



CHIEF JUSTICE
MALAWI JUDICIARY

19 FEB 2021

HIGH COURT
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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL DIVISION

CRIMINAL CASE NO. 8 OF 2021

(Being Criminal Case No. 946 of 2020 before the First Grade Magistrate Court sitting at Dalton Magistrate Court)

THE REPUBLIC

V

ANDREW CHAGAGA

Coram: Justice Vikochi Chima

Mr Trevor Mphalale, Ms Ruth Kaima and Ms Chijozi, Counsel for the State

Mr Kumpita, Counsel for the accused

Mrs Moyo, Court Clerk

SENTENCE

Chima J

I. INTRODUCTION

1. The accused was convicted of rape contrary to section 133 of the Penal Code before the Dalton First Grade Magistrate Court. The state applied before that court, under sections 14 (6) and 166 of the Criminal Procedure and Evidence Code, to have the accused committed to the High Court for sentencing owing to the fact that they felt the sentence that the convict deserved would be beyond the highest level of magistrate's jurisdiction. The state was of such opinion basing on the circumstances of the offence and also the sentencing trends in sexual assault cases. The court a quo agreed with their submission and granted the application.

II. THE FACTS

2. The complainant and two of her friends, a young lady and a young man, were arrested on the night of 12 December 2020, a Saturday, near Misesa Cemetery by a Sub Inspector

Chirombo. Sub Inspector Chirombo released one of the complainant's friends (the young lady). He, however, took the complainant and the young man to Limbe Police Station where he handed them over to the officers on duty that night who were the convict and a Sergeant Chitowe. The arresting officer ordered the convict to lock up the complainant and her friend until the Monday following when they would be taken to court. The convict and the complainant recognised each other since they attend the same church. The convict held the complainant by the hand and took her aside and enquired from her the reason for her arrest. She explained to him that she and her friends had been going to a night of praise at Bvumbwe and were arrested while waiting for transport. The convict led the two who had been arrested downstairs. They found another police officer who wanted to record the particulars of the two in a big book that was in front of him but the convict forbade him. The convict informed his colleague that he knew the complainant as someone with whom he attends the same church.

3. The convict rebuked the complainant and her friend for bringing the church into disrepute with their alleged conduct. He ordered the complainant to follow him. They went up a flight of stairs and got to a landing. He stopped and the complainant did the same. He ordered the complainant to place her phone on the window sill. He told her that since this was a Saturday, the next court day was going to be Monday but that there was no guarantee that she would be taken to court on Monday as police officers would be engaged in certain presidential functions. He further told her that the earliest she could be taken to court would be Wednesday. He then told her to propose how she could secure her own release that night. The complainant asked to phone her relations so that they could pay her way out. He told her that her relatives were not to be involved and that she was to behave like an adult woman and rescue herself. When she asked him to come out clearly as to what he wanted her to do, he unzipped his trousers and took out his penis so that it hang out of his trousers. He told her to fondle it for her to be released. She refused. He ordered her to lick it and she again refused. The convict then put his hand on the nape of her neck and pushed her head towards his penis with a view to forcing her to lick his penis. She resisted. He threatened that if she did not comply, she would not be released. She still refused. He knocked her to the floor and took off her cycling shorts and panties and attempted to penetrate her vagina. His penis landed on her anus. He adjusted himself and forcefully penetrated her vagina. She cried out in pain and he put his hand on her mouth to stop her from screaming. He had sexual intercourse with her and then lay spent on top of her. She shook him awake and told him to get off of her as he was heavy. He got up and zipped up his trousers. He ordered her to get dressed and she did so. He then led her downstairs.
4. When she got downstairs, she did not find her friend there. She did not also find the police officer who was at the counter. The convict went to a side room and suggested to his colleague that they were to ask Sub Inspector Chirombo to have the complainant and her friend released. Both the convict's and his colleague's phones had no airtime. The convict took the complainant's friend's phone and called Sub Inspector Chirombo and asked for

permission to have the two detainees released. Sub Inspector Chirombo declined stating that the two were to appear before court. The convict pleaded with him stating that the complainant was personally known to him since they were churchmates. Sub Inspector Chirombo advised him to release them around 3 am when traffic would be moving around town to avoid the two detainees suffering harm at the hands of street children in Limbe.

