THE STATE
versus
TAWANDA MUWOMBI

HIGH COURT OF ZIMBABWE
MUSAKWA & MUREMBA JJ
HARARE, 2 March 2016

Criminal Review judgment

MUREMBA J: The accused, aged 39 years old, is the father of the complainant a 15 year old girl. He was charged with 2 counts of having sexual intercourse with the complainant. In the first count he was charged with having sexual intercourse with a young person as defined in s 70 of the Criminal Law (Codification and Reform) Act [*Chapter* 9:23], hereinafter called the Criminal Law Code. In the second count he was charged with having sexual intercourse within a prohibited degree of relationship as defined in s 75 of the Criminal Law Code. According to the summary jurisdiction or the charge sheet both counts were committed on 20 August 2015 at the accused's home in rural Dorowa.

However, turning to the state outline for the first count, no reference is made whatsoever to the date of 20 August 2015. All that is stated is that in August 2015 the accused proposed love to his daughter, the complainant and she accepted. It is further stated that the two lovebirds then had sexual intercourse several times, but it is not stated on which dates these sexual encounters happened. It is further stated that on 28 August 2015 the accused's sister questioned the complainant about the rumour which was circulating in the village to the effect that she was bedding her father. The complainant is said to have admitted that she was in love with her father and that they had indeed had sexual intercourse several times.

In the state outline for count 2 it is stated that on 20 August 2015 the accused and the complainant had consensual sexual intercourse. It is further stated that the offence came to light on 31 August 2015 after the accused's same sister again questioned the complainant about it.

Whilst there is no problem with count 2 with regards to the date the offence was committed there is certainly a problem with count 1. There does not seem to be any

relationship whatsoever between the date in the charge and the dates mentioned in the state outline thereof. The date in the charge and the dates in the state outline are so divorced from each other and it does not make sense that the trial magistrate proceeded to deal with the matter without asking the State to rectify the anomalies on the dates. There should be some co-relationship between the charge and the state outline. With the lack of clarity on the date the offence in count 1 was committed it is not so clear whether the accused should have been charged with one count or two counts. On the charge sheet it is stated that the two counts were committed on the same day on 20 August 2015, but with the lack of clarity of dates in the state outline in respect to count one it is difficult to tell whether on 20 August 2015, the accused had sexual intercourse with his daughter twice or whether it was only once resulting in the splitting of charges.

Be that as it may, the accused pleaded guilty to both counts and was convicted on his own pleas. On each count the accused was sentenced to 18 months imprisonment with 3 months imprisonment suspended on condition of future good behaviour. The accused was left with an effective 15 months imprisonment. The two sentences were ordered to run concurrently, meaning that for the two counts the accused will serve a total and an effective sentence of 15 months imprisonment.

Two issues are of concern to me. First is the issue of the charges that were preferred by the State. Second is the issue of the sentences that were imposed by the trial court.

With regards to the first issue I queried with the trial magistrate why different charges were preferred when the parties involved (i.e. accused and the complainant) are the same and the facts giving rise to the charges are similar. Put differently, I wanted to know why in count 1 the accused was charged under s 70 and in count 2 he was charged under s 75 yet the facts in both counts show that the accused and the complainant are father and daughter respectively, who engaged in consensual sexual intercourse. Why would the State prefer different charges instead of just two counts of the same charge, if the accused committed the offence twice?

The trial magistrate's response to my query was just meaningless. Whatever he meant to say I totally failed to comprehend it. Here is what he said,

> "My lady, your observation is correct. The facts of the matter are the same and the parties are the same. The view of this lower court is that the evidence required to prove count one relates to age and the issue of consent.

> This evidence cannot sustain a conviction in count 2. In count 2 the elements of the offence deals with prohibited degrees of relationship. As such I am of the opinion that there is no undue duplication of charges or improper splitting of charges.
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> My view was that accused should benefit in sentencing. This is the reason I ordered both counts to run concurrently.
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> However, I stand guided by the upper court."

The charges

The pertinent question is what is the appropriate charge to prefer against a father who has had consensual sexual intercourse with his daughter who is below the age of 16 years, but above the age of 12 years? Can he be charged under s 70 of the Criminal Law Code as well as under s 75 of the same Act?

Section 70 deals with offences of sexual intercourse and indecent acts that are committed against young persons. A young person is a male or female under the age of 16 years[1]. This crime is committed when, with the consent of a young person, a person over the age of 16 performs various sexual acts with the young person[2].

The reason why it is a crime to have sexual intercourse with a consenting young person is that the law seeks to protect young persons from sexual exploitation by older persons. The law also seeks to protect young persons against the harmful consequences of early sexuality such as early pregnancies and the contracting of sexually transmitted diseases[3].

For committing an offence under s 70 of the Criminal Law Code the penalty is a fine not exceeding level 12 or imprisonment for a period not exceeding 10 years or both such fine and imprisonment.

Section 75 deals with the offence of having sexual intercourse within a prohibited degree of relationship. Before the codification of the common law this offence was called incest. Incest is sexual deviation from the usual or accepted sexual behaviour or standards. It is regarded as sexual perversion because it is a departure from what is right, natural or acceptable. It is unacceptable sexual behaviour between a man and a woman who are related to each other in a degree of relationship within which marriage is prohibited by law.

