THE STATE
versus

SIMBARASHE GUVHEYA

HIGH COURT OF ZIMBABWE
MUNGWARI J
HARARE, 7 August 2024

REVIEW JUDGMENT

W Badalane, for the applicant
R Mutare, for the respondent

MUNGWARI J: The proceedings in this matter were adjourned following the accused's conviction for a sexual offence, in accordance with s54 of the Magistrates' Court Act [*Chapter*7:10]. During the pre-sentencing hearing stage, it was brought to the attention of the trial magistrate that the offender suffers from Human Immunodeficiency Virus (HIV), which causes a condition known as Acquired Immunodeficiency Syndrome whose acronym is AIDS. He was HIV positive at the time he committed the offence he now stands convicted of. Taking into account his own ordinary sentencing jurisdiction of 5 years imprisonment or alternatively a fine not exceeding level 10, and that s 80 of the Criminal Law Codification and Reform Act [*Chapter 9:23*] (the Criminal Law Code)provides for a mandatory minimum sentence of 10 years imprisonment in the absence of special circumstances, the provincial magistrate in terms of s 54 (2) of the Magistrates Court Act [*Chapter 7:10*] (the MCA), stopped the proceedings and submitted his report and the record of proceedings to the Prosecutor General. The Prosecutor General, in turn directed that the matter be referred to the High Court in terms of s 54 (2) of the MCA as read with s 225 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (CPEA). Acting in terms of s 227 of the CPEA the registrar of this court subsequently placed the record of proceedings before me for the sentencing of the offender.

[1] The powers of the High Court or a judge thereof in such instances as well as the procedures which must be followed when seized with a matter referred to it in terms

of s 54(2) of the MCA are clearly spelled out in ss 227 and 228 of the CPEA. The provisions provide useful guidelines on how the court must proceed. They state the following:

> **"227 Powers of judge in respect of case transferred to High Court for sentence.**
>
> (1) Upon receipt of the documents mentioned in subparagraph (ii) of paragraph (*c*) of section *two hundred and twenty-six*, the registrar of the High Court shall with all convenient speed lay them before a judge in chambers and, if the judge considers the proceedings to be in accordance with real and substantial justice, he shall cause the accused to be brought before him in open court, on a date and at a place to be notified by the registrar to the accused and to the Prosecutor-General, to receive sentence in respect of the offence of which he was convicted by the magistrate or such other offence as the judge, in the exercise of the powers conferred upon him by section (2), has substituted for such first-mentioned offence.
>
> (2) The judge may in respect of the proceedings exercise such of the powers conferred upon the High Court by subsections (1) and (2) of section 29 of the High Court Act [*Chapter 7:06*], as may be appropriate.
>
> **228 Sentence by judge**
>
> When an accused is brought before a judge in terms of subsection (1) of section *two hundred and twenty-seven*, he shall not be called upon to plead to the charge but shall be dealt with as if he had been convicted by the High Court of the offence concerned."

[2] From the above, it is clear that in dealing with such matters the court is required do the following:

a. Review the proceedings to ensure that they are in accordance with real and substantial justice before proceeding to do anything
b. Where necessary, exercise the review powers provided for in section 29 of the High Court Act [*Chapter 7:06*]
c. If the proceedings are in accordance with real and substantial justice, the judge shall cause the offender to appear before him/her in court and thereafter undertake all the pre-sentencing procedures before sentencing the offender.

Whether the proceedings are in accordance with real and substantial justice

[3] Simbarashe Guvheya a twenty three year old appeared before the Magistrate's court in Chivhu on a charge of "contravening section 70 of the Criminal Law Codification and Reform Act [*Chapter 9:23*] as read with section 4 of the Presidential Powers(Temporary Measures) (Criminal Law (Protection of Children and young Persons)) Regulations, 2024 of SI 2 of 2024". On 7 March 2024 he was convicted on his own plea of guilty.

