IN THE SUPERIOR COURTS OF THE GAMBIA

IN THE SUPREME COURT OF THE GAMBIA

SC NO. 2/2012

BETWEEN

NFAMARA SAIDYKHAN — APPELLANT

AND

THE STATE — RESPONDENT

DATE: 7th May, 2015

ORAM:

HON. JUSTICE A.N. CHOWHAN — CJ

HON. JUSTICE G.B. SEMEGA-JANNEH — JSC

HON. JUSTICE A. RENNER-THOMAS — JSC

HON. JUSTICE R.C. SOCK — JSC

HON. JUSTICE W.S.N. ONNOGHEN — JSC

COUNSEL

MISS Ji:NEH l\1.C. CHAM FOR THE APPELLANT

MR. S.H. BARKUN (DPP) FOR THE RESPONDENT

JUDGMENT

R.C. Sock JSC: On the 1st of March 2010 the Appellant was convicted of rape and sentenced to imprisonment for life by the High Court presided over by Hon. Justice Moses B. Richards; He appealed against the said conviction and sentence to the C::ourt of Appeal of The Gambia, which dismissed his appeal. He has now appealed to this Court against the sentence of life imprisonment.

The appeal before us is based on a single ground which reads:-

> "The Sentence is harsh and excessive having regard to the Appellant's Antecedents"

From th1s so l e groun d fl ows a s1ng l e 1ssue f or d eterm1nat1on, name l y–

> " Whether the exercise of th Lower Court's dscretion yvhich declined to vary the life sentence imposed on the Appella was proper given the Appellant's antecedents."

In sum, what it seems to me this Court is asked to determine is whether the Court of Appeal was right in refusiQg to interfere with the trial judge's exercise of his discretion in passing the rngimum sent of lif fbrisonment.

In th tou 01fel fo t e accused/Appellant, in his plea in mitigation, urged the court to considethe fa t that the accused had no criminal record; that he was a young rr.a : working as a ailor in a Skills Centre to train young people; that he was the "bread winn l p his and that he had shown remorse. Counsel, therefore, urged the court to empec justice with mercy. (p. 67 of Record).

The trial judge's response to Counsel's plea in mitigation is instructive and consequently reproduce ull below:

"The prime object of the Criminal Law is the protection of the public by the maintenance of law and order always remembering of course, that the convicted person despite his wrongdoing remains a member of the community. This is the predominant judicial view. But the time has certainly come for the Court to put down offences such as rape with a heavy hand by imposing exemplary sentences.

Adults who engage in acts of raping innocent children has become a growing menace and a cause for alarm, and indeed society is v it has become a daily occurrence.

Nothing is more effective to stamp out crime than a long term of imprisonment. This may sound harsh but we have to remember the scores of ordinary people who last year and so far this year were the victims of rape. They and their like must be protected. And, in these circumstances, I do not need being told how awful it is that a comparatively young man should be sput up for a very long time. But do I have an option, I think no. Insofar as the protection of society especially the young and innocent of our society is uppermost in my considerations, I do not." (pp. 67-68 of the Record).

In the Court of Appeal, "Counsel for the Appellant under Ground 5 in the her "Brief of Arguments contended at page 110 of the Record that-

"The learned trial judge erred when he passed the maximum sentence of life imprisonment on the Appellant".

Even though Ground 5 alleges an error on the part of the trial judge, without specifying the nature of the error, the submissions of Counsel thereunder do not reveal any error but point to what Counsel regards as a "very harsh and excessive" sentence resulting from the trial judge's failure to consider the fact that the Appellant was a young man and a first offender.

In both the lower court and this Court (in the Appellant's Brief of Arguments, filed on the 23rd of April 2015) reference is made to Section 122 of the Criminal Code, which provides that "Any person who commits the offence of rape is liable to be punished with life imprisonment". Thus, it is argued, that the trial judge had a discretion to impose a lesser sentence having regard to the circumstances of the case.

However, Counsel for the Respondent has argued in his brief of arguments filed on the 4th of May 2015, that "the prescribed and only recognized punishment under the provision of Section 122 of the Criminal Code is life imprisonment." This he argues, is the effect of the use of the word "liable" when given its ordinary meaning.

Even though Counsel in the same breath has conceded that Section 29 of the Criminal Code provides the court with the discretionary power to impose a shorter term of sentence where "a person [is] liable to imprisonment for life", he contends that the discretion contained in that section is there because of the lack of sentencing discretion under Section 122 of the code.

