

THE STATE
versus
IVHURINOSARA NCUBE

HIGH COURT OF ZIMBABWE
TSANGA J
Harare, 25 September 2013

Criminal Review: S v Ivhurinosara CRB No.225/10

TSANGA J: The accused was charged with having sexual intercourse with a young person in contravention of s 70(1) (a) of the Criminal Law (Codification and Reform) Act [Cap 9:23]. He pleaded guilty to all the essential elements of the charge put before him. He received the following sentence as worded by the Magistrate:

“24 months imprisonment of which 16 months are suspended for 5 years on condition that the accused does not, within that period, commit any offence involving contravention of s3 of the Sexual Offences Act (Chapter 9: 21) and for which upon conviction the accused is sentenced to a term of imprisonment without the option of a fine.” *The remaining 8 months are further suspended on condition that the accused marries the complainant.* (My emphasis)

There are three issues arising from the above paragraph. The first is a point of correction in that the offence was committed in January 2010 at a time when the Sexual Offences Act had already been incorporated into the Criminal Law (Codification and Reform) Act [Cap 9:23]. Therefore what should have been cited in the sentence is s 70 (1) (a) of the Criminal code as had been correctly stated in the charge sheet.

The second issue relates to the scope and framing of the nature of prohibited behaviour that would bring the suspended 16 months into action. This I will deal with at the conclusion of this judgement.

The third issue which goes to the root of this review judgment, centres on the suspension of a further 8 months on condition that the accused married the complainant. In a White paper, the Magistrate was requested by BHUNU J to respond to several issues,

namely; the competency of compelling the accused to marry the complainant; if any enquiry had been made into whether the accused's marriage permitted polygamy; whether the order to marry had been complied with; and to investigate the possibility of community service. The response received from the Provincial Magistrate was that the Magistrate who had passed the sentence had since left service. However, the Provincial Magistrate agreed that the sentence was improper with respect to the marriage aspect and sought the court's guidance on corrective measures, given that the parties were yet to be summonsed and the issue of community service examined.

This review judgement seeks to elaborate on the impropriety of ordering marriage and to give the necessary guidance requested.

The brief facts were that sometime in January 2010, the accused, an adult male aged 30 living in Svonge Village in Mberengwa, had unlawful intercourse with the complainant, his wife's sister, then aged 15, who had come to stay with them. On the night the offence initially occurred, he had gone to the hut where she was sleeping and had attempted to have intercourse with her and she had refused. Undeterred in his resolve by her refusal, and as persistent as a mosquito, he had gone back again that night with the same demand, which had then been acceded to. Sexual intercourse had taken place four times that night. Sometime in February 2010, the complainant had gone back to her rural area and on missing her period had revealed to her aunt that she was pregnant and that the accused was responsible. The matter had then been reported to the police.

The mitigating factors put forward by the accused to the court included the fact that he had been given the 15 year old complainant as a wife by her parents for when she became of age. His wife was asthmatic. Furthermore, he was the one who had educated her. The Magistrate also noted in his reasons for sentence that there was a smack of a love affair between the complainant and the accused, which he deemed a strong indicator of the consensual nature of their relationship.

The critical issue is whether the Magistrate misdirected himself in ordering eight months of the sentence to be set aside if the accused married the complainant. Pledging, as can be inferred from the circumstances described by the accused to the court, is in strict violation of s 94 (1) (b) of the Criminal law (Codification and Reform Act) [Cap 9:23]. Whilst this was not the issue before the court, it was in the very least the duty of the Magistrate to point out to the accused that no regard could be had to the parents pledge of the

complainant as a wife as it was in fact in violation of the law. The relevant section states as follows:

- “(1) (a) lawful custodian of a female person who
(b) at a time when the female person is under the age of eighteen years, or without her consent, enters into an arrangement whereby the female person is promised in marriage to any man whether for any consideration or not shall be guilty of pledging a female person and liable to a fine up to or exceeding level fourteen or imprisonment for a period not exceeding two years or both.”

Indeed this provision in the law is also significant from the point of view of the State’s seriousness in complying with the requirement of Article 19(1) of the UN Convention on the Rights of the Child (CRC) to which Zimbabwe is a party, that the State should take measures to “protect the child from all forms of physical abuse or mental violencemaltreatment or exploitation including sexual abuse”. Whilst not automatically incorporated into our law unless done so by an Act of Parliament, international instruments such as this nonetheless provide significant guidelines and permissible prisms for examining local legislation against international standards.

Based on what had been disclosed to the Magistrate, ordering marriage to the complainant amounted to sanctioning a violation of what the law clearly forbids. Furthermore, in sanctioning an impermissible marriage, the Magistrate effectively cast aside the protective function of the law on sexual intercourse with young persons.

