STATE
versus
PEPUKAI RANGA

HIGH COURT OF ZIMBABWE
HUNGWE J
MASVINGO, 5 & 14 June 2012

Assessors: 1. Mr Mutombe
2. Mr Mushuku

Criminal Trial

E, Chavarika, for the State
C. Maboke, for the accused

HUNGWE J: The accused faces a charge of murder as defined in s 47(1) of the Criminal Law [Codification and Reform] Act, [*Chapter 9: 23*], ("the Code"). He denied any intention to kill and tendered a plea to a lesser charge of culpable homicide as defined in s 49 of the Code. The State rejected this and persisted with main charge of murder. The defence proffered by the accused is that he intended to discipline the deceased over her misdemeanour and not to kill. A plea of not guilty was therefore entered on behalf of the accused.

BACKGROUND

He was 13 years, at the time the allegations he faces arose. He was staying with both his parents in the Sojani 2 Village, Soti Source farming area of Gutu district in Masvingo Province. The deceased Catherine Ranga was 3 years old. She stayed with her grandmother, Nyengeterai Ranga, together with her elder siblings Creto Ranga aged 6 and Tinotenda Ranga aged 7, in the same village. The accused regarded the deceased as his niece.

The Evidence

The following facts were common cause or not in serious dispute. On 12 December 2009 around mid-day the accused, asked Tinotenda Ranga (7) and Creto Ranga (6) and the deceased to give him company as he went about herding cattle. The young children obliged

their uncle's request. By mid-day they were driving their cattle into the grazing area. As they went about this mundane activity in any rural setting, the deceased asked the accused why he had stolen their grandmother's bottle of cooking oil. The accused was deeply incensed by this accusation. He took a switch and used it to assault the deceased several times all over her body with it. When it broke he got another and that got broken too. The third switch was bedecked with thorns. He first dragged her away to a spot where he struck her around the neck area using the thorny switch. He also kicked her all over her body when she fell down. At one point he climbed up a nearby rock and used his elevated position to deliver kicks to deceased's head. She fell down. She began to bleed from her mouth and nose. When she got up he picked a hard-shelled wild fruit which he propelled towards the deceased. It found its mark on her head just above the right ear. She again fell down and lost consciousness. She soiled herself in the process. The accused then dragged her to a spot under a tree. The accused left the deceased under the tree.

The accused threatened the other two children, Tinotenda and Creto, with death should they reveal this incident to anyone. At the end of the day, the accused went to his residence so did the other two children. No-one reported the incident to their guardians or parents. When the deceased did not pitch up at home, her grandmother and guardian, Nyengeterai Ranga, believed that the deceased had gone home with the accused as was her custom. The following morning, she decided to go and fetch her for breakfast. Upon making enquiries with the deceased's father, she was surprised that the deceased had not slept over at the accused's father overnight. The whole village was alerted on the missing child. A search of the grazing lands led to the recovery of the remains of the deceased under a tree where she had been left. When the other children were questioned further how it was that Catherine had died and they had not reported the event, Tinotenda disclosed how Catherine had met her death at accused's hands. She explained that she and Creto had both been threatened by the accused not to report him. A report was thereafter made to police and the accused was arrested and charged with murder as defined in s 47 (1) of the Code.

Tinotenda Ranga gave evidence in court. Her evidence generally confirms the events summarised above. She was seven years old then. Not surprisingly, her power of recollection was not endowed with great detail. She attributed the lack of detail in her evidence to forgetfulness. Mr *Maboke*, for the accused, did not challenge the evidence of the following State witnesses; Nyegeterai Ranga and Phillimon Ranga, being family to the accused and the deceased; Pedzisai Mucheka, Anywhere Mangwiro and Bonface Mabeza all three being

members of ZRP Gutu. The state also relied on the post-mortem report compiled by Dr Zimbwa, a general medical practitioner. Their evidence was summarised in the State Summary of Evidence. The State relied on s 314 (1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] to get the evidence by these witnesses admitted on the record on the basis that it was not challenged. It was admitted as it appeared in the summary in terms of s 314 (1) of the Criminal Procedure and Evidence Act. Further evidence placed before this court and considered by the court consisted of the accused's warned and cautioned statement.

