THE STATE
versus
SIMBARASHE NDAFA

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 7 August 2017

Criminal Review

MUSAKWA J: The accused person pleaded to a charge of contravening s 70 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9: 23*]. He was sentenced to 18 months' imprisonment of which 8 months' imprisonment was suspended for 5 years on condition of good behavior. The remaining 10 months' imprisonment was suspended on condition of performing 350 hours of community service.

Initially, two counts were preferred, showing that the accused committed the offences against the same complainant on 16 and 20 January 2017. On the date of hearing the second count was crossed out and the act of unlawful sexual intercourse with a young person on 20 January 2017 was incorporated in the first count. The charge now read that:

> "In that on the 16th day of January 2017 and 20th January 2017 and at Odzi location, Odzi, Simbarashe Ndafa unlawfully and intentionally had sexual intercourse with Marvelous Saiti a female juvenile aged 15 years realizing that there is a real risk or possibility that she is a young person."

I queried this with the trial magistrate, having noted that there was no explanation for deletion of the second count. The trial magistrate commented as follows:

> "Before the accused person was called to plead to the charge the Prosecutor advised the court that what the section penalizes is unlawfully having sexual intercourse with the young person and that the number of times one did it would only be an aggravating feature. It was for that reason that the second count was deleted and incorporated in the first count."

It is evident that whatever took place between the court and the State prior to the accused person being asked to plead was not recorded. A Magistrates Court is a court of record in terms of s 5 of the Magistrates Court Act [*Chapter 7:10*]. The omission to record what transpired prior to the accused being asked to plead was an irregularity.

As justification for only one count being preferred, the trial magistrate had this to say:

> "With due respect, the court believed that that was the correct position as opposed to the crime of rape. If for instance the accused had had sexual intercourse twice or three times on the same day with the same minor child, I do not believe that the accused would have been charged with two or three counts of having unlawful intercourse with the same young person. On the other hand, if the accused had raped a woman two or three times during the same night, that would constitute two or three counts of rape.
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> We are of the view that the Section is intended to discourage people from sexually molesting young children and the number of times one does it only becomes an aggravating feature. To charge two counts would appear to be improper splitting of charges as what the Section wants to discourage is one particular conduct, that being, having unlawful sexual intercourse with a young person.
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> It was for that reason that the court agreed with the Prosecutor that the second count be deleted and that it be incorporated in one count. If, however the Honourable Judge is of a different view, we stand guided accordingly."

The analogy of rape used by the trial magistrate as justification for improper duplication of charges in the present matter is not convincing. I do not see why a repeat perpetration of the same offence on the same victim on separate dates can be termed improper duplication if the offence is unlawful sexual intercourse with a young person and proper if the offence is rape. What would be the difference? It is as if it is more tolerable for an accused to have unlawful sexual intercourse with a young person on separate occasions than to have sexual intercourse with a female person without her consent on separate occasions.

The starting point is s 144 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which provides that:

> "(1) Any number of counts, for any offences whatever, may be joined in the same indictment, summons or charge and where separate indictments, summonses or charges have been presented against an accused person, the court may, with the consent of the prosecutor and the accused, treat the separate indictments, summonses or charges as being a number of counts joined in the same indictment, summons or charge.
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> (2) When there are more counts than one in an indictment, summons or charge, they shall be numbered consecutively, and each count may be treated as a separate indictment, summons or charge.
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> (3) If the court thinks it conducive to the ends of justice to do so, it may direct that the accused shall be tried upon any one or more of such counts separately and such direction may be made either before or in the course of the trial.
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> (4) The counts in the indictment which are not then tried shall be proceeded upon in all respects as if they had been contained in a separate indictment.
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> (5) If it is alleged that on several different occasions on any one day or during any period any person has committed—

(*a*) an offence against or in respect of any one person; or

(*b*) an offence which is not an offence against or in respect of any person;
the indictment, summons or charge may charge in one count that the accused committed the offence on several different occasions on that day or during that period."

In *S* v *Mabwe* 1998 (2) ZLR 178 (HC) GARWE J (as he then was) held that generally charges should not be multiplied out of conduct that constitutes a single act. The rule of practice against the splitting of charges was designed to avoid a duplication of convictions arising from conduct that constitutes one offence. In this respect see *S* v *Mutawarira* 1973 (1) RLR 292, *R v Peterson and Others* 1970 (1) RLR 49 and *S* v *Grobler and Anoer* 1966 (1) SA 507.

Two tests have been used in determining whether there has been an unlawful splitting of charges. See *S* v *Mabwe supra.* The single evidence test applies to a situation where an accused commits two acts with single intent and both acts are necessary to carry out the intent. In such a situation the two acts are considered to constitute one transaction.

With the same evidence test, the test is whether the evidence necessary to prove one criminal act necessarily involves proof of another criminal act. In such a situation, both acts are considered as one transaction for purposes of a criminal conviction.

With the above observations in mind, one could say that the same evidence test applies to the present case. This is because the offences in the two counts were the same. The same applies to the accused and the complainant. If one used such an approach, what would be the difference if the charge had been rape?

The one comparable case I have been able to come across that could favour preferring one count is that of *S* v *Mhandu* 1985 (1) ZLR 228 (S). In that case the appellant was charged with three counts of having unlawful carnal knowledge of a young person. The offences had been committed during the course of the same month. In passing, MCNALLY JA expressed the view that it would have been preferable to prefer a single count. He placed reliance on *S* v *Mutawarira supra*. However the learned judge of appeal conceded that the issue was not well settled as he proceeded to state the following at 229:

"However, there is no settled rule in this regard (see S v Christie 1982 (1) SA 464 (AD) at 485) and any prejudice that may have been inherent in the procedure adopted was nullified by the fact that the magistrate took all three counts as one for purposes of sentence."

The case of *S* v *Christie supra* involved five counts of treason that were preferred against the appellant. Commenting on the issue of splitting of charges, DIEMONT JA had this to say at 485:

> "The question of splitting of charges has exercised the patience-and the ingenuity-of the courts for many years-and, as was said recently by JOUBERT AJA in S *v* Prius and Others 1977 (3) SA 807 (A) at 813, it is virtually impossible in our law to lay down a general inflexible test as to when there is a splitting or duplication of convictions."

Contrast the case of *S* v *Mhandu supra* with that of *S* v *James* 1998 (2) ZLR 424 (SC) in which the appellant was convicted of four counts of rape involving the same victim. The offences were committed on separate dates. On appeal the convictions for rape were set aside and substituted with four counts under s 3 (a) of the Criminal Law Amendment Act [*Chapter 9:05*]. The question of unlawful splitting of charges did not arise. I do not think that the appellate court was not alive to the duplication of charges. This is because, in assessing sentence afresh, all counts were treated as one and a globular sentence of a fine was imposed.

I would therefore hold that where offences are interspaced in time as to constitute separate acts, even if they involve the same victim, it is competent to prefer separate counts for each unlawful act. The duplication of such counts will only be taken into account for purposes of sentence. In the present case, the incorporation of the second count into the first count became futile. This is because the trial court did not take into account the second act for purposes of sentence. In light of the sentiments that were expressed in justifying the fusion of counts, the omission to consider the second act as aggravating amounts to a misdirection. This is notwithstanding the accused's youthful age and other mitigating circumstances. All factors in favour of or against the accused should have been considered.

In light of the foregoing observations, I will therefore withhold my certificate.