THE STATE

Versus

SIBONELO MABOTHE

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 1 NOVEMBER 2012

Review Judgment

CHEDA J: In this review matter the scrutiny Regional Magistrate noted that the learned trial magistrate omitted to ask the state to furnish the court with the complainant's age and that in his opinion he should not have sentenced accused to community service in view of the circumstances surrounding the commission of this offence.

The accused is 17 years of age and was charged with contravening section 70 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] (Having sexual intercourse with a young person.")

The agreed statements of facts are that between August 2010 to February 2012, the accused a 17 year old boy fell in love with the complainant who was 12 ½ years of age and they started having sexual intercourse until February 2012. The said sexual intercourse resulted in the complainant falling pregnant.

The Regional magistrate has noted that the accused should have been charged under section 64 (1) which reads:

> "A person accused of engaging in sexual intercourse, and sexual intercourse or other sexual conduct with a young person of or under the age of twelve years shall be charged with Rape--."

The state decided to charge accused with contravening section 70. This with all respect was wrong. It is always good prosecution and practical procedure to charge an accused with a more serious offence, so that in the event that during the trial, facts establish a lesser offence, the court can convict him for a lesser offence. The practice and legal principles do not work the other way round. This is the correct legal position.

Therefore it was not proper for the learned trial magistrate to have proceeded with contravening section 70 when the facts prove a more serious charge.

The second point relates to the sentence of community service. While community service sentences are no doubt now part of our legal system, it has to be carefully considered before it is passed. Community service is a rehabilitative scheme which has a dual purpose namely to rehabilitate the offender and at the sametime ensure that his offensive behaviour is curtailed or at least put on check.

The sentence of community service is, in my view, in order. What however should be borne in mind is that the need for rehabilitation can and should not take precedent over the principle of deterrence, see *R v Ford* [1969] 2 ALL ER 782N.

The main object though is the protection of society and other objects of punishment will always be secondary.

The accused stands convicted of a crime of sexual nature perpetrated on a young girl of 12 ½ years of age. The order that he performs community service at a primary school is in my opinion not unlikely to serve the interest of justice in that he is going to be working at a place where there are minor and vulnerable children. Accused has already proved his consistent desire for minor children. He, therefore, can not be expected to respect minor girls in his surroundings. Infact to allow him free reign at this school is tantamount to asking the infamous and much dreaded Dracula to guard the blood bank.

The courts in such matters should take the following considerations into account when determining a suitable community service sentences;

(1) the nature and circumstances in which it was committed;

(2) the age and character of the accused, and

(3) the effect of the accused's presence at the institution where he will perform community service.

(The list is inexhaustive) In as much as accused was properly sentenced to perform community service it was improper to ask him to perform it at a primary school.

I, therefore, entirely agree with the learned scrutiny Regional magistrate that his placement at this institution was misplaced.

My certificate is accordingly withheld as these proceedings are not in accordance with real and substantial justice.

Cheda J.....