KONE MUSIMO
and
KARIKOGA RUPINGIRO
and
MAFIROWANDA ZHOU
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE, MUREMBA & TAGU JJJ
HARARE, 15 October 2013 and 7 June 2017

Criminal Appeal

D Halimani, for the appellants
E Mauto, for the respondents

HUNGWE J At the hearing of this appeal we dismissed the appeal on the turn and gave reasons *ex-tempore*. These are the reasons for that decision.

The appellants were convicted on their own plea of guilty to kidnapping as defined in s 93(1) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. They were sentenced to 24 months imprisonment of which 8 months were suspended for five years. They now appeal against their sentence on the sole ground that the sentence is so harsh as to induce a sense of shock. They recite the failure to consider other sentencing options or failure to give reasons why those options were not considered appropriate. Generally, they dwell on the usual attack on the failure to give appropriate weight to the mitigatory features of the case emphasising the role cultural beliefs played in the commission of the offence.

The facts on which the appellants were convicted are as follows. The complainant was then 51 years old. The appellants were aged 41 years, 35 years and 28 years respectively. On the day in question the appellants teamed up and approached the complainant at his residence in the village. They asked him to come with them for an initiation and circumcision ceremony colloquially called "zviremba" locally. He refused. He was then threatened with violence and he, out of fear for his life, went with them. He was detained for two months during which period he was forced to undergo their traditional initiation and circumcision rituals. When he was released, he reported the matter to police. Upon their arrest the appellants admitted that

they forcibly abducted and kidnapped the appellant for the purpose of undergoing circumcision.

On appeal it was forcefully argued that since the appellants were ignorant of the law, the trial court ought to have treated that ignorance as a heavily mitigating feature in the assessment of sentence. In any event, Mr *Halimani* argued, the complainant benefitted from the act of circumcision therefore it ought to be considered in their favour that they had subjected him to the rituals. Further, it was also argued that the statute permitted a non-custodial sentencing option where the kidnapping was committed in mitigating circumstances. Mr *Mavuto*, for the State, agreed that there was a misdirection by the trial court in the approach to sentence as certain features of the case were clearly mitigatory, as such a non-custodial sentencing option must have been preferred.

I am unable to agree. The crime of kidnapping is aimed at preserving the individual right to liberty. Constitutionally entrenched rights and freedoms must be jealously guarded. The legislature in its wisdom has provided for life imprisonment for kidnapping where the kidnapping is accompanied by demands for ransom or is classified as aggravated. In all other instances of kidnapping, a fine or imprisonment of up to a maximum of two years is permissible. It seems to me that in the present case the learned trial magistrate was acutely aware of all these factors which appellants' counsel referred to in his argument as is clear from his reasons for sentence. It does not escape this court that the appellants kept the complainant for two months and three days against his will.

In *S* v *Dzimuri* & Ors 1997 ZLR 27 (HC) the court emphasised that the length of period during which the complainant endured loss of liberty did not affect the fact that there was loss of liberty; unless it was only for a transient period for which the principle of *de minimis non curat lex* could apply. In that case a bus crew was forced to go some 20 kilometres off its route with passengers. The accused were sentenced to 14 months imprisonment with 2 months suspended.

The question of whether the sentence imposed in the present case induces a sense of shock must necessarily be considered and determined in light of the penalty provided in s 93 which provides:

> "**93 Kidnapping or unlawful detention**
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> (1) Any person who:-
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> (*a*) deprives an adult of his or her freedom of bodily movement, intending to cause such deprivation or realising that there is a real risk or possibility that such deprivation may result; or

(*b*) not being the lawful custodian of the child concerned:-

(i) deprives a child of his or her freedom of bodily movement, intending to cause such deprivation or realising that there is a real risk or possibility that such deprivation may result; or

(ii) detains or keeps a child, intending to deprive the child's lawful custodian of his or her control over the child or realising that there is a real risk or possibility that such deprivation may result;

shall be guilty of kidnapping or unlawful detention and liable:-

A. to imprisonment for life or any shorter period, except in a case referred to in subparagraph B; or

B. where the kidnapping or unlawful detention was committed in the mitigating circumstances referred to in paragraph (*b*) of subsection (3), to a fine not exceeding level seven or imprisonment for a period not exceeding two years or both."

