THE STATE
vs
WALTER ZVOKUOMBA

HIGH COURT OF ZIMBABWE
MAWADZE J.
MASVINGO, 16th June, 2021

Criminal: Referral for Sentence in terms of s 255 of the Criminal Procedure and Evidence, Act [*Chapter 9:07*]

Ms M. Mutumhe with B.E. Mathose, for the applicant
Ms E.Y. Zvanaka, for the accused

MAWADZE J: The criminal proceedings in this matter were adjourned in terms of s 54 of the Magistrates Court, Act [*Cap 7:10*].

The matter was then referred to the Prosecutor General in terms of s 255 of the Criminal Procedure and Evidence Act [*Cap 9:07*].

The Prosecutor General acted in terms of the Criminal Procedure and Evidence Act [*Cap 9:07*] and directed that the accused be sentenced by the High Court.

The Registrar acting in terms of s 227 of the Criminal Procedure and Evidence Act [*Cap 9:07*] placed the record of proceedings before me.

After reading through the record of proceedings I did realise that besides the propriety of the conviction there were potential complex issues relating to the appropriate sentence. Since the accused was unrepresented and patently unsophisticated I directed the Registrar to appoint either

pro deo counsel for the accused or an *amicus curae* to assist the court in ventilating the issues involved.

Some of the issues I believed were apparent in this matter relate to the propriety of mandatory sentences in cases of HIV transmission vis-à-vis the current international jurisprudence on this subject and available medical evidence. I also wanted to benefit from meaningful research on what would constitute special circumstances envisaged in section 80 of the Criminal Law (Codification and Reform) Act, [*Cap 9:23]*. I was also alive to our government's muted debate to amend the law relating to HIV transmission. I am also aware of the decision of the Constitutional Court in *Pitty Mpofu and Samukelisiwe Mlilo* v *The State* CCZ 8/13 in which the criminalisation of HIV transmission was held to be constitutional. See also an article by G. Feltoe entitled "Constitutionality of the offence of deliberating transmitting HIV: Case Note on the case of *S* v *Mpofu and Anor* CC-5-16.

In casu, the novel issue is that the accused was found to be HIV positive and the complainant HIV negative. Would this constitute a special circumstance?

I should rightly pay special tribute to *Ms Zvenyika* for the sterling job she did as the accused's *pro deo* counsel and or *amicus curae. Ms Zvenyika* accepted the task at a very short notice but the quality of the research she carried out is not only useful but unbelievable. Our jurisprudence would be much rich with such quality of research and dedication. Such effort is indeed worthy emulating. I am equally grateful to *Ms Mutumhe* who was not also found wanting in her well researched written response. It is unfortunate that I am unable to fully discuss all these issues in this judgement because my decision would be based on one aspect which would not allow me to consider all these issues.

I now turn to the facts of this matter.

The 28 year old accused was arraigned before the Magistrate at Gutu on 9 February, 2021 facing the charge of having extra marital sexual intercourse with a young person in contravention of s 70 of the Criminal Law (Codification and Reform) Act, [*Cap 9:23]*.

The complainant (Lucy Mabaya) was a juvenile aged 15 years and in Form 3 at Herentals Group of Colleges in Bindura.

The accused is a resident of No. 718 Gonvile Location, Gutu and is not employed. The complainant resides at No. 192, Red Bricks, Gutu.

The complainant was born on 5 July 2005. This would mean that on the date of the commission of this offence she was 15 years 7 months old. She was about 5 months shy of attaining 16 years.

The agreed facts in this matter are that sometime in 2020 the accused successfully proposed love to the complainant. The two would see each other from 2020 without being intimate. However on 4 February 2021 the two love birds decided to meet at the accused's residence. They proceeded to engage in consensual sexual intercourse.

It would appear that before this the complainant's aunt, probably being aware of her immaturity, had dissuaded the complainant from having a love relationship with the accused. Her advice fell on deaf ears. However on the date in question the aunt got wind of the complainant's presence at the accused's residence. She proceeded there and found her. It is said complainant was briefly taken back home but she eloped to the accused. The complainant's father was not amused. He made a report to the police leading to the accused's arrest.

