

THE STATE
versus
C (a Juvenile)

HIGH COURT OF ZIMBABWE
MAWADZE & MUREMBA JJ
HARARE, 31 December 2014

Review Judgment

MUREMBA J: The accused, a 15 year old juvenile was charged with and convicted of rape as defined in s 65(1) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*].

The accused raped a 14 year old neighbor during the night as they were both sleeping in the same hut. The accused is friends with one of the complainant's brothers. On the fateful night the accused went to the complainant's home to see his friend. Unfortunately the friend was not at home. When the complainant and her other brothers retired to bed the accused joined them. The complainant and her brothers were sleeping in the same hut. During the night the accused raped her.

The accused denied the charge and was convicted after a full trial. I find the conviction proper and it is hereby confirmed.

The accused was sentenced to receive a moderate corporal punishment of 3 strokes with a rattan cane. He was sentenced on 26 September 2014 on the strength of s 353 (1) of the Criminal Procedure and Evidence Act [*Cap 9:07*] which allows for the imposition of corporal punishment. The section reads,

“(1) Where a male person under the age of eighteen years is convicted of any offence the court which imposes sentence upon him may:-

(a) in lieu of any other punishment;

or

(b) in addition to a wholly suspended sentence of a fine or imprisonment; or

(c) in addition to making an order in terms of subsection (1) of section three hundred and fifty-one, sentence him to receive moderate corporal punishment, not exceeding six strokes”.

What gave rise to the enactment of s 353 (1) of the Criminal Procedure and Evidence Act [Cap 9:07] is the old Constitution of Zimbabwe which permitted the imposition of corporal punishment on boys below the age of 18 years. S 15(1) thereof reads as follows:-

“No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment”.

Section 15(3) reads:-

“No moderate corporal punishment inflicted -

- (a) in appropriate circumstances upon a person under the age of eighteen years by his parent or guardian or by someone *in loco parentis* or in whom are vested any of the powers of his parent or guardian; or
- (b) in execution of the judgment or order of a court, upon a male person under the age of eighteen years as a penalty for breach of any law; shall be held to be in contravention of subsection (1) on the ground that it is inhuman or degrading”.

The foregoing provision of the old Constitution made it constitutional to impose corporal punishment. The right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment was limited to the extent specified in s 15(3).

While it was constitutional under the old Constitution to impose corporal punishment what is of significance in the present case is that the accused was sentenced after the new Constitution, that is, the Constitution of Zimbabwe Amendment (No.20) Act 2013 had come into operation . There is need to examine the provisions of the new Constitution and see if it is still competent for the courts to impose corporal punishment on male juvenile offenders.

In the new Constitution the right to freedom from torture or cruel, inhuman or degrading treatment or punishment is under s 53 and it reads,

“No person may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment”.

Section 86 thereof deals with limitation of rights and fundamental human freedoms.

Section 86(3)(c) reads:-

“No law may permit the following rights enshrined in this Chapter and no person may violate them:-

- (a)
- (b)
- (c) the right not to be tortured or subjected to cruel, inhuman or degrading treatment

punishment”.

It is clear that the way the new Constitution is worded on the right to protection from inhuman treatment is different from the way it was worded under the old Constitution. In the new Constitution the right is not limited at all. In fact s 86 makes it abundantly clear that no law may limit that right and provides for no exception. If the legislature had intended corporal punishment to remain as part of our law it would have limited the right by categorically stating that moderate corporal punishment inflicted in execution of the judgment or order of a court shall not be held to be in contravention of that right as was the case under the old Constitution. My interpretation of sections 53 and 86 of the new Constitution brings me to the conclusion that corporal punishment is now unconstitutional. What strengthens my conclusion are further provisions in the new Constitution which protect the right to personal security, equality and non-discrimination. Below are the relevant provisions.

Section 52 (a) which deals with personal security and prohibits violence states that,
“Every person has the right to bodily and psychological integrity, which includes the right—

(a) to freedom from all forms of violence from public or private sources.”

Section 56 deals with equality and non-discrimination. It reads,

“(1) All persons are equal before the law and have the right to equal protection and benefit of the law.

(2)

(3) Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock. (the underlining is mine)

(4) A person is treated in a discriminatory manner for the purpose of subsection (3) if—

(a) they are subjected directly or indirectly to a condition, restriction or disability to which other people are not subjected; or

- (b) other people are accorded directly or indirectly a privilege or advantage which they are not accorded.
- (5) Discrimination on any of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair, reasonable and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.”

