

MORGAN MHONDIWA

Versus

THE STATE

APPELLATE DIVISION OF THE HIGH COURT OF ZIMBABWE

NDOU AND KAMOCHA JJ

BULAWAYO 30 SEPTEMBER 2010

M T Jumo for appellant

K Ndlovu for respondent

Criminal Appeal

KAMOCHA J: The 26 year appellant was charged with the crime of rape. In that during the period between the months of January 2008 and October 2008 and on divers occasions he had sexual intercourse with the complainant who by that time was 13 years old knowing that she had not consented to it or realizing that there was a real risk or possibility that she may not have consented to it.

In the alternative, he was charged with contravening section 75(2)(b) of the Criminal Law Codification and Reform Act [Chapter 9:23] in that he was alleged to have had, during the period extending from January 2008 to October 2008, sexual intercourse with his step daughter knowing that she was related to him.

The appellant tendered pleas of not guilty and the matter proceeded to a full trial. He was found guilty as charged of rape on the main count. On the alternative charge he was found guilty of having sexual intercourse with a young person in contravention of section 70(1)(a) of the Criminal Law Codification and Reform Act [Chapter 9:23].

The court treated both counts as one for the purpose of sentence and sentenced the appellant to 15 years imprisonment of which 3 years imprisonment was suspended for 5 years on the customary conditions of future good behavior.

He has appealed against both conviction and sentence. In respect of the convictions the appellant complained that it was improper for the learned Regional Magistrate to convict him of both the main charge of rape and the alternative charge of having sexual intercourse with a young person on divers occasions from January 2008 to October 2008. The appellant's criminal conduct could not have constituted two different offences. Since he had been charged in the alternative the court should have acquitted him on the main charge of rape and convicted him

of having sexual intercourse with a young person in contravention of section 70 or contravening section 75 (2)(b) – having sexual intercourse with his step daughter.

Appellant further complained that it had not been established beyond reasonable doubt that the complainant had not consented to the first act of sexual intercourse when regard is had to the fact that she had not reported the matter at all. It was only after her mother had assaulted her that she opened up. When she and the appellant were caught *in flagrante delicto* she initially denied any wrong doing when confronted by Vimbayi. Complainant in fact admitted that after the first act of sexual intercourse she had consented to the subsequent ones.

His complaint against the sentence was that it was excessive and too long that it induced a sense of shock and outrage. It was way out of line with the maximum of 10 years imprisonment stipulated in section 70 of the Act. He concluded that since no violence was used during the commission of the offence and regard being had to the ages of the parties the sentence should be reduced to a period of imprisonment not exceeding 10 years imprisonment.

Mr K Ndlovu counsel for the respondent conceded that it was not proper for the trial court to convict the appellant on both the main count and alternative. The concession was properly made.

When charges are framed in the main and alternative the accused person has an election to either plead guilty to the main count or alternative count. He can plead not guilty to both counts and may be found not guilty of both the main and alternative; but he may not be found guilty of both counts. A further concession which was properly made by the respondent's counsel was that the appellant ought to have been convicted of contravening section 70(1)(a) – having sexual intercourse with a young person but should have been acquitted of rape.

In relation to the sentence imposed counsel for the respondent again properly conceded that it was out of step with that prescribed by the provisions of section 70(1)(a) of the Act which provide that a person convicted of having sexual intercourse with a young person shall be liable to imprisonment for a period not exceeding 10 years.

Although the trial magistrate had sentenced the appellant for both rape and having sexual intercourse with a young person the sentence was incompetent because it exceeded what the law provided. The global sentence imposed should have been within the court's jurisdiction on both counts.

It was submitted by the respondent counsel that the appellant deserved to be incarcerated for a long period in the region of 10 years imprisonment with a portion being

suspended on the customary conditions of future good behavior. It was pointed out that the appellant was 26 years when he committed the offences while the complainant was 13 years old. The offences were committed from January 2008 barely seven months after she had attained the age of consent. The age difference was 13 years which is too wide a difference. In addition the complainant was way below the age of 16 years. Furthermore the appellant was the boyfriend of the complainant's mother. He had sexual intercourse with the complainant on divers occasions. Meaning that at some stage he used to have sexual intercourse with both mother and daughter during the same period. The appellant is completely depraved. Very little or nothing can be said in his favour. The maximum sentence stipulated by law is appropriate in his case.

In the light of the foregoing the appeal succeeds to the following extent:-

- (a) The conviction of rape is hereby quashed and the appellant is acquitted on the main count;
- (b) The conviction for having sexual intercourse with a young person is confirmed; and
- (c) The sentence of 15 years imprisonment imposed by the court *a quo* is set aside and substituted with the following:-

10 years imprisonment of which 2 years imprisonment is suspended for period of 5 years on condition that the appellant is not convicted of any offence of a sexual nature committed within that period for which he is sentenced to imprisonment without the option of paying a fine.

Effective: 8 years imprisonment

Ndou J I agree