THE STATE
versus
THOMAS BRIGHTON CHIREMBWE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 16 February 2015

Criminal review

TSANGA J: The accused was charged with a combined thirty counts of contravening s 131 (1) & 2 (unlawful entry) and s 65 (rape) of the Criminal law (Codification and Reform) Act [*Chapter 9:23*]. Of the total 30 counts, 13 were counts of rape whereby after entering 10 domestic premises accused committed the rapes. He was however convicted of 21 of the 30 counts as the complainants and witnesses in other nine counts had moved or were out of the county.

For the 21 counts for which he was convicted, he received a total sentence of 290 years. Of these 60 years was suspended for five years on condition he did not commit a crime involving unlawful entry, violence on the person of another, or an offence of a sexual nature.

The regional magistrate who handled the case, referred the case after sentencing for review and consideration of whether the charges had been split unnecessarily. In arriving at the cumulative sentence, each count of unlawful entry was sentenced separately from the crime of rape that had been committed by the accused at the relevant premises and for which he had been convicted. To put the cumulative sentence into perspective, he was sentenced as follows:

Count 1	10 years (unlawful entry)[1]
Count 2	20 years (rape)
Count 5	10 years (unlawful entry)
Count 7	10 years (unlawful entry)
Count 8	10 years (unlawful entry)
Count 9	20 years (rape)
Count 10	10 years (unlawful entry)

[1] The indications of the crime in brackets are for ease of reference as to what the count related to.

Count 11	20 years (rape)
Count 13	10 years (unlawful entry)
Count 14	20 years (rape)
Count 15	10 years (unlawful entry)
Count 16	20 years (rape)
Count 19	10 years (unlawful entry)
Count 20	10 years (unlawful entry)
Count 21	10 years(rape)
Count 22	10 years (unlawful entry)
Count 23	10 years (unlawful entry)
Count 24	20 years (rape)
Count 25	20 years (rape)
Count 26	20 years (rape)
Count 30	10 years(unlawful entry)
Total	**290 years**

To put the 21 counts for which he was convicted into further perspective, 14 of the counts included seven for unlawful entry under aggravated circumstances and another seven for rape in respect to each of those unlawful entries. In one of these cases of unlawful entry the accused had committed three counts of rape against the victim. There were therefore five counts related to unlawful entry under aggravated circumstances that excluded rape.

The counts that included unlawful entry and rape against seven different complainants were the following:

Counts 1 & 2 (unlawful entry with rape)
Counts 8 & 9 (unlawful entry with rape)
Counts 10 & 11 (unlawful entry with rape)
Counts 13 & 14 (unlawful entry with rape)
Counts 15 & 16 (unlawful entry with rape)
Counts 21 & 21 (unlawful entry with rape)

Counts 23, 24, 25 & 26 which involved unlawful entry and three counts of rape against the same complaint

The counts which involved unlawful entry under aggravated circumstances where property was stolen were as follows:

Count 5
Count 7
Count 19
Count 22
Count 30

The offences took place between September 2011 and October 2012. The accused would basically break into domestic premises at night either through toilet or kitchen windows or the roof. He would be armed with items such as a knive, and or hammer, a cell

phone with a torch. Once in the room, he would wake up his victim, threaten them with death and would demand money cell phones and laptops. Coupled with unlawful entry and theft, sexual violence was a tool used by the accused to exercise power and control over the victims in selected cases. It essentially became an adventure to his repertoire.

His luck ran out when he returned to the premises of one complainant where he had previously been. No doubt traumatised by her previous experience, upon hearing noises she had immediately managed to make contact with a relative in the police force using her cell phone. The response had been swift and accused had been apprehended whilst inside the house. Thereafter some of the complainants had identified him at an identification parade. The accused had also taken the police to other premises where he had committed the crimes and had given indications of how he had committed the offences at the relevant premises.