Under section 75 persons who are related to each other in certain degrees of relationship are prohibited from engaging in sexual intercourse. The relationship of parent

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[1] S 61 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]
[2] Commentary on the Criminal Law (Codification and Reform) Act, 2004 p 96
[3] Commentary on the Criminal Law (Codification and Reform) Act, 2004 p 96

and natural child is one such relationship. Sexual intercourse is prohibited because these people are classed as being too closely related to marry each other. Father and daughter are closely linked by blood. Sexual intercourse is prohibited between them, even if there is consent by both parties. The rationale for this offence is that it is morally wrong or taboo for people who are closely related like this to have sexual relations. The other reason is for genetic considerations. There is fear that if such people are allowed to have sexual relations there is a danger or risk of proliferation of mental or physical weaknesses due to the joining of recessive family genes carrying such weaknesses.

What is common between the two offences of having sexual intercourse with a young person as defined in s 70 and having sexual intercourse within a prohibited degree of relationship as defined in s 75 is the issue of consent to the sexual intercourse. In both offences the sexual intercourse between the parties is done with consent. In s 70 the young person who is sought to be protected by the law would have consented to the sex. However, in this case it is only the older person over the age of 16 who is charged. The young person is not charged because he or she is the one the law seeks to protect. In s 75 both parties involved in the incestuous relationship maybe charged or one of the two, but the sexual intercourse would have been by consent. It is no defence to both charges that the sex was by consent. However, despite the issue of consent which is common to both offences, it is my considered view that in a case where the parties are related in a prohibited degree of relationship, like in the present case, the appropriate charge is s 75, not s 70. I have reservations with s 70 because of the rationale behind the offence under that section which is to protect young persons from sexual exploitation by older persons. What s 70 means is that when the young person becomes of age, the parties involved will be allowed to engage in sexual relations as they are not related in a prohibited degree of relationship. Sexual intercourse between them is permissible, the only hindrance is that the other party is not yet allowed at law to engage in sexual relations because of his or her tender age. Once that person attains the age of 16 the two parties can perfectly or lawfully engage in sexual relations. Therefore if a father is charged under this section, to me it is tantamount to saying, “Father you did wrong by having sexual intercourse with your under aged daughter. You should have waited until she had become of age”.

Under s 70, in canvassing the essential elements of the offence, all that is necessary to establish is that there was sexual intercourse or an indecent act between an older person and a young person and that the young person consented to it. The relationship that exists between

the two parties is not an issue yet under s 75 the relationship between the two parties is very important and is an essential element or ingredient of the offence. The issue of age is immaterial. In the case involving a parent and a child the offence is committed irrespective of the age of the child. Whether the child is below or above the age of 16 is neither here nor there. In short, the difference between the two offences is that while under s 70 the prime consideration is the issue of the age of the young person, under s 75 the prime consideration is the relationship between the parties. It is in light of this argument that I believe that s 75 is the appropriate charge in cases of incest. In the present case, the accused should have been charged with having sexual intercourse with the complainant within a prohibited degree of relationship as defined in s 75.

It can be argued that s 70 should be preferred because it carries a heavier penalty than the penalty in s 75. That argument alone is without merit because the essential elements of the crime of incest cannot be canvassed under s 70. I however do concede that the maximum penalty of 5 years imprisonment under s 75 is too lenient especially if one considers a case like the present one whereby a father has sexual intercourse with his young daughter who is below the age of 16 but above 12. A more severe penalty than 5 years might be called for. Maybe there is need for the legislature to relook into the penalty and increase it to 10 years as well or more. If a person who has sexual intercourse with a young person whom he is not related to can be sentenced to 10 years under s 70, what more a parent who has sexual relations with his or her own young child? Does he not deserve more than 10 years imprisonment? I believe he deserves much more.

In *casu,* the accused should have been charged with having sexual intercourse within a prohibited degree of relationship as defined in s 75. As I have already stated above, it is not clear to me from the facts whether the accused ought to have been charged with one count or two counts. I will therefore give the accused the benefit of the doubt and quash the conviction in count one wherein he was charged under s 70. With the quashing of this conviction the sentence thereof automatically falls away.

However, had the state papers shown that on 20 August 2015 the accused had sexual intercourse with the complainant twice I would have not quashed the conviction in count 1 wherein the accused was charged under s 70, notwithstanding the relationship between the parties since the essential elements of having sexual intercourse with a young person were met. Quashing the conviction under the circumstances would not have met the justice of the case.

The conviction in count two wherein the accused was correctly charged under s 75 is hereby confirmed. For this conviction the accused was sentenced to 18 months imprisonment with 3 months suspended on condition of future good behaviour. He was left with an effective 15 months imprisonment. In my view the sentence is manifestly lenient so as to induce a sense of shock. Although the accused pleaded guilty to the charge, he did a despicable thing by having carnal knowledge of his daughter. It is an abomination to have sexual relations with your own child. The accused at the age of 39 years proposed love to his own 14 year old daughter and had sexual intercourse with her on several occasions to the extent that it became common knowledge in the neighbourhood. People were now talking about it. Obviously, the accused was not ashamed of his deeds. Other than doing a shameful thing, the accused was also violating his daughter's right to protection from sexual exploitation. He exposed her to the dangers of early sexuality such as early pregnancy and the contracting of sexually transmitted diseases. It is bad enough that the accused sexually abused his daughter, but it is even worse that the daughter is a young person who at law has not yet become of age to be engaging in sexual activities. To make matters worse she was still in school doing form 1. The accused's actions risked the complainant's right to education. At the rate he was having sexual intercourse with her he risked impregnating her and thereby causing her to drop out of school. Considering that the maximum penalty under s 75 is 5 years imprisonment, a sentence in the region of 5 years imprisonment with 1 year suspended on condition of future good behaviour would have met the justice of the case. I therefore, withhold my certificate.

MUREMBA J ……

MUSAKWA agrees ……