STATE
versus
BRIAN MASUKU

HIGH COURT OF ZIMBABWE
MWAYERA AND TSANGA JJ
HARARE, 5 February 2015

Criminal Review

TSANGA J: The accused was convicted of contravening s 70 of the Criminal Law Codification and Reform Act [*Chapter 09:23*] which deals with having sexual intercourse with a young person. The facts upon which he was convicted are commonplace among sex experimenting youths. He was 17. She was 15. They were boyfriend and girlfriend. Unfortunately as is prone to happen from the risks of unprotected sex, she fell pregnant. He was reported for having sex with a young person and received the following sentence:

24 months imprisonment of which

a) 8 months imprisonment is suspended for 5 years on condition the accused is not convicted of any offence of a sexual nature committed within that period for which he is sentenced to imprisonment without the option of a fine.
b) The remaining 16 months imprisonment is suspended on condition the accused completes 525 hours of community service at Chivaka Primary School on the following terms:

i) The community service starts on 17/11/14 and must be completed within 18 weeks of that date.
ii) The community service must be performed between the hours 8 am to 1 pm and 2 pm and 4 pm each Monday to Friday which is not a public holiday to the satisfaction of the person in charge at the said institution who may, for good cause grant the accused leave to be absent on a particular day or days or during certain

hours. Any such leave of absence shall not count as part of the community service to be completed.

Although the conviction is proper in that it is in accordance with the law as it stands, my view is that the sentence is manifestly excessive given the overall context under which the offence occurred. Section 70 (1) is gender neutral in its thrust in that it seeks to protect both girls and boys from extra marital sex when they are young persons. Where the parties involved are both under 16 our courts have held that there can be no prosecution in such instances since both parties are effectively young persons under the age of 16. (See *S* v *CF (A juvenile)* 2011 (2) ZLR 48 which followed the reasoning in *S* v *Juvenile (RPS)* HB 1-2003 decided under the then Sexual Offences Act [*Chapter 9:21*] as still applicable under the current Criminal Code. Even juvenile sex offenders who commit the more serious crime of rape are not sentenced to imprisonment. (See *S* v *M* 2009 (1) ZLR 47). While corporal punishment was discussed as an alternative in that case, it is no longer among the options available for non-custodial remedies following it being outlawed as unconstitutional. See *S* v *Chokuramba* HH - 718-14).

Perpetrators of the crime of sex with a young person under s 70 often constitute the predatory male adult who preys on a young girl albeit with her consent. However, in addition to adult males as predominant perpetrators, those who have equally fallen foul of the provision are adolescent boys over the age of 16 but still children under the Constitution in terms of s 81(1). They are not young persons as defined by s 70 of the Criminal Code. Unlike in some jurisdictions, ours does not exempt from prosecution adolescent violators of such provisions when the parties are within a similar age bracket by two or three years above the minimum[1]. Youthful violators over 16 have to deal with the actuality of punishment which is often tempered down due to their age where the circumstances permit. Sentences however, can still be harsh.

Reports in the local media suggest that 66 % of teenagers between the ages of 15 and 19 indulge in unprotected sex.[2] Ignoring the reality of consensual sex among teenagers and adopting an overly formalistic approach to the crime can result not only in an unnecessarily punitive sentence, but also a criminal record and stigmatisation as a sex offender.

[1] Such as in some states in the United States of America

[2] See Daily News Wednesday 28 January 2015.

In the context of the prevalence of Sexually Transmitted Diseases (STDs) including the Acquired Immune Deficiency Syndrome (HIV/AIDS), and the very real dangers of teenage pregnancy as resulted in this case, it is understandable that the law, as well as public opinion, discourages sex with, and among adolescents. Male and female adolescents also do not suffer the same consequences from the act of teenage sexuality. The risks for girls are far graver due to the very real risk of pregnancy and the attendant problems associated with early motherhood that arise from such unprotected sex. There are also risks that arise from illegal abortions using crude means that span from drinking detergent to use of sticks to extract the foetus.

Sex among peers is a reality of adolescent sexuality. It does not justify a suspended imprisonment term for the teen male offender who has had sex as part of a romantic relationship with a peer.

Also law can only do so much to protect teenagers by discouraging sex with young persons by criminalising the act. It can also only go thus far to protect adolescent violators by taking age into account so as not to weigh too heavily on consenting peers. From a law reform standpoint, increasing the age that defines a young person to 18 would not only accord with the constitutional definition of a minor but would hopefully also help to protect girls from adult predators in particular. Even then the reality is that law on its own in such instances cannot be the panacea to problems that have deep social contexts. Law does not operate in a vacuum. To stem the dangers that arise for girls in particular from teenage sex, part of the answer would appear to lie in policy makers and society accepting the prevalence of youth sex and fashioning appropriate interventions. Availing contraceptive protection is one such intervention. A more rigorous and open approach to what is actually taught as sex education in schools is also another. This seems imperative since the dominant message of abstinence has obviously not succeeded in keeping the youth from having sex among their group.

In this case the sentence of 8 months imprisonment albeit suspended on condition that the accused does not commit any crime of a sexual nature is totally uncalled for given the fact that the accused was also sentenced to community service. At 525 hours, the length of community service is equally excessive. It amounts to about 75 working days based on a 7 hour working day.

The suspended prison sentence suggests that the accused belongs to the category of offenders that poses some danger to society hence the need to put him on terms of good sexual behaviour. Yet in the same breath, if his actions pose any danger, he is being asked to serve his community service at a primary school where there are many young girls who could easily put him into temptation. Clearly, given the circumstances of the case, he cannot be said to pose the same danger as the predator who seeks underage girls for sex hence the reason for placing him at a school to perform his community service.

Community service, under the circumstances of his case is sufficiently rehabilitative and more in tune with a policy approach towards juvenile justice, which places emphasis on rehabilitation rather than branding such a youth as a criminal.

Accordingly, for the above reasons the sentence in this case is altered as follows:

The accused is sentenced to **210** hours of community service at Chivaka Primary School on the following terms.

i) The community service starts on 17/11/14 and must be completed within 16 weeks of that date.
ii. The community service must be performed between the hours 8 am to 1 pm and 2 pm and 4 pm each Monday to Friday which is not a public holiday to the satisfaction of the person in charge at the said institution who may, for good cause grant the accused leave to be absent on a particular day or days or during certain hours. Any such leave of absence shall not count as part of the community service to be completed.

MWAYERA J agrees ……..