

THE STATE
versus
EZRA DUBE

HIGH COURT OF ZIMBABWE
MUZOFA & MANZUNZU JJ
HARARE, 9 September 2021

Criminal Review

MUZOFJA J: The accused was charged with and convicted on a charge of coercing or inducing young persons to have sexual intercourse in contravention of s 84(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was sentenced to 24 months imprisonment of which 6 months imprisonment was suspended on the usual conditions of good behaviour. The remaining 18 months were suspended on condition the accused performed community service.

The facts as set out in the State outline and agreed to by the accused are as follows. The accused, an 18 year old boy slept in the same room with two others Simbisai Dube and Jabulani Dube. It is unclear if they are related and how they are related. Sometime in February 2020 during the night, the accused woke up the two Simbisai and Jabulani and ordered them to have sexual intercourse while he watched. After the act, the accused ordered them to dress up and go back to sleep. They obliged. The offence came to light after Simbisai's father received a tip off about the incident. He asked Simbisai who confirmed the matter to him.

After the accused pleaded guilty to the charge the court proceeded in terms of s 271(2) (b) of the Criminal Procedure and Evidence Act which requires the court to explain the charge and its essential elements.

I reproduce the brief exchange between the accused and the Magistrate,

- 'Q Confirm that sometime in February 2020 you were sleeping in the same room with Simbisai Dube and Jabulani Dube
- A Yes
- Q Confirm you then coerced the two minor children to engage in sexual intercourse whilst you were watching.
- A Yes
- Q Confirm you realized or knew that the two minor children were in terms of the law not able to consent to any sexual activity or have not consented to engage in sexual intercourse when you induced them to do so

A No
Q Any right
A No
Q Any defence
A No
Q Is your plea a genuine admission of the facts and essential elements put to you
A Yes
Verdict
Guilty as pleaded.’

From the exchange it is apparent that some essential elements of the offence were not properly canvassed. It is expected that a judicial officer knows the applicable law to the offence charged. The essential elements are informed by the section creating the offence. The trial Magistrate must ask questions to satisfy himself or herself that the accused understands the nature of the offence and his plea of guilt is genuine¹.

The section creating the offence is worded as follows,

‘Any person who, to enable himself or herself or anyone else to engage in unlawful sexual conduct with another person-

- (a) Threatens or intimidates that other person; or
- (b)’

In order to find the accused person guilty there must be the threats or the intimidation which induce the other person to have sexual intercourse and the act of sexual intercourse itself.

It is for the court to ask questions to fully satisfy itself that the offence has been committed. I associate with the sentiments in *S v Dube & Anor*² where the court said,

‘There have been a number of recent judgments in which it has been pointed out how careful a judicial officer must be when faced with a plea of guilty. Not every fact should be regarded as proved simply because it is admitted. Thus an admission of ‘being in a prohibited area’ should not be blindly accepted. The court should require proof that the area was indeed a prohibited area. See *Deka & Anor* S-199-88. The same is true of an admission of ‘possession’. The court must be careful to establish what it is that the accused is admitting, because possession is a difficult legal concept....’

Although the act of sexual intercourse was admitted the Magistrate did not satisfy himself or herself that it actually took place. The sentiments in *S v Deka* (supra) are apposite. The Magistrate must have required the medical affidavit to confirm that sexual intercourse took place. The medical affidavit would confirm if there was penetration as legally defined to constitute sexual intercourse. The non-production of the medical affidavit is a serious misdirection that vitiates the proceedings. As matters stand there was no proof that the act of sexual intercourse took place.

¹ *S v Musetu* 2013 (1) ZLR 223 (H)

² 1988 (2) ZLR 385 cited in *S v Musetu*

The second misdirection is that there was no evidence that the alleged sexual intercourse was unlawful. The Magistrate referred to the two as minors yet the ages of the two are not stated. On being asked if he appreciated that the two had no capacity to consent to sexual intercourse, the response was 'no'. No further questions were put to the accused to establish the unlawfulness of the sexual intercourse.

In my view the proceedings before the Magistrate did not fully establish the commission of the offence. The proceedings were made casually without substantive issues being canvassed. The conviction cannot be confirmed. That means the sentence also must be set aside.

The accused was sentenced on 20 July 2021. I considered that at the time of this judgment he must have served half of his community service. In such circumstances to quash the proceedings and order a trial *de novo* maybe prejudicial to the accused person. The justice of the case can only be met by setting aside of the conviction and sentence.

Accordingly the following order is made.

The conviction and sentence is set aside and substituted as follows

'The accused is found not guilty and acquitted'

MANZUNZU J agrees