I have addressed this issue, which is a new issue raised by Counsel for the Respondent, merely to clear any doubts about the use of the word "liable", which is used throughout the Criminal Code to introduce sentencing provisions. The word "liable" is defined in the Oxford Learner's Dictionary, 7th Edition, in the context of "liable to do something" as "likely to be punished by law for something" with the following example, "offenders are liable to fines of up to $500." **Black's law Dictionary**, Eight Edition,

defines the word "liable" thus, "(of a person) subject to or likely to incur (a fine, penalty etc)."

I must confess I do not detect any connotation of a mandatory sentence in the above definitions, but rather a certain latitude in the use of the word "liable", as in the example in the Oxford Advanced Learner's Dictionary of "liable to fines up to $500", which ranges, strictly speaking, from $1 to $500. For an even more comprehensive example I would refer to the offences under Section 48 of the Criminal Code, which provides that-

"(1) A person who imports, publishes, sells, offers for sale, distributes or reproduces any publication, the importation of which has been prohibited under Section 47 of this Code, or any extract from the publication, commits an offence and is liable on conviction for a first offence to a fine not exceeding one thousand dalasis or to imprisonment for a term not exceeding two years or to both the fine and imprisonment and for a subsequent offence to imprisonment for a term not exceeding three years; and the publication shall be forfeited" (emphasis supplied).

I believe that whenever the legislature has intended to impose a mandatory sentence under the Criminal Code, it has clearly stated so. Under Section 35 of the Code relating to transportation, the punishment prescribed under subsection (1) reads-

"(1) A person who .....

commits the offence of treason and, subject to subsection (2) of this section, **is liable** on conviction to be sentenced to death or to imprisonment for life."

Subsection (2) reads –

"where a person commits an offence under paragraph (6) of subsection (1) of this section, he or she **shall,** on conviction, **be sentenced** to death." (Emphasis supplied).

And the same applies in the sentencing provisions for murder under Section 188 of the Code.

"A person convicted of murder **shall be sentenced** to death."

I, therefore, reject the arguments of Counsel for the Respondent on the import of the word "liable" under Section 12[illegible] of the Criminal Code. The complaint here is not that the trial judge failed[illegible] cir his discretion or exceeded his jurisdiction in so doing, but that the failure [illegible] the lower cour[illegible] interf re with the trial judge's exercise of discretion was impropij;,

rn both the lower court and this Court, the exhortation of the Honourable Justice Chomba JCA, as he then was, in the case of NYABALLY V THE STATE [1997-2001] GLR p. 64, at 68, that "sentencing magistrates [ought] to realize that when viciously long sentences are impo ed on first offenders, the effect can be counter-productive" has been urged on this Court as a general sentencing guidel_iAe applibable to the present case. The lower court rightly distinguished the NYABALLY case from the present case given the nature of the

offences involved, and concluded (p. 139 of the Record) that " under the circumstances of [this] case, the sentence imposed is justified and is reasonable." Whereas the appellant in the NYABALLY case had been convicted of house breaking and stealing and had raised in his appeal the issue of whether the magistrate court was right to have imposed two separate sentences, in this case the offence involved is rape. The two cases are by the nature of the offences involved clearly distinguishable: and therefore attract very different considerations regarding sentence.

Addressing the issue of the sentencing discretion of the triaf judge, the lower court said that-

> "In any event, the type of sentence to impose, after a conviction is always at the discretion of the trial judge. Discretion as was held in the case of MINISTER OF PETROLEUM V. EXPO SHIPPING LTD. [2010] 42 NSCQR on page 1025 " ... is not an indulgence of a judicia(whim, but the exercise of judicial judgment, based on fact guided law to the equitable decision ..." It is trite that appellate courts will not interfere with the exercise of discretion by the trial court, unless it is shown that the exercise of such discretion was arbitrary. O.O. Adekeye JSC held in the case of HAMZA V KURE [2010] 42 NSCQR on page 598 that " ... where the decision of court is substantially based on the exercise of discretion, an appellate court will not interfere with the decision unless the court failed to exercise its discretion judiciously or judicially but exercised same frivolously or arbitrarily. In view of the fact that discretion is aiWf1¥s unfettered, an appellate court cannot take steps to fetter such discretion except for the foregoing reasons ..."

Justice Arnie Joof, JA, as she then was, concluded in the lead judgment of the lower court that "in the instant case, that is not the nature of the complaint" and therefore found that the appellant had "not made out any case to warrant ... interference in the circumstances." The same principles are equally applicable whether the exercise of discretion forms the basis of a decision or a sentence, as in this case.

