

THE STATE
versus
GABRIEL MAGUYA
and
STEPHEN MAGUYA

HIGH COURT OF ZIMBABWE
PATEL & CHATUKUTA JJ

Criminal Review

HARARE, 18 October 2011

PATEL J: The two accused persons in this case were found guilty on their pleas of guilty to a charge of contravening section 94 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The facts giving rise to the charge were that the accused persons pledged the complainant, their female relative, to the family of one Fredy Neruwana who was killed by Nerimonos Maguya in 1980. The complainant was pledged some time in 2005, when she was a minor, as compensation for the death of Fredy Neruwana. Paragraph 6 of the State Outline suggests that she was pledged in marriage to the Neruwana family.

Upon conviction, the two accused persons were sentenced to a fine of US\$600 and US\$300, respectively, or 6 months imprisonment in default of payment of the fine. After having convicted and sentenced the accused persons, the learned trial magistrate took the view that the charge was defective in that it criminalised an act committed before the creation of the offence in question.

In terms of S.I. 152 of 2006, the Criminal Law Code came into operation on the 1st of July 2006. By virtue of section 2(2) of the Code, a reference in the Code or any other enactment to a crime mentioned in the Second Schedule shall be construed as referring to that crime as defined in the relevant provision of the Code. The

crime of “pledging a female person” is specifically mentioned in the Second Schedule as corresponding to section 94 of the Code.

In terms of section 11(1) of the Customary Marriages Act [*Chapter 5:07*], any agreement in which a person, whether for consideration or otherwise, pledges or promises a girl or woman in marriage to a man shall be of no effect. Section 11(2) makes it an offence for any person to enter into any such agreement. Additionally, section 15 of the Act penalises any person who by force, intimidation or other improper means compels or attempts to compel any female to enter into a marriage against her will.

Paragraphs (b) and (c) of section 94(1) of the Criminal Law Code re-enact the offences proscribed by sections 11 and 15 of the Customary Marriages Act. Paragraph (a) of section 94(1) specifically criminalises the so-called practice of “noxal surrender”, by making it an offence to hand over a female to another person, as compensation for the death of a relative of that person or as compensation for any debt or obligation.

As is evident from the foregoing, the crime of pledging females is not new and was clearly penalised under sections 11 and 15 of the Customary Marriages Act. What appears to be new, but in fact is not, is the offence of noxal surrender elaborated in section 94(1)(a) of the Criminal Law Code. Although the compensatory aspect of noxal surrender is distinct and peculiar to the offence under section 94(1)(a), the mischief aimed at by these offences is the same, *viz.* the non-consensual pledging of females. In practice, noxal surrender has always been treated as a species of the arrangements prohibited by section 11 of the Customary Marriages Act, and has been penalised accordingly.

It follows that the charge *in casu* did not purport to criminalise any conduct perpetrated before the creation of the crime in question. It was not defective or incompetent on the facts of this case. In the result, the conviction of the accused persons is

confirmed, as are the sentences imposed upon them, as being in accordance with real and substantial justice.

CHATUKUTA J: I concur.