

**S v Makorisha HH130/04 CRB R330/03 High Court of Zimbabwe. Harare. 16 June 2004**

KEY CONCEPTS	
Sentencing in child rape	Rape of 6 year old

This matter came before the court on automatic review from the regional court and involved the rape of a 6-year-old girl. The 38-year old accused was convicted and sentenced to 5 years' imprisonment of which 3 years was suspended. The High Court was satisfied by the conviction but gravely concerned with the sentence imposed.

The accused was separated from his wife and had 5 children. The trial magistrate appeared to have appreciated the seriousness of the crime of rape of a child, because he stated that crimes of this nature always attract sentences of imprisonment in the region of 8 to 10 years. Despite appreciating the seriousness of the crime, he nevertheless imposed the above sentence. His reasons were as follows:

"In this case it appears that accused was tempted persistently by a group of silly girls to do what he did. His blameworthiness is lowered considerably by the provocation he was subjected to. In sentencing him one considers that at his age he should have resisted the taunts. By his own admission, it was clear that complainant is too young for him to be intimate with her.

"Accused abandoned the rape on his own once complainant started crying in pain. That too is mitigatory. The doctor who examined complainant's private parts found them normal. Complainant's virginity was not tempered with. Further no physical harm was done to the 6-year-old girl. Complainant herself did not report the rape to her mother. I doubt if she was emotionally traumatised by this momentary and partial penetration."

**FACTS:** According to the accused, a group of 5 girls were teasing him and requested him to expose his private parts to them. He refused to do so, but they then exposed the private parts of one girl to him and then later that of the complainant. They pushed the complainant through a fence to the accused's side and asked him to try his luck at having sexual intercourse with her. As he had been sexually aroused by the exposure of the complainant's private parts, he grabbed the complainant and tried to insert his penis into the child's vagina. The complainant cried and he immediately abandoned the attempt at sexual intercourse, realising that his penis could not fit into the child's vagina.

**DISCUSSION:** The High Court was confused by how the accused, a man of 38 years, could be teased by a group of 5 children of the age of 6 and succumb to a temptation. The teasing was supposedly done by a group of very young children who would not know about sexual matters. The accused seemed to suggest that two of the children were a little older and one was apparently in grade 5. He suggested that it was these two older girls who exposed the

complainant's private parts and who persistently requested him to have sexual intercourse with the complainant but he refused until they allegedly ordered him to do so.

The High Court was disparaging about the accused's explanation:

"This is incredible. What the accused was alleging seems to suggest to me that the accused may not be quite normal or he is a simpleton. Otherwise how can children of that age tease such an old man, compared to them, about sexual matters if he was quite normal? One is inclined to think that the children have known him to be of low intellect and they can play with him in the manner described. They would not have dared playing with him in that fashion if he was quite normal. He would have told them that he would beat them up if they tried to continue doing something silly like that. He would have straight away told them to go away and would have told them that he was going to tell their parents about what they had done. His suggestion that the little children ordered him to have sexual intercourse with a child of six years is incredible and, with respect, does not make sense to any normal mature person."

The court made the following points about the rape of a child:

- Accused persons who rape children need to be adequately punished and should expect severe penalties
- In *Chidodo v S HH78/98* Blackie J stated: "Firstly and primarily rape is a very serious offence. It is a gross violation of the rights, body and dignity of the complainant. The offence is aggravated when it is committed on a child. A severe penalty must be seen to have been given.
- In the earlier case of *Daniel Phiri v S HH219/93* Mubako J stated that: "It is important that the courts protect victims of sexual aggression who are usually woman. Sexual assaults are a most reprehensible invasion of one's body, one's personality and dignity, the more so when it is perpetrated on young people."
- The court of appeal quoted the above cases with approval in *Thomas Amuvet. Nyamimba v S HH204/02* where a 44-year-old man raped a 6-year girl: "These sentiments are now even more valid in view of the high incidents of sexually transmitted diseases and the rampant spread of HIV-AIDS in Zimbabwe. 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."

**FINDING:** The High Court found the sentence imposed to be so grossly inadequate as to induce a sense of shock. Accordingly, the court found itself unable to certify the proceedings as being in accordance with real and substantial justice.