

STATE
versus
NYEMUDZAI CHIKUNGURUSE

IN THE HIGH COURT OF ZIMBABWE
GUVAVA J
HARARE

Sentence

GUVAVA J: The accused was charged with contravening section 3(1)(b) of the Sexual Offences Act [*Chapter 9:21*]. She pleaded guilty to the charge and was duly convicted of the offence. The matter was referred to this court for sentence in terms of Section 225(b)(i) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The facts which gave rise to this matter were set out in the outline of State case and can be summarised as follows.

On 19 September, 2002 at about 9 a.m. the complainant, who was 6 years old, was at the accused's home playing with some young boys. The accused called the complainant into her kitchen hut and locked the door. She ordered the complainant to remove his shorts and she removed her pants. She thereafter inserted the complainant's penis into her vagina. After a while the accused thereafter told the complainant to remove his penis from her vagina and use his forefinger instead. She then gave him some water to wash his hand and told him not to make a report to anyone.

The complainant made a report to his mother when he went home, leading to the arrest of the accused.

A medical report was produced by the State in respect of the complainant. The doctor observed that there was some bruising on the complainant's penis and that he complained of dysuria.

In mitigation the accused stated that she was 23 years old, single and had no children. She stated that she was residing with an aunt at the time of the commission of the offence. When questioned by the court on why she committed the offence she indicated that she was seeking satisfaction.

In aggravation the State called Dr Jonathan Brakash. He stated that he is a psychologist and has a doctorate in Clinical Psychology specialising in child psychology. He stated that he has been working as a child psychologist for 23 years. He explained that he had not had an opportunity to examine the complainant in this matter but would give evidence relating to studies that they

had conducted in Zimbabwe with sexually abused children. He said they had conducted a study of over 3 000 children (boys and girls) and found that the following short term effects occurred to children who had been sexually abused:

- (a) There was increased aggression
- (b) Fear of women
- (c) Increased headaches and stomach aches
- (d) A decrease in academic performance
- (e) Increased masturbation
- (f) Abnormal sexual practices

He stated that they had generally observed the following long-term effects:

- (a) Depression
- (b) Inability to have stable relationships
- (c) Sexually very aggressive.

He stated that they also found a small number of children who were not affected by the sexual abuse. In this category of cases, it was found that sex had been introduced as a game and the parents of the children had been very supportive when the matter came to light and not laid any blame on the children.

He also testified that in his experience the effects of sexual molestation would be the same for both boys and girls although he was of the opinion that abuse such as the one described in this case affected boys more than girls because they are not used to being forced to have sexual intercourse as society views them as the aggressor in sexual relationships.

He further stated that the injuries observed on the complainant by the doctor who examined him shows that intercourse must have gone on for a long period such that it caused physical injury to the complainant's genitalia. He stated that that this was likely to distress the child. He was however of the view that it was unlikely that the complainant in this case suffered excessive trauma as there was no evidence that he was threatened with violence and the offence had only occurred once.

He further stated that research had shown that the fact that the complainant immediately made a report to his mother leading to the arrest of the accused would mitigate the trauma on the complainant.

This witness was not cross-examined by the accused. The witness gave his evidence well and it cannot be faulted, as he was a professional witness who

merely told the court the findings which they have made in cases of a similar nature. His evidence was of importance to the court however as it illustrated the findings which have been made by research on the trauma which children go through when they are sexually abused.

The Sexual Offences act [*Chapter 9.21*] under which the accused was charged and convicted came into operation in March 2001. Prior to the promulgation of this act persons who had committed such crimes were charged with the common law offence of indecent assault. A review of the sentences imposed for such cases shows that they generally attracted sentences of between 6 months imprisonment to 3 years imprisonment depending on the circumstances of each case. In the case of *Edson Ncube v State* HC-H-83, the accused who dragged the complainant who was ten years old into the bush, removed her pants and attempted to remove his own when disturbed, was sentenced to 14 months imprisonment with 5 months suspended on condition of good behaviour. The court took into account that the accused had been drinking and no physical harm was occasioned to the girl.

