THE STATE

Versus

GUGULETHU TSHUMA

IN THE HIGH COURT OF ZIMBABWE
MUTEMA J
BULAWAYO 21 MARCH 2013

Criminal Review

MUTEMA J: The 20 year old accused person *in casu* was correctly convicted following a plea of guilty, of having sexual intercourse with a young person in contravention of section "70" (*sic*) of the Criminal Law (Codification and Reform) Act, Chapter "09" (*sic*) (erroneously given as section 70 and chapter 09 in the charge sheet). The correct citation should be section 70(1)(a) of chapter 9:23.

Apart from the plea of guilty, and the age of 20 years, accused is a first offender who is a grade 7 drop-out who said he did not know that it was an offence. The dentist who examined the complainant opined that she is aged between 14 and 15 years. Accused met complainant in February 2013 who was on her way to the shops and courted her but she turned him down. He met her again after two days and courted her and this time she agreed. After two days the two met at a river where complainant was fetching water. Accused called complainant to a secluded spot where he asked to have sexual intercourse with her and she consented. They had sexual intercourse once and parted. The matter came to light after complainant told her grandmother that she was in love with accused and was taken to Gwanda Hospital where she told the nurse about the sexual encounter.

The Provincial Magistrate who convicted the accused sentenced him to "18 months imprisonment of which 6 months imprisonment is suspended for 5 years on condition accused does not within that period commit an offence of a sexual nature, for which he is sentenced to imprisonment without the option of a fine." He was sentenced on 25 February, 2013. In justifying her sentence, the trial magistrate reasoned in these words: "The accused person is a mature 1st offender. He pleaded guilty to the charge and did not waster the court's time. The offence committed by the accused person is a serious offence. Young girls need to be protected from people like the accused especially in this era of sexually transmitted diseases. The girl is only 14 years and is doing grade 7. Because of the gravity of the offence a fine/community service will be too lenient."

I did not consider it worthwhile to send a query to the trial magistrate regarding the error of the citation of the charge alluded to *supra* and also regarding the extremely harsh

sentence that she imposed without any plausible justification as it would have the effect of further prejudicing the accused person. An insight into sentencing patterns in cases of having sexual intercourse with young persons would be instructive.

In *S* v *Nare* 1983 (2) ZLR 135 (HC) the court held that the rationale behind punishing carnal knowledge of girls under 16 years is the protection of immature females from voluntarily engaging in sexual intercourse on account of a lack of capacity to appreciate the implications involved and the possibility of mental or physical injury. The offence is mitigated where for instance –

(i) The complainant is of loose morals; or
(ii) She enticed the accused to have intercourse; or
(iii) The accused and complainant were genuinely in love; or
(iv) She was nearly 16 years old; or
(v) The accused is a simple and unsophisticated person from a community in which this law is not well known; or
(vi) He is a youth; or
(vii) He bona fide believed the complainant to be of age.

On the other hand, the offence is aggravated where-

(i) Accused is much older and more mature than the complainant; or
(ii) She is just above the legal age of consent; or
(iii) The accused has relevant previous convictions.

Other factors to consider in determining the seriousness of the offence are the age, appearance and character of the complainant, the age of the accused and the circumstances in which the offence was committed.

This case offered guidance to magistrates in assessing appropriate sentences for the offence in issue for decades and it is still relevant to this day.

In *S* v *Mutowo* 1997 (1) ZLR 87 (HC) GILLESPIE J remarked that the sentencing of persons found guilty of "statutory rape" is a difficult matter because of the wide range of differing circumstances that can attend this crime. The factors that should be considered include, inter alia, the age, appearance and character of the complainant, the age of the accused and the circumstances of the offence – a refreshment of memory of what was stated in *S* v *Nare supra*. The complainant's age is relevant because the younger she is, the more seriously will the court regard the exploitation of her youth, while the closer she is to 16 the less justified will be any presumption of her incapacity to make an informed decision about sexual intercourse. Her appearance is important because the moral blameworthiness of the man will be less if he wrongly believes, from her appearance, that she is older than she actually is. Similarly, the girl's character – whether she be virgin or promiscuous, a flirt or demure – must have a like bearing

on whether the accused was knowingly preying on the innocent or merely risking lying with an underage but worldly-wise girl. In no case, though, can the girl's sexual experience be a defence. The accused's age is important because of the relevance to his moral blameworthiness of his own experience or lack of it and of any disparity in the ages of the parties. Apart from the accused's age, it is also important to determine whether the accused was in a position of responsibility to the girl. A careful investigation of these and other relevant factors by the trial court is essential.

In the *Nare* case *supra*, accused was 22 years old and was a captain in the army. He had sexual intercourse with a 15 year old girl he had met on the very day. He was sentenced to a fine of $750 or 5 months imprisonment. In the *Mutowo* case *supra* a 27 year old widower had sexual intercourse with a 13 year old girl. Due to inadequate investigation into factors relevant to sentence, the review court was obliged to give accused the benefit of the doubt and treat him as a mature recently bereaved widower who sought release with a willing and experienced teenager who he took to be 15. A sentence of 24 months imprisonment of which 10 months were suspended on condition of good behaviour was altered to a fine of $300 or 1 month imprisonment. In *S* v *James* 1998 (1) ZLR 424 (SC) a 20 year old accused had sexual intercourse with an eleven year old girl on several occasions. He was sentenced to a fine of $600 or 1 month imprisonment.

In the instant case the accused is a 20 year old who pleaded guilty and is a first offender. He is unsophisticated and did not know that it was an offence to have consensual sexual intercourse with a girl below 16 years of age. He had sexual intercourse with her two days after his advances were accepted. She was between 14 and 15 years old. The trial magistrate's reasons for sentence are very scanty and are devoid of an investigation into the essential relevant factors alluded to in the above-cited cases. For instance, the girl's appearance and character were not interrogated. How could a 14/15 year old girl just agree to have sexual intercourse with a stranger, she had met four days previously and two days after accepting his proposition? This could well point to a girl of loose moral fibre or one sexually experienced – which fact was also not investigated.

The sentencing trends expounded above, coupled with the circumstances of this case compels me to hold that accused did not deserve to be incarcerated at all. The charge is corrected to read contravening section 70 (1) (a) of the Criminal Law (Codification and Reform) Act, Chapter 9:23 and the conviction is confirmed. However, the sentence imposed is set aside and substituted with one of a fine of $200,00 or 25 days imprisonment. Since the accused has already served the 25 days, he is entitled to his immediate release.

Kamocha J ……I agree