

# RAPE

*S v. Chirembwe*

[2015] ZWHHC 162, CRB No. R 1006/12

Zimbabwe, High Court

## COURT HOLDING

It was appropriate to split rape charges from unlawful entry charges. However, the lower court erred in sentencing each count of unlawful entry separately from rape, because they arose out of the same transaction. The counts that arose out of the same transaction (i.e., unlawful entry leading to rape) then could be sentenced individually but made to run concurrently with those transactions that were similar in nature and closely linked in time (the aggravated unlawful entry counts).

## Summary of Facts

The accused was a burglar who broke into houses and also committed acts of rape. He was charged with a combined thirty counts of contravening s 131 (1) & 2 (unlawful entry) and s 65 (rape) of the Criminal law (Codification and Reform) Act [Chapter 9:23]. Of the total 30 counts, 13 were counts of rape whereby, after entering 10 domestic premises, the accused committed the rapes. He was convicted of 21 of the 30 counts. For those 21 counts, he received a total sentence of 290 years. Of these, the final 60 years were suspended for five years on condition he did not commit a crime involving unlawful entry, violence on the person of another, or an offence of a sexual nature.

The magistrate had meted out the sentences cumulatively, with 10 years for each count of unlawful entry, plus 20 years for each count of rape, totalling 290 years.

The regional magistrate who handled the case referred the case to the High Court for review.

## Issue

Whether the splitting of the charges and the consequent sentence were appropriate.

## Court's Analysis

In the Court's opinion, the convictions were proper but the cumulative sentencing arrived at a ridiculous result, which did not serve any purpose except to shock people. The Court pointed to the probable influence of public sentiment, especially women's groups who perceived that courts were meting out lenient sentences to rapists. The Court acknowledged that magistrates usually gave sentences of between 15 to 20 years for rape cases, but they are later reduced on review.

The Court considered the views of Kamocha J in *S v. Ndlovu* 2012 (1) ZLR 393 that though life imprisonment is the maximum sentence permissible for rape under the criminal code, this should be reserved for the worst examples of the crime. According to Kamocha J, rape sentences should be between 5 and 10 years, and beyond 10 years for exceptional cases. He also discouraged giving out cumulative sentences when dealing with multiple counts.

Though the Court agreed with the views of Kamocha J in *S v. Ndlovu*, it expressed the view that this reasoning ignores the implications of sexual violence on the enjoyment of rights by women and girls. In the Court's opinion, sentencing must utilise an engendered approach and a constitutional and human rights perspective.

Sexual violence infringes the rights to bodily and psychological integrity, freedom from violence, and inherent dignity, and rape is "a particularly serious form of gender based violence against women and girls" which has an impact on the enjoyment of their human rights. These are rights guaranteed in the Constitution of Zimbabwe Amendment Act (No.20) Act 2013 (Constitution) and international human rights treaties. The Court recognised the pervasive nature of sexual violence and the reality that women and girls live in constant fear of sexual violence throughout their lives, and this impacts gender equality between women and men. The Court reasoned that it was the state's responsibility "not just to protect women against any such violations which encroach on their fundamental rights, but to also prosecute and punish appropriately as part of its exercise of due diligence."

Reviewing the sentence by the magistrate, the Court's opinion was that the lower court was generally right to sentence the rape charges separately from the unlawful entry charges. It however erred in sentencing each count excessively. Further, the lower court should have for the purposes of sentencing, treated each entry leading to rape as one transaction, sentenced individually but running concurrently.

## **Conclusion**

The Court resentenced the accused as follows:

For most of the counts involving unlawful entry under aggravated circumstances and rape on the same premises, the accused received ten years' imprisonment for each count, to run concurrently. For example, 10 years for Count 1 (unlawful entry) would run concurrently with 10 years with Count 2 (rape). For one of the charges of unlawful entry with rape, the Court did not explain the reduced sentence of 8 years. Finally, the accused was sentenced to 15 years for one unlawful entry with 3 rapes of the same complainant. By contrast, the five counts of unlawful entry and theft were sentenced to 3 years each, running concurrently with all previous sentences.

These totalled 73 years' imprisonment, of which the final 18 years was suspended for five years, on condition that the accused did not commit another crime involving unlawful entry, violence on the person of another, or an offence of a sexual nature. This yielded an effective sentence of 55 years.

## **Significance**

This case was more than just about sentencing for rape but also provides some insight on the evolution in Southern Africa's judicial system's response to the prevalence of rape and the appropriate punishment for perpetrators. The Court took cognizance of public sentiments accusing courts of being lenient with rapists and its decision signaled some movement towards taking the impact of rape on girls and women seriously.

One particularly egregious court decision that devalued the impact of rape on the victim was *WB v. the State* (Case No. CA 352/2006, South Africa), where the Appellant had raped his six-year-old

daughter and the trial court had sentenced him to life imprisonment. On appeal however, the High Court reasoned that the trial court failed to take into account the mitigating factors that the Appellant was a “caring, and loving husband and father” and reduced the sentence to 15 years in prison. The Court had decided to ignore the impact of rape on the girl-child on the basis that the Appellant was a good father and husband.

While the courts alone may not solve the problem of sexual violence against women, they should not condone a culture of leniency in cases of sexual violence against women. By acknowledging the human (women’s) rights dimension of sentencing, the Court signals a welcome change in judicial thinking about sexual violence, taking into account the life-altering impact of rape, not only on the victim, but on the group (girls and women) that disproportionately experiences pain and suffering.

## DISABILITY, SEXUALITY AND CRIMINAL LAW

*Center for Health, Human Rights and Development and Iga Daniel v. Attorney General*  
(2015), Constitutional Petition No. 64 of 2011  
Uganda, Constitutional Court

### COURT HOLDING

The language of Section 45(5) of the Trial on Indictments Act is unconstitutional because it labels defendants with mental disabilities as “criminal lunatics” and therefore violates their dignity. It also treats persons with such disabilities differentially, which contravenes the principle of presumption of innocence, and infringes on their rights to liberty.

Section 82(6) of the Trial on Indictments Act required modification to ensure conformity with the Constitution, so that persons are not detained indefinitely for reasons of insanity.

The use of the words “idiot” and “imbecile” in Section 130 of the Penal Code Act, criminalizing attempts at sexual relations with mentally disabled females, is derogatory, dehumanizing, and degrading and therefore unconstitutional.

### Summary of Facts

The applicant, Center for Health, Human Rights and Development (“CEHURD”), filed a petition challenging the constitutionality of Sections 45(5) and 82(6) of the Trial on Indictments Act and Section 130 of the Penal Code Act. CEHURD alleged that the impugned provisions contained language that was derogatory and prejudicial to persons with mental disabilities, and therefore infringed on various constitutionally guaranteed rights including the rights to dignity, non-discrimination, liberty, and presumption of innocence.

### Issues

The issues before the Court were as follows: