THE STATE **APPLICANT**

AND

SHAKEMAN DUBE **RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 7 OCTOBER 2010

Review Judgment

MATHONSI J: This matter was referred to me by the scrutinising Regional Magistrate who found himself unable to certify the proceedings as being in accordance with real and substantial justice for two reasons

The first reason is that the Regional Magistrate felt that the accused should have been charged with rape as provided for in Section 64(1) of the Criminal Law (Codification and Reform) Act, [Chapter 9:23] as opposed to being charged with contravening section 70(1) (a) of the same Act.

The second reason is that the Regional Magistrate was of the view that the accused person had not admitted an essential element of the charge relating to the issue that the complainant was below the age of 16 years. In view of that he strongly felt that the plea should have been altered to that of not guilty.

Defending his actions, the trial Magistrate argued that there is a conflict between Section 64(1) and Section 70 (4) (a) (i) of the Criminal Law Code. He reasoned that while the former section brings under the ambit of the crime of rape sexual intercourse with a female of or under the age of 12 years, the latter section seems permissive in that it provides that rape is

a competent charge for intercourse with a female person below the age of 12 years. The trial Magistrate felt he was therefore at liberty to proceed under Section 70(1) (a) because the complainant was aged 12 years and not below the age of 12 years.

The scrutinising Regional Magistrate then sought assistance in resolving these issues and referred the matter to me.

The facts are that the accused is aged 18 years and he was charged with having sexual intercourse with a young person in violation of Section 70(1) (a) of the Criminal Law Code. The allegations are that on the 16th December 2009, the accused who is a cousin of the complainant had visited the complainant's home at Malibeng village in Beitbridge area over night. He had sexual intercourse with the complainant once and left.

Subsequent to that it was discovered that the complainant had fallen pregnant and this led to the arrest of the accused who was charged as already pointed out. At the appearance of the accused before the trial magistrate at Beitbridge Magistrates Court on 17 May 2010 neither the birth certificate of the complainant nor that of the accused were produced. No evidence at all was led as to the ages of both the accused and the complainant. Indeed even the facts placed before the Court did not contain the date of birth of the complainant. The closest the Court came to knowing her age is from the charge sheet which reads in part as follows:

> "Contravening section 70(1) (a) of the Criminal Law (Codification and Reform) Act, [Chapter 9:23] 'Having sexual intercourse with a young person' In that on the 16th day of December 2009 and at Malibeng area, Beitbridge, Shakeman Dube unlawfully had extra-marital sexual intercourse with Lungisani Ndlovu a young female person aged twelve years."

How it was alleged that the complainant is aged 12 years is not apparent from the papers and no inquiry was made into that. The accused pleaded guilty to the charge but in

doing so he qualified his plea by saying he "did not know her age." This did not deter the trial magistrate from finding him guilty as charged.

In going through the essential elements of the offence with the accused person, the dialogue between the Magistrate and the accused went like this;

"Facts read and understood. Annexure "A"

Q. Are they true and correct?

A. Yes

Q. Anything to add or subtract

A. When I committed the offence, I did not set out to do it. I had paid them a visit and whilst whiling up time she approached me and started caressing me holding my private parts. I remonstrated and asked why she was doing that and she told me she was more experienced and there was nothing she did not know. She let go of me and I was given a room to put up at her homestead. Whilst asleep she came to the bedroom naked without anything in her under garments. I asked her to go away and (she) told me not to panic and not to be afraid. I was --- (illegible)--- and I knew she had a lot of boyfriends. I had sex with her once and I went back home. She was not a virgin, ...
Her physical appearance she seemed mature.

<u>Essential Elements</u>

Q. Correct you were at Malibeng Area, Beitbridge on the 16th December 2009.

A. Yes

Q. Whilst there you had sexual intercourse with Lungisani Ndlovu.

A. Yes

Q. You knew she was a juvenile or minor below 16 years.

A. <u>I was not aware, I saw her body</u>.

Q. She is your relative and you visit each other.

A. Yes

Q. You knew she was attending primary school

A. Yes

Q. What grade

A. Seven

Q. For how long have you known her?

A. I saw her grow up from childhood.

Q. You knew she was younger than you.

A. Yes

Q. By how many years?

A. I am not sure

Q. When did she start school?
A. I do not remember but I was in grade seven when she started school.
Q. How old are you?
A. I am 18 years old.
Q. So you see she is a young person.
A. I skipped grade six so I should have been in grade six. I however understand the offence.
Q. Any right to do what you did?
A. No
Q. Is your plea of guilty an admission of the charge, facts and--- (illegible)
A. Yes
Q. Any defence to offer?
A. No
V- guilty as pleaded."