It is obvious from the sole ground in this appeal that the only complaint is that the sentence of life imprisonment imposed by the trial court and affirmed by the lower court is "harsh and excessive "in the circumstances of this case, and not, as stated, "having regard to the Appellant's antecedents," of which there is no evidence. What Counsel for the Appellant regards as the "Appellant's antecedents" are matters really concerning the character of the Appellant, which Counsel qrgues ought to have been considered by the trial judge.

It seems to me that the matters touching on the Appellant's character, as distilled from both the plea in mitigation at the trial court and the Appellant's briefs in the lower court and this Court are as follows:

A. The Appellant is a first time offender and a young man;

B. He was involved in the running of a Skills Centre as a tailor, and the training of young people in the community;

C. He was the breadwinner of his family; and

D. He has shown remorse and repentance.

These are the matters which the Appellant's Counsel argues ought to have been given due consideration by the trial judge in imposing sentence.

On the other hand Counsel for the Respondent contended in his Briefs before the lower court and this Court that the fact of the Appellant being a first offender ought to be weighed against other numerous factors warranting the imposition of the maximum sentence of life imprisonment. These include-

"A. That the victim is an Orphan who has been traumatised early in life by the loss of both parents. A child in these circumstances needs special love and care from the society.

B. The accused merely took undue advantage of the unfortunate victim to satisfy his libido

C. The victim is grossly under-aged.

D. From the evidence on record which is supported by the testimony of the accused person himself, he had raw and unprotected sex with the poor girl not minding the possibility of transmitting AIDS and other sexually transmitted diseases to the innocent and uninformed girl or the obvious possibility of impregnating [sic] and terminating her educational pursuits.

E. The evidence on record showed that after the incident, the victim was bleeding." (pp. 121 -122 of the Record).

Counsel for the Respondent, therefore, urged the lower court not to interfere with the trial judge's imposition of a discretionary life sentence "unless it is shown that the exercise of such discretion was arbitrary, which is not the contention of the Appellant in this appeal."

Having considered all the above factors which Counsel on both sides argued impinge on the nature of the sentence imposed, the lower court refused the invitation from Counsel for the Appellant to hold the trial judge's imposition of the maximum sentence of life imprisonment as "harsh and excessive."

Counsel for the Respondent has urged this court to uphold the decision of the lower court not to interfere with the trial judge's discretionary life sentence imposed on the Appellant and submits that both the trial court and the lower court had exercised their discretionary powers judicially and judiciously.

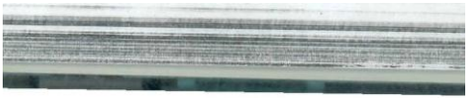
Counsel refers to several cases from Nigeria which support pronouncements made in decisions of courts in this jurisdiction that a judicial discretion ought to be exercised judicially and judiciously. He makes reference to the definition of "discretion" in Black's Law Dictionary, 6th Edition, 1990, quoted in the Nigerian Supreme Court case of SULEMAN V COP (2008) S N C C, as it applies to "public functionaries", but prefer that contained in the 7th Edition of Black's Law Dictionary in relation to "judicial discretionary" defined as-

> "The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; ..."

The principles guiding the exercise of a discretion by a court have been adequately stated in many cases both within and outside this jurisdiction. In a recent unreported case before this court, COLONE IN BO ADGIE RS AND THE STATE, Criminal Review No 1 – 7/2011, I had the opportunity to pronounce on this matter thus-

> "The exercise of a court discretion is a matter entirely for the determination of the court; no arguments need be heard on that, it can be exercised suo moto. But, it is settled that the discretion must be exercised judiciously and judiciously, taking all the circumstances of the case into consideration. It is also settled that reasons for the exercise of the discretion ought to be proffered, for it is on the basis of those reasons that the exercise can be adjudged either judicial and judicious or otherwise."

My brother Justice Semega-Janneh JSC, sitting as a single judge, in his Ruling on an application for a stay of execution in Civil App. No: 18/2012, NJOGOU SAER BAH (TRADING AS BOUTIQUE SAER AND STANDARD CHARTEREBANK (6AMBIA) LIMITED



(unreported) delivered on 31st July 2013, said this about the limit to the exercise by a court of a discretion –

> "The limit is that the discretion should, like any other judicial discretion, be exercised judiciously and not arbitrarily or capriciously, and should follow sound reasoning based on the facts and relevant law; to borrow from local parlance, the court is not entitled "to do whatever it likes or that which takes to its fancy" . Judicious consideration implies fair play and doing justice."

