HB 213-15
HCAR 1733-15
CRB WR 86-15

THE STATE

Versus

CELANI NDHLOVU

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO, 29 OCTOBER 2015

Criminal Review

BERE J: The accused, who was 19 years old at the time was convicted on his own plea of guilty on a charge of rape as defined in section 65 (1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The victim was 12 years old.

Following upon his conviction the offender was sentenced to a straight term of 8 years imprisonment. When the record was placed before me on review I queried why the learned magistrate had chosen to depart from the established rich practice by our courts of suspending a portion of the sentence. In answer to the query, the trial magistrate said,

> "The writer acknowledges that reasons for sentence do not specify why part of the sentence give *(sic)* and introduced her to sexual intercourse at a very tender age on page 2 *(sic)* of reasons for sentence was not suspended *(sic)* the writer believed that her reasons that the Accused abused a young was sufficient *(sic)*.
>
> The error is sincerely regretted.
>
> The writer should have specifically laid out that and will do so in future should any such situation arise. The writer is in tandem with the established practice of suspending a portion of the sentence and will stand guided by your minute."

It is clearly not without difficulty for one to decipher what was intended by the trial magistrate's reply. She seems to be suggesting that because the offender had committed a very serious offence by abusing a young girl, there was justification for her to impose the sentence which she opted for. Further, the trial magistrate also seems to be suggesting that there would

have been nothing wrong with her sentence if she had given sufficient reasons to support it. Therein lies the problem with the trial magistrate's approach to sentence.

It has been stated for times without number that when it comes to sentencing the trial court must avoid adopting a hysterical or intuitive approach. The approach to sentence must involve a delicate assessment of the factors in mitigation and aggravation which take into account the interest of the offender on one hand and the interest of society at large on the other hand. HOLMES JA eloquently puts it in the following:

> "Punishment must fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances. The last of these four elements of justice is sometimes overlooked."[1]

The issue that specifically confronts me in this case is the need to suspend part of the prison terms where one deems imprisonment to be appropriate or unavoidable. This issue was dealt with in some great detail by REYNOLDS J in the case of *S* v *Chirara and Ors*[2] when the learned Judge puts it in the following words;

> "… The point in question concerns principles of sentencing in relation to young first offenders in general, and in particular, to the suspension of all or part of the sentence imposed on such offenders."

In the case of *S* v *Dube* HH-409-88 I said the following at p 2 of the cyclostyled judgment:

> "It must be stressed that there is no rule of practice requiring that part or all of a custodial sentence passed on a young offender should always be suspended, but much more often than not, I would suggest, <u>such a form of sentence is both desirable and appropriate. I would even go so far as to say that it would be a most unusual case where such measures would not be advisable. Not only is the severity of the punishment thus moderated but the offender is encouraged to refrain from repeating his misconduct."</u>[2] my emphasis

1. *S* v *Khumalo* 1973 (iii) SA 697 at 698 A

2. *S* v *Chirara* & *Ors* 1990 (2) ZLR 156 D - F

The salutary practice which has evolved over the years of suspending part of the prison term must be applauded and embraced by all and sundry because of its immense benefits to both the offender and society.

I accept that in the instant case it was inevitable that the offender be punished by way of a term of imprisonment for a substantial period of time because of the nature of the offence. It was a bad one.

However, what I do not subscribe to is the stance taken by the trial court that because this was both a serious and heinous offence both the offender and the society could not benefit from having a portion of the sentence suspended.

The view that I take is that if a hysterical approach to sentence is adopted as appears to have been the case in this matter, then the sentence becomes an arbitrary one. In my view an arbitrary sentence amounts to an abuse of the court's discretion in sentencing. Once that is detected, the review or appeal court must then be at large on the question of that sentence. This implies that the sentence imposed by the lower court must be revisited, I proceed to do the same in this case.

Having regard to the fact that the accused is a young first offender (19 years at the time of the offence), who gave an unequivocal plea of guilty to the offence charged, thus registering contrition, the need to suspend part of the prison term becomes overwhelming and unavoidable. In this regard I can do no better than refer in *extensio* to the views expressed by REYNODS J in the case of *S* v *Chirara and Ors (supra)* when he stated as follows:

> "The rationale behind the suspension of a sentence is normally said to include the following desirable features:

1. The offender is deterred from repeating his misconduct by having a suspended sentence handing over his head like the classical "sword of Damocles". The consequences of breaching the conditions of suspension are known and certain and this is regarded as a more effective deterrent than the mere possibility of a more severe punishment for a subsequent offence.
2. A sentencing tribunal will often wish to give due and effective recognition to the frailties and deficiencies of youth and immaturity, and to give a first offender a second chance, as it were, to refrain from offending again. A suspended sentence serves to temper an otherwise severe penalty, and recognizes the veniality of many youthful transgressions.
3. When deciding upon an appropriate penalty for a youthful offender, a court will usually consider it desirable to formulate some type of sentence which, hopefully, will be rehabilitative in effect. A suspended sentence is based on this consideration.
4. It is well recognized that a sentence which, for good reason, keeps first offenders out of prison, or at least reduces the period of incarceration that would otherwise be served is very often both desirable and appropriate. As stated by Ashworth in Sentencing & Penal Policy at 318, "custodial sentences should be used as sparingly as possible". One of the principal reasons for this statement is the "deleterious effects of penal institutions", (at 320), and the unfortunate results that regularly follow the imposition of custodial punishment. See *S* v *Matanhire, supra*.
5. It is also a valid consideration in my view that the use of a suspended sentence not only allows the court to avoid sending an offender to an already overcrowded prison, but at the same time recognizes the gravity of the offence committed. Statistics from England show that "some 80 per cent of first offenders never return to prison", and it is suggested that "the suspended sentence might be equally effective as a deterrent with little cost to the state in the majority of cases". (Brian Leighton's report to the Penal System, 1962). It is appreciated that statistics of this nature in Zimbabwe may be different, but any measure which reduces the prison population without prejudicing the interests of justice is, in my view desirable"[3]

I may wish to add and say that I find the views stated by the learned Judge to be apposite even when it comes to sentencing major or mature first offenders. I have no doubt in my mind that if the court *a quo* was to be given an opportunity to reflect on the sentence it imposed it would have no difficulty in appreciating its inappropriateness given the issues that I have endeavoured to canvass though not in an exhaustive manner.

No cogent reasons, in my view, could be given to justify the failure by the trial magistrate to fail to suspend part of the sentence.

1. *S* v *Chirara and Ors (supra)* at pp 158F – 159E

It is for this reason that I am unable to certify these proceedings as being in accordance with real and substantial justice.

In the circumstances the sentence imposed by the court *a quo* is set aside and substituted as follows:

> "8 years imprisonment 3 years of which are suspended for 5 years on condition the accused does not during that period commit any offence of a sexual nature and for which upon conviction shall be sentenced to a term of imprisonment without the option of a fine."

Kamocha J agrees ………………………..