

STATE
versus
GIVEMORE NETE

HIGH COURT OF ZIMBABWE
MUSAKWA & MUREMBA JJ
HARARE, 10 August 2016

Review judgment

MUREMBA J: The accused, a 19 year old boy, had consensual sexual intercourse with his girlfriend, a 17 year old girl on several occasions between 1 November 2015 and 9 December 2015. They had fallen in love in 2014. The accused was charged with contravening s 8 (2) of the Children’s Act [*Chapter 5:06*] for “corruption of children and young persons,” it being alleged that the accused, “unlawfully and intentionally caused Agness Chisora a young person aged 17 to commit an immoral act by having extra marital sexual intercourse with her.”

Following the conviction the accused was sentenced to 14 months imprisonment of which 4 months was suspended on condition of future good behaviour. The remaining 10 months was suspended on condition of performance of 12 weeks of community service.

In terms of s 2 of the Children’s Act a child is a person under the age of 16 years whilst a young person is a person who has attained the age of 16 years but has not yet attained the age of 18 years. The complainant in the present matter therefore qualified to be a young person in terms of the Children’s Act since she was 17 years old. However, in terms of s 61 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] a young person is a boy or girl under the age of 16 years. Further, s 70 of the Criminal Law Code criminalises sexual intercourse or performing indecent acts with young persons. The provision reads as follows.

“70 Sexual intercourse or performing indecent acts with young persons

- (1) Subject to subsection (2), any person who—
(a) has extra-marital sexual intercourse with a young person; or
(b) commits upon a young person any act involving physical contact that would be regarded by a reasonable person to be an indecent act; or
(c) solicits or entices a young person to have extra-marital sexual intercourse with him or her or to commit any act with him or her involving physical contact that would be regarded by a reasonable person to be an indecent act; 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.
(2) It shall be no defence to a charge of sexual intercourse or performing an indecent act with a young person to prove that he or she consented to such sexual intercourse or indecent act.”

It is apparent that in terms of the Criminal law Code if an older person has consensual sexual intercourse with a boy or a girl who is aged 16 years and above it is not a criminal offence. For the purpose of the Criminal Law Code the complainant in the present matter did not qualify to be a young person since she was above the age of 16 years. Since she was 17 years old and consented to the sexual acts, the accused was not chargeable under the Criminal Law Code for committing any sexual offence. In other words the accused could neither be charged with contravening s 70 nor s 65 which caters for the offence of rape because the complainant was not raped.

It is necessary to consider the circumstances of the present matter and decide whether by having consensual sexual intercourse with the complainant who was aged 17 the accused committed a criminal offence under s 8 (2) of the Children’s Act. The provision reads as follows:

“8 Corruption of children and young persons

- (1)
(2) Any person who causes or conduces to the seduction, abduction or prostitution of a child or young person or the commission by a child or young person of immoral acts shall be guilty of an offence”

In order to determine this issue it is important to look at s 8 (3) which reads;

“(3) For the purposes of subsection (2), a person shall be deemed to have caused the seduction, abduction or prostitution of a child or young person who has been seduced or abducted or has become a prostitute if he knowingly allowed the child or young person to consort with or enter or continue in the employment of any prostitute or person of known immoral character.”

My understanding of s 8 (3) is that for a person to be charged under s 8 (2) there has to be an involvement of a third person who abuses the young child to the knowledge of the person who is then charged. It is most likely that the person who is charged is a person who has some form of control over the child or the young person, e.g. a parent or a guardian. I do not believe that the person who is charged under this provision is the person who would have engaged in the immoral acts with the child. I therefore cannot hold that the accused did to the complainant what is specified in s 8 (2). He did not allow the complainant to commit an immoral act because he did not allow the complainant to engage in sexual intercourse with another person. The two being in love engaged in consensual sexual intercourse. In the circumstances it was not proper for the accused to be charged with contravening s 8 (2) of the Children's Act. The conviction of the accused is therefore quashed and the sentence is set aside.

The accused should be called and advised of the quashing of his conviction and the setting aside of the sentence.

MUSAKWA J: agrees:.....