Judgment No. HB 60/2003
Case No. HC 897/2003
CRB REG 335/01

THE STATE

Versus

DAVIOUS NYATHI

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 22 MAY 2003

Criminal Review

NDOU J: The accused was charged of ten counts of rape of his juvenile daughter. Despite his protestations the Regional Magistrate in Gweru, sitting in the Central Region, found him guilty on all the ten counts. He was convicted after a lengthy trial the greater part of which he was legally represented. Considering the quality of the evidence adduced during the trial the findings of guilt cannot be faulted. The assessment of the testimony and the facts of the case by the learned Regional Magistrate is admirably in terms of the principles of criminal procedure.

The accused was sentenced as follows:

> "Count 1 and 2 as one – 10 years imprisonment
> Count 3 – 7 years imprisonment
> Counts 4 to 8 – 10 years imprisonment
> Count 9 – 7 years imprisonment
> Count 10 – 10 years imprisonment
> Further count 3 ordered to run concurrently with counts 1 and 2. Count 9 to run concurrently with counts 4 to 8. Total 30 years imprisonment."

This is mathematics in sentencing. *In casu,* although the individual sentences imposed in each count are in no way excessive, their cumulative effect is so excessive as to call for interference – see *S* v Hassim 1976(2) PH H58(N). It is trite that there are no hard and fast rules dictating whether a court should treat a number of counts separately or together for the purpose of sentence. A trial court has a very wide

discretion and, provided that discretion is exercised on reasonable grounds, an appeal court or review judge will not interfere – see *S* v *Coetzee* 1970(4) SA 83 (RA). The sentence must, of course, fall within the court's jurisdiction – see *S* v *Makurira* 1975 (3) SA 83 (R). Where multiple counts are closely connected or similar in point of time, nature, seriousness or otherwise, it is a useful way of ensuring that the punishment imposed is not unnecessarily duplicated or its cumulative effect not too harsh on the accused. Nevertheless the practice is undesirable and should only be adopted by lower courts in exceptional cases – see *S* v *Young* 1977(1) 602 (A); *S* v *Van Zyl* 1974(1) SA 113 (T) and *S* v *Van der Merwe* 1974(4) SA 523 (N).

Trial magistrates must adopt this approach sparingly and only in exceptional instances in the interests of the accused. Once this approach is, however, adopted then the principles set out in *Joseph Chirwa* v *S* HH-79-94 and *Anele Sifuya* v S HH-77-02 must be followed In the *Chirwa* case, GARWE J (as he then was) said at page 3 of the cyclostyled judgment-

> "The position is now fairly well settled that in cases involving multiple counts, the correct approach to sentence is either to take all counts as one for the purposes of sentence and then impose a globular sentence which court considers appropriate in the circumstances or alternatively to determine an appropriate sentence for each count taken singly so that the seriousness of offence is properly reflected. The court would then determine a realistic total which is considers appropriate in the circumstances and where necessary the severity of the aggregate sentence on all the counts taken together may be palliated by ordering some counts to run concurrently with others."

It seems to me that the learned trial magistrate adopted a combination of the two approaches. The trial magistrate erred by failing to palliate the aggregate sentence in order to come with a realistic total. The sentence of 30 years imprisonment is manifestly excessive and is in excess of the outer limit our courts would ordinarily impose – see *S* v *Sherman* SC-117-84. In this case MCNALLY JA

remarked –

> "How does one begin to measure the outer limits of a sentence in a case of this magnitude? One may say that even murder with actual intent often attracts a sentence of 16-18 years. One may ask – what sentence would be appropriate where a quarter of a million dollars is stolen and nothing is recovered? What sentence would be appropriate where two or six million dollars is involved? These considerations and suggestions suggest to me that a twenty year sentence for a crime of dishonesty unaccompanied by violence must be approaching the outer limit of what any court in this jurisdiction would impose for such crimes." See also *S* v *Sawyer* HH-231-99

On pages 3 – 4 of the cyclostyled judgment in *Anele Sifuya's* case *(supra)* GUVAVA J remarked:

> "In *S* v *Chikanga* SC-123-93 the Supreme Court commented that it knew of no reported case in South Africa or Zimbabwe, whether for only one offence or more where a man has been sentence to more than 25 years imprisonment. The court took the view that life imprisonment rarely exceeds 16 years in Zimbabwe and by statute more than one term of life imprisonment is served concurrently. The sentence imposed in this case was in excess of the outer limit generally accepted by the courts in this jurisdiction."

In casu, the sentence of 30 years imprisonment is well above the outer limit calling for interference. The sentence imposed here is so excessive that it is viewed as being disturbingly inappropriate. Whilst accepting that sentence is pre-eminently a matter for the discretion of the trial court I find that the exercise of such discretion *in casu,* was tainted with misdirection. *Ramushu and Ors* v *S* SC-25-93; *S* v *Matanhire & Ors* HH-18-02; *S* v *Mundowa* 1998 (2) ZLR 392 H and *Mavhundura* v *S* HH-91-02

The aggravating facts of this matter is that, after divorcing her mother, the accused remained raping their sixteen year old daughter. He is the natural father of the complainant. The accused has other two wives in his polygamous family. He raped his daughter ten times over a period of around one and half years. Force was used to achieve the rapes. Offences of this kind are prevalent and expose children to

Extreme trauma and incurable diseases. The learned trial magistrate was at least correct in regarding lengthy imprisonment as being appropriate. Save for what I said above about the length of imprisonment I otherwise agree with him.

I, accordingly, confirm the convictions in all the ten counts. I, however, set aside the sentence by the trial court and the following is substituted:

> "Counts 1 and 2 treated as one – 10 years imprisonment
> Count 3 – 7 years imprisonment
> Count 4 to 8 treated as one – 10 years imprisonment
> Count 9 – 7 years imprisonment
> Count 10 – 8 years imprisonment
> It is ordered that the sentences in counts 1 and 2, 3, 4 to 8 and 9 are to run concurrently. Effective sentence is 18 years imprisonment."

Cheda J …….. I agree