

THE STATE

Versus

BARBILONA CLASS

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 20 MAY 2004

Criminal Review

NDOU J: The accused was charged before a Provincial Magistrate sitting in Gweru for kidnapping. He was sentenced to three (3) years imprisonment. Nothing turns on the conviction. At the time of the conviction and sentence the accused was not represented by a legal practitioner. After sentence he sought legal representation. The accused's legal practitioner, instead of filing a notice of appeal against sentence, embodied a written statement on review. In *R v Pio & Ano* 1967 (1) RLR (G) DAVIES J said at 107H-

“In terms of subsections 55 and 58 of Magistrates' [Court] Act [now section 57 (i) (b) (ii) and 57 (2)] a person who has been convicted before a magistrate's court is entitled only to submit a written statement, on review, setting out the grounds or reasons upon which he considers the sentence imposed upon him not to be in accordance with real and substantial justice.”

The severity of the sentence is attacked by the accused in the written statement. The facts of this case are that the accused kidnapped an 11 year old minor on the basis of hearsay allegations of defamation. Even if the boy had made the defamatory remarks, he could hardly have been held responsible as he was well below the age of discretion. The boy was “force marched” for around two (2) kilometres while being beaten with sticks. He was further “tortured” by being chased around a yard and beaten with a stick for around an hour. Thereafter the accused took the boy

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back to his mother's residence and left him near the yard gate. This was around 2000 hours. The accused did not go into the house to report any wrong-doing by the boy. The accused was a soldier at the time. The accused voluntarily freed the complainant after about an hour.

There is no doubt that the offence of kidnapping is serious because it is an attack on and the infringement of the personal liberty of the individual – *R v Long* 1970 (2) SA 153 at 161; *Masuku and Ano v S* SC 132-89; *S v Chisando* HH-121-87; *Hove v S* SC 64-88 and *Nyathi and Ano v S* HB-19-92.

In the *Nyathi* case *supra*, the accused persons kidnapped the wife of a person who had sold them fake gold. The complainant was rescued by police after 45 minutes. A sentence of 24 months imprisonment with 6 months suspended on the usual conditions of good behaviour was confirmed on appeal.

In the *Hove* case, *supra*, a jealous cabinet Minister's wife proceeded to the complainant's house and at gun-point snatched the complainant's child and detained it for four to five hours. She thereafter returned the child and telephoned the complainant to tell her that she was lucky because her child had not been killed. Although the custodial sentence of 3 months imprisonment was not set aside, GUBBAY JA (as he then was) indicated that he would not have objected if a heavy fine conjoined with a suspended term of imprisonment would have been imposed. In the *Masuku* case, *supra*, for kidnapping school girls for a period of less than 5 minutes, the sentence of 12 months imprisonment of which 5 months was suspended on the usual conditions of good behaviour, was considered appropriate. In the *Long* case, *supra*, 5 years imprisonment was imposed for kidnapping of a ten year old girl, depriving her of liberty for about 19 hours and demanding ransom from her parents.

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It was pointed out that had the accused not been mentally ill, the sentence was going to be even higher.

In *Chisando* case, *supra*, the accused, who had previous convictions was sentenced to 18 years for kidnapping a 2 year old baby for 30 hours. In *Mahuni and Ors v S* HH-406-86 the kidnapping of a policeman for 3 hours by a bus crew a sentence of 10 months imprisonment with 4 months suspended on conditions of good behaviour was considered appropriate.

In this case, however, the trial erred in according appropriate weight to the various mitigatory and aggravating factors. In this regard I associate myself with what GIBSON J said in the *Mahuni* case, *supra*. On page 3 of her cyclostyled judgment the learned Judge said –

“The only thing that can be said is that perhaps less stress should have been laid on the nature of the offence, as a crime of kidnapping, and a greater stress, laid on the distinctive features of this particular crime. Apart from the lack of an evil intent, as pointed out by the trial court, the offence proved is no more than a technical crime of kidnapping.”

Looking at the facts of the case it appears that the accused was under the belief, rightly or wrongly, that he was chastising an errant child. I note that in the rural set up any adult has the “right” to discipline, and if necessary chastise an errant child. The trial magistrate does not subscribe to this line of thinking but the fact remains that out there in the rural communities there are many, like the accused, who believe in this custom. Their conduct is carried out *bona fide*. They believe they are helping the child. Scientifically they may be proven wrong but their intent is to help. More importantly, legally they open themselves to criminal sanction. This fact is enormously mitigatory. It shows absence of evil intent. The period of deprivation of liberty is around an hour. This factor has to be taken into account. The accused

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voluntarily returned the complainant. He acted on his own violation. This is another strong mitigatory factor that was not accorded sufficient, if any, weight by the trial magistrate. The trial magistrate rightly said that the assaults, the force-marching and the age of the boy were aggravating factors.

Looking at all the circumstances I hold the view that trial magistrate decision to impose a custodial sentence cannot be faulted. The same, however, cannot be said of the length of such imprisonment. The trial magistrate, as highlighted above, misdirected him in this regard.

In the premises the sentence of 3 years imprisonment imposed by the trial court be and is hereby set aside and the following imposed:

“20 months imprisonment of which 14 months is suspended for 3 years on condition the accused in that period does not commit any offence involving kidnapping and for which he is convicted and sentenced to imprisonment without the option of a fine.”

As the accused has already served the effective sentence he is entitled to immediate release.

Chiweshe J I agree

Tizira-Chapwanya & Mabuka, accused's legal practitioners