The starting point is for me to point that the convictions in both the above cases are irreproachable. In the first case, the evidence was properly assessed and the verdict of guilty logically arrived at. In the second case, the offender pleaded guilty and was duly convicted. I therefore confirm the convictions as being in accordance with real and substantial justice without hesitation. What caught my attention were the sentences which the regional magistrate imposed. I am not worried about their severity because they may well fall within the ranges imposed for similar cases. The seriousness with which the crime is viewed by the Legislature cannot be doubted. The court aquo in both instances justified the imposition of the fairly lengthy punishments. In *Banele*'s case, it considered that the age difference between the offender

and the complainant was fourteen years; that the offender was a close relative of the complainant and was expected to have acted in loco parentis instead of the abuser that he became; and that the complainant was only a child at the age of nine (9) years. In the case of *Ndlovu* the offender was forty-three years old whilst the complainant was just fourteen. The age gap between them was a whopping twenty-eight years. In fact, there was evidence that the offender's eldest child was the same age as the complainant. Further, the court found that he threatened to kill her if she resisted his violent advances. What however I found wrong with the sentences was the decision to suspend a portion of them once the trial magistrate had settled for fifteen years imprisonment. It is impermissible at law.

[4] For a better understanding of the point I wish to drive home, perhaps the starting point should be to relate to what my sister MUREMBA J so aptly put in the case of *S v Kamudzandu* HH 215/17 at p. 3 of the cyclostyled judgment when she remarked that: -

> "It is interesting to note that in terms of s 192 of the Criminal Law Code for attempting to commit any offence, the punishment is the same as the one that is imposed on an accused who has committed the offence concerned. This penalty came about as a result of the codification of the criminal law in 2004. The section states:
>
> **"**Subject to this Code and any other enactment, a person who is convicted of incitement, conspiracy or attempting to commit a crime shall be liable to the same punishment to which he or she would have been liable had he or she actually committed the crime concerned."
>
> Put differently, a conviction of attempted rape attracts the same penalty as a conviction of rape. This means that it is possible for an accused to be sentenced to 20 years imprisonment for a conviction of attempted rape. It all depends on the badness of the case. What is considered are the circumstances surrounding the commission of the offence, the mitigatory factors and the aggravatory factors all put together."

[5] The above approach cannot be debated. It is the law. It must follow therefore that there must not be any differentiation when sentencing one person convicted of attempted rape from another convicted of attempted rape. The sentences for rape as they appear in the amended s 65 of the Code are as follows:

> **"3 Amendment of section 65 of [Chapter. 9:23]**
> Section 65 ("Rape") (4) of the principal Act is amended by the repeal of the resuming words in subsection (1) and the 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 those factors), to life imprisonment or any definite period of imprisonment of **not**

> **less than fifteen year**s; 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." (the bolding is my emphasis).

[6] In explaining the above provision this court stated in the case of *S v Sixpence and Others* HH 567/23 at p. 17 of the cyclostyled judgment that:

> "My reading of the new provision is that it creates two sentencing regimes for the offence of rape. For starters it prescribes that where rape is committed and a court makes a finding which is unfavourable to the offender regarding the presence of any one or more of the factors listed in subsection (2) of s 65 that finding shall constitute an aggravating circumstance. The offender becomes liable or in other words shall be sentenced to life imprisonment or to any determinate period of incarceration which is not below fifteen years. Put differently, the amendment creates a minimum mandatory sentence of fifteen years imprisonment for rape committed in aggravating circumstances."

[7] Later in the same decision on the same page, the court put it thus:

> "The second sentencing regime attendant from the s 65 amendment is that where a court convicts an offender of rape and determines that it was not committed in aggravating circumstances, the law once more circumscribes the punishment. It provides a minimum mandatory sentence of five years and a maximum of fifteen years imprisonment. What this means is that no one convicted of rape under whatever circumstances and even in the face of palpably weighty mitigation can be sentenced to imprisonment of less than five years."

[8] In *S v TG (Redacted) & Anor* HH 51/23 this court stated at p.7 that:

> "Both the fifteen years (where the crime is aggravated) and the five years (in other cases) are minimum mandatory sentences."