[4] The above charge is wrong. This court as per MUTEVEDZI J in the case of *S* v *Bernice Chitsidza* HH 258/24 dealt with a similar scenario and held that:

> "When the record of the above proceedings was placed before me for review, it occurred to me that the conviction could not have been entirely correct for one stand out reason. It is the citation of the charge. Where there is an amendment to a principal Act, what is charged is not the amendment but the amended Act itself.
> In legal parlance, an amendment refers to a formal or official change or alteration to the existing law. The purpose of most amendments to Acts of Parliament is to improve that law. It is done when it is considered better or convenient to do so than to write a new Act. The change is achieved by adding to, subtracting from, or wholly substituting some provisions. [1] The amending regulation or provision does not therefore create law. It simply adds to, subtracts from or substitutes the existing law. Once that happens, its purpose is over and must sink into oblivion. The only reference to the amending provision that is often found in the amended Act is some kind of a footnote that advises users that the provision was inserted by that amendment. In summary therefore and as EBRAHIM J (as he then was) held in the case of *S* v *Mbewe and Ors* 1988(1) ZLR 7(HC) where a charge alleges a contravention of a statutory provision which has been amended, it should allege a contravention of the principal Act rather than a contravention of the amending Act or Regulations. Put bluntly, it is unnecessary to refer in the charge to the amending Act or Regulations."

[5] The same ailment afflicts the charge in this case. It was not necessary to read s 70 of the Criminal Law Code together with the Presidential Powers (Temporary Measures) Regulations which amended it to its current form. That unnecessary citation is not however fatal to the charge. Apart from that, I found that the trial magistrate meticulously explained all the essential elements of the offence and secured a genuine plea of guilty from the accused. Based on that, the trial court therefore correctly convicted the accused person of having sexual intercourse with a young person. By virtue of the powers reposed in this court by s 29 of the High Court Act [*Chapter 7:06*] the charge which the offender was convicted of is altered to read "contravening section 70 of the Criminal Law (Codification and Reform) Act. Thereafter, I have no qualms to certify as I hereby do, that the proceedings before the trial court were in accordance with real and substantial justice.

[6] Before scheduling the sentencing hearing, I noted the gravity of the situation in which the offender found himself in. He was facing imprisonment for a minimum mandatory ten years. It became clear that he needed legal assistance for me to properly deal with the matter and to ensure that all the relevant information was placed at my disposal. I

[1] https://www.law.cornell.edu/wex/amend; accessed on 18 June 2024

therefore directed the registrar of this Court to appoint counsel to represent the offender. Pursuant to that order, Ms *Mutare* from the Legal Aid Directorate was appointed counsel for the offender. She took instructions from the offender and provided representation throughout. I am eternally grateful for her dedication to duty.

Pre-sentencing hearing

[7] At the pre-sentencing hearing of the matter, the state informed the court that the offender has a previous conviction for physical abuse and for which he was sentenced to a wholly suspended term of 10 months imprisonment on condition of his future good behaviour. The offender acknowledged the existence of the previous conviction. With the consent of the defence, the prosecutor sought the admission of the certificate of previous convictions as an exhibit. I duly admitted it and it became Exhibit 1. The prosecutor argued that the previous conviction should be brought into effect as both offences involved abuse and are similar in nature. The defence however countered and argued that the offences are not similar. I will return to deal with the arguments later in the judgment.

[8] What is more important in my view is that the offence attracts a minimum mandatory sentence of ten years imprisonment. The offender does not deny that he is HIV positive. He does not deny that he was aware of his HIV status at the time that the offence was committed. It became obvious therefore that like in many other crimes where the minimum mandatory sentence can only be escaped from by establishing the existence of special circumstances, the starting point had to be an interrogation of the question of special circumstances. It had to precede the canvassing of all other general mitigation and aggravation.

[9] To establish the existence of special circumstances which she argued were present, Ms *Mutare* caused the offender to give oral testimony. She also presented a written document detailing the offender's personal circumstances and urged the court to consider them as special circumstances.