5. At the end of the conversation with Sub Inspector Chirombo, the convict ordered the complainant to follow him again. She obliged thinking he would offer her a place to sleep, he, having done what he had wanted. When they got to the landing, to her shock he told her he wanted to finish what he had started. She was totally confused and just froze. The convict undressed her and proceeded to have sexual intercourse with her. In the course of the act, he took off her bra and fondled and sucked her breast. She felt a lot of pain. At the end of the act, he dressed up and ordered her to dress up. She did so. He led her back downstairs.
6. When he got downstairs, he pulled a pail from under the table which had water in it. He ordered her to wash herself with the water. She refused. She told him that it was too cold. The convict forcibly lifted her wrapper and scooped some water from the pail and proceeded to wash her private parts whilst she was still in her underwear. He later poured the rest of the water on her. He then went to the cells and called out her friend. He brought her friend to the counter. He collected her friend's personal effects and removed therefrom K5,000 and then handed him the rest of the items. It was around 2 am. The convict told him that he was releasing them. They asked him how he expected them to move at that late hour. He told them that he would escort them to Midima court where there was usually a patrol car. The three walked out of the police premises. As they walked, she was in pain and so was lagging behind. The convict tried to make small talk with her but she ignored him. She loathed him. When they got to Midima court, there was no police vehicle there. They moved to Illovo stage and the convict told the two to wait for transport at that spot. He walked away towards the police station.
7. The complainant and her friend decided to follow him as they knew the place where they were that it was not safe. They followed him and huddled on the police perimeter fence and waited for dawn.

III. EVIDENCE ON SENTENCE

8. In pursuance to section 260 of the Criminal Procedure and Evidence Code, the state called one witness, the mother of the complainant. She testified that previous to her daughter having been sexually violated, she (the mother) had been carrying on a business of bringing in merchandise from Tanzania for sale in Malawi but that she is now unable to do the same having lost her capital due to the processing of the present matter. She stated that she had lost more than K200,000 due to the present case by spending on transport in coming to court as well as paying for the medical expenses of the complainant who had not been in good health since the occurrence of the offence.

9. She stated that she is a single parent to the complainant, her father having died when she was only two years old. She (the mother) had therefore singlehandedly financially supported the complainant's education from nursery up to the time of the offence, when the complainant was studying procurement at the Polytechnic. She testified that since the complainant was sexually assaulted, her education stopped. The complainant became fearful of venturing out of the confines of her home; she feels she has become a laughing stock. At the same time, the mother's income that could have supported the girl's education had run out. The mother stated that following the incident, the girl's spiritual life has been adversely affected as she no longer frequently attends church as she had previously done.

IV. AGGRAVATION, MITIGATION, SENTENCING PRINCIPLES AND THE SENTENCE

10. In *Rep v Tobeti Makuluni*,¹ Mwaungulu J said thus concerning sentencing in rape cases:

'The sentencing approach is the same for rape as with other offences. The sentencing court must regard the nature and circumstances of the offence, the offender and the victim and the public interest.

Sentences courts pass, considering the public interest to prevent crime and the objective of sentencing policy, relate to actions and the mental component of the crime. Consequently, circumstances escalating or diminishing the extent, intensity or complexion of the *actus reus* or *mens rea* of an offence go to influence sentence. It is possible to isolate and generalize circumstances affecting the extent, intensity and complexion of the mental element of a crime: planning, sophistication, collaboration with others, drunkenness, provocation, recklessness, preparedness and the list is not exhaustive. Circumstances affecting the extent, intensity and complexion of the prohibited act depend on the crime. A sentencing court, because sentencing is discretionary, must, from evidence during trial or received in mitigation, balance circumstances affecting the *actus reus* or *mens rea* of the offence.

Besides circumstances around the offence, the sentencing court should regard the defendant's circumstances generally, before, during the crime, in the course of investigation, and during trial. The just sentence not only fits the crime, it fits the offender. A sentence should mirror the defendant's antecedents, age and, where many are involved, the degree of participation in the crime. The defendant's actions in the course of crime showing remorse, helpfulness, disregard or highhandedness go to sentence. Equally a sentencing court must recognize cooperation during investigation or trial.

While the criminal law is publicly enforced, the victim of and the effect of the crime on the crime on the direct or indirect victim of the crime are pertinent considerations. The actual circumstances for victims will depend, I suppose, on the nature of the crime. For example, for offences against the person in sexual offences, the victim's age is important. An illustration of circumstances on indirect victims is the effect of theft by a servant on the morale of other employees, apart from the employer.

Finally, the criminal law is publicly enforced primarily to prevent crime and protect society by ensuring public order. The objectives of punishment range from retribution, deterrence, rehabilitation to isolation. In practice, these considerations inform sentencing courts although helping less in determining the sentence in a particular case.'

11. In *Fabiano Maliko v Rep*,² Kapindu J said of defilement that it is 'both a carnally and psychologically invasive offence'.³ The same must be stated about rape. In that case, the court also stated as follows:

¹ Confirmation Case No. 276 of 2001

² Criminal Appeal No. 13 of 2020

³ Ibid at 6, para 16

'Sexual offenders in cases of rape and defilement inflict a serious invasion of the victim's right to personal privacy as enshrined and guaranteed under section 21 of the Constitution of the Republic of Malawi. Indeed, they inflict such a serious invasion of that most private of spaces of any human being's individuality. These offences also seriously violate the victim's right to human dignity, which dignity is inviolable in terms of section 19 of the Constitution.'