The Act retained the common law rebuttable presumption of doli incapax pertaining to criminal capacity and only amended the presumption by raising the lower age of the presumption from 7 to 10 years. Therefore, in terms of s 7(2) of the Act a child, 10 years or older but under the age of 14 years is presumed to lack criminal capacity, unless the Prosecution proves, beyond reasonable doubt, that the child had the capacity to:

- appreciate the difference between right and wrong at the time of the commission of an alleged offence; and
- act in accordance with that appreciation. From the provisions in the Act governing the establishment of the criminal capacity of a child, it is clear that it is the intention of the legislature to ensure that the criminal capacity of the child (10 years or older but under the age of 14 years) is considered at the earliest possible point (within 48 hours where the child has been arrested) in the child justice process and thereby ensuring that the child is afforded the protection that the rebuttable presumption clearly offers children between the applicable ages. To achieve this, the Act provides that every child who is alleged to have committed an offence must be assessed by a probation officer unless assessment has been dispensed with by the prosecutor, and the reasons for such dispensing have been recorded by the inquiry magistrate. One of the purposes of the assessment, in the case of a child who is 10 years or older but under the age of 14 years, is to express a view on whether expert evidence on the criminal capacity of such a child would be required.

Mshengu v *S* 2009 (2) SACR 316 a 13-year-old child, who had legal representation, pleaded guilty on a charge of murder and handed in a statement in terms of s 112(2) of the Criminal Procedure Act, 1977, of South Africa, setting out the basis of his plea. He was convicted on his guilty plea and sentenced to 8 years imprisonment. The South African Supreme Court of Appeal set aside the conviction and sentence because the presumption that

the accused lacked criminal capacity at the time of the commission of the offence has not been rebutted by the State.

Upon a consideration of all this evidence the primary function of this court was to determine whether, in light of all the evidence, the guilt of an accused person has been proved beyond a reasonable doubt. The first hurdle which the State had to overcome was to show positively that the accused, who was aged 12 years at the time, understood the wrongfulness of his conduct. There were multiple bruises all over the deceased's body. In particular there was a wound on her head near the left ear. The post mortem report compiled by Doctor Zimbwa was most unhelpful. Why a proper autopsy was not carried out was not explained when the body was available barely two days after the death. Generally, an external post-mortem examination report is less helpful than a proper internal pathological diagnosis. I shall return to this later.

There is currently a practice in this circuit of relying on the external visual examination by a general medical officer of health. The evidentiary value of such a perfunctory visual examination of a corpse is doubtful. In my respectful view, effort must be made to secure the services of a properly qualified pathologist who is able to give appropriate expert evidence regarding the cause of death. Most of the cases dealt with in this circuit criminal liability for death resulting from assault are based on admitted violence on the deceased. I shudder to think whether the ends of justice are served by convicting accused persons on the basis of uninformed admissions regarding the cause of death. Better medical evidence providing irrefutable link between the actions of the accused and the death of the deceased can be secured from scientifically based examinations rather than perfunctory visual observations by a general medical practitioner. Proper laboratory procedures involving toxicology, photography, X-ray and microscopic examination of the body of evidence is required to provide the necessary evidence. With the current state of information technology this should not present an insurmountable hurdle in police investigations.

In *S* v *F (a juvenile)* 1988 (1) ZLR 327 (HC) GREENLAND J said:

> "Furthermore, a reading of the probation officer's report admits of the clear implication that the accused was incapable of appreciating the wrongfulness of his alleged action, ie that he was *doli incapax.* That is the overall impression given. It is common knowledge that young children necessarily internalise perceived behaviour of those around them and then will often proceed to experiment themselves without being conscious of the wrongfulness of such behaviour. In thus mimicking behaviour they are not acting criminally. The law recognises this. Hence its insistence that, in regard to young offenders, the element of knowledge of wrongfulness be proved. At the very least this aspect required investigation before prosecution was resorted to." (@p330)

The State is required, when it tries a person for allegedly committing an offence, to prove the guilt of the accused beyond a reasonable doubt. This high standard of proof – universally required in civilized systems of criminal justice – is a core component of the fundamental right that every person enjoys under the Constitution, and under the common law, to a fair trial. It is not part of a charter for criminals and neither is it a mere technicality. When a court finds that the guilt of an accused has not been proved beyond reasonable doubt, that accused is entitled to an acquittal, even if there may be suspicions that he or she was, indeed, the perpetrator of the crime in question. That is an inevitable consequence of living in a society in which the freedom and the dignity of the individual are properly protected and are respected.

The question of criminal capacity was not investigated upon the accused's arrest neither was it properly investigated, considered or decided during the subsequent trial before us. The prosecutor examined the accused as a preliminary to the issue of capacity. If this was intended to demonstrate or prove that the accused had the criminal capacity to commit the crime charged, then, in my view, it fell far too short to meet the requirements of the law. This court on reflection ordered that a report be complied by either a clinical or an educational psychologist in order to assist the court in arriving at a decision on the question whether the child had the capacity required to appreciate the wrongfulness of his conduct. In making the order the court was acutely aware of the fact that ideally, such an investigation ought to have been ordered immediately after the accused was arrested so as to bring the relevance of the findings to the facts and circumstances of the case. It is trite that a child between the ages of seven and fourteen years is legally presumed to be *doli incapax*. The onus is on the State to rebut the presumption by proving that, at the time of commission of the offence, the accused knew his act to be wrongful. See *Burchell and Hunt South African Criminal Law and Procedure* vol 1 p 186, citing extensive authority, including *R* v *Mahwahwa* 1956 (1) SA 250 (SR) at 251; *R* v *K 1*956 (3) SA 353 (AD) 356; *R* v *Tsutso* 1962 (2) SA 666 (SR) at 667-8; *S* v *Dyk* 1969 (1) SA 601 (C) 603.

