STATE

Versus

THULANI NCUBE

HIGHCOURT OF ZIMBABWE
MATHONSI J
BULAWAYO 10 FEBRUARY 2011

REVIEW JUDGMENT

MATHONSI J: The accused was convicted of rape after pleading guilty before the Regional Magistrate in Hwange on 26 October 2010. At the time of conviction and sentence he was aged 18 years. He was born on 7 June 1992 and therefore celebrated his 18th birthday on 7 June 2010.

At the time that he committed the offence for which he stands convicted on 2 March 2009 he was aged 16 and due to celebrate his 17th birthday on 7 June 2009. The facts are that on that day (2 March 2009) at 1300hrs, the complainant, a 12 year old, was in her mother's bedroom when the accused entered. The 2 are cousins and were staying together at the time.

Once inside the bedroom he tripped the complainant and lay on top of her. He lowered the complainant's underwear to knee level before inserting his erect penis into her vagina and having sexual intercourse with her without her consent. After being released the complainant made a report to a neighbour resulting in the accused's arrest.

The complainant was examined by a doctor on 13 March 2009 in the course of investigations. The doctor compiled a report which concluded that penetration ''might have been effected.'' Meanwhile a crime docket was opened at Lusulu police station under CR No. 02/3/09. There is nothing to suggest that at any one time the accused denied the charges.

For some reason, even as the accused was pleading guilty to the charges, he was not brought for trial until 26 October 2010 some 19 months later. When he was eventually charged he readily pleaded guilty to the charged. Asked by the magistrate why he committed the offence he replied;

''I am sorry. We thought we were playing.''

When the matter was referred back to the trial magistrate for a comment on why she had not treated the accused as a juvenile for purposes of sentence, she commented thus:

'' I do not believe I departed from the usual sentencing policy. If the accused was a juvenile at the date of sentence, I would have imposed a different penalty preferably corporal punishment. While he was a juvenile at the time of committing the offence he was an adult when he appeared in court.''

The learned trial magistrate is certainly correct in her interpretation of the relevant provision dealing with sentencing of juveniles, namely section 353(1) of the Criminal Procedure & Evidence Act, Chapter 9:07. It provides:

'' Where a male person under the age of 18 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 351

Sentence him to receive moderate corporal punishment, not exceeding 6 strokes.''

Clearly therefore the reckoning of age of the accused person is at the time of conviction and not at the time of commission of the offence. If the accused, through no fault of his own, is not sentenced until he attains 18 years he loses the benefit he would have been entitled to if he had been convicted before attaining that age. This is the interpretation accorded to the predecess or to section 353(1), that is section 330 of Chapter 59, by Gibson J in S v Chitiki 1986(1) ZLR 60 (H). I am in agreement with that interpretation.

However, it is the decision of the prosecution, as is so apparent in this case, to withhold the matter while bidding time for the accused to attain the age of 18 and then arraigning him before a magistrate thereafter in order to secure a stiffer sentence by virtue of the fact that the accused would not be entitled to a sentence of corporal punishment, which is unacceptable.

The accused was pleading guilty to the charge and investigations must have been completed in March 2009 after the complainant had been examined by a doctor. No other reason can be assigned to the failure of the state to bring the accused before a magistrate for a plea recording and sentence other than the fact that the state desired to secure a harsher sentence after the accused had turned 18. This is extreamely undesirable and brings the administration of justice to serious disrepute.

These courts should act decisively to stamp out such behaviour and protect the reputation of the justice system of this country. It must be stated in no uncertain terms for all

to hear that the courts will not tolerate such reprehensible conduct. The state will not be allowed to benefit from its own default, as it were, deliberately designed to gain an unfair advantage over young offenders.

This is a matter in which the accused should have been sentenced in March 2009 to corporal punishment when he was still under 17 years old. The sentence imposed induces a sense of shock. There is therefore a need to tinker with the sentence in order to give effect to the spirit of the law. Considering that the accused has served almost 4 months imprisonment nothing will be served by ordering corporal punishment at this stage. What he has served is enough and an adjustment of sentence recognising that will be made.

Accordingly, I make the following order;

1. The conviction of the accused is confirmed.

2. The sentence is set aside and in its place is substituted the sentence of 24 months imprisonment of which 21 months imprisonment is suspended for 5 years on condition he does not during that period commit an offence of a sexual nature for which he is sentenced to imprisonment without the option of a fine.

3. As the accused has served more than 3 months imprisonment he should be released immediately.

NDOU J..... I agree