In the case of *S v Mikali Joko* HC-H-497-83 the accused who was found lying beside a 5 year old girl with his trousers rolled down and his limp member pressed against the genitals of the complainant was sentenced to 6 months imprisonment of which 3 months were suspended. The court took into account that there was no injury to the complainant and the accused was drunk.

In *S v Ponder* 1989(1) ZLR 235, the appellant an 18-year old youth fondled the private parts of two young girls aged seven and nine respectively while playing with them in a swimming pool. He was convicted and sentenced to 8 months imprisonment. On appeal the court reduced the sentence to one-month imprisonment which was wholly suspended on the usual conditions of good behaviour. The court found that the sentence was manifestly excessive in view of the fact that the appellant was only 18 years old and a first offender who should be kept out of prison. The court also found that the complainants suffered no physical or psychological trauma from the assault.

In *S v C* 1965(3) SA 105 a 37 year old man was convicted of indecent assault on a young boy after threatening him with a weapon. He was sentenced to 5 months imprisonment.

In the more recent case of *S v Ndhlovu* HB66-03 it was held that a sentence in the region of 5 to 6 years imprisonment was called for in

circumstances where the accused placed his penis between the legs of a 5 year old boy on two separate occasions and ejaculated semen.

It seems to me that the legislature in promulgating the Sexual Offences Act, and providing a penalty section which provides for a sentence of up to 10 years imprisonment had recognised the growing problem of the abuse of young children. This was also an acceptance that the common law offence of indecent assault was not effectively dealing with the problem.

In my view it was also in recognition that Zimbabwe is also a party to the United Nations Convention on the Rights of the Child (CRC) and a party to the African Charter on the Rights of the Child that the legislation was enacted. Article 19 of the CRC provides as follows:

- “1. State parties shall take all appropriate legislative administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.(Underlining is my own)
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement”.

The corresponding provision in the African Charter on the Right of the Child is couched in a similar manner and also affords children protection from sexual abuse.

Both conventions require State Parties to protect the rights of children by putting in place administrative, legislative and other structures to ensure the full protection of children from all forms of abuse, including sexual abuse.

The conventions, as can be seen in Article 19(2) of the CRC require State Parties to provide support for the child who has been abused. Sadly in most developing countries, and Zimbabwe is no exception, very little is done in terms of counselling and other forms of support due to financial constraints. Institutions such as the Family Support Clinic, are only found in the big centres and not in the rural areas.

It seems to me that in these circumstances, the judiciary would be failing in its duty if it did not impose severe penalties on persons who abuse children sexually. As the evidence of Dr Brakash illustrated, the fact that the offender is punished for the offence assists in the healing process of the child.

The court, as upper guardian of all minor children would thus play a role in the rehabilitation of the child, whilst at the same time punishing the offender.

Sending the offenders to prison for lengthy terms would not, in my view have the effect of punishing the offender but would also act as a deterrent for other like-minded persons. Severe penalties are also necessary, as with the advent of H.I.V. and AIDS, victims of sexual abuse are placed at risk, though no fault of their own.

There can be no doubt that for the complainant, who was only a 6-year-old boy suffered some trauma as he was being asked to perform a sexual act on an adult woman.

It was also aggravating in my view that the complainant suffered some injuries from the sexual intercourse. It was Dr Brakash's opinion that the sexual act must have gone on for a long time in order for it to have caused the injuries reflected on the medical report.

In assessing sentence in this matter however, this court did not lose sight of the fact that the accused was a young girl of 23 years of age who had pleaded guilty to the offence thus exhibiting some measure of contrition. I also took into account, in her favour, that female offenders rarely re-offend. In mitigation I took into account that the complainant was not threatened in any way by the accused. I was thus satisfied that a fairly lengthy term of imprisonment with a portion suspended on condition of good behaviour would meet the justice of this case.

It was for these reasons that I imposed the following sentence:

5 years imprisonment of which 2 years are suspended for 5 years on condition that the accused does not, within that period commit any offence involving a contravention of 3 of the Sexual Offences Act [*Chapter 9:07*] and for which upon conviction the accused is sentenced to a term of imprisonment without the option of a fine.