12. The High Court in *Rep v Msowoya*⁴ quoted with approval the dictum of Lord Lane CJ in *R v Roberts*⁵ and gave guidance as to what ought to be the considerations in reaching an appropriate sentence for rape offenders. Lord Lane CJ had said:

'Rape is always a serious crime. Other than in wholly exceptional circumstances, it calls for an immediate custodial sentence...A custodial sentence is necessary for a variety of reasons. First of all to mark the gravity of the offence. Second, to emphasise public disapproval. Third, to serve as a warning to others. Fourth, to punish the offender, and last, but by no means least, to protect women. The length of the sentence will depend on all the circumstances. That is a trite observation, but these in cases of rape vary widely from case to case. Some of the features which may aggravate the crime are as follows. Where a gun or a knife or some other weapon has been used to frighten or injure the victim. Where the victim sustains serious injury (whether that is mental or physical). Where violence is used over and above the violence necessarily involved in the act itself. Where there are threats of a brutal kind. Where the victim has been subjected to further sexual indignities or perversions. Where the victim is very young or elderly. Where the offender is in a position of trust. Where the offender has intruded into the victim's home. Where the victim has been deprived of her liberty for a period of time. Where the rape, or succession of rapes, is carried out by a group of men. Where the offender has committed a series of rapes on different women, or indeed on the same woman.' (emphasis supplied)

13. The state isolated the aggravating factors of the case, which were: that the convict was a police officer and that he committed the crime while he was on duty; that the incident occurred at a police station; that the convict assaulted the complainant twice; and that the complainant is a child. They also pointed to the extenuating issues as being that the convict is a first offender and relatively young. Nonetheless, the prosecution is of the view that these mitigating factors pale into insignificance in the light of the grave circumstances of the present offence.

14. Mwaungulu J in *Republic v Bright Jamali*,⁶ laid down the following guideline in regards to sentences in defilement cases. He said that:

'The starting point for defilement should, therefore, based on the maximum sentences of life imprisonment, be fourteen years imprisonment. Sentencers at first instance must then scale up and down this starting point to reflect mitigating and aggravating circumstances and that the sentence must fit the offender.'

15. In my considered opinion, such a guideline should equally work for sentences in rape cases since both defilement and rape are sexual offences. They have more or less the same maximum penalties: defilement's maximum sentence being life imprisonment and rape being death or life imprisonment. They both involve the invasion of the one's privacy and violate the complainant's right to dignity. They both leave psychological trauma on the complainant's mind. The major difference as to the offences is the age of the complainant that is involved in these cases with defilement the complainant being a child under the age

⁴ 12 MLR 394

⁵ [1982] 1 ALL ER 609

⁶ Confirmation Case No. 421 of 2013 (HC)(PR)

of sixteen and in rape, a female of over sixteen years of age. There are other differences but the basics of these offences are more or less the same.

16. Indeed, the convict is a police officer who committed the crime while on duty and in uniform right in the police station. A police officer is someone who has been entrusted with the responsibility of protecting the citizenry. A police station should be one of the safest place to a human being. The convict desecrated his uniform as well as the police sanctuary. He had falsely chided the young girl and her friend accusing them of bringing disrepute to the church when the two had done no wrong and when he himself was the vile one. The convict and the complainant were people who knew each other and naturally, when the convict had first started talking to her in the police station, she must have felt a sense of relief seeing a familiar person in such a solemn setting, a police station. The sense of longtime association with her, however, did not stop him from violating her. He planned the act within the short period the complainant was within the police station: he forbade the officer on duty at the counter from recording the complainant's particulars and took her to a secluded place. He was going to extort sexual intercourse from her either through deceit or indeed by force. He painted a bleak picture for her that the earliest she could be taken to court was on Wednesday and that she therefore would have to stay in custody from that Saturday night until then unless she bought her freedom that night by acceding to his sexual demands. He exposed himself to her and demanded that the complainant handle and lick his genitalia. When she would not, he held her nape and forcibly directed her head to his organs. He then forced her to the ground and violently raped her and cupped her mouth to stifle any cries. When he took her downstairs to where the other officers were, she felt the worst was over. But when she took her again to the same spot and demanded the same thing, she was in utter shock and just froze. She was captive within the police station. He violated her again. After these events, he ordered her to take a cold bath to get rid of the evidence. When she complained that it was cold and could not take the cold bath, he poured the cold water on her private parts. He then escorted her and her friend out of the police station at an awkward hour to a place beside the road and abandoned them there. The complainant and her friend were so frightened being left there that they preferred to follow the convict and to huddle just outside the police parameters.
17. Counsel for the defence has argued that since there is no medical report verifying the complainant's health, then the court should not take this as an aggravating factor. That cannot be so. There is compelling evidence from the mother who has noted a drastic change of her child's disposition from a normal sociable being to a timid soul and she can only attribute it to this violation.
18. The main and only mitigating factor in this case is that the convict is a first offender. He cannot be classified as young. At age 33 one is taken to have matured and to take full responsibility of his actions. One is at his prime at that age.

19. Thus taking into account the full spectrum of the circumstances in the matter, I find the sentence of thirty years imprisonment with hard labour an appropriate sentence and I thus sentence Andrew Chagaga to that period with effect from the date of conviction.

Made in open court this day the 18th of January 2022


Chima J

