

THE STATE

Versus

COLLEN DLAMINI

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 17 MARCH 2011

Criminal Review

NDOU J: The accused was convicted by a Western Commonage Provincial Magistrate of two counts of kidnapping or unlawful detention as defined in section 93 (b)(ii) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. He was sentenced to 8 years imprisonment of which 2 years were suspended on the usual conditions of future good behaviour (both counts were treated as one).

The background facts are the following. The accused and the complainants are not related. The accused is a human courier. He transports human beings to South Africa. On the 11th May 2010 the two complainants aged 15 years and 17 years respectively ran away from their parents' homes and went to stay with the accused pending transportation to South Africa. They did not go there against their will. They went there of their own volition. If they were adults, there would have been no offence. But because they were juveniles the accused committed the offence charged because section 93 (1)(b)(ii) provides:

“Any person who –

(a) ...

(b) (i) ...

(ii) detains or keeps a child, intending to deprive the child's lawful custodian or his or her control over the child or realizing that there is a real risk or possibility that such deprivation may result;

shall be guilty of kidnapping or unlawful detention ...” (emphasis added)

It is common cause that the girls' parents/guardian did not agree to relinquish their control over the minors.

On May 2010 the accused took the two juveniles to South Africa. He used a cross-border courier to smuggle the girls to South Africa. The accused did not pay the latter for his

services once the girls were in South Africa resulting in the latter detaining the girls pending payment. When such payment was not forthcoming from accused the courier fortunately, smuggled the girls back to Zimbabwe. During the course of trial, after state witnesses testified, the accused decided to plead guilty. The accused was, therefore, properly convicted.

The evidence clearly established that although the girls went with the accused willingly, the mischief sought to be prevented under section 93(1)(b)(ii) is deprivation of the lawful guardian of the child his or her control over the child. If the children had been forced, the charge would have been under section 93(1)(b)(i). All essential elements under section 93(1)(b)(ii) are present in this case. The conviction is proper. The learned magistrate did not make a finding whether the offence was committed in aggravating or mitigating circumstances. This is a mis-direction on his part.

Section 93(3)(a) defines aggravating circumstances if-

- “(i) the kidnapping or unlawful detention was accompanied or motivated by the demand of a ransom for the safe return of the adult or child; or
- (ii) the kidnapping or unlawful detention was accompanied by violence or the threat of violence;”

As alluded to above, there was no violence or threat of violence as the girls went to the accused voluntarily in a bid to seek fortune in South Africa. There was no ransom sought by the accused. In the circumstances it can safely be found that the kidnapping or unlawful detention was committed in mitigating circumstances. This finding informs the sentence applicable. The penalty clause under section 93(1) provides-

“... and liable -

- A. To imprisonment for life or any shorter period, except in a case referred to in subparagraph B; or
- B. Where kidnapping or unlawful detention was committed in mitigating circumstances referred to in paragraph (b) of subsection (3) to a fine not exceeding level seven or imprisonment for a period not exceeding two years or both.”

The wording of this penalty clause is such that notwithstanding my finding that there are mitigating circumstances, the penalty under subparagraph A applies. This is so because the accused is neither a parent nor close relative of the two girls. Because of the above-mentioned misdirection I am at large as far as sentence is concerned. The sentence of 8 years is manifestly excessive and I set it aside. The accused is a first offender. He is of poor health. He has a wife

and one child and five dependants. He was trying to assist these juveniles to cross to South Africa. However this is a serious criminal conduct. Many young people from this region are deserting their parents or lawful guardians to go and seek fortune in South Africa. In most cases the children end up in abusive circumstances. These children had no passports. Accused abandoned these children in South Africa. The accused hired someone to smuggle them into South Africa. Cases of human trafficking of children are prevalent and a deterrent sentence is called for. Accordingly, the accused is sentenced as follows:

“Both counts treated as one -

4 years imprisonment, of which 2 years is suspended for 4 years on condition that the accused in that period does not commit an offence involving kidnapping or unlawful detention and for which he is convicted and sentenced to imprisonment without the option of a fine.”

Cheda J I agree