[10] Ms *Badalane,* the state representative had opportunity to cross examine the offender. She tendered a variety of exhibits with the defences' consent which included, the offenders HIV test results. She also tendered the complainants' two test results, one conducted on 1 March 2024 and the other conducted on 17 July 2024 (two days before this hearing). In both tests, the victim of this offence tested negative of HIV. The test

result slips were admitted as Exhibit 2. Additionally, a victim impact statement from Diana Blessed Wood was presented (Exhibit 3) as well as supporting affidavits: one from the victim's mother, Mavis Tanganayi (Exhibit 4) and another from the investigating officer Tonderai Chirandu (Exhibit 5). Both counsels then delivered their closing oral addresses. The following is the sentencing judgment that resulted from the pre-sentencing hearing:

[11] On 16 February, the victim, a sixteen-year-old female, left the farming compound in Wiltshire Chivhu where she lived, in search of a job. At around 6 pm the naïve and youthful girl encountered a twenty-three old tout (the offender) at Masasa business centre. He was a complete stranger to her but appeared helpful. Despite being unknown to her, he soon expressed his affection towards the victim, who reciprocated. They exchanged personal details and agreed to go to the offender's residence. In the full knowledge of the victim's age the offender engaged in unprotected sexual intercourse with her and with her consent. Driven by what they perceived as mutual love, they agreed that the complainant would live with the offender as his wife and resultantly engaged in more sexual encounters. In the process the victim conceived. Convinced that her problems were solved, the victim abandoned her plans to seek employment.

[12] Unfortunately, the blind and short-lived romance soon soured. Twelve days later, the victim sought relationship advice from the police at Masasa station. Upon learning of this illicit relationship and living arrangement the police apprehended the offender and arraigned him before a provincial magistrate sitting at Chivhu on a charge of contravening section 70 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (Having sexual intercourse with a young person). The offender subsequently pleaded guilty and was convicted as already stated above.

The Law

[13] Section 80 of the Criminal Law Code is couched as follows:

> (1) Where a person is convicted of –
> (a)…
> (b)… or
> (c) sexual intercourse …with a young person involving any penetration of any part of his /her or another person's body that incurs the risk transmission of HIV:
> and it is proved that at the time of the commission of the crime, the convicted person was infected with HIV whether or not he or she was aware of his or her infection, he or she shall be sentence to imprisonment for a period of not less than ten years.

Provided that—

(i) notwithstanding s 192, this subsection shall not apply to an incitement or conspiracy to commit any crime referred to in para (a), (b) or (c), nor to an attempt to commit any such crime unless the attempt involved any penetration of any part of the body of the convicted person or of another person's body that incurs a risk of transmission of HIV;

(ii) (ii) if a person convicted of any crime referred to in para (a), (b) or (c) satisfies the court that there are special circumstances peculiar to the case, which circumstances shall be recorded by the court, why the penalty provided under this subsection should not be imposed, the convicted person shall be liable to the penalty provided under s 65, 66 or 70 as the case may be.

[14] From the above, there is no argument that the burden to prove that an offender was at the time of the commission of the crime infected with HIV lies with the prosecution. In other words, the prosecutor must present evidence to the court showing that the convicted individual was HIV-positive when the sexual offence took place. Once that evidence is provided, it is presumed that the accused was aware of his HIV status at the material time. It does not matter whether he was or was not aware of his HIV status. In this case the state counsel tendered the offenders HIV results. They not only show that he was HIV positive but the offender himself admitted that he was aware at the material time of his HIV positive status. He stated that he had always been aware of his HIV status because he had been born with the virus. Both issues were therefore common cause. Once the offender confirmed that he exposed the complainant to HIV then the mandatory sentence specified in s 80 of the Criminal Law Code as shown above is triggered.

[15] Section 80 of the Criminal Law Code outlines the procedures and the sentences that may be imposed when a court convicts an accused of any of the specified offences listed therein and it is proved that the accused's actions posed a risk of infecting the victim of the crime with HIV. In cases where the court determines that there are no special circumstances, its discretion in sentencing is constrained. It must impose the minimum mandatory ten years imprisonment. The offender can only avoid the minimum mandatory sentence if he satisfies the court that there are special circumstances peculiar to the case that justify deviating from imposing the mandatory penalty. If the offender successfully establishes the presence of special circumstances, the court's sentencing discretion under section 70 is restored.