In *S v Wallace Kufandada and Anor* HH 233/24 at p. 12 of that judgment, MUREMBA J commenting on the amended s 65 also acknowledged that:

> "Put differently, the amendment creates a minimum mandatory sentence of fifteen years imprisonment for rape committed in aggravating circumstances and a minimum mandatory sentence of five years and a maximum of fifteen years' imprisonment for rape committed in non-aggravating circumstances."[2]

[9] I do not therefore think that it can be debated that the new s 65 provides for minimum mandatory sentences for the crime of rape. Yet in all this I acknowledge the contrary argument so well put out by my brother DUBE-BANDA J in the case of *S v Confidence Matibeki* HB 76/24 at p. 4 of the cyclostyled judgment where he remarked that:

[2] The same sentiments were expressed in the case of *The State v TG (redacted) and The State v Chimatya* HH 51/24

> "Back to the question, it is important first to determine whether s 65 provides for minimum mandatory sentences. This is so because the 8th Schedule to the Criminal Procedure & 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 s 65 of the Criminal Law Code provides for a minimum mandatory sentence? I make the immediate observation that where the legislature prescribes a minimum mandatory sentence it says so in clear and unambiguous language and provides for the canvasing 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." (the underlining is my own)

[10] Earlier in the same decision, at pp. 4-5, HIS LORDSHIP had acknowledged that:

> "Section 65 as amended enjoins the court to make a finding whether or not the offence was committed in aggravating circumstances. In a case where the offence was committed in aggravating circumstances the sentence is life imprisonment or any definite period of imprisonment of not less than fifteen years. If it was not committed in aggravating circumstances, to a period of not less than five (5) years and not more than fifteen (15) years. The penalty provision does not exclude from its operation juveniles convicted for the crime of rape. In essence it means a juvenile convicted of rape committed in aggravating circumstances may be sentenced to life imprisonment or imprisonment not less than fifteen years. And a juvenile convicted of rape not committed in aggravating circumstances may be sentenced to a period of not less than five years and not more that fifteen years. Therefore, a court that has convicted a juvenile for rape must look to the provisions of s 65 of the Criminal Law Code as amended for sentence."

[11] But to me, the findings as quoted in paragraphs [9] and [10] above are with respect, mutually exclusive. They cannot exist at the same time. My understanding of a minimum mandatory sentence is that it is a sentence which simply stipulates the minimum punishment that an offender can be sentenced to by a court. That minimum punishment is predetermined by Parliament and is not subject to the discretion of a court as long as certain predefined conditions are satisfied. I do not need to belabour this judgment by tracing the rationale of minimum mandatory sentences serve to say in the case of rape, the sentences are designed to eradicate this crime which is threatening to annihilate society's moral fabric. All that Parliament is saying to judicial officers in the case of rape is that it is such a wicked and detestable crime that those who commit it must be taken away from society for periods that society itself has predetermined and that the nature of the offence itself takes the sentencing decision out of the single opinion of a judge or magistrate. Instead the punishment is decided by the collective opinion of society.[3]

[3] See also the views of David Muhlhausen (May 27, 2010). "Theories of Punishment and Mandatory Minimum Sentences". *Heritage.org*. Archived from the original on October 27, 2016; accessed on 26 November 2024

[12] In the case of *S v Thomas Brighton Chirembwe* HH 162/15 TSANGA J pointed out at pp. 4-5 of the judgment that freedom from violence which encompasses freedom from sexual violence is guaranteed under s 52 of the Constitution of Zimbabwe, 2013. She remarked that:

a. "The enjoyment of rights such as bodily and psychological integrity, freedom from violence, inherent dignity take on their specific meaning in the lives of men and women when real life experiences are examined with gender lenses. For women and girls, the fear of violence is generally that which arises from the actions of non-state actors. Rape is a particularly serious form of gender violence against women and girls which impacts on their ability to enjoy certain guaranteed rights as contained in international instruments that we have signed as well as articulated in our Constitution."

[13] The legislation of sentences as mandatory minimum, has nothing to do with their inclemency but has everything to do with sentiments such as those expressed in *Chirembwe* (supra). Although it would be ideal to do so, the characterisation of mandatory minimum sentences cannot be based on the safety valve of allowing judicial officers to find special circumstances which would allow them leeway to impose sentences other than the minimum prescribed. I stated in *Sixpence* (supra) that s 65 is analogous to s 47(4) of the Code which provides for punishments for murder. There is no argument or at least I haven't encountered one, that where the murder was committed in aggravating circumstances, the law does not provide for a minimum mandatory sentence of twenty (20) years imprisonment because the judge is not given discretion to find the existence of special circumstances or because the provision does not specifically state that the sentence is a minimum mandatory penalty. It need not do so.

