FOSTER KASEKE
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA& MANGOTA JJ
HARARE, 9 February, and 12 May, 2015

**Criminal Appeal**

*SM Chikotora,* for the appellant
*R Chikosha,* for the State

MANGOTA J: The appellant was charged with rape as defined in s 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The state allegations were that, on 2 August 2013 and at Matienga Village, Mhondoro, the appellant did have sexual intercourse with one Susan Mutandwa without her consent.

The appellant pleaded not guilty to the charge. He was, however, convicted of having had sexual intercourse with a young person in contravention of s 70 of the Criminal Law (Codification and Reform) Act. He tested HIV positive. He was, therefore, sentenced to a mandatory minimum sentence of 10 years imprisonment. The court *a quo* imposed the sentence in terms of s 80 (1) of the Criminal Code.

The appellant appealed against conviction and sentence. He stated, in his grounds of appeal, that:-

(a) the state did not prove his guilt beyond reasonable doubt;
(b) he had reasonable cause to believe that the complainant was 16 years old or more when he had sexual intercourse with her – and
(c) the trial court erred in sentencing him to a mandatory sentence of 10 years imprisonment.

The respondent's position was that the appellant was properly convicted and

sentenced. Mr *Chikosha* stated that the appellant did not discharge the onus which rested upon him. He said he did not show that he had reasonable cause to believe that the complainant was 16 years old or more when he had carnal knowledge of her. He maintained the view that the sentence which was imposed was *in sinc* with the offence and the appellant's circumstances.

The appellant's appeal hinged on s 70 (3) of the Criminal Law (Codification and Reform) Act. Subsection (3) of the section offers a full defence to the appellant. It reads:-

> "(3) 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 young person concerned was of or over the age of sixteen at the time of the alleged crime. Provided that the apparent physical maturity of the young person shall not, on its own, constitute reasonable cause for purpose of this subsection."

Neither the criminal code nor the section defines the words reasonable cause. Reasonable cause, in the circumstances of the present case, would refer to the physical maturity of the complainant as read together with other matters which must have created in the mind of the appellant the impression that the complainant was sixteen years old or more when he had sexual intercourse with her.

The appellant stated from the outset that he believed the complainant to have been over sixteen years of age at the time that he carnally knew her. He made reference to a number of factors which he said confirmed his belief. Amongst the factors which he mentioned were the complainant's behaviour and the manner in which she interacted with him during their affair, her posture, her pride and her unusually forward character. He stated that all such factors led him to believe that she could not have been below sixteen years old. It was his testimony that his younger brother, Kudakwashe, who was a classmate of the complainant was 16 or 17 years old. He said he believed that the complainant was older than Kudakwashe.

Tineyi Chikanga, whom the appellant called as a witness, corroborated the view which the appellant said he held about the complainant's apparent age. He operated a barber's shop behind the shop of the complainant's parents. He was the one whom the complainant allegedly sent to call the appellant to her parents' shop on the morning of 2 August, 2013.

The trial court rejected the appellant's defence. Its reasons remained unclear. However, what is clear is that the state led no evidence which tended to show that the

appellant's defence was unreasonable. Its effort was centred on trying to establish that the appellant raped the complainant. It was for the mentioned reason that the appellant insisted and properly so, that the state did not establish his guilt beyond reasonable doubt.

The trial magistrate, in the court's view, misdirected himself when he convicted the appellant without any evidence which supported his guilt. His version of the events was more probable than that of the complainant. The defence which he raised remained available to him.

The trial court criticised the state at some point in its judgment. It did so after it had made findings of fact to the effect that the complainant had lied before it and her evidence was therefore, unbelievable. It said:-

> "The state grudgingly conceded that the complainant was not a credible witness. They said *(sic)* the court should sift between those portions of her account that read badly and jettison them and accept the areas which they *(sic)* believe the court should regard as credible and use them against the accused person. They *(sic),* however, did not supply the formula which this court must rely upon in determining which areas the court has to accept. I don't think they are saying wherever she was implicating the accused person should be the area on which she was being truthful that would be improper."

The trial court mentioned in the judgment a number of areas which showed that the complainant had lied. It is difficult to appreciate what persuaded it to believe that the complainant who was prepared to lie before it was not a cunning person who was not capable of misleading the appellant about her apparent age. The facts speak for themselves.

The appellant maintained a consistent story throughout his trial. There is no doubt that he had reasonable cause to believe that the complainant was at least sixteen years old when he had sexual intercourse with her. He did not have to prove his innocence beyond reasonable doubt. He had to sustain his defence on a balance of probabilities and he did just that to our satisfaction.

The appellant's last ground of appeal related to the sentence which the court *a quo* imposed. The sentence followed his conviction. With his acquittal, the sentence falls away altogether.

The court has considered all the circumstances of this case. It is satisfied that the appellant was erroneously convicted and sentenced. His appeal succeeds *in toto*. It is, in the result, ordered as follows:-

(1) That the appeal be and is hereby upheld.

(2) That the conviction of the appellant be and is hereby quashed and the sentence

set aside.

(3) That the appellant be and is hereby found not guilty and is acquitted of the charge.

CHATUKUTAJ agrees:…….

*Rubaya & Chatambudza*, appellant's legal practitioners
*Prosecutor General.,* state's legal representatives