(1) THE STATE
versus
SHEPHERD BANDA

(2) THE STATE
versus
EVERTON CHAKAMOGA

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 20 January 2016

Criminal Review

CHAREWA J: The facts and the sentencing regime for these two cases being very similar, I considered it appropriate to issue one review judgment for both.

Both accused are mature adults, more than 30 years old. Both had sexual intercourse with young persons, to wit, girls aged 15 years, about half the accused's ages. They both impregnated the young girls. Fortunately, both girls did not contract STIs or HIV. The only difference was that one accused took the young girl for his wife, an aggravating circumstance as I will discuss later. The other gave the young girl $2.00 and $1.00 after he had had his way with her.

Both accused were charged with contravening s 70 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], having sexual intercourse with a young person. Both were tried by the same magistrate, and sentenced to 24 months imprisonment of which 12 months were suspended for 5 years on the usual conditions for such cases, remaining with 12 months effective.

The convictions were proper, and the reasoning of the magistrate for sentencing purposes, *based on current practice*, can, hardly be faulted. However, the level of sentences handed down belie the magistrate's reasoning, particularly with regard to aggravating factors. Moreover, to say that the sentences handed down appear to trivialize the protective measures for young persons prescribed in our law and in the current international framework for safeguarding young persons is an understatement. Further, it seems that the magistrate

appeared to go by rote and refrained from freely applying his mind to the developments in the law and best practices on the protection of children, both locally and internationally. In particular, I note a worrying trend that judicial officers seem not to be aware that, s 327 (6) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 (the Constitution), requires them, in interpreting legislation, to adopt any reasonable interpretation that is consistent with international conventions, treaties, agreements that are binding on Zimbabwe.

In passing sentences for these kinds of offences, therefore, in addition to the usual reasons for sentencing that have evolved in our jurisdiction, which, to his credit, the magistrate in the present cases, took into account, judicial officers ought also to take into consideration the following:

Firstly, domestic law has seen fit to prescribe extensive provisions for the protection of children, for which judicial officers must not be seen to be giving mere lip service. Chapter 2 of the Constitution, sets out national objectives, of which s 19 prescribes the protection of children as one of these national objectives. Section 19 (1) requires the State, to adopt policies and take measures to ensure the paramountcy of the best interests of children.

Section 19 (2) (c) requires that policies and measures are taken.

> "…to ensure that children are protected from maltreatment, neglect or any form of abuse." (the emphasis is mine)"

Section 78 (1) proscribes marriage for persons under 18, providing as it does, that only persons who have attained 18 years of age can found a family.

Chapter 4, contains the declaration of rights where in Part 3, s 81 specifically prescribes the protection of children's rights. Section 81 (1) (e) provides that children must be protected from

> "…economic and sexual exploitation….and from maltreatment, neglect or any form of abuse". (the emphasis is mine)"

Sub-section (1) (f) guarantees children's rights to education and health care while sub-section (2) declares that the best interest of children are paramount. Finally, sub-section (3) declares that

> "Children are entitled to adequate protection by the courts, in particular the High Court as their upper guardian."

It is trite that the judicial service is but one of the pillars of State. 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 interests 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 the maximum protection accorded to children by law.

The questions judicial officers must always ask themselves in sentencing predatory adults who sexually exploit young persons should be: what message is the judicial service sending, when a person more than twice the age of a child, is sentenced to serve a mere 12 months in jail? Is it in the paramount best interests of young persons to hand down a sentence that seems to suggest that were it not for S70 of Cap 9:23, this conduct would be perfectly acceptable?

More particularly, the specific obligation placed on the courts, and the High Court in particular, by s 81 (3) made me consider that it may be high time that the courts had a serious relook at the sentencing regime for sexual offences so that the message is clearly sent that the courts, in the discharge of their protective mandate for young persons, find that it is totally unacceptable to sexually exploit young persons. This is especially pertinent for offences committed against those young victims aged between 12 and 16 who were directly or impliedly assumed to have "consented" to the sexual violations. The courts must be seen to apply the law in a manner that achieves the intended aim of the legislature in these cases: that is, to effectively protect children from predatory older persons and ensure the eradication, or seriously attempt to eradicate the problem.

