Judgment No. HB 119/2003
Case No. HC 1086/2003
CRB K 55/02

THE STATE

Versus

JOSEPH NCUBE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 13 NOVEMBER 2003

Criminal Review

NDOU J: The accused, a teacher at St Sebastian Secondary School, Kezi was charged before a Kezi Magistrate of common law abortion. He was convicted and sentenced to 12 months imprisonment. The conduct of the proceedings by the trial magistrate seems to have offended the learned scrutinising Regional Magistrate's sense of justice. He, as a result, addressed a minute to this court in the following terms –

> "The accused was convicted after having pleaded not guilty to a charge of common law abortion. In brief the background information to this charge is that the now accused was a teacher to a girl called E N (I will refer to her as EN to protect her identity). It is alleged that he fell in love with EN. He had sex with her. She conceived as a result. The accused person denied falling in love with EN let alone having sex with her.
>
> It is also stated that he persuaded the girl to accompany him to Bulawayo whereby a doctor gave her tablets so that she would drink them at home. She drank the tablets at home resulting in the so-called abortion. The girl was described as a complainant in this matter was convicted on her own plea of guilt CRB K08/02 on 3 January 2002.
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> It is apparent in the circumstances that the girl now so-called complainant in this matter was a co-perpetrator to the charge of abortion. When she was called to testify against the accused person she was supposed to be treated as an accomplice witness. Section 270 of the Criminal Procedure and Evidence Act [Chapter 9:07] reads as follows:

> "Any court which is trying any person on a charge of any offence may convict him of any offence alleged against him in the indictment, summons or charge under trial on the single evidence of any accomplice:
>
> Provided that the offence has, by competent evidence other than the single and unconfirmed evidence of the accomplice, been proved to the satisfaction of such court to have been actually committed."

Coming to the instant case the record does not show that the magistrate was alive to the fact that the girl was an accomplice witness. Instead she is euphemistically referred to as a complainant. My understanding of the above stated section is that other than the evidence of a single accomplice witness there must be evidence *aluende* (sic) which shows that an offence of abortion was committed. Abortion is defined as follows in the second edition of Snyman at page 433:

> "An abortion of a live foetus of a woman with intent to kill such a foetus"

It is a requirement that the foetus must be alive at the time of abortion. As for the word foetus it would appear as if in this country the wide meaning has been adopted. It means the age and level of development does not matter as long as the young of a vertebrae is aborted the offence is committed. Feltoe in his *A Guide to the Criminal Law of Zimbabwe* states that the stage of growth of the foetus is immaterial.

I have problems with this case in that the state did not produce a medical affidavit. There is no explanation in the record as to why it was not produced. EN's case was different in that she pleaded guilty to the charge of abortion which means all the issues became common cause.

The accused person in this matter pleaded not guilty and vigorously denied having sex with her. It means the issue of pregnancy itself was in dispute. In *The Principles of Criminal Law* by Jonathan Burchell and John Milton at page 408 it was stated as follows:

> "The question whether there is a foetus and whether it was alive at the time the abortionist sets about procuring an abortion will of course fall to be determined by medical evidence."

Having said all this the issues to be addressed are the implications of the failure to comply with section 270 of the code. The judgment of the magistrate does not show that he was dealing with an accomplice witness. In addition to that can the conviction stand taking into account that no medical affidavit was produced? The evidence mentioned in section 270 which is outside that of an accomplice witness would among other things include a medical affidavit.

> I feel that there is no evidence in this case besides that of single accomplice witness which shows that this offence was committed. We need to know the gestation period and whether the foetus was alive at the time of the act. I am of the view that the conviction should not stand. Maybe a trial *de novo* before a different magistrate would be an alternative approach."

