Judgment No. HB 66/2003
Case No. HC 4869/2003
CRB INY 797/02

THE STATE

Versus

MPUMELELO NDLOVU

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 12 JUNE 2003

Criminal Review

NDOU J: The accused person was aged 25 years at the time of the trial. He was charged and subsequently convicted of two counts of indecent assault at Inyathi Magistrates' Court. He was sentenced to 12 months imprisonment on each count. Of the total 24 months, 6 months was suspended on condition of good behaviour. I queried whether these acts were not covered by the Sexual Offences Act [Chapter 9:12] (hereinafter referred to as the "Act"). I also queried the appropriateness of the sentence. The learned trial magistrate responded –

> "1. The complainants in this matter are male juveniles and the accused ejaculated in between the legs and there was no penetration. My reading of the Sexual Offences Act makes me form the view that (the) *Act protects young girls but leaves the young boys.*" (the emphasis is mine)

Although the learned trial magistrate confidently alleges that he read the Act, he seems not to have done so. The Act categorically provides that it is applicable to the protection of young persons of both sexes. The interpretation clause in section 2 defines "a young person". It is stated that a young person "*means a boy or girl under the age of sixteen years.*"

The salient facts of this case are that victim of these two fiendish crimes is a boy aged five years. On 14 November 2002 at about 1100 hours the accused person

passed the complainant's homestead and called him to his own place of abode. The accused person took the boy into his hut. Whilst seated on a sofa he removed the boy's pair of pants and inserted his male organ between the boy's legs and made sexual movements until he satieted his lust and emitted semen around the boy's things. He repeated this ordeal on 19 November 2002. No medical evidence was adduced during the accused person's summary trial. From these facts the accused person should have been charged with contravening section 3(1)(b) of the Act which states –

> "3. Subject to subsection (2), any person who commits an immoral or indecent act with or upon a young person; shall be guilty of an offence and liable, subject to section sixteen, to a fine not exceeding fifty thousand dollars or to imprisonment for a period not exceeding ten years or both such fine and such imprisonment."

The Act, however, does not state explicitly that section 3(1)(b) has substituted the common law crime of indecent assault. The problem I discern in such cases is with respect to accused persons who are aged sixteen years. Such a juvenile accused person, if charged under common law, cannot raise a defence created by section 3(2)(a) of the Act. Section 3(2)(a) provides –

> "It shall be a defence to a charge under subsection (1) for the accused person to satisfy the court that he was under the age of sixteen years at the time of the alleged offence …"

If, however, he is charged under the statutory office in section 3(1)(b) he is entitled to this defence. In my view, the legislature could not have intended such an anomaly. In interpretation of statutes, reason and logic are ascribed to the legislature. Interpretation of legislation necessitates logical reasoning as far as the application of its provisions to concrete situations. Any interpretation of legislation which leads to an absurdity must, as a matter of course, be avoided: *interpretatio quae parit*

absurdam, non est admitta- See *Spinnaker Investments (Pty) Ltd* v *Tongaat Group Ltd* 1982(1) SA 65(A) 76, *R* v *Moodley* 1971(1) SA 320 (N); *Rogut* v *Rogut* 1982(3) 928 (A) and *Oos-Randse Administrasieraad* v *Rikhoto* 1983(3) SA 395(A). This anomaly would, however, not arise if the Attorney-General decides, as a matter course, not to prosecute anyone, under the age of sixteen with indecent assault i.e. all accused persons under sixteen being charged under section 3(2) of the Act. This absurdity does not arise *in casu* because the accused is aged over sixteen years. In the circumstances the common law crimes of indecent assault are proper and I, accordingly, confirm the convictions.

On the question of sentence I accept that it is pre-eminently a matter for the discretion of the trial court. I should be careful not to erode such discretion. I should only interfere when the sentence is viewed as being disturbingly inappropriate – see *Ramushu and Ors* v *S* SC-25-93; *S* v *Matanhire* HH-18-02; *Mavhundwa* v *S* HH-91-02 and *Musindo and Ors* v *S* HH-25-02. I regard the sentence imposed *in casu*, as being very lenient. But is it disturbingly inappropriate? I think so.

Sexual abuse of children is viewed in a very serious light. This type of conduct is very common thus exposing children to untold trauma and incurable diseases. Contrary to the view held by the learned trial magistrate, the Sexual Offences Act protects children equally, be they girls or boys. The definition of young person in section 2 clearly states that this means a boy or girl under the age of sixteen. Some of the old cases give the impression that abusers of boys should be treated more lenient than abusers of girls. It is clear that in those days the abuse of boys was not as prevalent as that of girls. In this day and age I do not find any legal basis for the distinction. Sexual abuse of all children is prevalent and should be viewed in a very

serious light. *In casu*, the child victim was aged 5 years. Within a short space of five days the accused had abused him twice. He ejaculated semen around his thighs. The age difference between the accused and the child victim is twenty years. He was not asked why he committed the offences, maybe it was because this was partly obvious from the facts. The accused persons moral blameworthiness is so high that an effective sentence in the region of five to six years imprisonment was called.

In light of the above factors I confirm the convictions. I am however, unable to certify the sentence imposed as being in accordance with true and substantial justice. On that account I withhold my certificate.