THE STATE
versus
PETER CHIGOGO

HIGH COURT OF ZIMBABWE
TSANGA & PHIRI JJ
HARARE, 03 December 2015

Criminal Review

TSANGA J: The accused was found guilty of contravening s 70 (1) of the Criminal Law Codification and Reform Act [*Chapter 9:23*]. He was sentenced to 30 months imprisonment of which 15 months was suspended for five years on the usual conditions. The remaining 15 months was also wholly suspended on condition that he performed community service at a primary school.

The conviction is proper but the sentence raises some concerns in light of the totality of the factual circumstances. The complaint was 15 years and a form one pupil at the time and the accused was 37 years old and married. The accused was alleged to have raped the complainant over 20 times over a course of time starting in March 2015 although she did not tell anyone. The accused lived a few meters from the complainant's homestead. The rape emerged because she fell pregnant. Upon suspecting that she was pregnant which was sometime in August 2015, her parents had sent her to an aunt in the neighbouring village to whom she had confirmed that the accused was responsible. The following day, on 30 August 2015, the complainant had been referred to the accused's homestead for him to marry her.

The accused told the court that the complainant was his girlfriend and that they were in love. The parties were said to be somewhat related with accused regarding complainant as his "niece". In his overall judgement, the magistrate emphasised the aspect of the parties being in some form of relationship. He observed that the police had found her cooking for the accused when they visited his residence upon receiving a complaint. It is however not clear who ultimately lodged the complaint but according to the state outline the police referred her back to her parents. The magistrate also observed that she was not a truthfulness witness on the basis that she had smiled when giving her evidence, a smile which he said portrayed that she was hiding something. Her failure to scream or tell anyone was deemed equally

problematic. He therefore found that she had not been raped, having only told her aunt that she was pregnant. The magistrate's finding under the circumstances was that the accused was guilty of sexual intercourse with a young person under the age of 16 and not rape. He also accepted the evidence that the two were not as closely related as to make marriage between the two of them culturally unacceptable. His view was that if they were closely related, the parents would not have permitted her to elope. In imposing his sentence he observed in the final analysis as follows:

> "Under normal circumstances because of the age difference between the two this court would send he accused to prison but this is an unusual case and I do not intend to send the accused to jail. So I think that community service will be proper in the circumstances".

The issue is whether a custodial sentence would have been more appropriate given that what s 70 (1) (a) of the criminal code penalises is "**extra marital sexual intercourse"** with a young person. At the time of the commission of the offence, the accused was certainly not married to the complainant. His sexual acts with a young person were clearly extra marital.

The continued lenient attitude towards grown men who abuse young girls and then get off lightly with their offence on the basis of "intended marriage" to the complaint is not in consonance with the spirit of the constitution in discouraging marriage of girls below the age of 18. Section 78 (1) of the Constitution which deals with marriage rights provides that "every person who has attained the age of eighteen years has to found a family". It thus places a restriction on marriageable age. Whilst there is still need to harmonise the existing laws with the constitution, with this constitutional framing of marriage, the customary reality whereby marriage is not linked to age but to puberty cannot continue to find justification in law and practice. It is the duty of the courts to actively take steps to pass judgments that are in harmony with the Constitution as well as children's rights as contained in the various instruments that we are a party to. For example, Article 21 of the African Charter on the Rights and The Welfare of the child which provides for protection against harmful social and cultural practices provides that legislation shall be passed by states specifying 18 as the minimum age of marriage. In terms of s 327 (6) when interpreting legislation courts are expected to adopt nay reasonable interpretation of the legislation that is consistent with nay international convention, treaty or agreement which is binding on Zimbabwe.

The parties herein were a 37 year old man and a 15 year old girl who was a form one student. The import of the magistrate's decision is to lend law's approval to early marriage when the opposite message is what the courts should be conveying. It is vital that s 70 of the Criminal Code be embraced as a law which specially exists in our books to protect children from child sexual abuse by prosecuting violators and according them appropriate punishment. Child marriages are unlikely to end where the courts continue to pass sentences that go against the intended letter and spirit of the constitution and of international instruments. Courts should be wary of letting a child sexual abuser get off the hook lightly just because the parents of the child and abuser negotiate a marriage when the matter comes to light. This is usually done to circumvent punishment on the part of the abuser, and, for financial gain in the form of lobola on the part of the family. A complainant is vulnerable because of her immaturity when the reality is that child marriages often lead to physical violence, psychological abuse and depression in addition to interfering with her education. The protection of child victims is minimised when courts deem it inappropriate interference where parties or families have agreed to a marriage within the context of their own cultural setting. Legal and non-legal non-governmental organisations in our midst have firmly put the unacceptability of child marriages on the agenda. They have the clear advantage of understanding problems and difficulties on that arise from early marriage from a grounded perspective. Courts therefore need to be alive to the overall picture regarding the non-acceptability of child marriages so as to work towards a common goal.

In *S* v *Onismo Girandi* HB 55/12 it was emphasised that there is a need to send a signal to society that courts will weigh heavily on child sexual abuse. It was stated in that case that a sentence of not less than two years should have been imposed. In *S* v *Nyirenda* HB 86-03 a 37 year old man had sexual intercourse a 15 year old neighbour. The age difference between two was regarded as an aggravating factor although the complainant's closeness in age to 16 was held to be mitigatory. Nonetheless, the sentence that was imposed was two years imprisonment of which 16 months was suspended on condition of good behaviour.

It also makes little sense to sentence a 37 year old man who has been charged with a sexual offence and who has clearly shown a lack of respect for appropriate age boundaries, to perform his community service at a primary school where there are girl children. Magistrates must therefore give proper thought to the issue of where it would be appropriate for an accused to perform their community service. As the community service sentence has most likely been carried out, there will not be much point ordering rectification at this point.

For the reasons I have explained above, I find that these proceedings are not in accordance with substantial justice and I accordingly withhold my certificate.

TSANGA J ……..

PHIRI J agrees …….