**THE STATE**

**AND**

**THABANI SIBANDA**

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 26 MAY 2011

Review Judgment

**MATHONSI J:** The accused was born on 29 September 1995 and will therefore celebrate his 16th birthday on 29 September 2011. He is a form 3 pupil at Magwegwe High School in Bulawayo.

He and the 6 year old complainant reside with their parents at a house in Old Pumula Bulawayo and the complainant, a Grade 2 pupil at Robert Sinyoka Primary School, Bulawayo is the accused's step sister. Her mother married the accused's father after the accused's mother passed away.

On 15 December 2009, when he was 14 years old, he was convicted by the Regional Magistrates' Court in Bulawayo of 2 counts of rape of the same complainant. He was sentenced to moderate corporal punishment of 6 strokes with a rattan cane. On 19 April 2011 the accused once again appeared before the Regional Magistrate facing one count of rape. The allegations are that on the morning of 14 January 2011 he had again raped his step sister.

The learned Regional Magistrate duly convicted the accused and sentenced him to 16 years imprisonment of which 8 years imprisonment was suspended for 5 years on condition of future good behaviour, leaving the accused with an effective imprisonment term of 8 years.

In arriving at that sentence the Regional Magistrate reasoned as follows;

> "Accused was described as a reserved person who is difficult to understand. He has no friends. A probation officer could have done a better job but knowing how scarce resources are, I knew for certain that waiting for the probation officer's report was going

to be an exercise in futility. I therefore decided to proceed to finalise this matter without the benefit of a probation officer's report.

Accused and complainant were living under the same roof as brother and sister under their parent's marital arrangement. Accused's father told the court that he talked to him after the first conviction and he promised not to do it again. He has however repeated it. The court imposed corporal punishment and warned accused against repeat conduct. He has repeated it. Indeed accused is a difficult character to understand. What however one sees is complete disregard of authority by the juvenile. He takes things casually.

Indeed imprisonment and the pains associated with it is going to have a devastating effect on the accused who is still at school. A plethora of case law authority strongly dissuade imprisonment of juveniles. What should a court do in a case where a juvenile like the accused takes no heed and proceeds to commit grave crime as a matter of tendancy?

I know it is destructive on the accused but I have come to accept that such are the unavoidable consequences of imprisonment where any other sentencing option makes nonsense of the particular merits of the case, like in the instance case.
I will reluctantly impose imprisonment on accused."

The learned Regional Magistrate went on to impose, as already stated, a heavy term of imprisonment under circumstances which suggested that he treated the accused person as an adult. With all due respect to the learned trial magistrate, the reasoning adopted in the above excerpt is not borne by the facts of the matter, is as illogical as it is injudicious and betrays a closed mind.

For a start, the trial magistrate was not sufficiently equipped with pre-sentencing information to enable him to embark on a rational sentencing process. He admits that there was a need for a probation officer's report before sentencing could be undertaken. He however proceeded that not withstanding merely because waiting for the report would "be an exercise in futility." It is not clear why the trial magistrate was in a hurry to finalise the matter. In doing so he fell into error.

As stated in *S v Ngulube* HH 48/02, magistrates are required to arm themselves with enough information for them to assess sentence as humanely and meaningfully as possible and

to reach a decision based on fairness. Upon realising the need for a probation officer's report the magistrate should not have proceeded without it. Doing so lends credence to the notion that he adopted an instinctive approach to sentencing *S v Shariwa* HB 37/03.

The accused had only been convicted once of raping the same victim in 2009. To suggest that he "proceeds to commit grave crime as a matter of tendancy" is as far from the truth as it is divorced from the facts of the matter. Such extravagant and emotional language is clearly inconsistent with the dispassionate and objective approach to sentencing which should be the hallmark of any judicial officer. *S v Mahati* 1988(1) ZLR 190(H).

The trial magistrate appears to have cut against all reason, logic and indeed case law authority in arriving at the sentence he imposed. He accepted that case law counsels against imprisonment of juveniles. He bemoaned the harmful effect imprisonment would have on the young offender and that he was not equipped with a probation officer's report to be able to do justice to the case. He however still went on, almost headlong, to reluctantly send the accused to a lengthy term of imprisonment.

This is a clear case in which the magistrate allowed emotion to get the better of him. The sentence imposed certainly cannot be allowed to stand. In terms of Section 351(2)(a) of the Criminal Procedure and Evidence Act, [Chapter 9:07], the trial magistrate had an option to refer the accused to the Juvenile Court to be dealt with in terms of the Children's Act, if he had misgivings about waiting for a report.

In the result, I order as follows; that:

(1) The conviction of the accused stands

(2) The sentence is quashed and the matter is remitted to the Regional Magistrate for purposes of:

(a) either requesting a probation officer's report on the accused person before an appropriate sentence is imposed,

or

(b) referral of the accused to a Juvenile Court in terms of Section 351(2)(a) of the

Criminal Procedure and Evidence Act, [Chapter 9:07] to be dealt with in terms of the Children's Act.

(3) A warrant for the liberation of the accused person from prison should be issued forthwith.

Mathonsi J.....

Kamocha J agrees.....