[16] As already stated therefore the initial stage in evaluating a sentence for a charge related to having sexual intercourse with a young person where the offender may have exposed the complainant to the risk of transmission of HIV is for the court to determine whether there are special circumstances. The rationale behind this approach is clear and needs no explanation. See the cases of *S* v *Mbewe 1998(1) ZLR* and the case of *S* v *Stephen Kambuzuma HH175/2015*.

[17] *In casu,* the legislature provided for special circumstances which are peculiar to the case. That emphasis suggests a more expansive interpretation of the question of special circumstances, encompassing factors related to both how the offence was committed and the personal circumstances of the offender which should be special in nature. MUREMBA J dealt with the issue in *S* v *Stephen Kambuzuma* (supra) where she cited with approval the remarks of BEADLE J in the case of *R* v *DA Costa Silva* 1956 92) SA 173 (SR) that:

> "There is, to my mind, some difference between 'a circumstance of the case' and 'a circumstance of the offence'. The Court is here dealing with the quantum of punishment, and in making a decision on this I think that any fact which might legitimately be considered as an aggravating or mitigating feature of the case must be regarded as 'a circumstance of the case', even though it may not be 'a circumstance of the offence'. An example might perhaps best illustrate this point. If a very elderly man who is suffering from some chronic disease which requires special diet and specialised medical treatment were convicted of driving a car whilst not insured against third party risks, and if it were shown that a sentence of imprisonment would be likely to cause his death, it seems to me that this would be a proper factor which the court could take into account in imposing a sentence of a fine instead of a sentence of imprisonment, although it would be a circumstance 'special' to the offender, and not 'special to the offence'."

[18] In pursuit of this goal, counsel for the accused requested the offender to testify and led him, in an effort to demonstrate the existence of special circumstances. In a series of statements, the offender highlighted two issues which he believed constituted special circumstances. Firstly, he mentioned that the victim used to visit his residence and he never actively sought her out himself. Secondly, he stated that he was born with HIV and became aware of his condition in 2013 while in the 7th grade. Since then, he has always taken medication and continues to do so. However during cross-examination he admitted to not informing the complainant about his condition and engaging in unprotected sexual intercourse with her, resulting in her pregnancy. He also acknowledged being aware that his actions exposed the complainant to the risk of infection.

[19] Counsel for the accused implored the court to find it a special circumstance that while he had exposed victim to the risk of transmission, she had not contracted the infection. The victim tested negative on two occasions on 1 March 2024 and on 17 July 2024. Regarding the offender's personal circumstances defence counsel detailed to the court that the offender is a youthful man at just twenty-three years old; he pleaded guilty to the offence, expressed remorse and contrition and was expecting a child with the underage victim. She emphasized that he is the sole breadwinner between them through his employment in the transport industry. Counsel then implored the court to consider the victim's attitude in determining sentence and referenced the precedent set in the case of S vs *Kelly* HH33-04 as a basis for this proposition.

[20] I agree with the defence's contention that in general, the victim's attitude should be taken into account when sentencing the offender. The sentencing guidelines outlined in SI 146/23 support that view. However, in cases where the offence attracts a mandatory sentence the complainant's attitude may hold less or no sway at all. It is worse in offences where the victim is a child. Section 70 is a law that was enacted specifically out of the realisation of the folly of young persons. They make uninformed decisions. That law is therefore intended to protect young persons against their bad decisions. An adult cannot defend themselves in such cases by pointing to the attitude of the young person who is their victim. It must be known that an adult person remains guilty and no less culpable when they commit any of the proscribed acts with a young person even in circumstances where the young person literally lures them into it. The adult is expected to make a better decision and resist such temptation. The attitude of the victim cannot therefore be regarded as a special circumstance by any stretch of the definition of that phrase.

[21] Out of an abundance of caution, the state counsel tendered the girl's victim impact statement, Exhibit 3. In it the girl detailed that she had to discontinue her education due to the actions of the offender, which resulted in her falling pregnant. Her expected date of delivery is in September 2024. She further disclosed that she is experiencing health challenges, including high blood pressure, stomach pains and that her mental health is at stake. Financially she is reliant on well-wishers as she lacks a source of income. She prayed in her statement that the offender be sentenced to imprisonment due to the untold suffering he had caused her. She was looking for employment. In her naivety and in his deviousness, she abandoned that pursuit in the

hope of becoming his wife. He turned around and ditched her immediately after he had made her pregnant and put her in a worse state than she had been when they first met.