In *Tsutso*'s case Maisels J set aside a conviction of culpable homicide, where a ten year old boy picked up a knife and fatally stabbed the deceased who had been knocked to the ground by the father of the accused. Maisels J held that the prosecution had failed to prove

> "that the accused's mind was sufficiently mature to understand, and that he did understand, the wrongful character of the conduct in question" (My emphasis.)

In *BP* v *R*, *SW* v *R*, [2006] NSW CCA 172 Hodgson JA in the New South Wales Court of Criminal Appeal said of *doli in capax* that in regards to a child aged between 10 and 14 there remains:

> "… a presumption that such a child is *doli incapax*, that is incapable of committing a crime because of lack of understanding of the difference between right and wrong, and consequential lacks of *mens rea*. It is clear that when a child between 10 and 14 years is accused of a crime, the onus is on the prosecution to prove beyond reasonable doubt not only that the child did the act charged, accompanied by the necessary mental element, but also that, when doing it, he or she knew it was seriously wrong, as distinct from an act of mere naughtiness or mischief…"

In *R* v *ALH* (2003) 6 VR 276 which was a matter where the child accused had been found guilty of indecent assault and rape, Cummins AJA, with the agreement of the other justices in the Victorian Court of Appeal said:

> "Adult value judgements should not be attributed to children. If they are not, there is no reason in logic or experience why the proof of the act charged is not capable of proving requisite knowledge. Some acts may be serious, harmful or wrong as properly to establish requisite knowledge in the child…. I consider that the correct position is that proof of the acts themselves may prove requisite knowledge if those acts establish beyond reasonable doubt that the child knew that the act or acts themselves were seriously wrong."

A child over seven and under 14 years of age is presumed to be *doli incapax* - *R* v *K* 1956 SA 353 (A) but the onus is on the State to rebut that presumption. There is an irrebutable presumption that a male person under the age of 14 years is incapable of committing rape *R* v *Magope* 1931 OPD 57; *R* v *M* 1949 (4) SA 1949 (4) SA 831 (A) and *S* v *F* (a juvenile) 1988 (1) ZLR 327 (H). In the last mentioned case, this court considered it inappropriate that a ten year old should have been charged with indecent assault – *S* v *F* (*supra* @ p 329).

For example, Afghanistan's draft Juvenile Code, for children older than the MACR (12 years), the factor of *rushed* is included wherein judges are duty bound to consider the degree of the psychological development, character and aptitude, and behaviour of each child during and after the offence (*Cipriani*,1995:22). Therefore, even when a child's chronological age is known, it is acknowledged that there are other measures of age and maturity that are significant in deciding upon the outcome of any decision in relation to that child. In fact, international juvenile justice standards broadly support the developmental perspective, recognising children's evolving capacities and their right to effective participation in juvenile justice matters, and to enjoy proceedings and treatment that take into account their age. The Beijing Rules appeal to the protective aspects of evolving capacity, stating that MACRs

"shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity".

As further explanation, the Commentary to the United Nations *Standard Minimum Rules for the Administration of Juvenile Justice* (The Beijing Rules, 1985) notes the role of culture in shaping concepts of age and responsibility, stating that

> "the minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially anti-social behaviour." (Para 4.1)

The State proceeded on the basis that because the accused knew that an assault on the person of another was bad, therefore he knew the wrongfulness of his conduct. In my view that was not enough to meet the criterion of the element of criminal capacity.

In *R* v *Begstedt* 1955 (4) SA 186 at 188 AD the court held that the words "know or ought to have known" contrast knowledge with a merely reprehensible failure to known" and wrongly import that either is sufficient for proving intention.

As the appellant was over 7 years and under 14 years of age when he submitted the act complained of he is presumed to *dolix in capatax*…..

> "……. but this....is rebuttable on proof of a malicious mind on the part of the child, in accordance with the maxim of the canonists *militia supplet aetatem* (malice supplies age)"

(per Kotze JA in A-G, *Transvaal* v *Additional Magistrate for Johannesburg* 1924 A.D. 421 @ 434.)

