THE STATE

versus

JABULANI MOYO

HIGH COURT OF ZIMBABWE

MATHONSI J

HARARE, 25 July 2012

**Review Judgment**

MATHONSI J: The accused person was 21 years old when he was arraigned before a Regional Magistrate in Bulawayo charged with contravening s 66 (1)(a)(i) of Criminal Law (Codification & Reform) Act [*Cap* *9*:*23*]. He was convicted on 1 December 2011 and sentenced to ten years imprisonment of which two years was suspended for five years on condition of future good behaviour.

When the matter came before me for automatic review in terms of s 57 (1) of the Magistrates Court Act [*Cap 7*:*10*], I sought an explanation from the trial magistrate by letter dated 21 December 2011 which reads in relevant part as follows:

“The accused was convicted of contravening s 66 (1)(a)(i) of the Criminal Law Code [*Cap 9*:*23*]. The evidence led is to the effect that he kissed the seven year old complainant on the mouth. There is also some evidence that he kissed her on her private parts although the nature of the kiss was not clarified.

Be that as it may, he was sentenced to ten years imprisonment of which two years was suspended on condition of good behaviour. The offence created by the relevant section is penetration of any part of a female’s body by a male person. The evidence does not show which part of the complainant’s body was penetrated and by what part of the accused person’s body. In fact that part of the case was not canvassed at all.

May the learned Regional Magistrate comment on the issues I raised above and also on whether the evidence did not disclose indecent assault which would have been a permissible verdict in terms of s 275 as read with the fourth schedule to the Criminal Law Code, in which case the accused would have been sentenced as provided for in s 67 of the Code.”

Although the trial magistrate had been transferred to Harare at the time the record was forwarded to her by the clerk of court by cover of letter dated 23 January 2012, she promptly responded, which is commendable indeed. Her response is dated 31 January 2012 and was received back at the High Court in Bulawayo on 6 February 2012. It would appear that the Assistant Registrar’s office in Bulawayo decided to “appropriate” the review record because it has only forwarded it to me now. I received it on 16 July 2012.

This court has repeatedly decried the need for both the Registrar and the Clerk of Court to adhere to the provisions of the law requiring review records to be placed before the reviewing judge with a dash of speed. *S* v *Mhondiwa* HB 193/11 at pp 4-5; *S* v *Shava* HB 200/11 at p 2.

No explanation has been given by the Assistant Registrar’s office for sitting on the record for over five months. It is imperative for court officials to act with speed in transmitting records for review in order for the review mechanism provided for by law to be effective as it provides the much needed checks and balances which ensure that any mistakes are corrected promptly without avoidable prejudice on accused persons. Right now the inattention of officers at the Bulawayo Registry has caused an inordinate delay in the conclusion of the review process while the accused person is languishing in prison.

Turning to the issue at hand, the trial magistrate’s response to the queries that I raised reads in relevant part thus:

“On the issues raised, the trial court went through the Honourable Justice’s comments and where the Honourable Judge marked with his pen on the record of proceedings. It is indeed true that the nature of the kiss was not canvassed to determine penetration by the tongue on the child’s private parts.

The trial Court had simply considered that the accused got on top of the child and kissed her private parts and her lips. The trial Court had considered that to be more than just an indecent act.

It was after going through the Honourable Justice’s comments that the trial magistrate realised the need to have canvassed or clarified the issue of the kiss. This was going to help consider the issue of penetration as envisaged by the Act.

The trial Court will want to thank the Honourable Justice for the comment and also to say she stands guided by the Honourable Justice.”

The explanation given by the trial magistrate clearly shows that she did not apply her mind to the offence the State was required to prove before the accused could be convicted. The charge preferred against the accused was that, on an unknown date during the month of December 2010, he unlawfully and with indecent intent kissed the complainant’s vagina realising the risk or possibility that she had not consented.

