THE STATE
versus
TANAKA MADIRO

HIGH COURT OF ZIMBABWE
MAWADZE DJP & MUSHURE J
HARARE, 7 May 2025

Review Judgment

MUSHURE J:

[1] This record has been placed before me for review at the instance of the scrutinising regional magistrate sitting at Harare. The referral is in terms of s58 (3) (b) of the Magistrates Court Act [*Chapter 7:10*] which empowers the scrutinising regional magistrate, if it appears to him or her that doubt exists whether the proceedings are in accordance with real and substantial justice, to cause the papers to be forwarded to the registrar, who shall lay them before a judge of the High Court in chambers for review in accordance with the High Court Act [*Chapter 7:06*].

[2] The accused is a few months shy of nineteen years, having been born on the 27th of July 2006. He was arraigned before a magistrate facing a charge which was captured as 'having sexual intercourse with a young person' as defined in s70 of the Criminal Law (Codification & Reform) Act [*Chapter 9:23*] (the Code). According to the charge sheet, the allegation in broad terms is that on the 7th of January 2025, and at a certain identified house in Harare, the accused unlawfully and intentionally had sexual intercourse with the complainant, a young person aged fifteen years, with her consent.

[3] On his appearance in court, the accused pleaded Guilty to the charges, whereupon the trial magistrate proceeded to canvass the essential elements in terms of s271 (2) (b) of the Criminal Procedure & Evidence Act [*Chapter 9:07*]. He was then sentenced to nine months imprisonment, of which four months imprisonment was suspended for five years on condition of good behavior. The remaining five months imprisonment was suspended on condition he performed 175 hours of community service.

[4] The record of proceedings was subsequently placed before a regional magistrate for scrutiny in compliance with the provisions of s58 (1) (a) of the Magistrates Court Act. The scrutinising regional magistrate noted that the accused was aged nineteen years, and the complainant, who was born on the 19th of May 2009, was two years and ten months younger than the accused. Being conscious of the requirements introduced by the Criminal Laws Amendment (Protection of Children and Young Persons) Act, 2024 ('the Amendment Act'), the regional magistrate queried if the Prosecutor General had authorised the charge. The trial magistrate replied in the negative and conceded that the conviction was not competent in the circumstances. The regional magistrate then referred the matter for review.

[5] I find that the concession by the trial magistrate was properly taken for the reasons I outline below.

[6] Before its amendment, s70 of the Code outlawed extra-marital sexual intercourse or performing indecent acts with 'young persons'. For the purposes of Part III under which s70 fell, a 'young person' was defined in s61 as a boy or girl under the age of sixteen years. This is no longer the case. The previous s70 has now been repealed by the Amendment Act and substituted with a new s70. A perusal of the Amendment Act demonstrates a paradigm shift from the position in the previous s70 in more ways than one.

[7] Firstly, unlike the previous position where a boy or girl aged between sixteen and eighteen was not protected under s70, the new s70 now protects children up to eighteen years. The interpretation section also repeals the definition of a 'young person' and substitutes it with the definition of a 'child' under s61. Further, it expands the age from sixteen to eighteen, by defining a child as a boy or girl under the age of eighteen years. The scope of protection under s70 has therefore now been widened, effectively curing the previous disparity between the definition of a child in the Constitution of Zimbabwe ('the Constitution') and the definition of a young person in the Code.

[8] Secondly, it repeals and substitutes the previous s70. Unlike the previous s70 which was titled '*Sexual intercourse or performing indecent acts with young persons*' the title to the new s70 is now more defined and age specific. It is couched '*Sexual intercourse or performing indecent acts with children between the ages of twelve and eighteen*'. The new s70 removes any doubt in terms of its application in as far as the age factor is concerned.

[9] Thirdly, in terms of the new s70, there is no longer an offence called 'sexual intercourse or performing indecent acts with a young person'. The offence is now called 'sexual intercourse

or performing indecent acts with a child'. The phrase 'young person' in s70 has been replaced with the word 'child'. It is therefore incompetent to charge an accused person with the offence of 'sexual intercourse with a young person' where that offence was committed after the 18th of September 2024.

