**COURT WATCH 3/2022**

**[31st May 2022]**

**Constitutional Court Rules on Age of Consent**

On the 24th May the Constitutional Court declared that provisions of the Criminal Law Code governing the age at which children can consent to sexual intercourse were unconstitutional.  The court was delivering its judgment in the case of *Kawenda v Minister of Justice, Legal and Parliamentary Affairs & Others*.  The case was brought by Veritas and the appellant was represented by Mr Tendai Biti.  The judgment can be accessed on the Veritas website *[*[*link*](http://www.veritaszim.net/node/5680)*]*.

**Background to the Case**

**The law**

Part III of Chapter V of the Criminal Law Code creates several crimes which involve sexual activities with young persons (defined in the Code as boys and girls under the age of 16 years):

**Section 70** makes it a crime for anyone, whatever their age, to have extra-marital sexual intercourse in Zimbabwe with a young person or to commit indecent acts with a young person.

**Section 71** makes the crime extra-territorial, declaring it to be a crime for a citizen or resident of Zimbabwe, whatever their age, to have extra-marital sexual intercourse or to commit indecent acts with a young person outside Zimbabwe.

Under **Section 76** it is a crime for persons in control of premises to permit anyone to have extra-marital sexual intercourse or to commit indecent acts with a young person in those premises.

**Section 83,** which makes it a crime to procure anyone for the purpose of unlawful sexual activities, prescribes a higher sentence if the person procured is a young person.

**Section 86** makes it a crime for the owner of a place to induce or allow young persons to be in the place for the purpose of engaging in unlawful sexual activities.

All these sections protect children under the age of 16 but they do nothing for youngsters between the ages of 16 and 18.  Those youngsters are treated as adults by the Code whereas, according to section 81(1) of the Constitution, they are children with the right to be protected from sexual exploitation.

**The case**

Veritas sponsored two applicants, Ms Kawenda and Ms Mudzuru, to approach the High Court in the public interest for an order declaring the above sections to be unconstitutional because they do not protect children between the ages of 16 and 18.  The High Court (Mr Justice Tagu) dismissed the application in January last year on the grounds that:

teenagers naturally engage in sexual activity;  the law cannot stop them from doing so and they should not be punished for it criminally, and

many other statutes distinguish between children under the age of 16 and young persons between the ages of 16 and 18;  all these statutes should be amended rather than just the sections of the Criminal Law Code.

Hence he declined to declare the sections to be unconstitutional.  Understandably dissatisfied with this judgment *[*[*link*](http://www.veritaszim.net/node/5685)*]*, Ms Kawenda and her sponsors appealed to the Constitutional Court.

**The Constitutional Court Judgment**

The judgment of the Constitutional Court was delivered by Makarau JCC.  She held that:

The simple issue before the Court was whether the sections of the Criminal Law Code which we outlined above violated the Constitution.  Resolving this issue entailed:

* + interpreting the relevant provisions of the Constitution,
  + assessing whether the sections of the Criminal Law Code were consistent with those provisions, and
  + if the sections were found to be inconsistent with the Constitution, deciding whether the inconsistency was permissible under section 86(2) of the Constitution, which allows a law to limit constitutional rights so long as the limitation is fair, reasonable, necessary and justifiable in a democratic society.

Section 81(1) of the Constitution defines a child as a boy or girl under the age of 18 years;  that is unambiguous and settles the definition of a child for any other law, practice or custom in Zimbabwe.  Any law, practice or custom that defines “child” differently is inconsistent with the Constitution.

The same section of the Constitution (section 81(1)) declares that all children – all persons under the age of 18 - have the right to be protected against sexual exploitation, i.e. having advantage being taken of their consent to sexual conduct.

The conduct prohibited by the sections of the Criminal Law Code outlined above are examples of conduct that amounts to sexual exploitation of children and from which children should be protected.  There are no other statutory provisions that afford children this protection.

The sections protect some children, but not all, from sexual exploitation.  The children who have been left out are not afforded any protection from being sexually exploited.  Hence the sections are inconsistent with the Constitution and infringe the rights of the children who have been left out of the protective ambit of the law.

Furthermore, by prohibiting only extra-marital sex, and implicitly allowing marital sex with children, the sections also fail to protect children in child marriages, whatever their age.

All children must be protected from sexual exploitation, even though the levels of protection may decrease with age to recognise the growing maturity of the child.  The sections of the Code do not offer any protection whatever to children between 16 and 18, even in an attenuated form.

The failure to protect children between 16 and 18 cannot be justified under section 86(2) of the Constitution.  Where the infringement of a fundamental right is a complete negation of the right, as in this case, there hardly exists any scope for arguing that the complete negation of the right is a justifiable limitation under section 86(2).

While raising the age of consent will have a legal impact on sexual relations between children, that cannot derogate from the need to protect all children from sexual exploitation in obedience to section 81 of the Constitution.

Health care providers must be empowered by the law to provide sexual and reproductive health services to children in need of such services without regarding the children as too young to need them.  Whilst it is highly desirable for children to stay away from sex until they are adults, in practice they often don’t do so, and children who have sexual relations have a right to health care services despite their youthfulness.

**The Court’s order**

As a result, the Court declared sections 70, 76, 83 and 86 of the Criminal Law Code to be unconstitutional and ordered them set aside.  The Court however suspended its order to give the Government time to enact a law that protects all children from sexual exploitation.  It did not however suspend its order in relation to the provisions in the sections that permit marital sex, i.e. sexual relations with children in child marriages.  Those provisions, the court held, were unconscionable and had to be struck down immediately.

**Effect of the Court’s order**

It is not quite true to say that the Court has raised the age of consent to 18.  Apart from the fact that the Court’s order will not take effect for another 12 months, the Court did not say that children between the ages of 16 and 18 may never consent to sexual intercourse.  The effect of the Court’s judgment is that such children may be allowed to give consent so long as the circumstances do not amount to sexual exploitation.

Another important result of the judgment is to criminalise, immediately, sexual intercourse between spouses in child marriages.  The Marriages Act is not yet in force so child marriages have not been outlawed.  On the other hand, the effect of the judgment is that if the husband of a girl under the age of 18 has sexual intercourse with her, he will commit the crime of having sexual intercourse with a young person in contravention of section 70 of the Criminal Law Code.  That is the law now, so the Court has effectively abolished child marriages.

**Conclusion**

The judgment is a progressive and far-reaching one which shows concern for the welfare of children and young persons and offers clear guidance on the direction that reform of the law should take.

In due course Veritas will produce a model draft Bill giving effect to the judgment.

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