

THE STATE

Versus

ANDSON NDLOVU

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 12 APRIL 2012

Review Judgment

KAMOCHA J: The 43 years old accused was charged with 5 counts of raping his biological daughters aged 7, 4 and 4 years respectively. The two 4 year olds are presumably twins. On arraignment the accused pleaded not guilty and claimed that his wife could have caused the children to fabricate the allegations in order to fix him. He was, however, convicted in respect of all the five counts at the end the trial.

The accused was then sentenced to 20 years imprisonment in respect of each of the five counts. That made a total of 100 years imprisonment. The sentence in count one was made to run concurrently with the sentenced on count four presumably because they involved the raping of the same complainant. Similarly the sentence on count two was ordered to run concurrently with the one of count five. A further 20 years imprisonment was suspended on the customary conditions of future good behaviour. That then left the accused with a total effective sentenced of 40 years imprisonment.

In reply to the query raised by this court in respect of the two counts where he was alleged to have called one complainant at a time into the kitchen hut and raped her during the absence of the mother who had gone to the fields, the trial magistrate conceded that no evidence had been led in respect of those counts and the convictions on those counts are improper. The concessions were properly made. The convictions on those two counts shall accordingly be set aside.

The convictions on the three counts are, proper and nothing turns on them. The sentences are, however, a cause for concern. The accused was sentenced to 20 years imprisonment in respect of each count giving a total of 100 years imprisonment. The convictions on two counts shall be set aside but that still leaves three convictions in respect of which the accused raped each child once. Each count attracted a sentence of 20 years imprisonment of which a sentence of 20 years was suspended for a period of 5 years on the customary conditions of future good behaviour.

The trial court found the following aggravating factors in this matter; accused is aged 43 years; he raped his own three children aged 7 years and twins aged 4 years; the 7 years old defecated in agony during the rape; he struck one of the 4 year olds with an open hand when she cried out in pain as he ravished her; the accused was HIV positive at the time he raped the children and above all that, the sexual attack was unprotected thereby exposing the children to infections with sexually transmitted diseases and HIV.

The rapes were indeed very serious and abominable. But were these the worst types of rape? If they had been the worst type they would have attracted a sentence of imprisonment for life. Section 65(1) provides that a person guilty of rape shall be liable to imprisonment for life or any shorter period.

Once a court has arrived at the conclusion that the offence does not warrant a sentence of imprisonment for life the shorter sentence must not be out of step of sentences which are expected to be imposed for that type of offence.

The worst crime under crimes against the person is the crime of murder. Where a person is found guilty of murder, he or she shall be sentenced to death unless he or she was under the age of 18 years at the time of the commission of the crime or the court holds that there are extenuating circumstances in the case in which event the convicted person shall be liable to imprisonment for life or any shorter period. See section 47 of the Criminal Law (Codification and Reform) Act [Chapter 9:33].

The trend where the convicted person intended to kill the other person (murder with actual intent) but the court is of the opinion that there are extenuating circumstances the convicted person is usually sentenced to imprisonment for a period ranging from 21 years imprisonment upwards. While a person who causes the death of another person realizing that there is a real risk or possibility that his or her conduct may cause death, and continues to engage in that conduct despite the risk or possibility (murder with constructive intent) shall also be sentence to death unless the court finds extenuating circumstances in the case in which case the sentence is usually between 14 years and 20 years.

In terms of section 47 (3) of the Act a person convicted of attempted murder or incitement or conspiracy to commit murder shall be liable to be sentenced to death or imprisonment for life or any shorter period. The shorter period rarely exceeds 10 years imprisonment.

Similarly, in terms of section 49 of the Act a person who is guilty of culpable homicide shall be liable to imprisonment for life or any shorter period. The shorter periods rarely exceed

10 years imprisonment. The rare ones would be verging on the crime of murder. The bulk of the cases of culpable homicide are handled by the regional courts. The cases involve the use of violence in causing death. Most of the sentences, depending on the circumstances of the case, range from 18 months to 10 years for the bad cases.

Why then should the shorter period in the crime of rape attract a sentence of 20 years? Rape is indeed a terrible crime. It is traumatizing, dehumanizing, humiliating and abominable but murder and culpable homicide involving causing death violently.

It seems to me that a sentence of 20 years on a single count of rape is completely out of step with sentences imposed in respect of other crimes against a person outlined above. It seems to me that rape should also attract a sentence from 5 years up to 10 years. Only the very bad rare cases of rape should attract sentences beyond 10 years and the worst ones should attract imprisonment for life.

Since the court was initially dealing with 5 counts of rape it should have borne in mind the cumulative effect of the sentences on the five counts and imposed a sentence which is not too excessive as to induce a sense of shock.

In the result the sentences imposed by the trial court in respect of each of the 3 counts are hereby set aside and are substituted with the following:

Count 1	-	6 years imprisonment
Count 2	-	6 years imprisonment
Count 3	-	6 years imprisonment
Total	-	18 years imprisonment

Cheda J agrees