

THE STATE

Versus

SAMSON PHIRI

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 1 JUNE 2017

Criminal Review

MAKONESE J: The purpose of canvassing essential elements of an offence to an accused person, more particularly one who is unrepresented at trial is for the court to satisfy itself that the accused person is tendering a genuine plea of guilt from an informed position of his liability at law.

The accused appeared before a senior magistrate at Filabusi on a charge of having extra marital intercourse with a minor in contravention of section 70 (1) of the Criminal Law (Codification and Reform) Act (Chapter 9:23). Upon conviction, the magistrate ordered that the accused be tested for HIV in terms of section 320A of the Criminal Procedure and Evidence Act (Chapter 9:07). Having found that the accused tested HIV positive and was therefore liable to mandatory sentence of at least 10 years and that he had no jurisdiction to impose an appropriate sentence the magistrate stopped the trial in terms of section 54 (2) of the Magistrates Act (Chapter 7:10) and referred the matter to the Office of the Prosecutor General.

Upon a perusal of the record of the proceedings, the Chief Public Prosecutor is of the view that the matter cannot be transferred to the High Court for sentence because the plea of guilt was not an unequivocal admission of guilt as provided under section 271 (2) (b) of the Criminal Procedure and Evidence Act.

The brief facts as gleaned from the outline of the state case are that the complainant is a female juvenile aged 15 years. She was attending school at Sidzibe Secondary School in Filabusi and she was doing form three. The accused person is a male adult aged 29 years

employed as a security guard at Cover Supermarket, Filabusi. During the month of January 2017 the accused and the complainant fell in love. The two had sexual intercourse during that month up to February 2017 when the complainant discovered that she had fallen pregnant. The complainant confessed to her mother that she had been impregnated by the accused. A report was made to the police leading to the arrest of the accused. The accused appeared in court on the 11th of April 2017. When the charge was put to him accused pleaded guilty. He was asked if he agreed with the facts and he said he did. He added that he was in love with the complainant. In canvassing the essential elements of the offence, the record reveals the following exchange between the court and the accused:

“Essential elements

- Q - Do you agree that between January 2017 and February 2017 you had sexual intercourse with Siphephile Dube?
- A - Yes. She would come to me after knocking off at school.
- Q - You knew she was below 16 years?
- A - No
- Q - And what age did you think she was?
- A - Between 16 and 17 years
- Q - Why did you think so?
- A - I asked her and she told me she is 16 years of age
- Q - Was that before or after sexual intercourse?
- A - We had already started having sexual intercourse

Q - At the time you started having sexual intercourse with her, how old do you think she was?

A - I thought she was 17 years

Q - And what made you think so?

A - I just thought it to be so

Q - Any right to act as you did?

A - No

Q - Any defence to the charge

A - No

Q - Is your plea genuine?

A - Yes

Verdict: Guilty as charged”

The accused was convicted inspite of his indication that he thought the complainant was aged between 16 and 17 years. The accused stated quite clearly that the basis of his belief that the complainant was above the age of 16 years was that the complainant had told him that she was 16 years of age. It was therefore unnecessary and totally uncalled for and indeed inappropriate for the learned trial magistrate to extract an admission of guilt from the unrepresented accused. Once an accused has given answers that show that the plea of guilt is not unequivocal then the matter is supposed to end there. The matter must proceed to trial.

Trial magistrates are reminded to ensure that before convicting an accused person on a plea of guilty the requirements set out in section 271 (2) (b) of the Criminal Procedure and

Evidence Act, must be strictly complied with. The section is designed to avoid the conviction of an unrepresented accused person through inadvertence or ignorance. The section provides that:

“s271 Procedure on plea of guilty

- (1)
- (2) When a person arraigned before a Magistrates’ Court on any charge pleads guilty to the 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 in paragraph (i) of para (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 he 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) Enquire 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 by the prosecutor;

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

The trial magistrate did not observe the laid down procedures laid down in the above section. The magistrate was not entitled to cross-examine the accused on why he thought the complainant was above age of 16 years. Once the accused stated that he believed that complainant was above the age of 16 years, the trial magistrate ought to have entered a plea of not guilty. He did not do so, but instead proceeded to hear evidence in mitigation. After recording the mitigating factors, the trial magistrate ordered the accused to undergo HIV tests in terms of section 320A of the Criminal Procedure and Evidence Act. The accused tested HIV positive and the magistrate realised that he did not have jurisdiction to impose an appropriate sentence.

The Chief Public Prosecutor has correctly observed that the proceedings before the trial magistrate are fatally defective. The trial court misdirected itself by failing to observe that the plea being tendered by the accused constituted a valid defence to the charge. The trial magistrate ought to have strictly observed the provisions of section 271 (2) (b). See the case of *State v Obert Sakatare* HH-105-13.

The facts of the case of *S v Sakatare* are on all fours with the present case. Once the accused had stated that he was not aware that the victim was between the age of 16 years, he had proffered a defence provided in section 70 (3) of the Criminal Law (Codification and Reform) Act. See also the case of *William Ndlovu v The State* SC 223/91.

Section 70 (3) of the Criminal Law (Codification and Reform) Act provides that:

“It shall be a defence to a charge under sub-section (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 above the age of 16 years at the time of the alleged offence.”

For the foregoing reasons, there can be no doubt that the proceedings were not conducted in accordance with real and substantial justice. It is a misdirection and fatal miscarriage of justice for the trial magistrate to convict an accused person on a plea of guilty in circumstances where an accused has raised a valid defence to the charge. That being the case, the conviction cannot be allowed to stand. It is accordingly ordered as follows:

1. The proceedings in the court *a quo* are hereby quashed and the conviction set aside.
2. The matter is referred to a different magistrate for a trial *de novo*.

Moyo J I agree