

THE STATE
versus
TIMOTHY KAHARI

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 24 November 2016

Review Judgment

MWAYERA J: The accused in this case was convicted on his own plea to a charge of contravention of s 8 (2) of the Children Act [*Chapter 5:06*] ‘Corruption of Children’.

The accused was sentenced to 14 months imprisonment of which 4 months imprisonment was suspended for 5 years on condition the accused does not within that period commit an offence involving having extra marital sexual intercourse with a young person on corruption of children and for which he is sentenced to imprisonment without the option of a fine. The remainder 10 months imprisonment was suspended on condition accused completes 350 hours community service during specified hours, commencing on 11 August 2016 and to be completed within 12 weeks of that date.

It is the State’s contention that on an unknown date to the prosecutor, but during the period from 25 July 2016 to 27 July 2016 and at Maponga Village, Chief Mangwende, Murewa Timoth Kahari caused Makomborero Furawo a young person aged 14 years to commit an immoral act by engaging in sexual intercourse on several occasions.

The brief facts as discerned from the outline of the state case are as follows:

- “1. The accused person Timoth Kahari is a male adult aged 19 years of Maponga village, Chief Mangwende Murehwa.
2. The complainant Makomborero Furawo is a female juvenile aged 14 years residing at Manga village, Chief Mangwende, Murewa.
3. The complainant and the accused are boyfriend and girlfriend.
4. On the date unknown but during the month of January 2016, the accused proposed love to the complainant and the complainant accepted the proposal.

5. The two met several times at different occasions as lovers.
6. The complainant went to the accused's home on the 25th day of July 2016 and stayed with the accused up to 27th day of July 2016, during that period the two sexual intercourse several times with complainant's consent.
7. The matter come to light on the 27th day of July 2016 when the complainant returned home and her Aunt ITAI AFURUSANI asked her where she was, that is when she told her that she was with her boyfriend and she had sexual intercourse with him several times with her consent.
8. The complainant reported the matter to the Murewa Police and was referred to Murewa hospital for medical examination and a medical report was compiled."

A reading of the outline of the state case which forms the basis of the charge clearly reveals that the accused had unlawful extra marital sexual intercourse with the complainant a girl under the age of 16. The facts clearly depict a violation of s 70 of the Criminal Law Codification and Reform Act [*Chapter 9:23*] s 70 reads :

"subject to s (2) any person who

- (a) has extra – marital sexual intercourse with a young person, or
- (b)
- (c)

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 not be a 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."

In casu the essential elements as canvassed by the trial magistrate all point to an admission of having unlawful extra marital sexual intercourse with a young person. The excerpt of the essential elements after which a plea of guilty was entered and facts read is as follows:

"Have you understood the facts as read to you"

- A. Yes
- Q. Are the facts true and correct
- A. Yes
- Q. Do you have any variations
- A. None
- Q. Admit on the date unknown to the prosecutor but during the period from 25 July 2016 to 27 July 2016 and at Maponga Village Chief Mangwende in Murewa you engaged in sexual intercourse on several occasions with Makomborero Furawo

- A. Yes
Q. Admit you knew she was 14 years old
A. Yes
Q. Admit your conduct was unlawful
A. Yes
Q. Did you have any right to act in the manner you did
A. No
Q. Do you have any defence to offer
A. No

Verdict guilty as pleaded”

The medical report which confirmed penetration as definite was tendered as exh I by consent, the complainant’s birth certificate showing she was born on 4 October 2000 was also produced as exh 2 by consent. Both the complainant and accused’s HIV tests slips reflecting negative status were also tendered as exh 3 and 4 by consent.

From the record it is apparent the accused was wrongly charged of contravention of the Children’s Act in clear circumstances of infringement and admission of s 70 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*], which provides a more stiffer penalty of a fine not exceeding level twelve or imprisonment for a period not exceeding 10 years or both. On the other hand the s 8 charged under the Children’s Act, [*Chapter 5:06*] provides for a fine not exceeding level 10 or imprisonment for a period not exceeding 5 years or both.

In any event even if the sentence was appropriate the facts and essential elements canvassed and admitted to do not confirm a conviction of corruption of children and young persons as envisaged in s 8 of the Children’s Act. Section 8 reads:

- “(1) Any person who allows a young child or young person to reside in or to frequent a brothel shall be guilty of an offence.
- (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
- (3) for purpose of subsection (2), a person shall be deemed to have caused the seduction, abduction or prostitution of a young 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.”

A close reading of s 8 depicts the legislative intention to protect children from abuse by being influenced into immoral acts for the benefit of a third party. It is more to censor

prostitution and pimping which is akin to slavitude of children by an abuser who seeks to earn from causing children to be abused. The evil sought to be protected by s 8 of the Children's Act is the upsurge of the social ill of child trafficking for prostitution purposes. The person who causes or conduces the child is punished for placing a child in the immoral situation leading to the abuse. From the facts of the present case, the deceased did not seek to cause seduction of a young person by somebody else but that the accused with the consent of a young child 14 year old, fully and intentionally participated on several occasions in extra marital sexual intercourse in apparent violation of s 70. The accused did not seek to facilitate for the benefit of anyone else but unlawfully engaged in extramarital sexual intercourse with a young person. The essential elements canvassed confirmed a conviction of violation of s 70 of the Criminal law Codification ad Reform Act [*Chapter 9:23*].

In the circumstances, the appropriate charge ought to have been unlawful extramarital sexual intercourse with a young person which calls for a stiffer penalty. In the absence of an indication on the record that the court drew the attention of the State counsel to the anomaly on the charge, one can only conclude that the trial magistrate did not raise the issue.

I appreciate that the State is *dominus litus* when it comes to preferring charges but it would equally be injudicious for a trial magistrate to allow an improper charge, not supported by the facts to stand and then improperly convict an accused person. It is improper for the judicial officer to pay a blind eye to the anomaly on a defective charge which is not supported by facts and meet out a wrong conviction and resultantly a wrong sentence. The interest of justice is central to all court proceedings and as such the duty is squarely placed on the court to ensure that proper charges are not clouded by slavish notion of the State being *dominus litus*. If the offence is not properly couched and the State is averse to directions, then the trial court ought not to be part and parcel of the flawed proceedings. The conviction and sentence in this case cannot be sustained.

I accordingly withhold my certificate and decline to confirm the proceedings as being in accordance with real and substantially justice.