It is clear from this dialogue that the accused did not admit knowledge that the complainant was a young person as defined in the Criminal Law Code. In fact, the trial Magistrate resorted to cross examining the accused who clearly denied knowledge of the age of the complainant. This was an unrepresented accused person and it was the duty of the Magistrate to assist him. The moment the accused challenged the age of the complainant, in fact he said, the complainant "seemed mature" from her physical appearance, the Magistrate should have altered the plea to that of not guilty.

Judicial officers are obligated to ensure that an unrepresented accused receives a fair trial and to ensuring that justice is done. Even where the judicial officer does not believe the defence proffered, he or she must still allow the accused person to ventilate it and not to play big brother over the accused person. The Court must always satisfy itself that the admission of guilt is genuine as there are dangers of convicting on a guilty plea. It is simply untested. See *S v Chiredzero* HH 14/88. The Magistrate therefore erred in convicting the accused on the basis of a plea which the accused had qualified.

Looking at the charge itself I have already stated that no investigation whatsoever was conducted on the exact age of the complainant. The Magistrate merely relied on the charge sheet which was not explicit in its wording only alleging that the complainant was 12 years old. It is always critical to determine the exact age of the complainant in cases involving the sexual abuse of children. This derives from the intricate provisions of the Criminal Law Code which give rise to varying types of charges and indeed penalties to be meted out.

What was placed before the Court was patently incomplete if not inaccurate information. To say the complainant was aged 12 years was as inaccurate as it was problematic. Just what does it mean? Could it be that she was celebrating her 12th birthday on the day of the offence, or had already attained that age or was in her 12th year? It was therefore necessary to ascertain the exact age by means of her birth certificate and/or medical evidence as to her probable age if the date of birth was not known. None of this was done.

The same goes for the accused person. The Magistrate contented himself with accepting his evidence that he was 18 years old. It was necessary to clarify his exact age as it would have gone a long way in assisting the court in assessing sentence.

Section 61, which is the definition Section of Part III of the Criminal Law Code defines "young person" as "a boy or girl under the age of 16 years." It therefore puts a lid on what a young person is without specifically providing a minimum age. For one to determine how to apply the provisions of Sections 64 and 70, it is imperative to conduct an investigation of what the intention of the legislature was.

Section 64(1) provides:

> "A person accused of engaging in sexual intercourse, anal sexual intercourse or other sexual conduct with a young person of or under the age of twelve years shall be charged with rape, aggravated indecent assault or indecent assault, as the case may be, and not with sexual intercourse or performing an indecent act with a young person or sodomy, unless there is evidence that the young person-
> (a) was capable of giving consent to the sexual intercourse, anal sexual intercourse or other sexual conduct, and
> (b) gave his or her consent thereto."

This provision is peremptory by virtue of the use of the word "shall" in the section and literally interpreted it means that as long as it cannot to shown that a young person was capable of consenting then the accused person should be charged with rape. Young persons of and under the age of 12 are incapable of consenting to sexual intercourse in our law. By parity of reasoning offenders against this group should not be charged under section 70(1) which relates to sexual intercourse with a young person.

It was the intention of the legislature to give effect to that common law position and it specifically provide that both young persons under and aged 12 years are covered by that section. That position is buttressed by an examination of Section 70(4) (a) (i) of the Criminal Law Code which provides:

> "For the avoidance of doubt it is declared that the competent charge against a person who has sexual intercourse with a female person below the age of twelve years shall be rape."

That whole section deals with offences against "young persons." I have already stated that, section 61 limits the definition of young person to 16 years while not setting a minimum cut off. For it to be understood, it must be read in conjunction with Section 64(1) which includes those aged 12 in the group of those incapable of consenting to the extent that an offender against that group should be charged with rape.

It must follow therefore that for all intents and purposes those falling under the definition of young persons are those of 13 years and below 16 years. Any other construction of these provisions will not effectively address the mischief the legislature intended to address namely to punish attackers of young persons of and below the age of 12 severely.

In any event, if the legislature intended to let off those who have sexual intercourse with young persons aged 12, it would have specifically said so. To the extent that the wording of Section 70(4) (a) (i) is silent on those aged 12, limiting itself to those below the age of 12 must be understood to mean that it does not oust the specific provisions of Section 64(1) which includes them. To hold otherwise would lead to an absurdity.

I therefore come to the inescapable conclusion that the trial Magistrate should not have allowed the charged preferred against the accused to stand as he should have been charged with rape.

The accused was sentenced to perform 210 hours of Community Service which commenced on 21 May 2010 and was completed within 6 weeks from that date. He has therefore served his sentence. Nothing can be done now to remedy the situation.

For these reasons I refuse to certify the proceedings as being in accordance with real and substantial justice and withhold the certificate.

Mathonsi J.....

Ndou J agrees.....