

THE STATE

Versus

ANDREA M NGWENYA

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 12 FEBRUARY 2009

Criminal Review

NDOU J: The accused was aged 79 years at time of his conviction. He was convicted by a Bulawayo Regional Magistrate of two counts of rape. Nothing turns on the conviction. He was sentenced to 18 years imprisonment on each count. Of the total 36 years, 6 years was suspended on the usual conditions of good future behaviour. The old man who is in the afternoon, if not the sunset, of his life was therefore sentenced to an effective 30 years imprisonment. The background facts of the case are the following. The accused is a traditional healer. The complainant is a female aged 19 years at the time of the offences. She suffered from fits and had bouts of dizziness. The accused approached the complainant's grandmother and offered his services to rid the complainant of these epileptic attacks. The complainant and her grandmother naturally agreed as they believed in the accused's healing powers. The accused took the complainant to a mountain allegedly for treatment. At the mountain, the accused lit a fire and told the complainant to undress and sit in front of the fire. She obliged. The accused then ordered the complainant to lie down while naked and she did so. He removed his own attire and got on top of her and raped her once. After he satiated his sexual lust, he told her to go home and return to the same place the following day. The accused repeated this ordeal on another day. Not surprising, her condition did not improve instead she felt violated and traumatised and reported the sexual abuse to her sister and grandmother resulting in the accused's arrest. On the one hand, the accused is a first offender. He is the sole breadwinner in his family. He is widowed. Despite his advanced age, he has a child doing grade 1. On the other hand, this is a very serious form of sexual abuse as rightly observed by the learned Regional Magistrate. As a traditional healer, he abused a patient who had consulted him. The individual sentences imposed in each count are excessive. More

importantly, the cumulative sentence of 30 years imprisonment is manifestly excessive and is in excess of the outer limit that our courts would ordinarily impose – *S v Sherman* SC-117-84; *S v Sawyer* HH-231-99; *S v Chikanga* SC-123-93; *Sifuya v S* HH-77-02 and *S v Nyathi* HB-60-03. The sentence imposed here is disturbingly inappropriate *S v Mindowa* 1998(2) ZLR 392 (H) and *Ramushu & Ors v S* SC-25-93. The exercise of the sentencing discretion was tainted with misdirection calling for interference.

Accordingly, the convictions are confirmed. I, however, set aside the sentence imposed by trial court and the following is substituted:

Count 1 - 10 years imprisonment

Count 2 - 10 years imprisonment

Of the total 20 years, 6 years is suspended for 4 years on condition the accused in that period does not commit an offence of rape or an offence of a sexual nature and for which he is convicted and sentenced to imprisonment without the option of a fine.

Cheda J I agree