[14] In *S v Molo Mweembe and Anor* HB 102/18 MATHONSI J (now JA) weighed in on that argument and said that:

> "… mandatory minimum sentences, by their very nature, constitute an invasion of the usual sentencing discretion of the court, which it exercises having regard to the various relevant factors of the case which should inform the assessment of an appropriate sentence. With mandatory sentences the legislature intervenes and prescribes the sentence to be imposed usually in respect of prevalent crimes which are causing serious economic or social harm. One would want to believe that when prescribing a mandatory sentence, the legislature would have already taken into account the mischief that is intended to be addressed by it and fixed stern deterrent punishment that fits the offence."

The background to the amendment of s 65 is an open secret. The general public consensus was that many rapists were escaping with punishments which society viewed as nothing

but a slap on the wrist. The reaction was in my view, this legislative fury which resulted in the enactment of penalties that a section of society believes to be unduly harsh. But that is beside the point. The harshness of the sentence or the failure by the sentencing court to find avenues of palliating that severity must be non-issues in the determination of whether or not a particular sentence is a mandatory minimum penalty.

[15] It is admitted that for failure to provide for the finding of special circumstances, an enactment prescribing a mandatory minimum penalty may be found to be unconstitutional. But the law in Zimbabwe is that every enactment enjoys the presumption of constitutional validity until it has been validly set aside through the appropriate legal procedures.[4] The purpose of that presumption is to place the onus on whoever is alleging invalidity to prove such. [5] A court may not refrain from following the dictates of the law on the basis of some perceived potential unconstitutionality of a law.

[16] I equally note the argument that where it intends to enact a mandatory minimum sentence, the Legislature usually expressly states that the sentence is a minimum mandatory one. That however is not a rule of thumb. I have already referred to s 47 (4) of the Code in relation to sentences for murder. That provision is silent on whether or not the penalty specified therein is a minimum mandatory sentence. It is equally mute as to whether or not a court can suspend a portion or the whole of the prison sentence. Yet those issues are given effect to in s 358(2) as read with the 8th Schedule to The Criminal Procedure and Evidence Act [Chapter 9:07] (the CPEA). The CPEA regulates the entirety of criminal procedure in Zimbabwe. It is the Bible to which judicial officers must turn in the absence of specific provisions in a particular statute when seeking guidance on how to administer a penalty apparently designed to operate as a mandatory minimum punishment.

[17] If any debate remained on the issue, it must be terminated by the deliberations in Parliament itself at the time that the s 65 amendment was being debated. Commenting on the Criminal Law Code Bill which ultimately became the law that introduced the new s 65, VeritasZim, an organisation that is renowned for providing information on the work of the

[4] Refer to the case of *Magaya v Zimbabwe Gender Commission* Sc 105/21
[5] The case of *Levison Chituku and Others V Minister of Lands, Agriculture, Climate and Rural Resettlement and Others* CCZ 3 /23 is instructive.

Parliament of Zimbabwe and the laws of Zimbabwe and makes public domain information widely available, in its Bill Watch No. 1 /2023 acknowledged that Parliament through the Criminal Law Code Bill was going to introduce mandatory minimum sentences for rape. [6]

[18] I have already stated that by virtue of s 192 of the Code and as explained in case authorities, the sentencing of a person convicted of attempted rape shall be the same as that of one convicted of an actual rape. The common law rule used to be that minimum mandatory sentences did not apply to attempts to commit the specified crime unless a statute said so. It appears that when our criminal law was codified, s 192 made sweeping alterations to the common law position by stating that the sentences for all attempts shall be the same as those for persons who would have committed the actual offence. If it remained in doubt that the situation applied to minimum mandatory sentences, then s 358(2) and the 8th Schedule clarified it beyond argument.

