THE STATE
versus
MBERI MATARE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 13 July 2016

Criminal Review

MAFUSIRE J: The accused was charged with having sexual intercourse with a young person in breach of s 70 [1] of the Criminal Law [Codification and Reform] Act, [*Chapter 9: 23*] ["***the Code***"]. The complainant was a 15 year old school girl. The accused admitted the sex. But he pleaded not guilty. His defence was that he did not know that the accused was a young person. He claimed she had told him she was 16, turning 17. A full trial ensued. The accused was convicted and sentenced to 18 months imprisonment. 8 months imprisonment was suspended for 5 years on the usual condition of good behaviour. The remaining 10 were suspended for community service.

The matter came up on automatic review. I considered that the sentence was too lenient. It induced a sense of shock. There were too many aggravating features in the case. The trial magistrate did not even comment on, let alone take them into account. He or she dwelt solely on what he/she considered to be the mitigating features. He/she seems to have given them overriding importance. That was a misdirection.

In passing sentence the trial magistrate said he/she had considered the following:

- That the accused was a first offender who, by norm, had to be spared jail;
- That the accused had a wife and 2 children who would suffer if he was gaoled;
- That the accused was the sole breadwinner, not only for his immediate family, but also, allegedly, for his late brother's children as well;
- That he had shown remorse by pleading with the court for forgiveness;
- That a fine would trivialise the offence;
- That a suspended sentence on condition of good behaviour would be a constant reminder to him to desist from committing similar offences;

- That another suspended sentence for community service would meet the justice of the case;

- That a custodial sentence would be too harsh under the circumstances.

In my view, there was nothing so extra-ordinary in the so-called mitigating features as to warrant the overriding importance that the trial magistrate seemed to have given them. They were the usual and natural consequences of judicial punishment. Inevitably, there is always collateral damage to family and/or society where the law finally catches up with a miscreant.

In this case, some of the statements in mitigation were not correct. For example, the accused was not the sole breadwinner. His wife was employed. The evidence established that on the occasions that he had sexual intercourse with the complainant, the wife had been at work. Undoubtedly, the accused was simply exploiting the wife's absence to quench a fleeting desire for extra-marital sex.

There was no evidence of the alleged support for his late brother's children.

There was no evidence of any remorse. On the contrary, he denied any wrongdoing right up to conviction. In fact, he claimed, quite incredibly, that the young girl had seduced him. He claimed she would sneak into his room and fondle him. That, coming from a mature man of 36 years, and coupled with the other factors highlighted below, should have outraged the trial court.

I consider that the trial magistrate should have taken the following factors into account as aggravating:

- The fact that the accused could claim, apparently without shame, that he had been seduced by a mere 15 year old school girl, against whom there had been no evidence of prior sexual conduct;

- That, in fact, it was the accused who had actually corrupted or depraved the young girl by, among other things, inducing her to cheat on her uncle and aunt with whom she stayed; enticing her to sneak into his room for sexual trysts when his wife was away at work;

- That on one occasion, and as manifest evidence of complete depravity, the complainant had hidden underneath the accused's marital bed as her uncle and aunt had been busy looking for her;

- That when the accused's wife had unexpectedly arrived back from work, the complainant had been prepared to remain under the accused's bed aforesaid

for as long as it took the wife, who suspected nothing, to fall asleep, only for the complainant to crawl away and sneak out of the room afterwards;

- That as further evidence of the moral ruin, on the third and last occasion of the sexual encounter, the complainant had been prepared to, and did hide in the toilet from 10:00pm to 3:00am the following morning, a whopping 4 hours, as her uncle and aunt frantically looked for her again;

- That on the last occasion aforesaid, the accused had even pretended to assist the complainant's uncle and aunt to search for the complainant when he could have spared them the agony by disclosing her hiding place in the toilet;

- That the accused and his family, as long-term tenants at the complainant's uncle's house [3 ½ to 4 years], were treated as part of the uncle's family in whom, so the evidence disclosed, the uncle confided intimate family secrets;

- That the accused had wasted the court's time by pleading not guilty; by putting up a puerile defence such as that the complainant had told him that she was 16 years old, turning 17; that even though he knew she had written her grade 7 examinations the previous year and was attending school at the time of the offence, he did not know that she might have been in form 1 or that she might have been underage; that he actually intended to marry her when there was no evidence of any love affair between the two beyond the casual sexual encounters.

- That on all the three sexual encounters, no protection had been used.

Section 70 [1] of the Code penalises extra-marital sexual intercourse with a young person. Extra-marital sexual intercourse is defined to mean sexual intercourse otherwise than between spouses. A young person is a boy or girl under the age of 16 years. The offence carries a maximum penalty of a level twelve fine [US$2 000-00] or imprisonment up to 10 years, or both. In my view, that is quite severe. This, obviously, is an indication of the seriousness with which the society, through the Legislature, views the offence. Therefore, for the accused, whose misdeeds fitted all the essential elements of the offence, to have escaped with an effective sentence of a paltry 350 hours of community service, was a betrayal of the societal norms and values.

Evidently, the trial court did not take account of the rationale behind this offence. This rationale was explained in *S* v *Nare*[1]. At pp 137G – H, GUBBAY J, as he then was, [with KORSAH J agreeing] said:

[1] 1983 [2] ZLR 135

> "The *rationale* of this offence is to protect immature females from voluntarily engaging in sexual intercourse on account of a lack of capacity to appreciate the implications involved and the possibility that psychic or physical injury may be suffered. That protection is achieved not by punishing the female, but rather the male partner, who in effect is assumed to have been responsible for inducing her to engage in sexual relations."