The statement of the principles governing the exercise of judicial discretion and its consideration on appeal was reiterated by my brother. Justice Onnogher dSC in the recent judgment of this Court, in the case of MADIKABBEH JABBI AND ALHAGI LANSANA SILLAH (both parties suing in their representative capacities), delivered on 6th May 2015.

He said-

> " It is not whether this coyrt, being an app llate court in the matter and faced with the same set of facfs would Have exercised is discretion differently. Also settled is the principle that the Supreme Court or an appellate court for that matter, does not make a pra ticze Of interfering with the exercise of discretion by the lower court for the pose of exercising the discretion differently or reaching a conclusion differe£1 m that of th lower court particularly when it is not demonstrated that the lower cqurt improperly or wrongfully exercised its discretion."

Now, in this case the questions that, in my opinion, arise are whether the trial judge's exercise of his discretion was arbitrary or capricious, or judicious and judicial, based on sound reasoning; and whether the lower court ought to have interfered with the Judge's exercise of discretion.

It is obvious from he tria dge's response to the plea in mitigation, reproduced above, that he did take tne following matters into consideration before sentencing --==..

A. that the convict "remains a member of the community"

B. that because of the alarming increase of rape offences, it is necessary to "stamp" it out by imposing long exemplary sentences;

C. that he was aware that the convict was a young man, but felt compelled to impose a long custodial sentence to protect "the society and especially the young and innocent of our society."

D. that due to the paramount importance he accords to the protection of the victims of rape, particularly the young and innocent, he felt compelled to impose the maximum sentence of life imprisonment.

It is apparent from the trial judge's response to the plea in mitigation that his primary concern was for the victim and that having weighed the considerations affecting both the convict and the victim, the scales of justice heavily tilted in favour of the victim. The trial judge's reasons for his decision to impose the maimum sentence of life imprisonment are clearly stated.

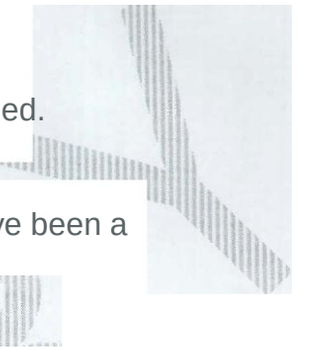
I commend the trial judge's emphasis on the importance of protecting the victim in this case. I believe the time has come for all involved in the judicial process to be more victim-firn reate tendency has been to focus much attention on the criminal to the detrimen of the victim. The victim in this case is an orphan, who at the tender age of 14 years was traumatised by the dastardly act of a 29 year old man, to whom the community had entrusted the training of his peers at a Skills Centre. The victim's ordeal started when she went to the Skills Training Centre to collect her school uniform from the Appellant who lured her to his house, where he raped her. Her screams for help were muffled by the Appellant.

In his evidence the Appellant admitted he had sex with the victim and, under cross-examination, further admitted having sex with the victim in the following unrelenting words (page 32 of the Record) –

"I met Chaku's [the victim's] guardian after the incident and told him she had left for home. I did not tell him we had sex, he did not ask me.

If he had asked me I would have explained to him what had happened.

She should not have reported this matter to the Police. It should have been a secret between us."



According to the evidence of PWI, Jerrehba Banda, a police officer investigating the case, the accused/Appellant was arrested on the 3rd of January 2009. The Record shows at page 32 that the evidence of the accused under cross-examination, including the excerpt quoted above, was given on the 30th of September 2009, almost 9 months after his arrest. I must state that contrary to the Appellant's Counsel's statement regarding "remorse and repentance" on the part of the Appellant, I do not detect a scintilla of remorse or repentance even 9 months after the commission of the offence. Instead the Appellant has throughout the proceedings in the trial court and the lower maintained his innocence, a position he has obviously abandoned in this appeal which is solely against sentence. Thus, whatever signs of remorse and repentance by the Appellant have been discerned cannot be through the lenses of either the trial judge or judges in the lower court. I, therefore, not element'ot: remorse or repentance on the part of the Appellant.

Counsel for the Appellant has under paragraph 3 of her Brief of Arguments before this Court listed what she regards as important "facts" which the lower court failed to take into consideration. I'(d my mirld these are extraneous and peripheral matters which the lower COfh could not . are considered. They concern the ignorance of the Appellant of the rature or the ofnce of rape; the failure by Counsel for the Appellant at the trial court to appreciate the law relating to rape, and the consequent reliance by the Appellant on the erronous advice of Counsel that co sent was a defence in this case, which, as Counsel for the Appellant puts it (under para 3.2), made him appear "as cold, unsympathetic and apologetic [sic, I believe she meant 'unapologetic'] for his actions."

