

THE STATE
versus
ELVIS MUPOTSA

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 30 September 2016

Review Judgment

MUNANGATI-MANONGWA J: The accused a 22 year old male was charged with having sexual intercourse with a young person as defined in s 70 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He pleaded guilty and was duly convicted. The conviction being proper, same is confirmed.

The facts surrounding the case are as follows:

The accused had sexual intercourse with the complainant aged 14 years, several times in the bush. The girl became pregnant as a result and eloped to the accused's homestead. The parties started living as husband and wife. The accused later returned the complainant to her parents upon hearing rumours that the girl once eloped to another boy.

The magistrate sentenced the accused person to 14 months imprisonment wholly suspended for 5 years on condition accused does not within that period commit an offence of a sexual nature and for which upon conviction accused will be sentenced to imprisonment without the option of a fine.

In handing down this sentence the magistrate considered that the age difference between the parties is about 8 years, the complainant fell pregnant and accused exposed the complainant to the risk of acquiring the deadly HIV and AIDS as well as sexually transmitted infections. Although no medical report was placed before the court regarding the HIV status of both the accused and the complainant, the considerations by the court *a quo* were reasonable.

However, a wholly suspended sentence was not appropriate in the circumstances for the following reasons:

The accused has ruined the life of a 14year old who he has also returned to her parents. The complainant who is of school going age is unable to continue with education and is faced with motherhood at a very early stage. The complaint's parents will have to shoulder the burden of looking after complainant who is still a child, and her child as well.

The likelihood of accused repeating the offence and ruining the life of another child is high given that he was given a wholly suspended sentence. No doubt the abuse of children is on the increase as noted in CHAREWA J's judgment in *The State v Shepherd Banda* and *The State v Everton Chakamoga* HH 47/16. This judgment is a "must read" for all judicial officers dealing with criminal matters involving sexual offences.

In referring to the obligation placed on the State by s 81 of the Constitution of Zimbabwe Amendment (no 20) Act 2013 particularly ss 81 (1) (e) on protection of children against sexual exploitation among other things and the adequate protection of children by the courts, in particular the High Court as the upper guardian of children, the learned judge had this to say at p 3 of the cyclostyled judgment:

"Therefore the general constitutional duties and obligations placed on the State apply equally to the conduct of judicial officers in their dispensation of justice. It therefore behoves on judicial officers to ensure paramountcy of children's interest in all proceedings before them, including handing down appropriate sentences that deter those preying on children to refrain from doing so in order to give maximum protection accorded to children by law."

Given the above expressed position one is forced to ask whether the sentence *in casu* "is the appropriate sentence that has a deterrent effect and accords maximum protection to children as demanded by the law?"

I acknowledge that a wholly suspended sentence is a competent sentence. However, I am not satisfied that it is an appropriate sentence given the facts of this matter. (my emphasis)

In essence accused has a hanging sentence over his head but to society he is a free man. A short imprisonment term would have been appropriate. A sentence of 6 months imprisonment with 3 months imprisonment suspended for 5 years on condition accused does not commit an offence of a sexual nature for which upon conviction will be sentenced to imprisonment without the option of a fine would have been appropriate. Community service was not considered at all. That in itself was a misdirection, accused being a first offender, that alternative mode of sentence should have been considered. Community service seeks to rehabilitate a convict outside the rigors of prison whilst at the same time his community benefits from the work performed. This

would also have been an appropriate sentence. The courts must not be seen as aiding or condoning criminal behaviour. Society looks up to the courts for justice. If same is not forthcoming by way of appropriate sentences, society will lose confidence in the justice delivery system. This will lead to anarchy where the aggrieved can take the law into their hands in order to assuage injured feelings. It could also lead to a negative attitude where crimes are not reported it being taken that courts are not helpful. It is therefore incumbent upon each judicial officer in the course of dispensation of justice to ensure that children's constitutionally endowed right to protection against sexual abuse or any other abuse is upheld. This can only be achieved through taking cognisance of the impact the crime will have upon the victim, the need to discourage such conduct, of course balancing same with the facts and circumstances of each case.

I am of the view that the sentence imposed was lenient or not appropriate in the circumstances. It was not in accordance with real and substantial justice, accordingly I withhold my certificate.