The convictions in my view are proper but the sentence induces more than a sense of shock to the point of being ridiculous given that no one lives to 290 years and none of it runs concurrently. As such much of it serves no purpose other than being of shock value. As stated in *S* v *Mukome* 2008 (2) ZLR 83 (H) the competing interests of society and the accused persons must be balanced in arriving at a desirable sentence. While deterrence is a valid consideration, the view expressed in *S* v *Nemakuru* 2009 (2) ZLR 179 (H) that in sentencing, judicial officers must avoid giving the impression that a sentence is a tag which society must read for it to be deterred seems apt in this instance. In *casu*, increasing public sentiment especially from women's groups against perceived leniency in meting out sentences to rapists, given the prevalence of sexual offences against women and girls appear to have influenced the sentence. Although regional magistrates generally impose fairly stiff sentences for rape often in the range for 15 to 20 years for a count of rape, some such sentences involving multiple counts are often reduced on review perhaps feeding into perceptions of the "permissive court".

For instance *S* v *Ndlovu* 2012 (1) ZLR 393 the view was expressed on review that ordinarily the sentence for rape should not exceed the sentence for murder or culpable homicide. In that case a 43 year old accused had been charged with five counts of raping his biological daughters aged between seven and four years. The four year olds were twins. He was sentenced to 20 years in respect of each count giving him a total period of 100 years in prison. The sentence in one count was made to run concurrently with another involving the same complainant. A further 20 years was suspended on good behaviour. The total effective sentence was accordingly 40 years.

In reviewing the sentence, KAMOCHA J emphasised that life imprisonment is indeed the maximum sentence permissible for rape under the criminal code, and that this should be reserved for the worst examples of the crime. He reasoned that the worst crime under crimes against the person is the crime of murder and in the past unless there were no extenuating circumstances the sentence would be death. He further reasoned that in those cases where the death penalty was not warranted the sentence imposed is generally between 14 and 20 years. He also noted that in cases of attempted murder the penalty rarely exceeds 10 years. Although acknowledging its traumatising effects in his view a sentence of 20 years for a single count of rape was excessive. As he put it:

> "It seems to me that a sentence of 20 years on a single count of rape is completely out of steps with sentences imposed in respect of other crimes against a person as outlined above. It seems to me that rape should also attract a sentence from 5 to 10 years. Only the very bad cases of rape should attract a sentence beyond ten years and the worst ones should attract imprisonment for life.
>
> Since the court was initially dealing with five counts of rape it should have borne in mind the cumulative effect of the sentences on the five counts and imposed a sentence which is not so excessive as to induce a sense of shock".

He accordingly reduced the sentences on the three counts for which he found him to have been rightly convicted to six years per count, giving a total of 18 years.

Also in *S v Nyathi 2003 (1) ZLR 587* a 30 year sentence had been imposed on a father for 30 counts of rape on his 16 year old daughter. The 30 year sentence was deemed excessive and reduced to 18 years.

The yardstick by KAMOCHA J is somewhat useful in so far as it purports to give a bench mark figure of what should constitute a starting point when sentencing multiple counts of rape. However, akin to comparing oranges to apples as fruits in the same basket, it seems to me to skirt the point of the vast implications of sexual violence for the enjoyment of a range of fundamental rights for women and girls. In my opinion, an informed assessment of the sentence to be imposed in cases such as this cannot be reached without utilising an engendered approach to this area of criminal law, as well as engaging a constitutional and human rights perspective.

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.

Freedom from violence is guaranteed in our Constitution [Amendment Act (No.20) Act 2013], under s 52 of the Constitution which states that:

Every person has the right to bodily and psychological integrity which includes the right

a) To freedom from all forms of violence **from both public and private sources**. (My emphasis)
b) …….
c) …….

Article 51 is also useful in providing protection from violence in that it protects the right to human dignity. It is couched as follows:

> "Every person has inherent dignity in their private and public life, and the right to have that dignity respected and protected".