[10] Fourthly, the previous s70 (1) (a) proscribed extra marital sexual intercourse with a 'young person'. It therefore, by implication, permitted intra-marital sexual intercourse with a young person. This offence, and consonant with the standing legal position prohibiting child marriages as reflected in s78 (1) as read with s81 (1) of the Constitution, s3 of the Marriages Act [*Chapter 5:17*] and the Constitutional Court decision in *M & Anor* v *Minister of Justice, Legal and Parliamentary Affairs & Ors* 2015 (2) ZLR 45 (CC), has been totally dropped off under the new statute. The new s70 outrightly outlaws having sexual intercourse and performance of indecent acts with a child. By statutory command, there is no longer room for one to hide under the façade of marital 'permission' to sexually or indecently abuse a child.

[11] Fifthly, the previous s70 (2a) has been repealed but reintroduced in an expanded from under s70 (3). Section 70 (2a) was worded as follows:-

> "(2a) Where extra-marital sexual intercourse or an indecent act occurs between young persons who are both over the age of twelve years but below the age of sixteen years at the time of the sexual intercourse or the indecent act, neither of them shall be charged with sexual intercourse or performing an indecent act with a young person except upon a report of a probation officer appointed in terms of the Children's Act [*Chapter 5:06*] showing that it is appropriate to charge one of them with that crime."

[12] My understanding of the import of s70 (2a) is that the requirement of the law then was that if the young persons involved were both above twelve years but below sixteen years at the time of the sexual intercourse or indecent act, it was incompetent to prefer charges against either of them without having first obtained a report from a duly appointed probation officer to the effect that preference of charges was appropriate in the circumstances.

[13] The new s70 (3) ushers in a whole new dimension to this requirement in the following terms:-

> "(3) Where sexual intercourse or an indecent act takes place between—
> (a) children between whom the difference in age is not more than three years; or
> (b) a child and an adult who is not more than three years older than the child;
> neither of them shall be charged with sexual intercourse or performing an indecent act with a child unless the Prosecutor-General, after considering a report by a probation officer appointed in terms of the Children's Act [*Chapter 5:06*], has authorised the charge."

[14] If I have understood the amendment correctly, s70 (3) introduces two primary considerations to be taken into account before a person is charged under s70. Both

considerations have to do with the ages of both the accused and the complainant. The first consideration is the ages of the accused and complainant where both of them are children. If both are children and the age gap between them is three years or less, then the authority of the Prosecutor General is required to prefer those charges. The probation officer still retains their report compiling role as in the repealed s70 (2a), but it is not only a legal but peremptory requirement for the report to be placed before, and considered by, the Prosecutor General, before he or she authorises the charge.

[15] I digress momentarily to note that at first glance, it would appear that unlike the blanket application of the exception which applied where both the accused and the complainant were above twelve but below sixteen under s70 (2a), s70 (3) (a) now limits that exception to a three year age gap. However, this is not a question I have been called upon to determine and would leave that discourse open for proper judicial ventilation, suffice to state that s70 (4) contains a rider that the requirements in s70 (3) shall be additional to the requirements of any other law relating to the protection and charging of children.

[16] Reverting to the issue at hand, s70 (3) (b) provides for a process similar to the process under s70 (3) (a) where the offence is committed between a child and an adult who have an age gap of not more than three years. Thus, where for instance the complainant is seventeen and half and the accused is nineteen, the offence, though involving a child and an adult would fall within the remit of s70 (3) (b) by virtue of their age gap. This is a new requirement of our law and the reason why the scrutinising regional magistrate referred the current matter for review.

[17] It seems to me that while establishing the ages of the parties at the time of the commission of the offence remains a requirement under s70, the establishment of ages has now assumed more significance so as not to fall foul of the requirements prescribed under s70 (3). It follows therefore that before a trial magistrate seized with a matter in which the accused is charged under s70 proceeds to hear the matter, he or she must be satisfied that the accused and the complainant do not fall within the ambit of s70 (3) and if they do, that the Prosecutor General has authorised the charges.

[18] This brings me to the circumstances of the present case. As I have intimated earlier on in this judgment, the accused was born on 27 July 2006. The complaint was born on 19 May 2009. The offence was committed on 7 January 2025. At the time the offence was committed, the accused was a little over nineteen years and four months old. The complainant was 16

years seven months old. The age gap between the two was two years and ten months. By operation of the law, at the time the offence was committed, the provisions of s 70 (3) (b) were applicable. From a reading of the record and as correctly observed by the regional magistrate and conceded by the trial magistrate, these provisions were not taken into account in dealing with this matter.