Counsel for the Appellant further surmises that the trial judge was influenced in sentencing by the wrong interpretation given by Counsel for the Respondent to the phrase "the bread winner of his family" as indicating that the Appellant was responsible for a nuclear family, and that inspite of that he hunted little children. Whether this "misinterpretation" actually played on the trial judge's mind in sentencing is speculative and thus untenable.

For all the above reasons, Counsel for the Appellant urges this court "to find that the lower court did not exercise its discretion properly, allow the Appeal in its entirety, [even though the appeal is solely against sentence] set aside the judgment of the lower court on sentence and reduce the sentence of life imprisonment to 7 years or any reasonable length ....."

From the Record it is evident that the only arguments proffered by Counsel for the Appellant in the lower court against the sentence imposed relate solely to the fact that the Appellant was a first offender, a consideration which, ought to have attracted a lesser sentence, she argued. Other mitigating factors before the lower court are those contained in the plea in mitigation made at the trial court.

On the other hand, Counsel for the Respondent argued extensively in the lower court and this Court for the affirmation of the sentence of the trial court and has listed factors which ought to be considered as warranting the imposition of the maximum sentence and consequently the non interference with the trial Judge's discretionary sentence.

I agree with Counsel's submission that the MUSA SARR case, decided by this Court on 11th June 2014, is distinguishable from the instant case for in that case the victim was above eighteen years and the Appellant had been convicted on his guilty plea. In that case the sentence of life imprisonment was reduced to 15 years pursuant to powers vested under Section 29(2) of the Criminal Code. In this case, Counsel for the Respondent urges this court to follow its decisions in LAMIN KRUBALLY V. THE STATE and the recently decided case of OMAR KITAN V THE STATE, Elelivered on 29th April, 2005.

However , Counsel for the Appellant has sought to distinguish the case of LAMIN KRUBALLY V THE STATE, in which judgment was delivered by this Court on the 13th November, 2013, in that there was a close relationship between the prosecutrix 1 Respondent and the accused/Appellant, who was her step father in **loco parentis** and repeatedly had sex with her leading to her pregnancy. In such circumstances, which are different from those of this case, Counsel conceded, the sentence of life imprisonment was warranted. Counsel also referred to the OMAR KITAN case, cited above, as also distinguishable from the present case in that the prosecutrix in that case eventually became pregnant and the sentence of life imprisonment was affirmed by this Court.

While the circumstances of the two cases referred to by Counsel for the Appellant are different from those of the instant case, I do not think they have any mitigating effect when considering this case, which, as stated earlier, is an appeal urging this Court to interfere with the lower court's exercise of its discretion in declining to vary the sentence imposed by the trial judge in the exercise of his discretion. I do not think sentences in such cases ought to be measured soley on the basis of surrounding circumstances but also, and to my mind, more importantly on the deleterious effects on the lives of the victims.

After distinguishing the N'DIAYE case, (referred to earlier) the lower court said at page 139 of the Record –

> "In this case, which is far from house breaking or stealing [the offences in the N'DIAYE case], the innocence of the child was taken away from her. The question I ask is, what gave the Appellant the right to have sex with a 14 year old and think it is okay? What gave the appellant the right to think he can get away with having rudely taken innocence away. The victim has been scarred for life and can never reclaim her innocence again. Therefore, under the circumstances of the case, the sentence imposed is justified and is reasonable."

The lower court found no reason to interfere with the sentence of the trial court.

I believe the reasons given by the trial court and lower court for the imposition and affirmation of the sentence of life imprisonment in the circumstances of this case are cogent and judicious, and victim-centred. As I stated earlier, the time has come for those of us involved in the judicial process to be more victim-conscious and ensure victims of heinous crimes are afforded the protection they deserve as members of society.

For all the reasons I have stated herein, I dismiss this appeal and agree with the lower court in affirming the said sentence of life imprisonment imposed by the trial court.

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HON. J STICE R.C. SOCK **(JSC)**

I agree:

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HON. JUSTICA.N. CHOWHAN- CJ

I agree:

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HON. JU}'CE G.B.S. JANNEH – JSC

I agree

.....

HON. JUSTICE A. RENNER-THOMAS – JSC

I agree:

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HON. JUSTICE W.S.N. ONNOGHEN - JSC