The section codifies the common law position which regards kidnapping in serious light especially where an evil intent was evident. (See also *S* v *Dzimuri & Ors supra* and the cases therein cited). Mr *Halimani* urged the court to find that because the appellants acted in pursuit of a cherished local custom unaware of its illegality until visited upon them by the law, that ignorance of the law should act as such a strong mitigatory feature as would entitle them to a non-custodial punishment. He relied on the case of *R* v *Motati* (1896) 13 SC 173 at p 177 where a member of a primitive tribe in 1896 claimed a right to enslave certain people called Vaalpensen. He also quoted the words of SQUIRES J in *S* v *Chisiwa* 1981 ZLR 666 at p 674 where the following appears:

> "I am even less able to accept Mr Gillespie's argument that reasonable mistake or ignorance of the law cannot be a factor of mitigation in punishment, if for no other reason than dolus and culpa will attract, and always have attracted, different assessments of blameworthiness and correspondingly different punishment. It seems to me to be so obvious that someone who commits an offence, knowing that he is doing so, is more deserving of punishment than someone who does not know, that it does not need authority to support it. A just system of criminal law must place emphasis on the principle of *nulla poena sine culpa*, and seek to ensure as far as possible that violations of the law are punished only in proportion to their relative blameworthiness."

He also referred us to *R* v *S* 1965 (4) SA 604 (R,AD) where YOUNG J dealt with a case of an accused person who had been convicted of rape after sexual intercourse with the girl pledged to him according to local BaTonga custom. The learned judge took the view that the "extra-ordinary" nature of the rape lessened the accused's moral blameworthiness which entitled him to a lesser sentence. He said:

> "The Batonka people are, by current criteria of civilisation, still an isolated and primitive people; and their standards of conduct must therefore loom prominently in the assessment of punishment for crimes committed amongst themselves. I am given to understand that, despite the prohibition against pledging of children in marriage contained in section 11 of the African Marriages Act, Chapter 105, the custom is still virtually universal among the BaTonka……."

Whilst these cases reflect the courts' dilemma posed by the conflict between cultural norms and the prevailing legal mores of the epoch in which they were tried, sadly that conflict is still with us. When dealing with cultural offences, it is well to remember that the courts are sub-consciously advancing the ethos of a dominant culture as opposed to the minority culture to which the accused belongs. Seen in this light a cultural offence has been defined as an act by a member of the minority culture which is considered an offence by the system of the dominant culture. That same act is nevertheless, within the cultural group of the offender, condoned, accepted as normal behaviour and approved or even endorsed and promoted in the given situation. A very accurate description of the essence of the problem was given in 'The Cultural Defence in the Criminal Law', 99 Harvard Law Review (1986) p 1293 where it is stated:

> "The values of individuals who are raised in minority cultures may at times conflict with the values of the majority culture. To the extent that the values of the majority are embodied in the criminal law, these individuals may face the dilemma of having to violate either their cultural values or the criminal law."

To my mind when YOUNG J speaks of the extra-ordinary nature of the rape as lessening the accused's moral blameworthiness, and SQUIRES J speaks of reasonable mistake or ignorance of the law by an accused as a factor calling for a different assessment of moral blameworthiness, both judges are essentially addressing the same issue crisply raised in cultural offences. What may have been missed in Mr *Halimani's* argument was the underlying constitutional imperative which is raised in such cases where there is a clear conflict of the legal norm and social cultural norm. Pre-independence, this country already enjoyed the status of multi-culturalism. In spite of that fact there was a deliberate policy to discriminate against indigenous cultures. Post-independence, no deliberate effort was made to entrench the promotion and preservation of indigenous cultures until the recently adopted new Constitution (Constitution of Zimbabwe Amendment No 20). The problem posed by cultural offences is not peculiar to this jurisdiction but is a world-wide phenomenon which require the courts to resolve problems of socio-legal complexity. It may well be an appropriate opportunity to examine, in this jurisdiction, the impact of the justiciable rights enshrined in the new Constitution viz-a viz the cultural offences/defences.

Some legal academic writers have bemoaned the apparent dual nature of the legal-social consequences in former colonies and observed that:-

> "In some formerly colonised countries something different happened. The economic and cultural elite, endorsing the values of the former colonisers, tried to force these values onto 'native peoples'. Examples of this category can be found in the Americas[1]. On the other hand, in some African countries, after independence, the newly founded 'native-elite' sometimes endorsed the values of the former coloniser taking over his legal system and codes and applying them to the peoples living in the newly founded nation state, just as the coloniser did. In each of those cases, situations might arise where a person tried does not share the cultural values incorporated in the norms upheld by the state[2]."