[19] A trial magistrate is obligated to ensure strict observance of the requirements of the law. It is trite that this role assumes heightened importance where the accused person is unrepresented, bearing in mind that a trial magistrate is the primary bulwark in defending the ignorant or the impoverished against potential injustices. In *casu*, the trial magistrate must have been satisfied that the statutory dictates had been followed to the letter.

[20] In my judgment, with the promulgation of s70 (3) in its current state, it is no longer business as usual. While a member of the National Prosecuting Authority is competent to institute and conduct criminal proceedings on behalf of the State, some formal evidence of the Prosecutor General's authority to prosecute that particular matter is required so as to comply with the provisions of s70 of the Code. In my view, the exercise of prosecutorial powers by a prosecutor under s70 must be in sync with the provisions of s4 of the National Prosecuting Authority Act [*Chapter 7:20*] which provides that:-

> "(4) A member shall be competent to exercise any of the powers referred to in subsection (1), to the extent that he or she has been authorised thereto in writing by the Prosecutor-General, or by a person designated by the Prosecutor-General."

[21] Therefore, at the appearance of the accused before the trial magistrate, it is incumbent upon the prosecutor to produce conclusive proof that the Prosecutor General has authorised the charge as required by s70 (3) (b). The mere presence of the prosecutor in court is not evidence that the Prosecutor General has granted that authority. More is required. The prosecutor must place before the trial magistrate demonstrable evidence to show that the Prosecutor General is not only aware of the charges but also that she or he has authorised those charges.

[22] I take the view that for the magistrate to be satisfied that the peremptory motions laid under s70 (3) have been complied with, that authority must be in writing. In the absence of that evidence, the trial magistrate will not be able to tell whether or not the spirit and the letter of the law have been followed.

[23] It seems to me that s70 (3) is a special provision specifically reposing in the Prosecutor General the power to give the authority. It also seems to me that if the Prosecutor General

makes a decision to delegate the authority as she or he is empowered to do by s5 (2) of the Criminal Procedure & Evidence Act, that delegated authority should be very clear *ex facie* the record. A trial magistrate should therefore not accept the mere say so of the prosecutor that the Prosecutor General has authorised the charges.

[24] In *casu* and in the absence of such conclusive proof, I am of the view that the trial magistrate fell into error by proceeding to hear the matter. The failure by the trial magistrate to comply with the peremptory provisions of s70 (3) of the Code amounts to a gross misdirection. In fact, the proceedings are a nullity.

[25] Section 29(3) of the High Court Act provides that:

> (3) "No conviction or sentence shall be quashed or set aside in terms of subsection (2) by reason of any irregularity or defect in the record of proceedings unless the High Court or a judge thereof, as the case may be, considers that a substantial miscarriage of justice has actually occurred."

[26] I find that the proceedings in the court a *quo* were not in accordance with real and substantial justice. By failing to comply with the peremptory provisions of the law, I consider that a substantial miscarriage of justice has actually occurred. Consequently, the conviction cannot be confirmed and stands to be vacated.

[27] Unfortunately, I note from the record that at the time the record was submitted for review, the accused had already performed four of his five week community service sentence. The punishment that was visited on the accused cannot be reversed.

[28] I propose to dispose of this matter in two ways. The first is to quash the proceedings and set aside the sentence so that the accused is not saddled with a criminal record flowing from flawed proceedings. I however hasten to mention that it still remains within the discretion of the Prosecutor General to prefer charges against the accused after taking into account the process prescribed under s70 (3) of the Code.

[29] Should the Prosecutor General exercise her discretion and authorise the charges, in the event of a conviction, the sentence already served shall be considered as part of that sentence.

[30] The second is to prevent other similarly placed accused persons from suffering the same fate as the accused in *casu*.

Accordingly, I make the following order:-

1. The proceedings in this matter be and are hereby quashed and set aside;

2. The conviction and sentence imposed on the accused be and are hereby also quashed;
3. The Prosecutor General is at liberty to reinstate the prosecution if she deems it fit;
4. The Registrar is directed to bring this review judgment to the attention of both the Chief Magistrate and the Prosecutor General for distribution to both magistrates and prosecutors throughout the country.

MUSHURE J:…….

MAWADZE DJP agrees ……..