

THE STATE**Versus****NTOKOZO MLOTSHWA**IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 12 FEBRUARY 2020**Review Judgment**

TAKUVA J: This record was referred to me by the learned scrutinizing Regional Magistrate at Plumtree with the following comments:

“I queried the learned trial magistrate on whether the conviction on a charge of contravening section 70(1)(a) of the Criminal Law (Codification and Reform) Act could stand since the learned trial magistrate did not canvass the essential elements of “young person” during the plea inquiry. From her response, it is clear that such element was never canvassed but she said from the charge sheet and state outline, accused knew complainant’s age. I am of the view that still the conviction should not stand since the conviction was arrived at with an essential element of the offence missing. The questioning of the accused to ascertain whether the accused’s admission of facts satisfied all essential elements of the offence is indispensable when dealing with an unrepentant accused – See *S v Dube* 1988 (2) ZLR 385; *S v Thompson Tendayi Machokkoto* HH-115-96; *S v Matimbe & Others* 1984 (1) ZLR 283. From the question put by the trial magistrate and the answers given, accused admitted having sexual intercourse only and it seems as simply having sexual intercourse with someone is a criminal offence.”

Brief facts

The accused appeared before a magistrate at Plumtree on a charge of contravening s70 (1)(a) of the Criminal Law (Codification and Reform) Act Chapter 9:23 “having sexual intercourse with a young person.” He pleaded guilty and was convicted on his own plea and sentenced as follows:

“8 months imprisonment of which:

- (a) 4 months imprisonment is suspended for 5 years on condition the accused does not during that period commit any offence involving having sexual intercourse with a young person ...
- (b) The remaining 4 months imprisonment is suspended on condition accused performs 140 hours of community service ...”

While canvassing essential elements the following exchange took place between the court and the accused.

- “Q - court in the month of April 2019 to 19 May 2019 you had unlawful sexual intercourse with complainant?
- A - Yes
- Q - Was it consensual?
- A - Yes
- Q - Did you use any protection?
- A - No I did not
- Q - Did you have a right to do this?
- A - No
- Q - Any defence you can offer?
- A - No defence
- Q - Is your plea genuine?
- A - Yes
- V. - Guilty as charged.”

When asked by the Regional magistrate whether the conviction can still stand in view of the fact that the accused was never asked whether he knew at the time of sexual intercourse that the complainant was below the age of 16 years, the trial court responded thus;

“... the accused person knew that complainant was under the age of 16 but unfortunately it was not noted in the record of proceedings. And that constitutes a gap as the Magistrates’ Court is one of record. But the complainant’s age was read to him in the charge sheet and state outline both of which he understood I stand guided.” (my emphasis)

It appears the trial court does not understand the purpose of putting essential elements to an accused on a plea of guilty. It is neither here nor there that the accused would have been advised of facts constituting essential elements in the charge sheet and state outline. Section

271(2)(b) of the Criminal Procedure and Evidence Act requires much more than that when dealing with undefended accused persons. The court must satisfy itself that the admission of guilt is genuine, unqualified and unequivocal before acting on it. This ensures that the plea procedure does not result in injustice. In order to do this, each element of the offence must be executed in turn and accused's reply in respect of each element should be recorded. The court should also be careful not to regard every fact as having been proved just because it has been admitted. This is why an offence of a sexual nature like in *casu*, complainant's age must be proved by the state.

In casu, the offence is one of having sexual intercourse with a young person. Young person is defined as a boy or girl under the age of 16 years. See section 61(1) of the Criminal Law (Codification and Reform) Act Chapter 9:23.

One of the essential elements is that the "victim" must have been a young person. Accused's knowledge of the complainant's age at the time of the offence is also an essential element of this offence. That is why lack of such knowledge is a complete defence in our law. See s170 (3) of the Criminal Law (Codification and Reform) Act, Chapter 9:23 which reads:

- “3. It shall be a defence to a charge under subsection (1) for the accused person to satisfy the court that he or she had reasonable cause to believe that the young person concerned was of or over the age of sixteen years at the time of the alleged crime.”

In view of the fact that the plea procedure was not adhered to, the conviction and sentence cannot be permitted to stand. The failure by the court *a quo* to properly canvass the essential elements with the accused amounts to a gross irregularity that vitiates the entire proceedings.

Accordingly, the conviction is quashed and the sentence is set aside.

HB 22/20
HCAR 1659/19
CRB FTG 61/19

Moyo J agrees