There is no doubt that the accused's actions clearly trampled on these fundamental rights. It is not only the right to personal security that is at stake when women experience forms of gender based violence as exemplified by rape but it is also rights such as freedom from cruel and degrading treatment and the right to equality and non-discrimination. (See Arts 53 and 56 of the Constitution). It is the pervasive nature of sexual violence and the reality that women and girls have to live in constant fear of it from childhood to old age that continues to hamper true equality between men and women. The bottom line is that it is the responsibility of the State not just to protect women against any such violations which encroach on their fundamental rights, but to also prosecute and punish appropriately as part of its exercise of due diligence. The courts cannot adopt an overly "softly, softly" approach under the guise of comparative sentencing, completely oblivious of the reality that we are dealing with a problem of gender based violence so pervasive in our society and largely indicative of its treatment of women and girls as sexual objects, such as to impact on their right to enjoy fundamental freedoms. Even when society's interests are balanced against those of the individual, sight should not be lost of the fact that sexual violence is a deeply engrained societal problem and the approach to sentencing should acknowledge rather than skirt this reality.

The provisions discussed above in our Constitution are examples of concerted efforts to tailor local legislation to meet global norms. Of relevance for instance are Art 9 of the International Covenant on Civil and political rights which deals with the rights to security of the persons and Art 7 which prohibits cruel and degrading treatment. The Convention on All Forms of Discrimination against Women is also significant in that its provisions have been interpreted by the CEDAW committee in Recommendation No. 19 to specifically cover gender based violence against women as a form of sex discrimination. It is regarded as discrimination because of the distinct effects it has on the lives of women which prevents them from enjoying equality as envisaged by Art 1 of the Convention. Equally significant are provisions to the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa whereby Art 3 for example, guarantees the right to dignity for women and the protection of their human and legal rights. Article 4 in particular addresses violence against women including the punishment of perpetrators (Article 4(2) (e). Women also have a right to live in a positive cultural context in terms Art 17. Rape is a form of gender based violence that emanates from cultural attitudes towards women that permit the use of sex as an instrument of power and control.

In my view, whilst there was no misdirection in the splitting of charges for unlawful entry and those of rape, the misdirection was in sentencing each count of unlawful entry separately from rape given the cumulative effect of the sentence. Also, the sentence for each count was excessive and the sentences could have been made to run concurrently given their similarity in nature and proximity in time in the commission of some of the offences. There is however no doubt that the court was faced with a serial rapist and an unrelenting one for that matter for whom a stiff sentence was called for. Having said that, the 290 year sentence with 60 years suspended makes no sense and certainly arises from sentencing the counts separately without any of them running concurrently.

In dealing with multiple counts and deciding whether to apply a globular sentence it was stated in *S* v *Chayisva* 2004 ZLR (1) 80 (H), that the factors to be taken into account include whether the offence is the same or similar nature; whether the offences are closely linked in time; and whether the offences arise out of same transaction. I do not think that this is a case for a globular sentence as the offences did arise from the same transaction. They were distinct in time and nature and should be approached as such. In *S* v *Muyambo* HH 52-94 it was stated that there are two permissible approaches to sentence where multiple counts involved: sentencing as one those similar in nature; or where counts are individually

sentenced, ordering the sentences to run concurrently. It is the 'concurrent' approach which in my view would be partly appropriate in this case in terms of rationalising the sentence.

The sentence is accordingly altered as follows for the counts involving unlawful entry under aggravated circumstances and rape;

Counts 1 & 2:	10 years imprisonment
Counts 8 & 9:	10 years imprisonment
Counts 10 & 11	10 years imprisonment
Counts 13 & 14	10 years imprisonment
Counts 15 & 16	10 years imprisonment
Counts 21 & 21	8 years imprisonment
Counts 23, 24, 25 & 26	15 years imprisonment

For the above counts, the accused is accordingly sentenced to a total of 73 years of which 18 years is suspended for five years, on condition accused does not commit a crime involving unlawful entry, violence on the person of another or an offence of a sexual nature.

For the following counts involving unlawful entry under aggravated circumstances without rape the accused is sentenced as follows.

Count 5	3 years (unlawful entry)
Count 7	3 years (unlawful entry)
Count 19	3 years (unlawful entry)
Count 22	3 years (unlawful entry)
Count 30	3 years (unlawful entry)

The cumulative sentence of 15 years for these counts to run concurrently with the effective sentence of 55 years.

TAGU J agrees:……..