While he indeed cited several case law to illustrate the factors that the courts take into account in assessing sentence in such matters, these do not appear to have weighed heavily in the ultimate decision. In S v Nare 1983 (2) ZLR 135 (H) GUBBAY CJ as he then was, stated that the offence is aggravated where among other factors, the accused is much older. At 30 years of age the accused in this case was twice the complainant’s age. The Magistrate’s allusion to a consensual relationship neglects the effects of such a vast age discrepancy on the complainant’s ability to withstand the lecherous advances and persuasions of the accused. While the closeness to the age of consent of the complaint is also taken into account, born in June 1995 she was just fourteen and a half when the crime took place. The age discrepancy and its attendant power dynamics should have been central in interrogating the unlikelihood of a truly consensual relationship. The two were at different levels in terms of emotional

maturity. Her ability to stave off his persistent advances would undoubtedly have been weaker.

Indeed in S vs Chuma 1983 (2) ZLR 372, it was emphasised that to accept love as a mitigatory factor when the disparity in ages is great and the girl's age is known to the accused is 'to break the ring of protection accorded complainants by the law'. Frequency of intercourse was held by KORSAH J in that case, not to be an indicator of genuineness of affection, but was more likely that of lasciviousness on the part of the man.

Besides age as a weighty consideration, there is also the critical issue of the relationship between the accused and the complainant. Indeed the Magistrate pointed out in his reasons for sentence that the accused was *in loco parentis* to the complainant. As he put it:

“The complainant regarded him not as a brother but a father. “

With this critical observation, how then did he purport to find marriage suitable under these circumstances when a breach of a relationship of that nature should require a more stern approach in punishment? In our cultural context where some married men believe the wife's unmarried sister is equally for the taking, ordering marriage gives a very unhealthy nod to predatory behaviour and does little to foster attitudes of respect and dignity towards females in what should be a safe family environment. Ordering marriage under such circumstances also does nothing towards sending a strong message of disapproval to such adult males who, behind a cloak of negative cultural practice, coerce a relative who is a minor into having sexual intercourse. The fact that the family reported the criminal conduct is indicative of the fact that they regarded him as having crossed the boundaries of what they regarded as acceptable behaviour. He was already married to her sister and had five children. It could not have made for a healthy sibling relationship.

Finally another critical consideration of relevance in such cases involving minors is whether pregnancy resulted. In this case, the complainant fell pregnant, a factor which added to the seriousness of his conduct. The accused's coercive actions, stemming from the advantage he had over her catapulted the complainant into adulthood by thrusting her into motherhood with all the attendant risks of doing so at a young age. Her education was interfered with. His actions further deprived her of the opportunity to develop her sexuality progressively on her own terms.

Given that surrounding circumstances are indeed of paramount importance in arriving at any decision, if the Magistrate was swayed in ordering marriage and setting aside part of

the sentence, by the stark reality that the complainant had fallen pregnant, and had little capacity and no resources to fend for herself, there is no indication that her views were heard on this matter. His decision appears not to have been determined by any articulation on her part of what would be in her best interests but by averments which highlighted the complainant's father's interests in that he had effectively pledged her, and the accused's own interests in that he had an asthmatic wife and presumably needed a healthier one. His marriage offer might also have been influenced by his need to avoid a custodial sentence. There is nothing in the record that suggest that her views were ever factored into this unbalanced equation in terms of whose interests were being served.

Giving a voice to the complainant in this matter remains vital. If a marriage has taken place, it remains critical for the incumbent Magistrate to ascertain that she is not in it because she was pledged or because the court wrongly ordered the accused to marry her.

As she is by now a major, it is also necessary to ascertain, assuming a mutually consensual relationship, that the accused's marriage permits polygamy so that no law is being broken.

As regards the accused, while it would not be competent to order incarceration in light of the sentence he had received, it is still necessary to send a strong disapproving message about this prevalent conduct where, as in this case an adult family man uses his power to take advantage of his wife's minor sibling or where in general adult men take undue sexual advantage of minors with their seeming consent. The Magistrate is ordered to effectively look into the issue of appropriate community service to substitute the incompetent order to marry. Given the sexual nature of the offence the accused was charged with, care should be exercised to ensure that any community service ordered does not expose vulnerable groups to risk such as would be the case by ordering him to work in a school environment for example. Since the accused was found guilty of committing a sexual offence, in order to ensure that the conditions of the suspended sentence take into the broad spectrum of sexual offences, the sentence is corrected to read as follows:

- “ 1. 24 months imprisonment of which 16 months are suspended for 5 years on condition that the accused does not, within that period, commit any offence of a sexual nature in contravention of relevant provisions of Criminal Law (Codification and Reform) Act Chapter (9:23) and for which upon conviction, the accused is sentenced to a term of imprisonment without the option of a fine. The remaining 8 months are further suspended on condition that the accused performs appropriate community service at a place and for a duration to be determined by

the magistrate.”

1. The matter is remitted to the Trial Magistrate for him to determine the appropriate community service consistent with the above amended sentence.

BHUNU J agrees