[19] For the above reasons, my conviction remains unshaken that the sentences for rape which are provided under s 65 of the Code are by any standard mandatory minimum sentences. Once the above conclusion is made, the court must go back to the question whether or not it was appropriate to suspend a portion of the prison terms which were imposed on the two offenders in this case. All the authorities that I have cited above appear to be in unison that a court cannot suspend a portion or the whole of a sentence where an enactment provides for a minimum mandatory penalty. In many of its judgements[7] this court has explained that the suspension of a term of imprisonment on various conditions which is usually resorted to by the courts is not a thumb suck but is premised on provisions of the law. It is permitted by s358 (2) (b) of the Criminal Procedure and Evidence Act (the CPEA) which provides that:

> (2) When a person is convicted by any court of any offence <u>other than an offence specified in the Eighth Schedule</u>, it may—
> (*a*) …
> (*b*) pass sentence, but order the operation of the whole or any part of the sentence to be suspended for a period not exceeding five years on such conditions as the court may specify in the order; (underlining is my emphasis)

[6] See https://www.veritaszim.net/
[7] See for instance S v World Kera HH 425/222

[20] From the above, it is equally apparent that s358 (2) constricts the power of a court to suspend imprisonment either wholly or in part on any condition in relation to those offences which are specified in the 8th schedule to the CPEA. That schedule is couched in the following terms:

> **EIGHTH SCHEDULE (SECTION 358)**
>
> OFFENCES IN RELATION TO WHICH POSTPONEMENT OR SUSPENSION OF SENTENCE, OR DISCHARGE WITH CAUTION OR REPRIMAND, IS NOT PERMITTED
> 1. Murder, other than the murder by a woman of her newly born child.
> 2. Any conspiracy or incitement to commit murder.
> 3. Any offence in respect of which <u>any enactment imposes a minimum sentence</u> and any conspiracy, incitement <u>or attempt</u> to commit any such offence. (underlining is my emphasis)

[21] I note that the trial magistrate in this case, although she did not specifically state it, must have determined that the attempted rapes were committed in aggravating circumstances. If that was her intention and she had found so, it was incumbent upon her to impose a minimum fifteen years imprisonment. In doing so and as required by s 358(2) in conjunction with the 8th Schedule, she could not suspend a portion or the whole of the prison term. If the finding was that the crimes were not aggravated, the trial court was once again required to impose a prison term of not less than five years or more than fifteen years. Needless to state, whatever term it would have resorted to could not be suspended in part or wholly by virtue of the same provisions stated above.

[22] For the avoidance of doubt, I conclude by restating that where a court has convicted an offender of the crime of attempted rape, the steps that it must follow are principally the same as those it takes in sentencing rape convicts. The starting point is to decide whether or not the attempted rape was committed in aggravating circumstances. If it was the minimum mandatory sentence of fifteen years must be imposed. Nothing can and nothing must be discounted from that sentence. If a court imposes anything more than fifteen years once again it cannot suspend any portion of the sentence on the guise that it will remain with at least the minimum fifteen years imprisonment.[8]

[8] See the case of S v World Kera (supra)

[23] In accordance with the above findings, I reach the conclusion that the sentences imposed in the cases of the two offenders were impermissible. They must be vacated. As such I make the following order:

a. That the sentences imposed in the case of *S v Banele Sibanda* on Gwanda CRB NO. GNDR 152/24 and in the case of *S v Nicholas Ndlovu* on Gwanda CRB NO. GNDR 196/24 be and are hereby quashed
b. Each of the matters is remitted to the trial court for it to reconsider whether or not each of the crimes was committed in aggravating circumstances and to thereafter, resentence each of the offenders in accordance with the principles set out in this judgment
c. The periods that each of the offenders may have served to date shall be considered as part of the new sentences which may be imposed

[24] I have consulted my brother NDLOVU J who agrees with the above views and the order I make.

NDHLOVU J:

[25] I have read the judgment prepared by MUTEVEDZI J. I entirely agree with his reasoning and the attendant order. I wish to state that in the recent past in the case of *S V Ngonidzashe Nkomo and Others* HB 154/24, I expressed the view that it was possible to suspend a portion of a prison term imposed for attempted rape. In doing so, I clearly overlooked the provisions of s 358(2) of the CPEA as read with paragraph 3 of the 8th Schedule whose essence has been explained by my brother herein. That the sentences of rape in s 65 of the Code are mandatory minimum penalties cannot be debatable. Given that position, the suspension of a portion of any prison term for attempted rape is therefore outlawed by the provisions already cited. In the circumstances, the decision in *S v Ngonidzashe Nkomo* can only be of relevance for purposes other than the sentencing of offenders convicted of attempted rape. Judicial officers in the lower courts may be guided accordingly.

Mutevedzi J……..

Ndlovu J …… ……. I agree