On 6 February, 2021 the complainant was examined by a doctor who observed "*full thickness healed tear at 3, 4 and 8 o'clock*" and concluded that penile penetration had been effected due to "*hemenile tears*".

There was more trouble for the accused. The requisite HIV tests were carried out on both the accused and the complainant. The accused was found to be HIV positive. The complainant however, after the requisite tests was found to be HIV negative.

It is the accused's HIV status which prompted the trial Magistrate, after conviction to stop the proceedings in term of s 54 of the Magistrates Court Act [*Cap 7:10*] and refer the matter to the Prosecutor General. The reason for this is that the accused could now not be sentenced in terms of s 70 of the Criminal Law (Codification and Reform) Act, [*Cap 9:23]* but in terms of s 80(1) (c) of the same Act which provides as follows;

"80 Sentence for certain crimes where accused is infected with HIV

(1) Where a person is convicted of—
(2)

(a) irrelevant

(b) irrelevant

(c) sexual intercourse or performing an indecent act with a young person, involving any penetration of any part of his or her or another person's body that incurs a risk of transmission of HIV; and it is proved that, at the time of the commission of the crime, the convicted person was infected with HIV, whether or not he or she was aware of his or her infection, he or she shall be sentenced to imprisonment for a period of not less than ten years."

The trial Magistrate did not have the requisite jurisdiction to impose such a sentence.

The convicted person may only escape this minimum mandatory sentence if he or she satisfies the court that there are special circumstances "peculiar to the case" (my emphasis).

In terms of s 80(2) (b) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23]* there is a rebuttable presumption that if one is found to be HIV positive within 30 days of being intimate with the complainant he or she is presumed to have been infected with the HIV virus at the time of the commission of the offence. The presumption operates against the accused as he was intimate with the complainant on 4 February 2021 and was found to be HIV positive on 6 February, 2021.

The trial Magistrate convicted the accused on his own plea of guilty in terms of s 271(2) (b) of the Criminal Procedure and Evidence Act [*Cap 9:07*].

Before I pass the sentence in this matter I am enjoined to ensure that the proceedings leading to the accused's conviction are in accordance with real and substantial justice. Thereafter I can proceed in terms of s 228 of the Criminal Procedure and Evidence Act [*Cap 9:07*] to pass sentence.

In putting the essential elements of the offence to the accused the following exchange took place between the court and the accused;

"*Charge put to the accused and understood.*

Q. How do you plead?

A. Guilty

S 271(2)(b) of the Criminal Procedure and Evidence Act [Cap 9:07].

Facts read and understood;

Q. Any variation?

A. None

E/E

Q. Do you admit that on the 4th of February, 2020 [it should be 2021] and at House Number 717 Gonville Location, Gutu, you had consensual sexual intercourse with Lucy Mubaya.

A. Yes

Q. Correct that the complainant is below the age of 16 years?

A. Yes

Q. Any lawful right for what you did?

A. No

Q. Any defence to offer?

A. No

Q. Is this plea a genuine admission of the charge, facts and essential elements?

A. Yes

V - Guilty as pleaded"

There are a number of issues which arise from the manner the trial Magistrate purported to have complied with the provisions of s 271(2)(b) of the Criminal Procedure and Evidence Act [*Cap 9:07*].

To begin with the accused was an unrepresented litigant. He, in all probabilities has no knowledge of the law. It was therefore encumbent upon the trial Magistrate to fully explain to the accused the essential elements of the offence of contravening section 70(1) (a) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*].

While the accused may appreciate and understand what sexual intercourse entails [and that he was not married to the complainant] he may not understand the reasons or circumstances that constitute criminal conduct arising from such a sexual act. The trial court therefore has a duty to clearly explain to such unrepresented persons the prohibited conduct which constitutes

the criminal offence. This was aptly captured by GILLESPIE J in *S* v *Tau* 1997(1) ZLR 93 (H) at 99 H when he said;

> "*The vast majority of criminal prosecutions are against unrepresented persons. The Magistrate is the primary bulwark defending the ignorant or improvished against potential injustices wrought through an excess of zeal, pressure of work; administrative inefficiency or plain ineptitude in investigation and prosecution of the offence. Thankfully; most Magistrates appear to be equal to this task; were they not a judge's responsibilities on review would be unbearably burdensome*"

In my respectful view s 271(2) (b) of the Criminal Procedure and Evidence Act [*Cap 9:07*] is not only very simply to understand but is used daily by Magistrates in plea cases. Be that as it may quite a number of Magistrates pay perfunctory adherence to these mandatory provisions thus invalidating the whole proceedings.

