

THE STATE
versus
FRANCIS GORORINO
and
CLAUD DOTA
and
FELIX MBADZO

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE 15th December 2004

Criminal Review

BHUNU J: The 3 accused persons were convicted on charges of rape and sentenced by the same Magistrate on different dates.

It is however convenient to deal with all the 3 cases in one review judgment as they have a lot in common.

Francis is a 17 year old juvenile, he raped a 9 year old juvenile. He was sentenced to 9 years imprisonment of which 2 years imprisonment was suspended on appropriate conditions of good behaviour on the 4th of October 2004.

On the following day the 5th October 2004 the same Magistrate convicted Felix a 15 to 16 year old juvenile of raping a 14 year old juvenile. Felix's exact age is not clear from the record of proceedings. This is because the charge sheet says that he is 15 years whereas the state outline says he is 16 years.

Nothing much however turns on that minor discrepancy save to say that it was the duty of the trial Magistrate to ascertain and establish the accused's correct age.

On the above facts the accused was sentenced to corporal punishment of six strokes.

The following day on the 6th October 2004 the same Magistrate convicted Claude a 17 year old juvenile for raping a 5 year old infant. He also was sentenced to a moderate correction of 6 strokes with a light cane.

What immediately strikes one's mind is the huge discrepancy between the sentence meted out on Francis and that imposed on his fellow convicts.

There is hardly any justification for the huge discrepancy because all the three offenders are juveniles who perpetrated the same offence on fellow female juveniles. Their moral culpability is more or less the same save that the fact that he raped an infant.

For justice to be done and be seen to be done there is need to treat offenders who commit the same offence with more or less the same moral culpability equally.

Justice and fairness requires that there must be uniformity and equal treatment of offenders in equal guilty particularly where they appear before the same judicial officer. Judicial officers should not operate as loose canons imposing penalties at random. There is need for uniformity.

In the case of *s v Zuze* 1972 (1) RLR the court emphasized the need for reasonable uniformity in sentencing convicts with equal moral culpability and blame worthiness.

While appreciating the need to treat young first offenders with a measurable of leniency, where however they enter crime at the deeper end the courts have a duty to meet out appropriately stiff and deterrent sentences for their own good and the benefit of society at large.

Teenagers who commit serious offences such as rape stand in need of a constant reminder not to transgress again from the narrow and straight path. It is therefore certainly not enough to simply sentence the offending juvenile to corporal punishment with a few strokes of a rattan cane.

I am of the strong view that in serious offences for corporal punishment to achieve the desired effect it ought to be coupled with an appropriate wholly suspended term of imprisonment on conditions of good behaviour.

On the other hand sentencing a juvenile first offender to 9 years imprisonment for a serious offence which may be the product of juvenile

pranks brought about by immaturity and the foolishness of youth, is tantamount to killing a fly with the proverbial sledge hammer. There is need to temper justice with mercy and leniency without exposing society to the dangers of deviant juvenile delinquency.

I am therefore caught in between too lenient sentences and a manifestly too severe term of imprisonment which induces a sense of shock.

As regards the too lenient sentences all I can do now is to decline to certify the proceedings as being in accordance with real and substantial justice.

There is however need to interfere with the harsh sentence for justice to be done. Francis Gororino is a 17 year old first offender. He was sentenced to 9 years imprisonment of which 2 years were suspended on conditions of good behaviour in circumstances where other juveniles were sentenced to corporal punishment for the same offence.

By now he has served more than 5 months of the sentence. No useful purpose can be served by his continued incarceration. The longer he stays in prison the more he is likely to be brutalised and contaminated by hardened criminals. The punishment he has already served is in my view adequate for his transgression. He is therefore entitled to his immediate release.

It is accordingly ordered:

1. (a) That the sentence in respect of Francis Gororino CRB BNR 303/04 be and is hereby quashed and set aside and replaced by the following:
 - (b) That the accused be and is hereby sentenced to 12 months imprisonment of which 6 months imprisonment is wholly suspended for a period of 5 years on condition the accused does not again within that period commit any offence of a sexual nature and for which he is sentenced to imprisonment without the option of a fine.
2. That the court declines to certify the proceedings in respect of Felix Mbadzo and Claude Dota CRB BNR 333/04 and *Claud Dota CRB*

BNR292/04 as being in accordance with real and substantial justice.

KUDYA J, agrees:.....