HH 74-02
Crb 276/02

THE STATE
vs
WILSON BANDA

HIGH COURT OF ZIMBABWE
PARADZA J,
HARARE, 22 May, 2002

Criminal Review

PARADZA J: The accused was convicted of contravening section 3(d) of the Criminal Law Amendment Act [Chapter 9:05]. That offence is committed where a person unlawfully engages in sexual intercourse with a female idiot or imbecile. The age of the complainant is not mentioned anywhere in the record of proceedings, but that of the accused is stated as 15 years.

The accused pleaded guilty to the offence and, after certain questions were put to the accused, the Court proceeded to convict him, thus accepting the accused's plea of guilty. The proceedings were conducted in terms of section 271(2)(b) of the Criminal Procedure and Evidence Act, [Chapter 9:07].

A State Outline was tendered describing in some detail the allegations against the accused. The magistrate recorded that the facts had been read and understood. I quote hereunder the contents of the State Outline.

> "(1) The accused and complainant know each other from childhood but they are not related in any way.
>
> (2) On the18 October, 2001 at around 1100 hours the accused got (*sic*) at the complainant's place of residential (*sic*).
>
> (3) The accused knocked the door (*sic*) while the complainant was inside the house and she did not open the door but the accused forced open (*sic*).
>
> (4) When he got in he sat on the chair before he made advances towards where the girl was and he sat close to her.

(5) The accused started to remove the clothing (*sic*) of the complainant and her panties.

(6) The accused took off his trouser (*sic*) and inserted a penis into vagin (*sic).*

(7) (Deleted).

(8) The sister to the complainant came from school who knocked and got in where she found the accused and the complainant seated together.

(9) The complainant did not bleed during the sexual intercourse".

It will be noted that the State Outline did not make any reference to the mental capacity or otherwise of the complainant which is an essential element of the charge in respect of which the accused was convicted.

The following questions, *inter alia*, were put to the accused -

"Q. Accept facts?
A. Yes.
Q. 18/10/01 11 a.m. you were at the complainant's place of residence?
A. Yes.
Q. You forced the door open and found complainant there?
A. Yes.
Q. You then had sex with the complainant.
A. Yes.
Q. At all time you knew that complainant was an imbecile/idiot?
A. Yes.
Q. And you took advantage of that fact?
A. Yes.
Q. Did you have a right to act in this manner?
A. No.
Q. Any lawful excuse to offer?
A. No.
Q. Are you admitting to all these facts freely and voluntarily?
A. Yes."

When I perused the record of proceedings, I became concerned about a number of things.

The first was to do with the State Outline. As indicated above, it bears little relevance to the charge upon which the accused was convicted. A State Outline must of

necessity set out, in detail, in what manner the accused is alleged to have committed the offence charged. This is more so, if the Court is proceeding on a plea of guilty where the Court has to satisfy itself that the accused in fact understands the nature of the allegations he is admitting. This was clearly stated in the case of *S* v *Matimba* 1989(3) ZLR 173 a judgment of DUMBUTSHENA CJ. The headnote to that case insofar as is relevant for our purposes, reads as follows -

> "When an accused pleads guilty and the Court proceeds in terms of Section 255(2)(b) of the Criminal and Procedure Evidence Act (Chapter 59), care must be taken to ensure that the accused understands the elements of the offence to which he is pleading guilty. In the case of an offence involving negligence, the particulars of negligence must be put to the accused. If the charge and the State Outline do not disclose the particulars, the Court should not record a plea of guilty, instead it should record a plea of not guilty and proceed in terms of Section 255 A of the Act. To record a plea of guilty in these circumstances is an irregularity. Although the Supreme Court has the power in terms of section 15(d) of the Supreme Court of Zimbabwe Act 1981 to set aside a conviction and admit the case for trial *de novo,* it would be wrong to do so because the prosecutor and trial magistrate ought to have been aware of the deficiencies during the trial. "
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> The headnote to the case continues to read as follows -
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> "Where there are several irregularities or defects in the proceedings in the trial court, an appeal court must ask itself whether there has been a failure of justice. If the court cannot be satisfied that the appellant was not prejudiced in his defence by the irregularities or defects, it will set aside the conviction".

It is difficult to understand and appreciate why the trial court proceeded to put essential elements to a juvenile accused person which were not contained in the State Outline which was tendered by the State. The record itself shows a number of corrections to the State Outline which indicates that the prosecutor went through it and must have satisfied himself that the facts disclosed an offence. In addition, the trial magistrate should also have gone through the State Outline and satisfied himself that the facts disclosed an offence. In this case it is quite apparent that none of the two made any

effort to satisfy himself that the State Outline explained fully and in detail, to the juvenile accused the nature of the offence that he was admitting to have committed. All the same, the magistrate went on to ask the accused questions which he admitted to, clearly without appreciating the need to know exactly how and in what way he was supposed to have contravened the law.

Another irregularity which appears clearly from the record is the lack of any medical evidence to satisfy the Court that the complainant was indeed either an imbecile or an idiot. GILLESPIE J in *S* v *Doko* 1999(2) ZLR 164(H) went to great lengths in explaining the complications that arise if such evidence is not before the Court. For example, in *S* v *Chaka* HH 84-97 GILLESPIE J made a clear distinction between an idiot and an imbecile. An imbecile is not the same as an idiot. An idiot is a person who, because of her mental deficiency, is unable to give informed consent, while an imbecile is a person with a degree of mental retardation exceeding feeble-mindedness and deserving of protection.

Before proceeding to convict therefore, the Court had to be satisfied as to the level of mental retardation of this girl, so as to determine whether it amounted to mere feeble-mindedness and therefore not deserving of protection, or whether her degree of mental retardation exceeded such mere feeble-mindedness and is thus deserving of protection from the law. The reason is obvious, as stated in that same case. The sexual exploitation of a girl when her retardation is so severe that her acquiescence is meaningless constitutes rape. That, to me, means that the Court has to have enough medical evidence before it so as to be able to draw the line between rape and statutory rape in the context of section 3(d) of the Criminal Law Amendment Act.

In this case the Court decided to proceed on the basis of admissions by a 15 year old juvenile accused person, who clearly does not have the capacity or maturity to determine or know levels of mental retardation so as to be able to know whether the complainant deserved any protection of the law or not.

I wish to emphasise, by way of addition, that the fact that the accused was so much of a child himself required the magistrate to do a lot more in his explanation of the essential elements of the offence than what he did. If the magistrate had explained the essential elements of the charge, he would obviously have afforded himself an opportunity to define the terms "imbecile" and "idiot". I do not believe the magistrate himself could have been able to do so effectively, without the benefit of some medical evidence to assist him in doing so. That is why it is always necessary that before the magistrate embarks on the journey of satisfying himself that the accused is genuinely pleading guilty to a charge, he must cast his mind over the entire spectrum of the essential elements, explain them to the accused and then proceed to ask the questions that he is expected to ask.

This was not done in this case and therefore under the circumstances I am unable to certify these proceedings as being in accordance with real and substantial justice.

I therefore make the following order - the conviction is hereby quashed and the sentence is set aside.

SMITH J, I agree.