THE STATE
and
BERNICE CHITSEDZA

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 20 June 2024

Criminal Review

MUTEVEDZI J: In May 2022, in the case of *Diana Eunice Kawenda* v *Minister of Justice, Legal and Parliamentary Affairs and Others* CCZ 3/22, the Constitutional Court determined that sections 70, 76, 83 and 86 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Code) were unconstitutional. It accordingly proceeded to set the sections aside. The orders of constitutional invalidity were however suspended for twelve months from the date of the order in a bid to afford the Minister of Justice and other concerned institutions to enact a law for the protection of all children from sexual exploitation in accordance with the provisions of s 81 (1)(e) of the Constitution of Zimbabwe.

[1] The moratorium expired on 24 May 2023. Up to that date, no such law as envisaged by the order of the Constitutional Court had been enacted. It created a legal vacuum which exposed children to the depredations of perverts who could prey on them and hide behind the lacuna. Fortunately, at the beginning of 2024, the President of the Republic of Zimbabwe, resorted to the powers vested in him by the Presidential (Temporary Measures) Act [*Chapter 10:20*]. He enacted the Presidential Powers (Temporary Measures) (Criminal Laws) (Protection of children and Young Persons) Regulations, 2024 through statutory instrument 2 of 2024 (hereinafter the Regulations).

[2] Section 3 of the Regulations repealed the definition in s 61 of the Code which described a young person as a boy or girl under the age of sixteen years. It substituted it with a new definition which redefined a young person as a boy or girl under the age of eighteen years. In addition, section 4 of the Regulations substituted a new section for s 70 of the Code. Effectively, the new provisions bridged the gap which had been created by the

declaration of constitutional invalidity of the provisions of the Code already cited above.

[3] In an unexpected turn of events, the Regulations instead of smoothening the prosecution of offenders for having sexual intercourse and or performing other proscribed acts with young persons appear to have created a new challenge for both prosecutors and magistrates on how such charges must be framed. Below, I will demonstrate that the challenge is an unnecessary mortification which the court officials bring upon themselves.

[4] In this case, the accused person Bernice Chitsidza was arraigned before the court of a provincial magistrate at Guruve on 10 May 2024. He was alleged to have engaged in sexual intercourse with a juvenile aged fifteen years.

[5] The charge which he faced in court was couched as follows:

> **"Bernice Chitsedza Hereinafter called the accused person charged with the crime of Contravening s 4(1) of the Statutory Instrument 2 of 2024 of the Presidential Powers (Temporary Measures) (Criminal Laws) (Protection of children and Young Persons) Regulations, 2024**
> In that on a date to the prosecutor unknown but during the period from the month of December 2023 to the 3rd of March 2024 and at Zvivindi B Village, Chief Chipuriro Guruve, Bernice Chitsedza a male adult unlawfully and intentionally had extra marital sexual intercourse with Mimi Chindori, a female juvenile aged 15 years"

The accused pleaded guilty to the charge and was duly convicted. He was sentenced to 18 months imprisonment of which 6 months imprisonment was suspended on the usual condition of future good behaviour. The remaining 12 months were also suspended on condition of his performance of 420 hours of community service.

[6] When the record of the above proceedings was placed before me for review, it occurred to me that the conviction could not have been entirely correct for one stand out reason. It is the citation of the charge. Where there is an amendment to a principal Act, what is charged is not the amendment but the amended Act itself.

[7] In legal parlance, an amendment refers to a formal or official change or alteration to the existing law. The purpose of most amendments to Acts of Parliament is to improve that law. It is done when it is considered better or convenient to do so than to write a new Act. The change is achieved by adding to, subtracting from, or wholly substituting some provisions. [1] The amending regulation or provision does not therefore create law. It

[1] https://www.law.cornell.edu/wex/amend; accessed on 18 June 2024

simply adds to, subtracts from or substitutes the existing law. Once that happens, its purpose is over and must sink into oblivion. The only reference to the amending provision that is often found in the amended Act is some kind of a footnote that advises users that the provision was inserted by that amendment. In summary therefore and as EBRAHIM J (as he then was) held in the case of *S v Mbewe and Ors* 1988(1) ZLR 7(HC) where a charge alleges a contravention of a statutory provision which has been amended, it should allege a contravention of the principal Act rather than a contravention of the amending Act or Regulations. Put bluntly, it is unnecessary to refer in the charge to the amending Act or Regulations.

[8] If the above is read properly, the charge in this case should have simply been couched as follows:

> "Bernice Chitsedza Hereinafter called the accused person charged with the crime of Contravening of contravening s 70 (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (Having sexual Intercourse with a young person)
> In that on a date to the prosecutor unknown but during the period from the month of December 2023 to the 3rd of March 2024 and at Zvivindi B Village, Chief Chipuriro Guruve, Bernice Chitsedza a male adult unlawfully and intentionally had extra marital sexual intercourse with Mimi Chindori, a female juvenile aged 15 years"

[9] In addition to the above indiscretions, I also note from the allegation in the charge, that the dates when the accused is alleged to have had sexual intercourse with the juvenile stretch from December 2023 to 3 March 2024. SI 2 of 2024 became effective on 12 January 2024. The danger in the above particulars is therefore that if sexual intercourse occurred between 1 December 2023 and 11 January 2024, it would have happened during the period when having sexual intercourse with young persons had inadvertently been decriminalised by Parliament's failure to abide by the conditions of the suspension of the orders of constitutional invalidity of the Constitutional Court. Judicial officers must always be alive to such overlaps.

[10] My apprehension regarding those dates was however somewhat assuaged by the facts that appear in the outline of the state's case which the accused admitted were correct. Besides the generalised allegations, it stated that the accused was caught in *flagranto delicto* having sexual intercourse with the complainant on 3 March 2024 that is well after the effective date of the amendment. The accused was charged with a single count of contravening s 70(a) of the Code. The encounter on 3 March 2024 alone would have

sufficed. There was therefore no prejudice at all to him in relation to the acts that could have happened prior to the 12th January 2024.

[11] What is important to mention however is that describing the offence as having been committed on a day/date which is unknown but between two stated dates is a tool only to be resorted to where no particular date or day is known. In circumstances such as the present case, where the date is known it is important to identify the date of the offence as accurately as possible.

[12] Further I am also positive that the amendments which I suggested should have been made to the charge occasion no prejudice at all to the accused person. The facts which the accused admitted to show that he had sexual intercourse with a girl aged 15 years. She is a young person as defined in s 61 of the Code. Sexual intercourse took place over a number of unidentified dates but more importantly on 3 March 2024. He offered no defence and admitted all the essential elements as they would have been put to him if the charge had been correctly cited as contravening s 70 (a) of the Code and not a contravention of the Regulations which amended that section. It cannot be imagined that the accused did not know what he was pleading guilty to.

[13] This court is permitted by law particularly s 29 (2)(iii) of the High Court Act [*Chapter 7:06*] to set aside or correct the proceedings of the inferior court or tribunal or any part thereof. As such I elect to exercise that power to correct the charge with which the accused was convicted to reflect what I have already discussed above.

[14] All said and done, I have no gripe with both the conviction and the sentence imposed. This judgment is intended for the guidance of both prosecutors and judicial officers in the preference of charges in instances where provisions of an Act would have been amended. As such I confirm the proceedings as having been in accordance with real and substantial justice.

MUTEVEDZI J:…….