Secondly, Zimbabwe is part of the international consensus that, effective and full protection must be accorded to children to ensure their health, education and consequent full realisation of their potential as participants in socio-economic and political development.

In that regard, regionally, Zimbabwe is signatory to the African Charter on the Rights and Welfare of the Child, which defines anyone under 18 as a child. The preamble, in paragraph 4 notes that children require special safeguards and care on account of their physical and mental immaturity. Paragraph 6 reinforces the need for <u>legal protection</u> (my emphasis) of children to ensure particular care with regard to their health, physical, mental, moral and social development. Article 4 echoes our Constitution in directing that in all processes, it is the best interests of children that are paramount. Articles 11, 14 and 16 emphasise children's rights to education to promote development of a child's personality, talents and mental and physical abilities to the fullest potential; the child's right to physical,

mental and spiritual health; and protection against sexual abuse. Article 21 goes to the extent of requiring member States to pass legislation specifying the minimum age of marriage as 18 in order to enhance the protection of children.

Further, Zimbabwe has, for decades, had a Commissioner seating as a member of the African Committee of Experts on the Rights and Welfare of the Child, set up to ensure the promotion and protection of children's rights on the continent. In addition, the current African Union Ambassador against Child Marriages is Zimbabwean. Zimbabwe currently holds the chairmanship of the African Union, with the mandate to ensure meaningful compliance with African Union legal frameworks, and in so far as these cases are concerned, the effective implementation of the African protective framework for children.

On the wider international platform, Zimbabwe has ratified the Convention on the Rights of the Child, thus subjecting itself to the rigours of regular examination and review of its child protection record by the United Nations Committee on the Rights of the Child. The review process focuses, among other issues, on the prevalence of sexual exploitation and abuse of children and forced or early marriages of young girls.

Increasingly, in various regional and international judicial colloquia,[1] it has been recognised that domestic judicial officers must, when dealing with cases which impact on the human rights of children in particular, take cognisance of best practices and standards elsewhere including international standards set by regional and international treaties and conventions to which their country is party. In our jurisdiction therefore, judicial officers must, in the discharge of their mandate, take into account the norms and standards that Zimbabwe has subscribed to in the treaties and conventions it has ratified.

The *NewsDay* newspaper of 15 January 2016 reported in its Southern Eye supplement at p.7 that

> "Zimbabwe is one of the countries battling an increasing number of child rights abuses, including rape, forced early marriages……"

It is therefore incumbent upon judicial officers to play their part in improving the country's record by seriously shouldering the obligation that S81(3) of the Constitution puts upon the courts to protect children by passing sentences which effect is to ensure that would

[1] See the report of First Summit of Presidents and Chief Justices of Constitutional, Regional and Supreme Court Justices 5-14 November 2012 held in Mexico City, Mexico,(website of the National Supreme Court of Justice of Mexico) and reports of the Continental Judicial Dialogues for African Judiciaries Arusha 2013 and 2015(website of the African Court on Human and Peoples' Rights)

be marauding adults stop targeting vulnerable and immature young persons. Further, in order not to belittle or contradict the country's advocacy and agitation for the protection of children in the wider sphere, judicial officers must be in consonance with the national position by not ignoring or minimising such protection through appropriate jurisprudential pronouncements.

Section 327 (6) of the Constitution effectively means that, gone are the days when it was enough for a judicial officer to be insular in his jurisprudence, but that attention must be paid to international best practices, particularly on matters that impinge on the rights of vulnerable groups, such as children. The current position that Zimbabwe holds on the African continent requires judicial officers to rise to the responsibility that go with it and help, if not lead, in setting judicial standards and benchmarks for the protection of children.

