

THE STATE
versus
GIFT NDARADZI

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 28 February 2023

Criminal Review

MUNANGATI-MANONGWA J: It is this court’s duty in reviewing matters which come on automatic review as per its mandate in terms of s 70(5)(a) of the Constitution of Zimbabwe and s 57(1) of the Magistrates Court Act [*Chapter 7:10*] and s 29 of the High Court Act [*Chapter 7:06*] to consider among other things the justifiability of the sentence imposed on an unrepresented accused person. This duty has to be taken seriously. This ensures that despite lack of legal representation an accused is treated fairly. The procedure provides a safeguard against arbitrariness and in certain circumstances abuse of power. The sentence imposed upon the accused *in casu* typically exemplifies a scenario where without such safeguards an accused person can seriously be prejudiced by being overly punished.

The accused was charged with contravening s 67(1)(a)(i) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] “indecent assault”. The accused pleaded guilty and was duly convicted. The accused was sentenced to 30 months imprisonment of which 4 months imprisonment is suspended for 5 years on condition accused does not within that period commit an offence involving indecent assault or of a sexual nature for which upon conviction accused is sentenced to imprisonment without the option of a fine. The facts of the matter are as follows:

The accused a 36 year old male met the complainant a 15 year old female along the way at around 4.00 p.m. when the girl was coming from her garden. The girl was in the company of her sister. The accused person held the complainant’s hand and asked to fondle her breasts. She refused but the accused went ahead and fondled her breasts. She did not resist. This happened in the presence of the complainant’s young sister. The accused was interrupted by the arrival of

another villager. The complainant proceeded home and reported to her mother leading to the arrest and arraignment of the accused person. The initial allegations referred to the fondling of the complainant's breasts and buttocks but the accused person indicated that he only fondled the complainant's breasts which explanation the State accepted. The conviction is proper and is duly confirmed. It is the sentence which is problematic.

Before a judicial officer sentences an accused person it is imperative that he or she familiarizes with the prescribed sanction for the offence. The other considerations like the mitigatory and aggravating factors and any other circumstances which the court is obliged to take into consideration like the circumstances under which the offence was committed are then taken into account. The court *a quo* failed to do this. The penalty provided by s 67 of the Code for a conviction of indecent assault is a fine not exceeding level seven or imprisonment not exceeding two (2) years or both. The court *a quo* erroneously sentenced the accused person to 30 months imprisonment a period in excess of the prescribed two (2) years. This was a misdirection and calls for the setting aside of the imposed sentence. This error could have been avoided had the court familiarized itself with the sentencing provision beforehand. In that regard the proceedings cannot be certified to be in accordance with real and substantial justice.

Apart from the sentence not being sanctioned by the law, an imposition of an effective prison term is in my view not justified in the circumstances. An effective prison term of twenty-six months is not only a misdirection but outrageous given the circumstances of the matter. The court misdirected itself in finding that this was a bad case of indecent assault without justifying the same. The complainant did not resist and seems to have taunted the accused. When asked by the court why he touched the girl's breasts the accused stated as follows: "I had heard that she had been fondled by a certain boy in the area and I asked her. She denied it saying that her breasts are sacred and that if anyone touched them their hands would get swollen. I then said I wanted to see for myself....I wanted to disprove that is untrue." No doubt the actions of accused were unlawful and underlined by foolishness given the explanation rendered. In passing sentence the court *a quo* emphasized that this is a bad case which requires that an example be set and sent a clear message to paedophiles by meting a long custodial sentence. The accused is a first offender. There is no evidence on record to classify him as a paedophile.

Sentencing is a very important process in the justice delivery system and has to be approached with such diligence and consciousness so as to balance the matrix involved in reaching a fair and justifiable decision on the ultimate sentence imposed. It is not an easy process and a judicial officer must not be carried away by the need to use an accused as an example as happened in this case. An accused should not be a sacrificial lamb for any would be offenders. An accused must be sentenced fairly due regard being made to the circumstances of his matter and the operative dictates characterizing the sentencing regime as provided by the law. Deterrence cannot outdo other considerations as rehabilitation. The purpose of sentencing is not to ensure retribution but to let accused realise that when he breaches the law there are repercussions, at the same time try to mold him into a responsible citizen who is able to be accepted back into society.

It is clear from the record that accused is a married man and is 32 years old. He has two children both below seven years of age. He thus has responsibility to take care of his young family. He is a farmer and does gold panning. He is a first offender. His folly and bad judgment landed him in this situation. No consideration was ever made to impose community service or a fine as provided in the penalty clause. The court should have considered the accused's eligibility for community service and the failure to do so is a misdirection. As the accused has already stated serving a prison term having been incarcerated on 10 February 2023 nearly a month ago, it is of no benefit to send the matter back for resentencing given the seemingly slow movement of records from the lower court to this court. Equally from the evidence before the court imposing a fine at this juncture would create hardships for the accused person as he had indicated that he had no savings at the time he was sentenced. This will cause further prejudice. Given that the sentence imposed was beyond that provided by statute the following order is granted:

1. The sentence imposed by the court *a quo* be and is hereby set aside.
2. The sentence is substituted as follows:

“6 months imprisonment wholly suspended for 3 years on condition that the accused does not within that period commit an offence involving indecent assault or an offence of a sexual nature for which upon conviction is sentenced to imprisonment without the option of a fine.”

3. The accused is entitled to immediate release and a warrant of liberation is duly issued.

MUNANGATI-MANONGWA J:.....

MUSITHU J:.....Agrees