

THE STATE
versus
WILLIAM GONYE

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 18 October 2016

Review judgment

MUNANGATI MANONGWA J: The accused a 23 year old had sexual intercourse with a young female complainant of 14 years of age. As a result the complainant became pregnant. Accused was charged with contravening s 70 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] for having sexual intercourse with a young female person under the age of 16 years. Accused was convicted after a full trial. The conviction was proper and it is hereby confirmed.

The court *a quo* sentenced accused to “24 months imprisonment of which 6 months imprisonment is suspended for 5 years on condition accused does not within that period commit any offence of a sexual nature and for which upon conviction accused will be sentenced to imprisonment without the option of a fine. The remainder of 18 months imprisonment is suspended on condition accused completed 630 hours of community service at Sangano Clinic. The community service shall be performed on Monday to Friday excluding public holidays and between the hours 0800-1300, 1400-1600 and to the satisfaction of the person in charge at the institution who may for good reasons shown grant him leave of absence which shall not count as part of the community service to be completed. The performance shall commence on 15/08/16 and must be completed within 10 weeks of that date.”

In sentencing the accused the court considered that as a young first offender it was not desirable to send accused to jail. Further as accused was employed as a domestic worker, imprisonment was to lead to loss of employment. The court took cognisance of the fact that having sexual intercourse with a young female person under the age of 16 years is a serious and prevalent offence hence courts must be seen as passing deterrent sentences. Reference was made to the age difference of about 8 years between complainant and the accused. The

court also took note of the fact that complainant fell pregnant and that she also got infected with a sexually transmitted disease, genital warts which facts were aggravatory.

The magistrate proceeded to comment as follows “The court is of the view that complainant appears to be a girl of loose morals. She had sexual intercourse with the accused the very day he proposed love to her.” This is a shocking statement from a court official who is obliged by the Constitution of Zimbabwe particularly sections 44 and section 45 to protect the rights set out in [Chapter 4]. The sections read as follows:

“44 Duty to respect fundamental human rights and freedoms

The State and every person, including juristic persons, and every institution and agency of the government at every level must respect, protect, promote and fulfill the rights and freedoms set out in this Chapter.

45 Application of Chapter 4

(1) This Chapter binds the State and all executive, legislative and judicial institutions and agencies of government at every level.”

The fundamental rights to be protected in terms of children pertain *inter alia* the right to be protected from sexual exploitation or any form of abuse as stated in s 81 (1) (e) and the right to adequate protection by the court as provided for in s 81 (3) of the Constitution.

If the courts are seen to blame the child victim can it be said they are upholding the Constitution and living up to the duty imposed upon them to protect the children? The comment by the magistrate is not only sexist, unsubstantiated, judgmental but also misplaced. The reason why the legislature provided for the protection of children under 16 years is because of their vulnerability. Children are impressionable hence easily susceptible to influence especially where an adult is involved. As the court *a quo* had rightly observed, accused is 8 years complainant’s senior, complainant still has to grow and mature both physically and mentally which attributes the accused has since attained. . From the record it is clear that accused invited complainant to his homestead after which they had sexual intercourse. On the second occasion accused followed complainant to the river and asked for sex from complainant. This amounts to preying on the complainant. For the court *a quo* to then turn around and blame the child where an adult has abused her, is not conduct expected of a judicial officer who should clearly be aware of the reasons for the promulgation of this law.

The aggravating factors in this case far outweigh the mitigatory factors. It is common cause that the complainant became pregnant, became infected with genital warts and was ditched by the accused.

To then find that because accused is employed as a domestic worker earning \$50-00 per month justifies him not being incarcerated is ridiculous.

Whilst community service is a competent sentence, it is not proper in the circumstances. *In casu*, an effective prison term of between 24 months and 30 months would have been proper. If courts continue meting out lenient sentences the cancer of sexual abuse of female persons below the age of 16 years can never be eradicated. The courts have to respect the duty thrust upon them by the Constitution to protect and safeguard children's rights. The court in my view is the final port of call for abused children and the very institution meant to protect and uphold children's best interests. If courts adopt a hostile attitude by blaming the victim and failing to balance the interests at stake, then this amounts to serious abrogation of duty. Whilst CHAREWA J's judgment in *The State v Shepherd Banda* and *The State v Everton Chakamoga* HH47/16 seems to have laid a solid base for magistrates to follow in their sentencing trends it seems a lot is required in terms of empowering magistrates *vis* sentencing and punishment.

Due to the sentence imposed which in my view is lenient given the facts and circumstances attended to the case, I am not satisfied that the proceedings are in accordance with real and substantial justice. Accordingly I withhold my certificate.