In *casu*, therefore, sentencing a plus 30 year old man to an effective 12 months imprisonment for having sexual intercourse with a young person of 15 can hardly be aimed at deterring other older men from preying on young and immature persons, who are swayed by the offer of $1-00 or $2-00, in these harsh economic times. The very fact that a young person "agrees" to sexual intercourse with a much older men for such a paltry amount is clear evidence of her immaturity and incapacity to make an informed choice or decision. As Gubbay CJ stated in *S* v *Nare* 1983 (2) ZLR 135 (H), the offence is aggravated where the accused is much older. This is because, per Tsanga J in *S* v *Ivhurinosara Ncube* HH 335-13 at p. 3:

> "The age discrepancy and its attendant power dynamics (are) central in interrogating the unlikelihood of a truly consensual relationship."

Nor can a promise to marry, or even eventual marriage of the child be, in my view mitigatory. This is because, firstly, as stated by Tsanga J in *S* v *Peter Chigogo* HH 943-15 at p.2, s 70 (1) (a) penalises extra marital intercourse with a young person, and at the time of the commission of the offence, the accused was certainly not married to the complainant. I therefore fully subscribe to Tsanga J's further comment that

> "The continued lenient attitude towards grown men who abuse young girls and then get off lightly with their offence on the basis of "intended marriage" of the complainant is not in consonance with the spirit of the constitution in discouraging marriage of girls below the age of 18."

Indeed, I share Tsanga J's concern that child marriages are unlikely to end where the courts continue to pass sentences that go against the intended letter and spirit of the constitution and international instruments to which Zimbabwe has subscribed.

I find it particularly aggravating that the much older accused person in Review 4727/15 divorced his wife and made this child "wife" look after his two children, who included a 4 month old baby, at a time when she herself was a pregnant child.

It is my view therefore that judicial officers should not look with favour on these much older men who "marry" or intend to marry these children for purposes of sentencing as this attitude from the bench would seem to be promoting child marriages, which our constitution and the international instruments which Zimbabwe has ratified frown on.

That the accused persons were both married men with 4 and 2 children, is in my view, aggravating rather than mitigatory. Such mature persons ought to take their obligations as married fathers seriously enough to want to protect their families. That they did not consider the plight of their families as a damper on their sexual abuse of young persons, is the height of irresponsibility and carelessness, which they should not to be allowed to hide behind to escape a just punishment. In *S* v *Onismo Girandi* HB 55/12, the need to send a signal to society that courts will descend heavily on child sexual abusers was emphasised, with the court exhorting that a sentence of not less than two years should be imposed. More than three years later, there appears to be no slackening off of the rate of commission of these offences, requiring the courts to effectively discharge their obligation under s 81 (3) of the Constitution more forcefully.

I agree with the trial magistrate that the fact that the victims fell pregnant adds to the aggravating factors of the two cases. Indeed, these are young persons whose bodies are still developing and not yet mature enough to carry a pregnancy without added risk to their health. It is a matter of public information that maternal mortality rates in young persons are higher than in mature women. Other health challenges may also ensue from the early pregnancies and subsequent child births that the young persons' immature bodies will be subjected to, including vaginal fistula and haemorrhoids.

I also agree with him that, in addition, the accused persons interfered with the education of the complainants, one of whom was in Form 3 and the other in Form 1, thus limiting their prospects for self-advancement.

Looking at the aggravating features that the magistrate rightly took into account, I am unable to understand how after such a well-reasoned analysis, he came up with such lenient sentences. It is up to judicial officers to show that the courts will not tolerate predatory older men who prey on young persons by handing down appropriately severe sentences.

The prevalence of these type of offences, the consequential incalculable damage they cause in preventing young persons from attaining their full potential, the damage to the social fabric, coupled with its impact on national development and the need to conform to international standards in the protection of children ought to be additional grounds for handing down deterrent sentences.

When the aggravating features considered by the magistrate are considered together with the additional issues I am urging judicial officers to take into account when considering reasons for sentencing, and following on from *S* v *Onismo Girandi* (*supra*), I would add that an effective sentence of not less than three years should be imposed, on an incremental basis for those accused who are twice the victims' ages, are married with children of their own, and impregnate the young persons or infect them with sexually transmitted diseases other than HIV.

In the result, I am unable to certify that the sentencing regime was in accordance with real and substantial justice, and I accordingly withhold my certificate.

I direct that this judgment be circulated to all magistrates for their information and attention.

TSANGA J agrees…….