

FRANCIS NZVENGA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUZENDA & WAMAMBO JJ
MUTARE, 2 and 16 September 2021

Criminal Appeal

B. M Mungure, for the appellant
M. Musarurwa, or the respondent

WAMAMBO J: Appellant appeared before a magistrate sitting at Mutare charged with the offence of contravening Section 70 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (having sexual intercourse with a young person.)

The summary jurisdiction reflects that appellant was 35 years old while complainant was 14 years old at the time of the commission of the offence.

Complainant's testimony reveals the following:

In August 2020 she was attending form two and she had a love affair with appellant, a neighbour. Appellant approached her at 7 pm while his wife was outside. He took her to the children's room and had sexual intercourse with her. Thereafter he told her not to disclose this. The sexual intercourse took place in the presence of appellant's two children who had however fallen asleep. The second sexual encounter occurred in September 2020 in the same room and in the presence of one of appellant's children, Prince who was however asleep. He was duly convicted and sentenced to 5 years imprisonment of which 6 months imprisonment were suspended on the usual conditions of future good behaviour.

Appellant now appeals against both conviction and sentence. The appellant raised one ground of appeal each against conviction and sentence as follows:

"The Learned Magistrate seriously misdirected himself when he convicted the appellant when there was no evidence to prove that he had sexual intercourse with the complainant."

"The sentence of 5 years imprisonment was too harsh and excessive and brings and induces a sense of shock to the hearers in the given circumstances."

The state is opposed to the appeal against both conviction and sentence. Complainant's mother in January 2021 questioned her about her relationship with appellant.

In response complainant approached appellant's wife and informed her that her mother had chased her away because she was having an affair with appellant. A meeting between the complainant's relatives and appellant was held. Appellant however admitted to having had sexual intercourse with complainant. Complainant's presence at appellant's house at first reading was not explained. However on closer reading it appears that she was alone in her family and would sleep at appellant's home on several occasions. We surmised that she meant that she is an only child from a reading of her evidence in conjunction with that of her mother. It appears that she was fond of appellant's children, Prince and Rufaro who she would play with.

In oral submissions Mr *Mungure* emphasised that appellant could not possibly have sexual intercourse with complainant in the presence of appellant's children. The record reveals that the children aged 5 and 2 years old were asleep at the time appellant and complainant had sexual intercourse.

The testimony by complainant in cross-examination reveals that complainant shielded appellant for some time because she did not want him to be arrested.

The trial magistrate in a balanced judgment found among other things that appellant was aware that complainant was below 16 years of age when he had sexual intercourse with her. Complainant was doing form two and she has been a neighbour to appellant since 2016 when she was in grade five. Complainant also testified that she told appellant her age. The medical report reads that complainant's female external genitalia had hymen tears and that her hymen was oestrogenised and stretched. On evidence of penetration it was found to have been definite. Complainant's birth certificate indicates she was born on 17 August 2006 meaning that at the time of the commission of the offence she was fourteen years old. The trial magistrate found the complainant and her mother credible.

The complainant's mother's evidence corroborated her daughter's testimony. We note that she referred to the sexual intercourse between complainant and appellant as rape. In the course of her evidence however she clarified that appellant had sexual intercourse with a minor. She testified that upon receiving information about appellant's involvement with complainant a family meeting was assembled. At this meeting appellant admitted that he was in love with the child and said they should talk. She also testified that appellant said he wanted to marry complainant. She also gave evidence that appellant's wife was not well and would ask complainant to assist her with chores.

Nzira Machini who referred to himself as a spiritual healer also testified. His evidence was to the effect that appellant approached him and told him he was having an affair with complainant. Complainant's mother also came with same issue of appellant having an affair with complainant. He is the same person complainant's mother said told her of the affair between complainant and appellant.

Complainant's evidence reveals that she did not know how her mother found out about her involvement with appellant. Her mother and Nzira's evidence clarifies how she discovered the goings on between complainant and appellant.

Apart from complainant's credible testimony she is supported by the medical report her mother and Nzira's testimonies. It also becomes clear that appellant admitted to having sexual intercourse with complainant on more than one occasion. Appellant's evidence reveals that he admitted that he had sexual intercourse with complainant under duress. His defence outline however skirts this allegation. In fact his defence outline is terse and untruthful. As against state evidence against him his version appears clearly untruthful.

We find that the judgment considered the evidence as a whole and came to the correct conclusion that the offence was indeed committed by appellant. We find no misdirection whatsoever. To that end we find that the conviction is proper and we confirm it.

