

GEORGINA NDLOVU

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU AND CHEDA JJ
BULAWAYO 11 OCTOBER 2010 AND 24 NOVEMBER 2010

Mr. G. Nyoni for appellant
Mr T. Makoni for respondent

Criminal Appeal

CHEDA J: This is an appeal against sentence only.

On the 11th October 2010 counsel for both parties made submissions before us. After hearing them we allowed the appeal to the extent that the sentence passed by the court a quo be set aside and substituted with the following:-

8 years imprisonment of which 2 years imprisonment is suspended for 5 years on condition accused does not within that period commit any offence of a sexual nature of which upon conviction she is sentenced to imprisonment without the option of a fine.

Effective: 6 years imprisonment.

We undertook that our reasons would follow and these are our reasons.

Appellant is an old woman of 60 years of age. She was charged with aggravated indecent assault, she pleaded guilty, was duly convicted and sentenced to 20 years imprisonment of which 5 years was suspended on condition of good behaviour.

The background of this matter is that, appellant, lost her first husband but continued staying at her late husband's homestead. While, there she fell in love with one Robert Moyo who is complainant's grandfather. After their union, her new husband joined her in her homestead. In making his relocation Robert Moyo brought with him his nephew, Bernard Dlamini, the complainant in this matter. The complainant is mentally challenged.

In early 2007, accused enticed complainant to the fields wherein she grabbed him and forcibly removed his pair of trousers and inserted his penis into her vagina against his will. This practice continued from early 2007 until April 2008. Complainant apparently did not appreciate this sexual encounter and as a result of this he made a report to the police which led to the arrest of the accused.

I have gone through the essential elements of the charge and I find nothing untoward about them, therefore, the plea of guilty, I am convinced is a genuine one. Her legal practitioner is also content with accused's admission of guilty and I accordingly confirm the conviction.

Appellant has attacked the court a quo's sentence for being unduly harsh in the circumstances, heed being had of accused's age. In my view, this is the only major factor which is in her favour as the offence is greatly reprehensible.

Appellant's conduct, no doubt deserves chastisement and condemnation of the highest order. The complainant suffers from mental abnormality. In other words, he is in a state of arrested or incomplete development of mind which includes subnormality of intelligence and is of such a nature that he is incapable of living an independent life or guard himself against

serious exploitation. This is evidenced by the fact that although such sexual abuse occurred, he was incapable of resisting or repelling appellant's conduct as would have been expected.

The complainant's lack of appreciation of appellant's conduct must have traumatised him a great deal. Accused is old enough to be complainant's grandmother. She went against all customary and traditional practices in an effort to quench her insatiable appetite for sex with a mentally challenged 20 year old man, who, by virtue of her marriage to his grandfather, had become her nephew. (*in loco parentis*).

She is a woman of low moral character and of a very coarse nature, who had very little idea of faithfulness to her husband to an extent of forcing a boy, forty years her junior to have sexual intercourse with her.

This is what takes away the sting of sympathy from her, thereby, justifying a sentence of a custodial nature.

However, it has always been the practice of these courts to treat women first offenders leniently than their counter-parts, see *R v Harvey*, 1967 RLR 203; *S v Moyana* 1980 ZLR 460; *S v Rubie* 1975 (4) SA 855 and *S v Ncube* 1983 (2) SA 855. It is for that reason that we exercised leniency on her and tremendously reduced her lengthy custodial imprisonment.

Ndou J.....concurring

Moyo and Nyoni, appellant's legal practitioners
Criminal Division, Attorney General' Office, respondent's legal practitioners