THE STATE
versus
MARTIN MAHUNI

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 21 January 2009

Criminal Review

KUDYA J: The accused person was born on 24 May 1992. On an unknown date but during the period between December 2006 and January 2007 he sexually assaulted two six year old girls in the bush where they were all herding cattle. He threatened them with dire consequences if they ever reported the incident. The threats held sway until 3 March 2007 when the two girls made a report to their grandmother. He was thereafter arrested. The two girls were taken to hospital where a medical doctor examined them on 13 March 2007. He confirmed that penetration had been effected.

The accused person was arraigned before the Regional Magistrate, Masvingo on 9 July 2008. He pleaded guilty to and was duly convicted of two counts of rape in violation of s 65 (1) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. A detailed probation officer's report that was compiled on 27 April 2007 was produced. In addition, the boy told the learned regional Magistrate in mitigation that he was a form two pupil at a secondary school in Masvingo. In answer to the question why he committed the two offences, he retorted that he thought they were playing.

The trial magistrate paid regard to his plea of guilty. She surmised that he must have pleaded guilty because of the presence of the two girls who had come to testify as the probation officers' report indicated that he was denying the charges. She noted that he was 14 at the time of commission. She counterpoised these factors against the seriousness of the offence, the ages of the girls at the time and the threats he issued against them. She disregarded the recommendation of the probation officer to consider corporal punishment on the basis that such a punishment would be too lenient. She proceeded to sentence him on the day she took the plea to 9 years imprisonment of which 3 years was suspended for 5 years on condition he did not during that period commit any offence of a sexual nature for which he would be sentenced to imprisonment without the option of a fine.

It seems to me that the trial magistrate misdirected herself in her approach to sentence. There is no doubt in my mind that at the time he committed the offence he knew that his actions were wrongful, otherwise he would not have issued the threats and then proceeded to deny the offences by hiding behind the façade of some perceived ammosity between their families. These factors notwithstanding, it must have dawned on the trial magistrate that on the date of commission he had just completed Grade 7 and was waiting to make entry into Form 1. He was clearly an immature 14 year old boy who was given to acting out childish pranks. To consign such an immature character to prison at all and for the length imposed was so harsh as to induce a sense of shock.

The second misdirection was her consideration that corporal punishment is a lenient sentence. Her view contradicts the sentiments expressed in superior court decisions such as *S v A Juvenile* 1989 (2) ZLR 61 (S) and *S v Marko Mhlanga and Two Others* HB 2/94 These decisions have characterized it as brutal, inhuman and degrading. Such a sentence cannot ever be characterized as lenient.

This court in such cases as *S v Zaranyika & Ors* 1995 (1) ZLR 270 (H), *S v Tendai & Anor* 1998 (2) ZLR 423 (H) set out guidelines for Regional Magistrates in sentencing juveniles convicted of rape. The common thread between these decisions is that juvenile offenders should not be treated as little adults. Their very ages denote their mental immaturity. Non-custodial options other than fines and community service should be pursued. See *S v Zhou* 1995 (1) ZLR 329 (H) and *S v Stoddart* 1996 (1) ZLR 1 (H). Some of these options are counseling, institutionalization in juvenile reformatories and corporal punishment. The choices in Zimbabwe are limited by our level of economic development and our prevailing economic challenges which impact negatively on the development of new institutions and the funding and staffing of existing ones. Our courts therefore are obliged to resort to the disproportionate use of corporal punishment coupled with a suspended term of imprisonment as the only available and viable option.

At the age of 14, the accused must have been undergoing pubertal stirrings on his sexuality which he did not appreciate. His actions of setting upon two infants would be inexplicable other than through a failure on his part to handle his sexuality. Such a boy would be a suitable candidate for rehabilitation through counseling perhaps in a probation home or other reformatory institution other than prison. See *S v Kuzhinginya* HH 175/94. It appears

from the probation officer's report that such an option was not available hence his recommendation for corporal punishment.

The appropriate sentence would have been in the region of 5 cuts with a rattan cane with an additional suspended period of imprisonment of 3 years. The boy has unnecessarily been in prison for the past 6 months. One hopes that he has not been contaminated by the corrosive prison subculture. I will set aside the sentence that was imposed and substitute it with a wholly suspended term of imprisonment and thereafter issue a warrant for his immediate liberation.

In the result, the sentence that was imposed is set aside and substituted by the following:
3 years imprisonment the whole of which is suspended for 3 years on condition he does not during this period commit any offence of a sexual nature for which he is sentenced to imprisonment without the option of a fine.

I have issued a warrant for his immediate release from prison.

GUVAVA J, agrees …….