There must be proof of a malicious mind on the part of the accused and it seems to me that his mind must be malicious in relation to the circumstances under which he committed the act complained of.

In *Rusell on Crime*, 10th ed vol 1 @ p 43 the following is found:

> "The modern rule is that a child of 8 and under 14 is presumed to be incapable of criminal intent (*doli incapax*) but the presumption may be rebutted and weakens with the advance of the child's age towards 14 and the particular facts attending the … of the act and …… the understanding of the child. The evidence of *mens rea* which is allowed to displace the presumption (expressed in the ancient phrase *malitia supplet aetatem*) should be strong and clear beyond all doubt."

In my view this statement seems to me to accord with our law.

It does not seem to me that the State addressed its mind to this operation.

During cross examination the questions seemed to be suggesting that the accused knew the difference, is not, in my opinion sufficient per se to show that when he assaulted the

deceased the accused knew that he was not entitled to use switches to assault deceased as a way of disciplining her for a false accusation.

I say this because the only evidence regarding this issue is the educational psychologist's report which suggests an even younger mental age than the chronological age.

It was never suggested that despite his amended age, knew at the time that he was not entitled to discipline the deceased. This was important as the accused claimed that he believed the assault was such as he would be entitled to administer to the deceased in order to instil discipline. This brings to the fore the factors which ought to be considered when determining the onus on the state to rebut the presumption has been overcome.

Such factors may include but not limited to the following:

- The educational level, cognitive ability, domestic and environmental circumstances, age and maturity of the child;
- the nature and seriousness of the alleged offence;
- the impact of the alleged offence on any victim;
- the interests of the community;
- a probation officer's assessment report;
- the prospects of establishing criminal capacity if the matter were to be referred to a preliminary inquiry;
- any other relevant factor.

In light of the fact that the maximum "spare the rod and spoil the child" is of the wide application in the society from which accused came, taking into account the circumstances in which he regarded his duty to correct a toddler he believed was prone to propagate a lie, it cannot be said that the state had proved beyond doubt that the accused knew, on this occasion that what he was doing was wrong and that he should be held responsible for his actions. In order to rebut the presumption operating in favour of the accused, the state needed to prove that the child had the capacity to: (a) appreciate the difference between right and wrong at the time of the commission of an alleged offence; and (b) act in accordance with that appreciation.

The description of the assault does indeed paint a very grave type of assault. He used at least three switches, a missile as well as his feet to perpetrate this assault. The question in the present case is whether the state has proved that when the accused assaulted the deceased with switches he knew that he was doing a wrongful act in the sense that it can be said that

the state had proved that the accused had sufficient cognitive capacity to appreciate the wrongfulness of his conduct and to act in accordance with that appreciation. Whilst the *actus reus* for an assault has no doubt been proved by the admitted facts, one must always bear in mind that the issue under investigation is the intent to commit murder and the capacity of the accused to realise the real possibility that an assault with a switch, a kick or kick to the body, and a stoning of the head carries with it a possibility of a real risk of serious injury or death. The circumstances under which the deceased died are indeed unfortunate, but, unless the state is able to bring the proof of all the essential elements of the crime charged, a court cannot convict where there is a reasonable possibility of the accused's story being reasonably possibly true. In any event even if the court accepted the fact that there has been sufficient basis to convict that accused of culpable homicide, without the proof of criminal capacity, the matter remains one in which a conviction would be unsafe for lack of criminal capacity, therefore, for lack of proof of *mens rea.* The court does not have to believe every detail in that story before it can acquit. It only need to entertain a doubt in respect of proof regarding one element of the crime charged.

The prosecution needed to have considered the question of criminal capacity right from the outset, in this case in 2009 when the accused was arrested. Up-on a determination of the issue it may well have been decided to withdraw the charges altogether or prefer a lesser charge which the child may have at the time of commission appreciated constituted an offence. There is an unwelcome practice to sit on children's cases supposedly waiting for the child to get older or nearer 14 before a prosecution is mounted. This must be discouraged as it tramples on the children's rights. Such practice may in practice be in violation of various regional and international treaties on the rights of the child to which Zimbabwe is a signatory. In the present matter I am not satisfied that the state has proved the criminal capacity of the accused, nor was there sufficient facts laid out in the trial from which such an inference as would rebut the presumption of criminal incapacity.

In the result, the state has not been able to rebut the presumption at law operating in favour of the accused due to his age expressed in the maxim *doli incapax.* There has been no proof beyond a reasonable doubt that the accused had, at the time of commission of the offence criminal capacity to commit the crime charged. As such, he is found not guilty of the crime of murder and is acquitted.

Attorney General, State's legal practitioners
Mwonzora & Associates, accused's legal practitioners