Internationally corporal punishment is regarded as violence against children and as a breach of fundamental human rights. It is considered inhuman and degrading as it violates children’s physical integrity and demonstrates disrespect for human dignity and undermines the self-esteem of children. It is said to treat children as half-human beings thereby breaching the principle of equal protection before the law and non-discrimination. There are regional and international conventions which protect these rights and the right to freedom from torture, inhuman and degrading punishment. Zimbabwe has ratified and acceded to some of them. It ratified the Convention on the Rights of the Child on 11 September 1990 and the African Charter on Human and Peoples’ Rights (ACHPR) on 30 May 1986. It acceded to the International Covenant on Civil and Political Rights (ICCPR) on 13 May 1999 and to the African Charter on the Rights and Welfare of the Child on 19 January 1995.

Under **the African Charter on Human and Peoples’ Rights** under Article 3

- “1. Every individual shall be equal before the law.
- 2. Every individual shall be entitled to equal protection of the law.”

Under Article 5,

“Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”

Under **The International Covenant on Civil and Political Rights** under Article 7

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment and punishment.”

Under Article 4 (2) even in times of public emergency no derogation from Article 7 may be made.

Under Article 26, “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any

discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Under **The Convention on the Rights of the Child** the following provisions are relevant.

“Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.”

Under **the African Charter on the Rights and Welfare of the Child** the following are the relevant provisions.

“Article 1: Obligation of States Parties

1. Member States of the Organization of African Unity Parties to the present Charter shall recognize the rights, freedoms and duties enshrined in this Charter and shall undertake to the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.

2. Nothing in this Charter shall affect any provisions that are more conducive to the realization of the rights and welfare of the child contained in the law of a State Party or in any other

international Convention or agreement in force in that State.

3. Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged.

Article 2: Definition of a Child

For the purposes of this Charter, a child means every human being below the age of 18 years.

Article 3: Non-Discrimination

Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.

Article 16: Protection Against Child Abuse and Torture

1. States Parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of the child.

2. Protective measures under this Article shall include effective procedures for the establishment of special monitoring units to provide necessary support for the child and for those who have the care of the child, as well as other forms of prevention and for identification, reporting referral investigation, treatment, and follow-up of instances of child abuse and neglect.

Article 17: Administration of Juvenile Justice

1. Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others.

2. State Parties to the present Charter shall in particular:
(a) ensure that no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment”

By becoming a State Party to the above mentioned conventions, Zimbabwe indicated its consent to be bound by these conventions. As such it has international legal obligations to respect, protect and fulfil human rights for everyone within its jurisdiction. As a State Party it is duty-bound to enact the necessary legislation to give domestic effect to them. It is evident from Part 3 of Chapter 4 of the new Constitution that Zimbabwe has endeavored to fulfil its international legal

obligation in protecting the rights of the children. Section 81 thereof elaborates on the rights of children. Of significance are sections 81 (1) (a) and 81 (1) (e) which make it clear that children are not half-human beings as they ought to be treated equally as adults and protected from all forms of abuse including violence. They read as follows:

“81(1) Every child, that is to say every boy and girl under the age of eighteen years, has the right—

- (a) to equal treatment before the law, including the right to be heard;
- (b)
- (c)
- (d)
- (e) to be protected from economic and sexual exploitation, from child labour, and from maltreatment, neglect or any form of abuse” (my emphasis).

This elaboration of the children’s rights in conformity with the regional and international conventions that Zimbabwe has ratified demonstrates that the new Constitution does not allow for the imposition of corporal punishment anymore. Clearly s 353 (1) of the Criminal Procedure and Evidence Act [Cap 9:07] is now a law which is inconsistent or *ultra vires* the Constitution. Section 10 of Schedule 6 of the new Constitution provides that, “all existing laws continue to be in force but must be construed in conformity with this Constitution.” Section 2(1) thereof goes on to state that, “the Constitution is the supreme law of Zimbabwe and any law, practice custom or conduct inconsistent with it is invalid to the extent of the inconsistency”. What it means under the circumstances is that whilst the

Criminal Procedure and Evidence Act [Cap 9:07] remains in force its section 353 (1) is now an invalid law.

Section 2(2) of the new Constitution states that:-

“The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them”.

What it means is that the courts have a duty to uphold the Constitution and to promote, respect and protect the rights and freedoms enshrined therein. I thus declare s 353 (1) of the Criminal Procedure and Evidence Act [Cap 9:07] to be constitutionally invalid.

One other issue that I feel obliged to comment on although it is not an issue before me is that s 53

of the new Constitution seems to outlaw the infliction of corporal punishment on children by their parents, guardians or by persons *in loco parentis*. As already explained above the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment is an absolute right.

