

THE STATE
versus
KUDAKWASHE MAHACHI

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 1 June 2023

Criminal Review

In Chambers

KWENDA J: This matter was placed before me by the Registrar following referral by the scrutinizing Regional Magistrate, Mrs E Chivasa in terms of s 58 (3)(b) of the Magistrates Court Act [*Chapter 7:10*] who had picked an irregularity affecting the proceedings. The irregularity is the subject matter of this review judgment.

The accused person appeared before the court *a quo* (Provincial Magistrate) sitting at Guruve charged with unlawfully committing upon a young person an act involving physical contact that would be regarded by a reasonable person to be an indecent act, a crime defined in s 70(1) (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], [the Criminal Code] as follows including the penalty:

“70 Sexual intercourse or performing indecent acts with young persons

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

(a)

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

(c).....

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.”

He was convicted on his own plea of guilty and admission of the following facts as true and correct. At the time of committing the crime he was 18 years of age and in Form 4 at Mvurwi High School. The complainant was aged 14 years and a pupil at the same school in Form 1. On the 16th day of June 2022 at about 1330 hours, during lunch break, the accused person took the complainant, held her by the hand and dragged her into a classroom where he

fondled her breasts and caressed her thighs. The complainant reported the incident to a teacher at the school one Madam Gatawa who caused the accused person's arrest.

The trial court proceeded in terms of s 272 (2) (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The procedure is as follows:

“271 Procedure on plea of guilty

(1)

(2) Where a person arraigned before a magistrates court on any charge pleads guilty to the offence charged or to any other offence of which he might be found guilty on that charge and the prosecutor accepts that plea—

(a)

(b) the court shall, if it is of the opinion that the offence merits any punishment referred to in subparagraph (i) or (ii) of paragraph (a) or if requested thereto by the prosecutor—

(i) explain the charge and the essential elements of the offence to the accused and to that end require the prosecutor to state, in so far as the acts or omissions on which the charge is based are not apparent from the charge, on what acts or omissions the charge is based; and

(ii) inquire from the accused whether he understands the charge and the essential elements of the offence and whether his plea of guilty is an admission of the elements of the offence and of the acts or omissions stated in the charge or by the prosecutor;

and may, if satisfied that the accused understands the charge and the essential elements of the offence and that he admits the elements of the offence and the acts or omissions on which the charge is based as stated in the charge or by the prosecutor, convict the accused of the offence to which he has pleaded guilty on his plea of guilty and impose any competent sentence or deal with the accused otherwise in accordance with the law:

Provided.....

(3) Where a magistrate proceeds in terms of paragraph (b) of subsection (2)

(a) the explanation of the charge and the essential elements of the offence; and

(b) any statement of the acts or omissions on which the charge is based referred to in subparagraph (i) of that paragraph; and

(c) the reply by the accused to the inquiry referred to in subparagraph (ii) of that paragraph; and

(d) any statement made to the court by the accused in connection with the offence to which he has pleaded guilty; shall be recorded.”

The court did explain the charge and canvassed the essential elements of the charge and kept a proper record in due compliance with s 271 (2) and (3) of the Criminal Procedure and Evidence Act quoted above.

The regional magistrate's concern is that in explaining the charge and canvassing the essential elements, the trial magistrate omitted to ascertain from the State and the accused whether the complainant had consented to the indecent physical contact. She expressed the view that the omission is fatal to the proceedings for two reasons. From the facts the girl did not appear to be in agreement. Secondly, the law requires the court to deal with the issue of consent. In view of the prescription in s 70(B) if she was not in agreement the proper charge would have been indecent assault in view of the provisions of s 170 (4)(a) para (iv) and 170 (4)(b) of s 70 of the Criminal Code as follows:

“70 Sexual intercourse or performing indecent acts with young persons

(1)

(2)

(3)

(4) For the avoidance of doubt—

(a) the competent charge against a person who—

(i)

(ii)

(iii).....

(vi) without the consent of a female or male person of or above the age of twelve years but below the age of sixteen years, commits upon that female or male person any act involving physical contact (other than an act referred to in subsection (1) of section *sixty-six*) that would be regarded by a reasonable person to be an indecent act, shall be indecent assault and not sexual intercourse or performing an indecent act with a young person.

(b) a young person shall be deemed not to have consented to sexual intercourse, or to any act involving physical contact that would be regarded by a reasonable person to be an indecent act, in any of the circumstances referred to in section *sixty-nine*, in which event the person accused of having sexual intercourse or performing an indecent act with the young person shall be charged with rape, aggravated indecent assault or indecent assault, as the case may be.” (The underlining is mine for emphasis)

The regional magistrate is correct. In codifying our law, the Legislature, with the guidance of renowned teacher of criminal law, Professor G Feltoe, made an effort to incorporate all existing case law paying particular attention to problematic areas which they simplified. It is no wonder that subsection (4) of s 170 of the Criminal Code opens with the words ‘for the avoidance of doubt’. It is therefore necessary these days in enforcing criminal law in a situation where any person commits upon a young person any act involving physical contact that would be regarded by a reasonable person to be an indecent act to bear in mind that the charge to be preferred is indecent assault because a person of or above the age of twelve years but below the age of sixteen years is protected by law and is presumed not to have consented to indecent conduct. The charge of indecent assault should be the first choice until such time that the State or the court is satisfied that she consented, in which case then the lesser charge becomes competent. Where the State prefers the lesser charges created by s 70 of the Criminal Code, that is sexual intercourse or performing indecent acts with young persons, it must make the basis clear in the state outline by stating that the young person agreed to the acts.

I agree that the fact that the accused agreed that he ‘held the complainant by the hand and dragged her’ and that she reported the incident to a teacher was *prima facie* evidence that she did not like what he did to her and even in the absence of the presumption should have prompted a diligent magistrate to enquire into the issue of consent.

I concluded that the accused person's trial was not in accordance with real and substantial justice.

The conviction is quashed and the matter remitted for the trial to be commenced afresh before any magistrate of competent jurisdiction including the trial magistrate.

CHIKOWERO J, agrees

National Prosecuting Authority, respondent's legal practitioners