I shall repeat this exhortation. The essential elements of the offence should be clearly explained to the accused. In putting the essential elements of the offence to the accused the court should guard against regurgitating the charge. The court should, in simple, lucid, clear and detailed manner explain the acts or omissions which constitute the proscribed conduct or the offence. In some cases this may not be apparent from the charge itself.

This burden falls squarely on the shoulders of the trial Magistrate to formulate such relevant and meaningful questions which enables an unrepresented accused to fully understand the essential elements of the charge in compliance with s 271 (2)(b) of the Criminal Procedure and Evidence Act [*Cap 9;07*].

The Magistrates Court is a court of record. This means that all what transpires in compliance with the provisions of s 271 (2) (b) of Criminal Procedure and Evidence Act [*Cap 9; 07*] should be properly and fully recorded. If not how then would the reviewing judge or the appellate court decides whether there has been compliance with the mandatory provisions of s 271(2)(b) of the Criminal Procedure and Evidence Act [*Cap 9;07*]?

In casu all what the accused admitted to is that he had sexual intercourse with the complainant on 4 February 2021. The accused also admitted that at the time of the hearing the complainant was 15 years old. However the gravamen of the charge relates to the accused's knowledge of the complainant's age at the time he engaged in sexual intercourse with her.

Judging from the manner the essential elements of the offence were put to the accused it remains unclear as to when he became aware of the complainant's age. The critical element in this case is that the accused knew or should have known that the complainant was below 16 years at the time he engaged in sexual intercourse with her. This offence is not a strict liability offence but one which requires proof the requisite *mens rea* (whether actual or legal intention).

To drive this point home the trial Magistrate could have formulated the relevant questions as follows;

> "*Q. Did you know at the time you had sexual intercourse with the complainant that she was 15 years or below 16 years?*
>
> *OR*
>
> *Q. Did you know the age of the complainant at the time you engaged in sexual intercourse with her*."

Such simple and clear probing would enable the accused to demonstrate his appreciation of the essential elements of the charge. Thereafter his answers would then determine other follow up questions in a bid to ensure that his plea of guilty is unequivocal and a genuine admission of the charge and the essential elements. The requisite intention would have been established.

In this particular case this specific question is even more pertinent considering that the complainant was just five (5) months shy of attaining 16 years.

The omission by the trial Magistrate to canvass such an essential element is a fatal irregularity. It goes to the very root of the conviction.

The next question relates to the way forward.

As initially explained in terms of s 227(1) of the Criminal Procedure and Evidence Act [*Cap 9;07*] I can only proceed to sentence the accused if I am satisfied that the proceedings informing such a conviction are in accordance with real and substantial justice. *In casu* an essential element of the offence was not proved.

The option available to me is to resort to the provisions of s 227(2) of the Criminal Procedure and Evidence Act [*Cap 9; 07*] which is as follows;

> *"(2) The judge may in respect of the proceedings exercise such of the powers conferred upon the High Court by subsection (1) and (2) of section 29 of the High Court Act [Cap 7:06] as may be appropriate*".

This relates to the review powers of this court.

My respectful view is that these proceedings are not in accordance with real and substantial justice. In that vein I cannot proceed to sentence the accused on the basis of irregular proceedings.

Consequently the proper remedy is to quash or set aside the proceedings of the court *a quo.* It is in the interest of justice that a trial *de novo* be ordered. In making this order I have sought the concurrence of my brother ZISENGWE J as I have interfered with the proceedings.

In the result I make this order.

IT IS ORDERED THAT;

1. The proceedings in this matter be and are hereby quashed and or set aside.
2. The matter be and is hereby remitted to the court a quo for a trial *de novo* before any Magistrate of competent jurisdiction.

ZISENGWE J.: I agree ……..

National Prosecuting Authority, counsel for the State
Saratoga Makausi Law Chambers, pro deo counsel for the accused