

THE STATE
versus
C F (A JUVENILE)

PHIGH COURT OF ZIMBAWE
KUDYA J
HARARE, 6 July 2011

Criminal Review

KUDYA J: This review judgment deals with the issue of whether under s 70 (1) (a) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*], a male young person can be competently convicted of engaging in extra-marital sexual intercourse with a female young person.

The facts in the present case were that in April 2009 the 15 year old CF who was in Form 3 fell in love with a 14 year old form 1 girl at a secondary school where they were both attending. They first had consensual sexual intercourse in July 2009 and thereafter continued to do so on divers' occasions. The matter came to light when the girl fell pregnant.

The boy was charged and convicted on his own plea of guilty of contravening s 70 (1) (a) of the Criminal Law Code. He was sentenced on 14 May 2010 to receive a moderate corporal punishment of 3 cuts with a rattan cane to be administered in private by a designated prison officer. The sentence was duly carried out even before the record was submitted on review. On 9 July 2009 I asked the trial magistrate whether the conviction was competent at law. His terse response of 10 December 2010 stated that:

“After going through the relevant section and other literature, I concede that I erred in convicting the accused person who is also a minor.”

I noted from my discussions with other judges that it appeared that there were many such cases that were coming on review. Accordingly, I wrote to the Attorney General on 4 February 2011 seeking his opinion on the matter. I am indebted to his response of 8 April 2011, which I reproduce hereunder:

The probation officer's report, which forms part of the record had the following findings and recommendations:

"Both juveniles will benefit from pre-marital sex counseling as they are both victims of it. Taking the girl to live with the boy would not yield fruitful results as they are both children who still need parental guidance to grow up physically and emotionally. In view of the above highlights, it is respectively recommended that the charges be dropped and the juvenile continue in school, [which] will guarantee a brighter future to and better control of the juvenile.

Notwithstanding the probation officer's recommendations, both the trial prosecutor and the presiding magistrate seem not to have paid any due regard to the probation officer's report.

Be that as it may we have noted that s 61 of the Act defines "young person" as "a boy or girl under the age of sixteen years." The offence in s 70 of the Act seeks to protect young persons from adults who take advantage of their immaturity by engaging with them in extra marital sexual activities. It is envisaged that young persons are not mature enough to appreciate the consequences of such activities. That is why the probationer officer remarked that both the boy and girl were victims of pre-marital sex.

It is clear from the wording of the legislation that not only girls are protected but young male persons are protected as well. In short, no offence is created where a young male person engages a young female person in any consensual sexual act. See the remarks of NDOU J in *S v Juvenile* (RPS) HC 18/03 that:

'Whilst it might be a bitter pill to swallow for parents, youngsters aged under sixteen can freely indulge in sexual activities outside criminal sanction of the Sexual Offences Act as long as the sexual act is consensual. This does not seem ideal in this era of HIV/AIDS. There is nothing criminal about accused's conduct although morally and religiously reprehensible'.

The facts in that case involved a 15 year old boy who had sexual intercourse with a 15 year old girl. The conviction was set aside. The offence of having sexual intercourse with a young person under the Sexual Offences Act, now repealed, is the precursor to s 70 of the Criminal Law (Codification and Reform) Act [*Cap* 9:23]. However, s 70 of the Act did not change the position pronounced by NDOU J, *supra*.

It is our respectful view that if a proper consideration and due regard had been given to the above cited case; prosecution would not have been warranted in the circumstances.

Accordingly, the Attorney General is unable to support the conviction."

I agree with the observations and conclusions of the Attorney General.

Unfortunately, the punishment that was visited on the juvenile in this case cannot be reversed. There are only two options that are open to me on review in these circumstances.

The first is to quash the proceedings and set aside the sentence so that the juvenile is not saddled with a criminal record. The second is to prevent other similarly placed juveniles from suffering the same fate as the present juvenile.

Accordingly, it is ordered that:

1. The conviction and sentence imposed on the juvenile is hereby quashed;
2. The Registrar is directed to bring this review judgment to the attention of both the Chief Magistrate and the Director of Public Prosecutions for distribution to both magistrates and prosecutors throughout the country.

CHITAKUNYE J: agrees.....