Under the old Constitution parents, guardians and persons *in loco parentis* were allowed to inflict moderate corporal punishment on children. It appears that that position has since changed.

In view of the fact that the accused was sentenced after the new Constitution had come into operation the trial magistrate ought to have employed the provisions of the new Constitution in sentencing the accused. Since the new Constitution has outlawed corporal punishment the trial magistrate should have considered other sentencing options in rape cases in respect of juvenile offenders.

Article 17 (3) of the African Charter on the Rights and Welfare of the Child states that,

“the essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, re-integration into his or her family and social rehabilitation.”

Article 40 (1) of the Convention on the Rights of the Child also states that:

“State Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society”

The above provisions show that what is important when punishing juveniles is the need to have the child rehabilitated back into society and his family. Fortunately, we have provisions in our Criminal Procedure and Evidence Act [Cap 9:07] which are meant to promote the child's rehabilitation and reintegration into society

In terms of s 351 (2)(a) of the Criminal Procedure and Evidence Act [Cap 9:07] the court may refrain from passing sentence and refer the matter to the Children's Court if the juvenile is a child who is in need of care. Under this section it is not competent for the court to pass sentence and to refer the child to the Children's Court at the same time. If the matter is referred to the Children's Court the juvenile offender should be dealt with in terms of the Children's Act [Cap

5:06], See also *S v Mupariwa* 2000 (1) ZLR 168 (HC).

The other alternative that the court has is to have the juvenile offender placed or institutionalized in a reformatory or in a training institute. This is in terms of s 351 (2) (b) of the Criminal Procedure and Evidence Act [Cap 9:07]. This should be done after ascertaining with the Ministry of Social Welfare that accommodation is available. See also *S v Mupariwa* 2000 (1) ZLR 168 (HC). The challenge that we have though with this option is that we have very few such institutions in Zimbabwe. With the economic hardships that we are facing even funding the few existing institutions is a big challenge. Again, if the court goes for this option it should not pass sentence.

The courts also have an option to impose wholly suspended prison terms. See *S v M* 2009 (1) 47 (H). In some cases effective imprisonment can be imposed. Generally juveniles should not be sent to prison but in cases where there are aggravating features such as multiple counts, transmission of sexually transmitted diseases to the victim, serious psychological and or physical trauma, a high degree of violence or force used during the rape and the use of a weapon during the rape, effective imprisonment might be called for especially if the juvenile offender is between 16 and 18 years. However, the periods of imprisonment should vary according to the age and the moral blameworthiness of the offender - See John Reid-

Rowland *Criminal Procedure in Zimbabwe* pp 13-10. See also *S v Zaranyika and Ors* 1995 (1) ZLR 270 (H).

For the court to arrive at an appropriate penalty it should consider and assess all relevant factors and recommendations by the Probation Officer.

Community service should not be imposed in rape cases as this is meant for petty or non-serious offences. See *S v Zhou* 1995 (1) ZLR 329 (H).

In *casu* I did not have the benefit of reading the Probation Officer's report although the trial magistrate made reference to it in her reasons for sentence. The report was not attached to the record when it was submitted for review. I suppose it was an oversight on the part of the trial magistrate. However, in her reasons for sentence the trial magistrate indicated that the Probation officer had recommended community service, but as I have already stated above, community service should not be imposed in rape cases. Considering the way the rape was committed, the age of the accused (15years), the age of the complainant (14 years) and that the accused is a first offender who is still in secondary school doing form 3, a wholly suspended prison sentence in the region of 3-4 years would have met the justice of the case.

The accused has already been caned. There is nothing that can be done about it now. I cannot certify the sentence to be in accordance with real and substantial justice. I thus withhold my certificate.

Although I have declared s 353 (1) of the Criminal Procedure and Evidence Act [*Cap 9:07*] to be constitutionally invalid, in terms of s 167 (3) and s 175 (1) of the new Constitution it is the Constitutional court which makes the final decision on whether an Act of Parliament is constitutional. Any order of constitutional invalidity of any law that is made by another court other than the Constitutional court has no force unless it is confirmed by the Constitutional court. In terms of s175 (3),

“Any person with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order concerning constitutional validity by a court in terms of subsection (1).”

In casu since this matter came before me as a criminal review I hold the view that it is the Prosecutor-General who should apply to the Constitutional court to have the declaration of constitutional invalidity confirmed. As such this review judgment should be brought to the attention of the Prosecutor-General.

MAWADZE J agrees