

S v Nzara
[2001] JOL 8529 (ZH)

Reported in (Butterworths)	Not reported in any Butterworths printed series.
Case No:	HH 72 / 2001
Judgment Date(s):	30 / 03 / 2001
Hearing Date(s):	None Indicated
Marked as:	Unmarked
Country:	Zimbabwe
Jurisdiction:	High Court
Division:	Zimbabwe
Judge:	Chinhengo J
Bench:	Chinhengo J
Parties:	The State (At); Irvine Nzara (Acc)
Appearance:	Mr NM Wamambo (At); In Person (Acc)
Categories:	Review – Criminal – Substantive – Public
Function:	Sets New Precedent

Key Words

Criminal procedure (sentence) – common law crimes – sodomy – young adult infected with HIV committing sodomy on 4 year old and infecting him – appropriate sentence

Mini Summary

Sodomising a minor child is a serious offence which is akin to rape. But sodomising a minor child with the knowledge that one is infected by a sexually transmitted disease and possibly by HIV/AIDS, is a much more serious offence. Children are entitled to the protection of their right to dignity and integrity of the person. Courts have a duty to send a clear message to sodomists and potential sodomists and to the community in general that they are determined to protect the dignity and integrity of young children and no mercy must be shown to those who seek to invade the young children's rights.

Page 1 of [2001] JOL 8529 (ZH)

CHINHENGO J: The accused was charged with the crime of sodomy. It was alleged that between 15 and 17 of December 1999 at a house in Glen-Norah, the accused unlawfully and intentionally and against the order of nature had sexual intercourse *per anum* with one Z, a minor aged four-and-half years on diverse occasions. He pleaded not guilty and after a long trial, he was found guilty of the crime charged and he was referred to the High Court for sentence.

I am satisfied that the conviction was in order and the referral of the matter to the High Court for sentence was also in order.

It is significant that the issue of the accused's HIV status arose when, during the trial, the accused asked if the child had a sexually transmitted disease similar to the one he was suffering from. This prompted the magistrate with the accused's consent and the consent of the minor child's parents to order that the accused and the minor child both be examined or tested for the HIV/AIDS virus. The accused person confirmed in court that he was indeed examined. Blood samples

were taken from him and they were analysed. The results of the tests were that the accused was found to be HIV positive and the minor child was also found to be HIV positive.

In sentencing the accused, I need to highlight one feature of this case for the benefit of society at large. The accused was employed on odd jobs by the minor child's parents at their rural home in Chiweshe communal area. The accused visited

Page 2 of [2001] JOL 8529 (ZH)

the minor child's parents' home in Harare from Chiweshe in order to discuss matters connected with the tasks he was performing for them. From the evidence on record he had a view to being asked to do more work for them. He stayed at their home for three days and was asked to do some work in the garden for which he was paid \$100,00. During the three days on which he stayed at their home, he slept on the same bed and in the same blanket with the minor child. It was during the night or nights that he sodomised the minor child.

In my view, parents should be jealously protective of their minor children. They should not expose them to persons, relatives or otherwise trusted visitors, without the absolute necessity to do so. It was as a result of the parents' baseless trust in one of their casual workers that resulted in this tragedy. Sodomising a minor child is a serious offence which is akin to rape. But sodomising a minor child with the knowledge that one is infected by a sexually transmitted disease and possibly by HIV/AIDS, is a much more serious offence.

From what transpired during the trial, the accused was aware that he had a sexually transmitted disease. He must have been aware that he was also possibly HIV positive. Because of the illness which he suffered and of which he was aware, he would have had every reason to believe that he was infected with the HIV/AIDS virus. It is proved in this case that at the time of the offence the accused was indeed HIV positive because the minor child was tested HIV positive on examination.

The accused was 22 years old and he is now 24 years old. He is single. He has submitted in mitigation that he looks after his grandparents and his young brothers and sisters who are dependent on him. He has asked the court to exercise leniency in his favour. The accused committed a most grievous offence against a young child who he was entrusted to sleep with in the same bed. He abused both the trust bestowed on him and betrayed the minor child's parents' trust in him in a most painful manner. His moral blameworthiness is therefore very very high indeed.

Page 3 of [2001] JOL 8529 (ZH)

The courts must impose a punishment which is retributive in nature. Retributive because with the absence of a cure for HIV/AIDS, the accused has procured that the minor child will not only suffer during whatever remains of his natural life, but also that he will eventually die from HIV/AIDS.

Sodomy is a distasteful offence. It is an offence of deeper malignity than rape (see *State v Kampher* 1997 (2) SACR 418 (C)). Children are entitled to the protection of their right to dignity and integrity of the person. Courts have a duty to send a clear message to sodomists and potential sodomists and to the community in general that they are determined to protect the dignity and integrity of young children and no mercy must be shown to those who seek to

invade young children's rights. In my view, the accused represents a danger to society sufficiently serious to warrant his detention for a very very long period.

In assessing the appropriate sentence, I have taken into account the fact that the accused himself is HIV positive. He is therefore a sick man but in sentencing him and having to balance the interest of society and the absolute necessity to protect young children from child abusers, I consider that the following sentence is justified.

I therefore sentence the accused to 20 years' imprisonment.