Abolition of Common Law by Termination of Pregnancy Act [Chapter 15:10]

Before I deal with the issues raised by the Regional Magistrate I think it is necessary to consider whether the accused was correctly charged under common law abortion. Under common law only one ground of justification for abortion was acknowledged, *viz* necessity. The statutory abortion differs from the common law one in an important respect, which is that the former has created many more grounds on which an abortion may lawfully be procured than were known under common law. According to a number of decisions of this court, the common law offence of abortion has been entirely replaced by the offence under the Act and therefore persons who would previously have been charged with abortion should now be charged with contravening section 3 as read with section 12(a) of the Termination of Pregnancy Act. This decision of the court has followed a South African judgment in *S* v *Kruger* 1976(3) SA 290 (O), *S* v *Ncube* HB-148-88 and *S* v *Mapuranga* HB 242-86. In these cases it was held that, although the Act does not state this explicitly, it has substituted a new crime (or crimes) for the common law crime, in other words, the common law crime no longer exists. If it were otherwise, a person charged under the common law would have only one defence at his disposal, namely that it was necessary for him to procure the abortion in order to save the woman's life, and he would not be able to rely on the list of defences set out in the Act. It was held, correctly in my view, that the legislature could not have intended such an anomaly – see *Criminal Law* by C R

Snyman 3rd Ed at page 406 and A guide to the *Criminal Law of Zimbabwe* by G Feltoe 2nd Ed at page 66. I, accordingly, find that the accused should have been charged with the statutory abortion in contravention of section 3 as read with section 12(1)(a) of the Act.

I now wish to consider the issues raised by the Regional Magistrate individually.

Failure to adduce medical evidence

In this case no medical evidence was produced. As a result it was unknown how the foetus was or whether it could have existed independently of its mother. It is, however, known that EN was around three and half to four months pregnant. According to EN in her testimony this fact was confirmed at United Bulawayo Hospitals (UBH) where she was taken by the accused for tests. The accused in his own words also confirmed that EN was examined at UBH and found to be around four months pregnant. So it is common cause that when the two went to UBH it was confirmed that EN was indeed around four months pregnant. The confirmation came from the accused himself. Such confirmation satisfies the requirement set out in the proviso to section 270 *supra*. This evidence symbolises that there was a live foetus at the time of the abortion. I, however, agree with the learned Regional Magistrate that medical evidence should be led in cases of this kind. Were it not for the above common cause issue the prosecution case would have fallen on account of lack of medical evidence. The failure to adduce evidence is, therefore, not fatal.

In the final analysis the above two irregularities were correctly highlighted by the scrutinising Regional Magistrate. He suggested that I set aside the conviction on account thereof and order a trial *de novo*. It is trite that remittal will be ordered only

in those matters where it appears that if the conviction or sentence were left undisturbed there would be a possibility, that a miscarriage of justice would take place – *Maponga* v *S* HH-276-84; *R* v *Haya* 1957 R and N 645; *R* v *Mokwena* 1948 (2) PH H 203; *Belcem* v *Jarvis NO & Garnett NO* 1952 SR 140 and *S* v *Ngulube* HH-48-02. Generally, the interests of justice are not served by lightly requiring the re-opening of a case that has already been adjudicated upon – *R* v *Boschoff* 1956 R and N 61 SR. According to the provisions of section 29(3) of the High Court Act [Chapter 7:06] no conviction or sentence may be quashed or set aside by reason of irregularity or defect in the record of proceedings unless the reviewing judge considers that a substantial miscarriage of justice has actually occurred. The object of this provision is to prevent proceedings being set aside on technical grounds. The test is whether there has been substantial prejudice to the accused. The only possible prejudice in charging common law abortion as opposed to the statutory one is that the accused is only entitled to one ground of justification, *viz*, necessity. What the accused said in his defence outline is not consistent with other grounds of justification in the Termination of Pregnancy Act *supra*. He denied having sexual intercourse with EN. He denied procuring the abortion at all. He stated in the court *a quo* that he was arrested as a fabrication by the headmaster and EN’s parents. He did not avail himself the grounds of justification set out in the Act. In the circumstances there is no substantial prejudice to him occasioned by the irregularity. I am satisfied on the findings of the trial court that the accused should have been found guilty of contravening section 3 as read with section 12(a) of the Termination of Pregnancy Act [Chapter 15:10]. The evidence at the disposal of the trial court proved the accused guilty of

that offence. In terms of the powers vested in me by virtue of proviso (viii) to section 29(2) of the High Court Act, *supra*, I alter the conviction by the deletion of "procuring abortion" and substituting as follows:

> "Contravening section 3 as read with 12(a) of the Termination of Pregnancy Act [Chapter 15:10]".

There is no prejudice to the accused by the citation of the charge being changed. The body of the charge remains unchanged. This alteration does not in any way alter the accused's person moral blameworthiness and, therefore, the sentence and the rest of the proceedings are accordingly confirmed.

Chiweshe J …………………….. I agree