With the advent of independence and the 2013 Constitution in which the liberal rights are justiciable, the task of the court is not only to interpret the law but also to effectively do so in a manner that has a powerful steering or filtering effect on the interpretive task of the court. The Constitution, as the supreme law of the Republic places a duty on the courts to develop a new legal culture, a constitutional culture. Chapter 4 of the Constitution entrenches the fundamental rights and freedoms to which every citizen is entitled. These rights and freedoms include the right to life[3], the right to personal liberty[4], the right to human dignity[5], the right to personal security[6], freedom from torture or cruel, inhuman or degrading treatment or punishment[7], and the right to participate in the cultural life of one's choice.[8] One may wonder whether these are not some of those matters that may have been envisaged by s 282 of the Constitution when it speaks to the functions of traditional leaders. Could the promotion and protection of cultural rights be strengthened by seeking the wise counsel of this section of society in the fair administration of the criminal justice system? I leave this question open for further discussion by the Law Development Commission at its own time with the caveat that the time may be now to reflect on the problems cited above.

The right to equality and the right to a fair trial, to my mind all impact on the cultural foundational basis of the appellants' convictions. In my view, the offence of which the appellants were convicted brings into sharp focus the need to balance the individual rights and freedoms as espoused in the Constitution and the cultural background of the appellants, as a court is required to do, in order to strike the delicate balance in the assessment of an

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[1] 18. F.e. D.S. Clark, *loc. cit.*, p. 683 on the Chocó (tribe of native Americans) in Colombia.
On the balancing of cultural differences in criminal Law in New Guinea: R.S. O'Regan, 'Western Criminal Law in New Guinea', 7 *Australian and New Zealand Journal of Criminology* (1974) pp. 5–16.

[2] Jeroen Van Broeck- Cultural Defence and Culturally Motivated Crimes (Cultural Offences) ; European Journal of Crime, Criminal Law and Criminal Justice, Vol. 9/1, 1–32, 2001.

[3] Section 48;

[4] Section 49

[5] Section 51

[6] Section 52

[7] Section 53

[8] Section 63

appropriate sentence. This court would have welcomed the cultural expert who would have guided it as to the nature of the conflict between the appellants' conduct and the general law in which their conduct is criminalised. Unfortunately we were not favoured with such an opportunity but to my mind it may be necessary in future for such evidence to be led wherever a cultural offence/defence is raised by the facts of a particular case.

The appellants were aware that the complainant was not willing to be subjected to the deprivation of liberty which is the gravamen of the crime of kidnapping. Whilst I am in general agreement with the sentiments expressed by my learned brethren in respect of the need to take into account the moral blameworthiness of the accused in each particular case, I do so on an entirely different basis. I also agree on the need to assess differently the moral blameworthiness of an accused where the offence was committed out of a reasonable mistake of law or through ignorance of the law. The authorities cited by Mr *Halimani* can clearly be distinguished both on the basis of the nature of the crime under consideration as well as the state of mind of the accused. In the case before YOUNG J the accused was oblivious of the fact that he was committing an offence as he considered the woman his lawful wife. The court correctly settled on a less than usual sentence for rape. The appellants stand on a different pedestal. They were aware that the complainant was unwilling to be part of their rituals. They forced him to go with them under the pain of punishment. Their motive was not however as evil as their effect of the deprivation of his personal liberty, but nevertheless deprive him of that liberty they did for slightly more than 2 months. In my view it is this that calls for a custodial sentence rather than some other alternative. The court a quo imposed a sentence of 24 months imprisonment with part suspended. In *S* v *Chitiyo* 1987 (1) ZLR 235 (SC) the court reduced the sentence of 14 years imposed on each of the two counts of kidnapping committed during the course of a spate of armed robberies to 9 years on each count. The two counts were ordered to run concurrently. In the present case, the offence consists in the deprivation of liberty of the complainant against his will. Without the expert evidence of a cultural guru in the appellants' culture this court accepted that they believed that they were entitled to take the complainant for the cultural rites. However, the supreme law of the land does not recognise their right as extending to the deprivation of another person's liberty. Section 63 (b) expressly provides that no person exercising the rights in Chapter 4 shall do so in a way that is inconsistent with the provisions of that chapter. Therefore as the law stands, this court ought to assess sentence against the express provisions in both s 93 of the Criminal Law Code and the Constitutional provisions in Chapter 4.

I consider that the appellants' moral blameworthiness to be moderate in light of the mitigating cultural beliefs under which they conducted themselves. Had this point been properly taken, I venture to say that it may well have operated as a defence to a limited extent. It is therefore highly mitigatory. However, I do not lose sight of the seriousness of the offence, taking into account the fact that the appellants detained the complainant for two months. I find that their professed cultural imperative does not detract from the seriousness of the offence. One should infer recklessness from the lengthy period spent in captivity by the complainant.

Consequently, the appeal against sentence is dismissed.

MUREMBA J & TAGU J agrees……..

Chuma Gurajena & Partners, appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners