

THE STATE
versus
P M (a juvenile)

HIGH COURT OF ZIMBABWE
MUZENDA & SIZIBA JJ
MUTARE, 15 MAY 2025

CRIMINAL REVIEW

SIZIBA J:

1. The position that no criminal offence is committed when two children aged above 12 years of age and less than 18 years of age engage in consensual sexual intercourse is no longer part of our law. The relevant penal provision being s 70 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] has been the subject of several amendments in the past few years. Apart from the original legislative intent of protecting minor children from sexual predators who are adults, there is now an additional thrust by the legislature in protecting minor children from their own counterparts who are much older than them such that depending on the age difference between the two minors, a criminal charge might be competent at law.

BACKGROUND OF THE MATTER AND ISSUE FOR DETERMINATION

2. The accused in this case was arraigned before the Magistrates Court in Chimanimani facing a charge of having sexual intercourse or performing indecent acts with children between the ages of 12 and 18 years contrary to s 70 (1) (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was convicted by the trial magistrate on his own plea of guilt on 14 April 2025. He was then sentenced to 10 months imprisonment which was wholly suspended for five years on condition that he does not within such period commit any offence involving unlawful sexual intercourse upon conviction which he is sentenced to imprisonment without the option of a fine.

3. The facts from the record show that the accused and the complainant or victim in this case were in a love relationship and that they engaged in sexual intercourse several times from September 2024 to 23 December 2024 by consent until the accused person was arrested in connection with this offence after the complainant was found to be pregnant. They both resided at Manase Village under Chief Ngorima in Chimanimani. The complainant is a girl who was aged 13 years at the time of the offence and she was by then doing grade 7 while the accused was a boy aged 17 years and doing form 4. Their age difference was recorded to be 4 years. A report by the Probation Officer recommended that the accused person should be prosecuted and be treated as an adult for purposes of sentence. There was also a consent to the prosecution by a representative of the Prosecutor General.
4. On the 16 April 2025, the learned Regional Magistrate in Chipinge directed a question to the learned trial magistrate as to whether any criminal offence had been committed by the accused person in light of the fact that both the accused and the complainant were minor children who were meant to be protected by the relevant law and who were both in need of similar protection from sexual exploitation. The trial magistrate stood his ground with due respect and submitted that in terms of the current s 70 of the Criminal Law (Codification and Reform) Act as read with ss 7 and 8 of the same Act, the charge and the conviction of the accused was proper at law since the age difference between the accused and the complainant was a period of four years and also given the fact that both the Probation Officer and the Prosecutor General had supported the prosecution of the accused person. The learned trial magistrate's submissions are contained in his letter dated 17 April 2025 which was addressed to the learned Regional Magistrate. On 24 April 2024, the learned Regional Magistrate then referred the matter to this court for clarification of the legal position on this aspect of the law and accordingly, the sole issue for determination by this court is whether the conviction of the accused person was proper at law or not.

THE LAW AND ITS APPLICATION TO THE PRESENT CASE

5. The position that two children aged above 12 and less than 18 years who engage in consensual sexual intercourse cannot be charged of any criminal offence since the legislature intends to punish only adult sexual predators who exploit minor children was previously part of our law. See *The State v CF* (a juvenile) HH 143/11.
6. The current s 70 (1) to (5) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] reads as follows:

“(1) Subject to this section, any person who—

(a) commits upon a child any act involving physical contact that would be regarded by a reasonable person to be an indecent act; or

(b) solicits or entices a child to have sexual intercourse with him or her or to commit any act with him or her involving physical contact that would be regarded by a reasonable person to be an indecent act;
shall be guilty of sexual intercourse or performing an indecent act with a child, as the case may be, and liable to a fine not exceeding level 12 or imprisonment for a period not exceeding ten years or both.

(2) It shall be no defence to a charge of sexual intercourse or performing an indecent act with a child to prove that he or she consented to such sexual intercourse or indecent act.

(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.

(4) The requirements of subsection (3) shall be additional to the requirements of any other law relating to the prosecution and charging of children.

(5) It shall be a defence to a charge under subsection (1) for the accused person to satisfy the court that he or she had reasonable cause to believe that the putative

child concerned was of or over the age of eighteen years at the time of the alleged crime.”

Provided that such a defence may be refuted by the prosecutor adducing evidence to the effect that the accused person knew or had reasonable cause to believe that the child concerned was under the age of eighteen years at the time of the alleged crime”. (Emphasis added)

7. The above provisions of the law are explicit in their literal construction. Subsection (3) above has the effect of allowing the prosecution of sexual predators who are minors without any further qualification or requirement if the age difference is more than three years as long as the accused person has criminal capacity in terms of ss 6 to 8 of the Criminal Law (Codification and Reform) Act and as long as all other provisions relating to the prosecution of minor children are observed. For such offenders, there would be no need of the consent by the Prosecutor General. A Probation Officer’s report would suffice and proper representation of the minor child by his or her guardian.
8. Sections 6 to 8 of the Criminal Law (Codification and Reform) Act provides as follows in relation to the criminal capacity of children:

“6 Children under seven years of age not criminally liable

A child below the age of seven years shall be deemed to lack criminal capacity and shall not be tried for or convicted of any crime which he or she is alleged to have committed before attaining that age.

7 Criminal capacity of children between seven and fourteen years of age

A child who is of or over the age of seven years but below the age of fourteen years at the time of the conduct constituting any crime which he or she is alleged to have committed shall be presumed, unless the contrary is proved beyond a reasonable doubt—

- (a) to lack the capacity to form the intention necessary to commit the crime; or*
- (b) where negligence is an element of the crime concerned, to lack the capacity to behave in the way that a reasonable adult would have behaved in the circumstances.*

8 No presumption of criminal incapacity for persons over the age of fourteen years

For the avoidance of doubt it is declared that no person who is of or over the age of fourteen years shall be presumed to lack the capacity to form the necessary intention to commit any crime or, where negligence is an element of the crime

concerned, to behave in the way that a reasonable person would have behaved in the circumstances of the crime.”

9. In the case of those situations where the consensual sexual act involves children whose age difference is less than three years, a prosecution would only be competent with the consent of the Prosecutor General after considering a Probation Officer’s report where such children have criminal capacity to commit a crime at law.
10. In the result, the current position of the law is that consensual sexual intercourse by minors aged above 12 and below 18 years of age may result in a competent criminal charge at law if the age difference between the two is more than three years or if it is less than three years where the Prosecutor General consents to the prosecution. The intention of the legislature is now to protect minor children from sexual predators who are adults and also from other older minor children who may be inclined to exploit other children who are younger than them. This is still in tandem with the best interests of the children.
11. In view of the above considerations, I do not see any error by the trial magistrate in convicting the accused person in this case. The plea of guilt was properly confirmed. There was an age difference of four years between the accused and the complainant and the consent of the Prosecutor General was obtained even though it was superfluous. There was a report by the Probation Officer which recommended the prosecution of the accused. At the age of 17 years, the accused person had criminal capacity at law. I also do not see any error in the sentence that was imposed by the trial court. I therefore confirm both the conviction and the sentence as having been in accordance with real and substantial justice.

SIZIBA J

MUZENDA J Concurring