

**THE STATE**

**Versus**

**CARLOS MWEMBE**

IN THE HIGH COURT OF ZIMBABWE  
NDOU J  
BULAWAYO 8 DECEMBER 2005

Criminal Review

**NDOU J:** The accused was convicted by a Bulawayo Provincial magistrate of contravening section 31(a) of the Sexual Offences Act [Chapter 9:12] (the Act) and sentenced to undergo eighteen(18) months imprisonment nine(9) of which were suspended on the usual condition of good behaviour. He was not legally represented during the trial. At a preliminary level, the Act does not have section 31, the last section is 27. From the body of the charge sheet I can only discern that the intention was to cite a contravention of section 3(1)(a) i.e. having extra-marital sexual intercourse with a young person. The citation of the charge sheet is accordingly changed to reflect the above mentioned correction. The accused pleaded guilty and the plea proceedings were conducted in terms of the provisions of section 271(2)(b) of the Criminal Procedure and Evidence Act [Chapter 9:07]. I am concerned about the propriety of the conviction. Section 3 of the Sexual Offences Act provides:

“(1) Subject to subsection (2), any person who-

- (a) has extra-marital intercourse with a young person;  
or
- (b) ...
- (c) ...

HB 122/05

shall be guilty of an offence and liable ...

- (2) It shall be a defence to a charge under subsection (1) for the accused person to satisfy the court that-
  - (a) he was under the age of sixteen years at the time of the alleged offence; or
  - (b) he had reasonable cause to believe that the young person concerned was of or over the age of sixteen years at the time of the alleged offence."

So, in terms of section 3(2)(b) *supra*, the accused must have known or at least have reasonably suspected that the young person was under the age of sixteen years. The state outline produced during the trial neither alleges that the accused knew of young person's age of fifteen years nor that he should have reasonably suspected that she was under sixteen years.

When the essential elements were canvassed with the accused, he was not specifically (or even impliedly for that matter) asked whether he was aware of her age of fifteen years or what her apparent age was. He was, therefore, deprived an opportunity to state whether or not he had the defence articulated in section 3(2) (b). The court *a quo* convicted the accused without knowing whether he knew her age, as a fact, or believed that her apparent age was below sixteen. In order to escape conviction, in such a case where extra-marital sexual intercourse is common cause, it is incumbent upon the accused to prove on a balance of probability

that he did not know that the complainant was above the age of sixteen years or that he had *bona fide* believed the complainant to be above the age of sixteen years. Further, that he has reasonable cause for such belief – *R v*

HB 122/05

*Carmody* 1969(2) RLR 525(AD) at 527E; *S v Ryce* SC 13-88 and *S v Hove* 1992(1) ZLR 70(S). Section 3(2)(b) creates a special defence that should have been made known or canvassed with the accused and the questions and the replies to questions put to him recorded. Obscure points such as those provided in section 3(2) must be explained to the accused. Only an informed accused can understandingly admit that he has no defence contained section 3(2) – see also *S v Sikarama & Anor* 1984(1) ZLR 170(H) and *Criminal Procedure in Zimbabwe* – John Reid Rowland at 17-6. The complete failure by the trial magistrate to canvass the provisions of section 3(2)(b) with the accused constitutes a gross irregularity.

Accordingly, the conviction of the trial court is quashed and the sentence set aside. A trial *de novo* is ordered before a different magistrate.

Cheda J ..... I agree