The evidence accepted by the trial court as credible, and upon which it convicted the accused, was to the effect that the complainant’s ten year old brother had found the accused person kissing the seven year old complainant on the mouth as he lay on top of her. This was the evidence of the brother which differed significantly from that of the complainant who was found to be “a very clever child who gave her evidence in English and could clearly express herself.”

The complainant testified that the accused had also kissed her on her private parts as the two lay on the floor side by side. The trial court accepted the evidence of the mother that the complainant’s grandmothers had inserted their fingers in her vagina as they examined her after the offence was discovered and that this interference explained why, upon being examined by the doctor, the complainant’s hymen was found to have been “defective”.

Section 66 (1)(a)(i) of the Criminal Law Code provides:

“Any person who being a male person commits upon a female person any act, other than sexual intercourse or anal sexual intercourse, involving the penetration of any part of the female person’s body or of his own body with indecent intent and knowing that the other person has not consented to it or realising that there is a real risk or possibility that the other person may not have consented to it, shall be guilty of aggravated indecent assault and liable to the same penalty as is provided for rape.”

The offence created by this section therefore arises from the penetration of the female body. Penetration is an essential element of the offence. The evidence led was that the accused person kissed the complainant on the mouth and the private parts. The trial magistrate has admitted that she did not canvass the issue of penetration at all. To her mind, it was sufficient that the accused “got on top of the child and kissed her.”

In my view, this betrays a closed mind and is the result of an extremely faulty thought process. Clearly there was no evidence of penetration. If the court had entertained the thought that the accused could have penetrated the complainant by kissing her, it then became necessary to investigate that possibility and enquire further into the nature of the kiss. That was not done.

The State did not prove the offence provided for in s 66 (1)(a)(i) of the Code. I am however satisfied that the evidence before the trial court established indecent assault. Mercifully, in terms of s 275 as read with the fourth schedule to the Criminal Law Code, indecent assault is a permissible verdict to a charge of contravening s 66 of the Code.

I therefore propose to proceed in terms of s 29 (2)(b) of the High Court Act [*Cap 7*:*06*] which provides:

“If on a review of any criminal proceedings of the inferior court or tribunal, the High Court considers that the proceedings are not in accordance with real and substantial justice, it may, subject to this section-

1. alter or quash the conviction; or
2. reduce or set aside the sentence or any other order of the inferior court or tribunal or substitute a different sentence from that imposed by the inferior court or tribunal.”

The accused person should have been convicted of indecent assault in violation of s 67 (1)(a)(i) of the Criminal Law Code and sentenced in terms of that section. That section reads:

“A person who being a male person commits upon a female person any act involving physical contact that would be regarded by a reasonable person to be an indecent act, other than sexual intercourse or other act involving the penetration of any part of the female person’s body or of his own body with indecent intent and knowing that the other person has not consented to it or realising that there is a real risk or possibility that the other person may not have consented to it, shall be guilty of indecent assault and liable to a fine not exceeding level seven or imprisonment for a period not exceeding two years or both.”

The accused person is an unmarried young first offender who has the responsibility of looking after his siblings as both his parents are now deceased. He showed contrition. Even taking into account all the factors set out in subs (2) of s 65 of the Code, a prison term of twelve months with half of it suspended would have met the justice of the case. He has been in custody since 1 December 2011, a period of more than seven months. I take the view that what he has already served is enough. He should be released forthwith.

In the result, I make the following order; that

1. The conviction of the accused person is altered to that of indecent assault in contravention of s 67 (1)(a)(i) of the Criminal Law (Codification & Reform) Act [*Cap 9*:*23*].
2. The sentence of ten years imprisonment with two years suspended on conditions is set aside in its entirety and in its place is substituted the sentence of twelve months imprisonment of which five months imprisonment is suspended for three years on condition the accused does not, during that period, commit an offence of a sexual nature for which, upon conviction, he is sentenced to a term of imprisonment without the option of a fine.
3. As the accused person has already served the effective sentence of seven months he is entitled to his immediate release.

MUTEMA J: agrees.