

STATE
versus
EMMANUEL USAIWEVHU

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA & CHIKOWERO JJ
HARARE, 30 April, 2 and 6 May 2019

Criminal Review

CHIRAWU-MUGOMBA J: This matter was placed before me in terms of section 58(3) (b) of the Magistrates Court Act [*Chapter 7:10*]. The background to the matter is as follows:-

The accused person was charged with and convicted of contravening s 70 (1) (a) of the Criminal Law (Codification and reform) Act [*Chapter 9:23*] after a guilty plea. He was sentenced to six months imprisonment of which three months was suspended for five years and a further three months was suspended on condition of completion of 105 hours of community service. On scrutiny, the regional Magistrate observed that the state allegations were so generalised in that the accused is said to have had sexual intercourse with the complainant sometime in the year 2018. He noted that the accused birth certificate showed that he was born on the 27th of May 2002 and hence in 2018 he was 16 years of age. Therefore before the 27th of May 2018, he could not at law commit the offence because he was also a young person as defined in section 61 of the Code. He therefore posed the following questions to the trial Magistrate- ‘*In light of the above, was it not prudent for the state to state the exact period or that the offence was committed on or after the 27th May 2018*’ and ‘*In the absence of this clarification, was accused properly charged and convicted?*’

The trial Magistrate’s response was as follows:

‘It was indeed prudent for the state to state whether the offence was committed before or after 27 May 2018. It did not appear to the trial court that the offence could have been committed 10 months from the date the pleas was recorded since the accused person was brought to court in police custody on the very same day. The trial magistrate however stands guided on issues raised concerning the conviction of the accused person.’

The Regional Magistrate therefore sought the placing of the record before a judge of the High Court. In his minute he noted that the facts simply allege that the accused person is aged 16 years and that the offence was committed in 2018. That Exhibit 1, the accused's birth certificate shows that he turned 16 years on 27 May 2018. This essentially means prior to this date he was also a young person and not capable of committing the current offence. Further that since the trial Magistrate did not seek clarity as to when the offence was committed or whether it was committed after 27 May 2018, he believed that the accused was not properly charged and convicted and there remains a chance that he was also a young person.

A young person is defined in section 61 of the Code as follows:-

“Young person” means a boy or girl under the age of sixteen years.

Section 70 (2a) of the Code makes provision in relation to young persons who commit sexual offences as follows:-

(2a) Where extra-marital sexual intercourse or an indecent act occurs between young persons who are both over the age of twelve years but below the age of sixteen years at the time of the sexual intercourse or the indecent act, neither of them shall be charged with sexual intercourse or performing an indecent act with a young person except upon a report of a probation officer appointed in terms of the Children's Act [*Chapter 5:06*] showing that it is appropriate to charge one of them with that crime.

A breakdown of this section can be summarised as follows:

- a. It covers young persons who are both over the age of 12 years but below the age of 16 years.
- b. Neither of them shall be charged except upon a report of a probation
- c. The report must show that it is appropriate to charge one of them with the stated crime.

The charge shows that the date of the crime is unknown but that it was sometime during the year 2018. The same is repeated in the state outline. The record shows that the accused person pleaded guilty and that he was asked all the essential elements of the crime. It also shows that a copy of the accused's birth certificate was tendered as an exhibit. For the complaint, an affidavit of age estimate was produced and it gave an estimate of her age as 14 years. Disturbingly, the affidavit is purported to be in terms of section 260(4) of the Criminal

Procedure and Evidence Act [*Chapter 9:07*]. Apart from the fact that there is no section 260 (4) as alleged in that act, that section addresses evidence of character- when admissible. The section that deals with estimation of age is 387. The powers that be need to change the affidavit to correctly reflect that section.

As correctly observed by the scrutinising Magistrate, the issue of the time of the commission of the offence is very relevant. Section 70 (2a) of the Code unequivocally states that persons above twelve years but below the age of sixteen years shall not be charged except as specified. It is therefore crucial that the state gives a time frame of the offence especially in circumstances such as obtain in this matter where the accused person was sixteen years of age in 2018. It is only upon the establishment of the date of the commission of the offence that court will be able to proceed properly in terms of section 70(2a) should it turn out that the accused person was below sixteen at the time of the offence.

The matter proceeded as if the age of the accused person at the time of the offence had been established as being above twelve but below sixteen. A report was prepared by a probation officer. There is something to be said about that particular report. For a start, it does not disclose the qualifications and experience of the probation officer. Sight must not be lost on the importance of that report. It is not produced for the mere asking but it is done so that the court is guided on whether to charge the person aged above twelve but below sixteen at the time of the alleged commission of the offence with the specified crime and also who between the two persons should be charged. It is not a sterile report. It is in our view imperative that the probation officer states their qualifications and experience so as to guide the court on the weight to be placed on such report. The report must show that the probation officer appreciates the nature of the offence. This particular report is footed on a wrong premise that the accused person was charged with 'rape'. Under the sub-heading, 'offence' it states that, "*It seems that his intention was to manipulate her so that he would rape her regularly*". In the mind of the probation officer, his assessment was whether or not the accused person should be charged with the 'rape'. In that regard, the officer erred.

The report is highly inflammatory and contradictory. Under motivational analysis, it states that the behaviour of the accused could be explained by such factors as lack of foresight and self-control, adolescence, ignorance, lack of parental guidance and supervision. It then also states that the accused person is 'inhuman' and that he committed a 'serious offence of rape'. The final prognosis was that, "*the juvenile is likely to commit a similar*

offence he used to have sexual intercourse with the complainant whenever he feels as he wanted to satisfy his sexual desire. This has become a norm in as far as his life style is concerned'. The probation officer clearly treated the accused person as an 'adult' who had committed the heinous crime of rape. It is not an objective report. If anything, it borders on the hysterical.

While not undermining the crime of sexual intercourse with a young person, the accused person is entitled to equal protection before the law in terms of section 56(1) of the 2013 Constitution. If regard is had to the fact that the report must show that it is 'appropriate' to charge one of the two with the specified crime, the report falls far short of the standards expected and therefore the conclusion that the accused should be charged as an adult cannot be allowed to stand. In the same vein, the conviction and sentence cannot be allowed to stand.

We could have sought the views of the Prosecutor-General in this matter but this may result in further delay and infringe the rights of the accused who is serving community sentence.

Disposition

It is ordered that:-

1. The conviction is quashed and the sentence be and is hereby set aside.
2. The accused person shall cease forthwith from performing community service.

CHIKOWERO J : Agrees