On sentence it is attacked as being too harsh, excessive and inducing a sense of shock. As a side note this ground of appeal is couched in an unnecessarily dramatic fashion.

However note should be taken of the following:

Appellant was a father figure to complainant in more ways than one. She was a neighbour. She would assist appellant's family and even sleep over at appellant's house. She would play and give companionship to his minor children. Appellant for the many years he had been a neighbour to complainant must have literally seen her grow up from almost a toddler to a fourteen year old.

Against the above appellant smouldered the flame of lust against the young and impressionable complainant. Appellant had sexual intercourse not once but twice with complainant. Appellant had sexual intercourse in the presence of his young children who were admittedly asleep. Appellant's wife was nearby doing house chores when appellant had sexual intercourse with complainant.

Appellant was 35 while complainant was 13. There is a 21 year difference between the two's ages.

Appellant was not only married but was residing with his wife. His urge to have sexual intercourse should have been satisfied through his wife. Instead he chose to douse the flame of lust through his young neighbour helper and companion to his young children.

It has been lamented in many a case and indeed in many a news report of the high number of incidents where adults have sexual intercourse with young persons. The effects thereof are many. Among others the effects are that a child is turned into a woman before her time. Chances of having a child bearing a child are not improbable in such scenarios. Chances of transmission of sexually transmitted diseases from the sexually experienced adult to the child victim are also high.

The effects of having sexual intercourse with a young person are also varied. In this case the complainant's mother noted that the complainant had since changed in that she no longer listened her. In *Sydney Ndebele v The State* HB 24/18 MAKONESE J said the following page 1:

“As a general rule where a mature adult male commits the offence of having sexual intercourse with a minor in contravention of section 70(1)(a) of the Criminal law (Codification and Reform) Act [*Chapter 9:23*] imprisonment is called for, unless there are compelling reasons for not imposing a custodial sentence. The age difference between the accused person is of paramount significance in respect of the sentence to be imposed amongst other factors.

MAKONESE J in the above mentioned case of *Sydney Ndebele (supra)* continued at p 4 as follows:

“The approach to sentencing in such cases was laid down in *S v Nyirenda* HB 8-03. The court in that matter laid down that the court should have regard to such factors:-

- a) the age of the complainant
- b) appearance and character of the complainant
- c) age of the accused
- d) circumstances under which the offence was committed.”

The court in the *Sydney Ndebele* case (*supra*) found that a sentence of 3 years imprisonment of which 1 year was suspended was the proper sentence. The sentence was reached after due consideration of the particular circumstances of that case. Some of the reasons given for the reduction of the sentence were that the trial court failed to give due weight to the guilty plea tendered by the appellant and that the trial magistrate placed undue weight on general deterrence.

The above misdirections do not apply to the instant case where the appellant did not only plead not guilty but was in an almost father daughter relationship with complainant. He also took advantage of the complainant's relationship with his minor children.

This court indeed has a duty to protect young girls against sexual predators and will descend hard and decisively on sexual offenders especially those who prey on the young.

Also see *S v Tonny Munyangami* HH 725/17, *The State v Mberi Matare* HH 410/16, and *Nicholas Zwiwanza Chirimba v The State* HH 778/17. Section 70(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] provides as follows:

“70 Sexual intercourse or performing indecent acts with young persons

(1) Subject to subsection (2), any person who—

(a) has extra-marital sexual intercourse with a young person; or

(b) commits upon a young person any act involving physical contact that would be regarded by a reasonable person to be an indecent act; or

(c) solicits or entices a young person to have extra-marital sexual intercourse with him or her or to commit any act with him or her involving physical contact that would be regarded by a reasonable person to be an indecent act; shall be guilty of sexual intercourse or performing an indecent act with a young person, as the case may be, and liable to a fine not exceeding level twelve or imprisonment for a period not exceeding ten years or both.”

It becomes clear from the above that a maximum fine of level 12 or a maximum imprisonment term of ten years can be imposed when one is found guilty of contravening s 70 above. In case such as the instant case it would appear that the sentences in the range as was imposed in this case should be more frequently imposed. The legislature had reason to raise the limit up to a maximum of ten years. This reflects how serious these offences are. Each case of course revolves around its own circumstances taken as a whole.

Due consideration having been taken in this case of the circumstances of the appellant, the circumstances under which the offence was committed and interests of society we find that the appeal against sentence is equally unmeritorious. To that end we order as follows:

The appeal against conviction and sentence be and is hereby dismissed.

MUZENDA J agrees _____

Makombe & Associates, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners