

**The State  
Versus  
Pearson Nhire**

HIGH COURT OF ZIMBABWE  
BHUNU J  
HARARE, 28 September 2005

**Criminal Review**

BHUNU J: During the period extending from January 2003 to October 2004, the accused a 54 year old man repeatedly raped his 16 year old daughter on diver's occasions.

The complainant is an orphan whose mother had passed away and she remained in the accused's custody together with 7 other children. The children are currently under the care and custody of the accused's in-laws.

She had previously been gang raped by 3 men on her way to school. As a result she was no longer attending school preferring to study at home, perhaps for fear of being raped. Whilst she was so studying at home the accused developed a lustful sexual appetite for his daughter. He would therefore, from time to time call her into his room where he forcibly had sexual intercourse with her without her consent.

The little girl eventually decided to escape from the accused's shackles and went in search of her grandmother. She however fortuitously got lost and wandered into a police station where she reported her ordeal, resulting in the accused's arrest.

The accused was employed as a gardener earning a paltry \$165 000.00 per month. He made a clean breast of it all, unreservedly pleaded guilty and was contrite.

On those facts the accused was sentenced to 20 years imprisonment none of which was suspended.

At face value I felt that the trial magistrate had exceeded his jurisdiction and that in any case the accused being a first offender deserved to have a portion of his sentence suspended.

In his response the learned magistrate pointed to section 51(4) of the Magistrate Court Act [*Chapter 7:10*] as amended by section 25 of the Sexual Offences Act 8 of 2002. The section provides that:-

"(4) Notwithstanding section fifty the jurisdiction of a regional magistrate in respect of punishment for a sexual offence, whether on summary trial or remittal by the Attorney-General shall be –

- (a) Imprisonment for a period not exceeding twenty years
- (b) .....

(5) For the purposes of section (4) –

"sexual offence means –

- (a) rape or sodomy, or
- (b) a contravention of section 3, 4, 5, 6, 8 or 15 of the Sexual Offences

Act [*Chapter 9:21*]  
(c) an attempt to commit an offence referred to in paragraph (a) or (b)."

It is therefore clear that the learned regional magistrate had the requisite jurisdiction to pass the sentence which he did.

What remains is to determine whether the severity of punishment was correct. Undoubtedly the accused's conduct was reprehensible and his moral culpability of a very high degree indeed. Despite that observation in the normal run of things the maximum penalty is reserved for the worst contravention of the law. See *S v Nkala* SC 74/91. In this case I would not go as far as saying that the accused's conduct represents the worst kind of rape imaginable, without in any way trying to minimize the gravity of the offence.

The accused being a first offender he ought to have got credit for having kept the narrow and straight path for the past 50 or so years.

In the case of *Thomas Amunet Nyamimba vs State* HH 204-02 where a 44 year old had raped a 6 year old girl GUVAVA J made the following pertinent observation at page 6 of her cyclostyled judgment: -

"Given the high incidents of rape of innocent young children and their possible exposure to these diseases the courts must impose severe penalties in order to deter offenders from committing such offences. That this view is widely held in Zimbabwe is evidenced by the recent promulgation of the Sexual Offences Act [*Chapter 9:12*] and the severe penalties which are provided therein.

In my view given the above dangers to which a rape victim is exposed, a rape perpetrated on a young girl should attract a sentence of at least 10 to 15 years imprisonment."

I am in respectful agreement with the learned judge's sentiments. This case is however aggravated by the fact that the accused raped his own daughter not once but on several occasions.

He raped his own daughter who had been previously raped. He was therefore in breach of trust and his parental duty of care. His conduct does not however merit the imposition of the maximum penalty provided for in the Act.

That being the case it is ordered: -

1. That the sentence of 20 years imprisonment imposed by the trial court be and is hereby quashed and set aside.
2. That the accused be and is hereby sentenced to 17 years imprisonment of which 2 years imprisonment is suspended for a period of 5 years on condition the accused does not again within that period commit any offence involving rape or sexual indecency and for which he is sentenced to imprisonment without the option of a fine.

MAKARAU J agrees.....