[22] In her closing address to the court on special circumstances Ms *Mutare* conceded that the offender had not demonstrated any such circumstances and remarked that her client had "clearly failed to prove that there are special circumstances in the matter." State counsel Ms *Badalane* in turn seized upon the concession and concurred that considering all the evidence presented to the court, there indeed were no special circumstances to consider.

[23] I agree with the arguments put forth by both counsels that the reasons presented by the offender in his testimony and his overall personal circumstances do not amount to special circumstances. This is because the reasons provided neither pertain to the offender's actions or personal situation, nor do they relate to anything extraordinary, uncommon, or unforeseen under which the crime was committed. See also the case of *S v Panashe Marimba* HMT 8-23.

[24] On the contrary, the assertion that the victim would visit the offender's place of residence is implausible. In his plea of guilty which I have already verified and confirmed, as being a genuine plea, the offender admitted that, at the time of the sexual intercourse, the victim was residing with him in his house. It is illogical to suggest that she would visit his residence when they were living together in the same place as husband and wife. Furthermore, his conviction established that he was aware of the complainant's youth and immaturity, and that consequently she lacked the legal capacity to consent to engage in sexual relations with him. Instead, being the older and more experienced individual, he had taken advantage of her immaturity and induced her into consenting to the sexual encounters.

[25] Moreover, the accused explicitly disclosed that he was aware of his HIV-positive status at the time of the offense, as he was born with the condition. He explained his understanding of his medical situation, acknowledging that engaging in unprotected sexual intercourse could potentially expose the complainant to the risk of transmission. Significantly, he admitted to having unprotected sexual intercourse with the complainant, fully cognizant that he was putting her at risk of infection. This constitutes an aggravating factor in the case and not a special circumstance. It is also essential to underscore that the victim's subsequent non-contracting of the disease does not constitute a special circumstance. I conclude so because section 80 expressly

stipulates that the mandatory sentence is not for infecting the victim with HIV. It is triggered by the mere act of exposing someone to the risk of infection, irrespective of whether transmission actually occurs. The rationale behind section 80 is to deter the careless endangerment of others through potential transmission of the virus. The mere exposure to such risk therefore warrants the application of the mandatory sentence. The fact that, by providence, the complainant did not contract the disease does not therefore qualify as a special circumstance, as the critical issue remains the unwarranted exposure to the risk of infection.

[26] Finally, I conclude that there are no unique or exceptional circumstances in the offender's personal situation. The ones listed by defence counsel qualify as ordinary mitigating factors. Despite being twenty-three years old and a youthful offender, he is still an adult who knowingly jeopardized the victim's health by exposing her to the risk of infection. The fact that he was her provider for twelve days and is willing to offer financial support to the complainant does not mitigate his actions. On the contrary, the added complication of impregnating the young girl, who will soon become a mother and is expected to fend for her new-born baby aggravates the offender's situation. Consequently, there are no exceptional circumstances and the minimum mandatory sentence will apply.

[27] The only issue remaining for consideration is whether the accused's previous conviction should be taken into account. My view is that it must not be considered. While this offense was committed before the suspension period for the previous conviction had lapsed, the new crime does not constitute a violation of the conditions of the prior suspended sentence. The terms of suspension stipulated are that the accused should refrain from committing any offenses involving violence against another person. The present offense, for which the accused now stands convicted, relates to a violation of the bodily integrity of the victim and not to physical violence. It therefore does not qualify as a breach of the conditions on which the sentence was suspended.

[28] As previously mentioned, in the absence of special circumstances, the court's discretion is restricted, and it is mandated by law to impose the minimum sentence of ten years. Accordingly, the offender is sentenced to **10 years imprisonment.**

National Prosecuting Authority, the State's legal practitioners,
Legal Aid directorate, accused's legal practitioners