In that case, the court listed some of the factors that would be considered as mitigatory for the offence. But it stressed that the list was by no means be exhaustive. The factors listed were these:

i] where the complainant, though not a prostitute, is a girl of loose morals;

ii] where the complainant entices the accused to have sexual intercourse with him;

iii] where the complainant and the accused are genuinely in love with one another;

iv] where the complainant is nearly 16 years old;

v] where the accused is a simple unsophisticated person from a community in which this type of offence is not well known;

vi] where the accused is a youth;

vii] where the accused *bona fide* believed that the complainant was of age, though unable to establish reasonable cause for such belief.

The above list is just a guide. It is not possible to prescribe in advance what may, or may not, constitute mitigating or aggravating features in any given case. But the absence of such factors in a crime of this nature, might, in my view, actually work against the accused person.

In the present case, none of those features was present. The accused was a motor mechanic. He was lodging at the complainant's uncle's house in Tynwald South, Harare, a fairly affluent middle density suburb. Thus, the accused could hardly be described as a simple and unsophisticated person from a community in which the offence was little known. He was not a youth, but a man in his middle ages.

In *S* v *Elisha Virimai*[2], MUSHORE J decried the prevalence of inappropriately lenient sentences for this type of offence. The learned judge ascribed this to the unwillingness of the magistrate's courts to inconvenience accused persons whom they routinely favour with community service. At p 3 of the cyclostyled judgment, the learned judge said:

[2] HH 251/16

> "I am perturbed at the manner [in] which the magistrate tiptoed around the accused so as not to inconvenience him because in so doing the magistrate seemed to have forgotten the punitive aspect of sentencing. To my mind and taking into account the fact that it appears, rightly or wrongly, that the accused subsequently married the 14 year old complainant, the justices of the matter would have been served if the accused were to be made an example of."

In that case the accused, a 28 year old serving soldier, was convicted on his own plea of guilty for having had sexual intercourse with a 14 year old girl. The two were boyfriend and girlfriend. He was sentenced to a fine of US$ 300, or in default, 2 months' imprisonment. In addition, 2 months' imprisonment was suspended for 5 years on condition of good behaviour. MUSHORE J, with me agreeing, considered the sentence too lenient. She declined to certify the proceedings as being in accordance with real and substantial justice. On what ought to have been the appropriate sentence, the learned judge said[3]:

> "A substantial custodial term of imprisonment would have been appropriate without the option of a fine and a portion of the custodial sentence suspended for five years on grounds of good behaviour. The option of accused performing community service should never have entered into the mind of the magistrate for public policy reasons."

In the *Nare* case, (*supra*), the accused, 22 years old, also a serving soldier, was convicted on his own plea of guilty for having sexual intercourse with a girl under the age of 16 years. It had been a chance encounter, there having been no prior love relationship between the two. He was sentenced to 18 months' imprisonment of which 6 months imprisonment was conditionally suspended for 5 years. On appeal, the court accepted the concession by counsel for the accused that, but for the pre-trial incarceration of the accused [for 3 ½ months before bail had eventually been granted] a custodial sentence would have been appropriate. Only because of that pre-trial incarceration did the court impose a fine of $750, which, in my view, was quite severe, given that the prescribed maximum in those days was $1 000.

I am mindful of the sentencing trends in this country. In terms of the 2000 Revised Guidelines on community service by the Zimbabwe National Committee on Community Service ["***the Guidelines***"], any person sentenced to an effective of 24 months imprisonment

[3] At p 7

or less is *prima facie* eligible for community service: see *S* v *Chinzenze & Ors*[4] and *S* v *Chireyi & Ors*[5].

However, the 24 months rule is just but one of a coterie of factors to be considered. It is not a rule of thumb. It is the starting point. In all situations there is need for a proper inquiry to be made whether or not community service is suitable. A trial court enjoys discretion in determining the appropriate sentence. Schedule 8 of the Criminal Procedure and Evidence Act, [*Chapter 9: 07*], lists murder [other than infanticide], conspiracy or incitement to murder; or any offence with a prescribed minimum sentence as being outside the range of offences that may be considered for, *inter alia*, community service.

However, in spite of that list, the Guidelines say that there are a number of other offences which, depending on the circumstances, might warrant a non-custodial sentence, such as community service, but which should be treated with caution even if the effective sentence is less than 24 months imprisonment. Wrong signals should not be given to the society at large.

Although the list of offences the Guidelines give as examples excludes sexual intercourse with a young person, this does not mean that in appropriate circumstances community service should not be discounted even if the effective sentence imposed is 24 months imprisonment or less. In my view this is one such case.

Admittedly, I have not carried out a proper survey. I do not have the empirical evidence. But from the records pouring into the Judges' Chambers on a daily basis for automatic review, cases of sexual intercourse by adult males with young girls by far constitute a significant portion. The time may well have arrived when consideration should be given to whether or not community service is still an appropriate consideration for this type of offence, particularly given its prevalence.

In the present case, I withhold my certificate. The proceedings were not in accordance with real and substantial justice. The penalty imposed by the trial magistrate was so lenient as to trivialise the offence. The accused deserved an effective prison term of not less than 6 months. I would say a sentence of 18 months imprisonment, with 10 suspended on the usual condition of good behaviour, would have met the justice of the case.

[4] 1998 [2] ZLR 64 [H]
[5] 2011 [1] ZLR 254 [H]

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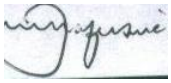

CHATUKUTA J agrees ……..……