THE STATE
versus
VLADIMIR MASHATISE

HIGH COURT OF ZIMBABWE
HUNGWE AND MAVANGIRA JJ
HARARE, 24 July 2012 and 16 January 2013

IN CHAMBERS IN TERMS OF SECTION 35 OF THE HIGH COURT ACT, CHAPTER 7:06

Criminal Appeal

T. Tandi, for the appellant
J. Uladi, for the respondent

MAVANGIRA J: in this matter the Attorney-General has, in terms of s 35 of the High Court Act, [*Cap 7:06*], filed a notice conceding that the conviction of the appellant cannot be supported. The section provides:

35 Concession of appeal by Attorney-General

When an appeal in a criminal case, other than an appeal against sentence only, has been noted to the High Court, the Attorney-General may, at any time before the hearing of the appeal, give notice to the registrar of the High Court that he does not for the reasons stated by him support the conviction, whereupon a judge of the High Court in chambers may allow the appeal and quash the conviction without hearing argument from the parties or their legal representatives and without their appearing before him.

As the concession was properly made the case was withdrawn from the roll to be dealt with in chambers. Below appear the reasons why the Attorney-General's concession is proper and consequently why the appeal must succeed.

The appellant was charged with one count of having extra-marital sexual intercourse with a young person in contravention of s 70 (1) (b) of the Criminal Law (Codification and

Reform) Act, [*Cap 9:23*] (the Act). The appellant who was not legally represented at the trial initially pleaded guilty to the charge. When the facts and essential elements of the offence were put to the appellant his plea was altered to one of not guilty in view of his responses. He was then convicted after a trial and sentenced to 30 months imprisonment of which 6 months imprisonment was suspended on condition of future good conduct. He now appeals against both conviction and sentence.

A medical report that was produced in evidence showed that the complainant was 18 weeks pregnant.

The grounds of appeal against conviction are firstly, that the lower court erred in failing to appreciate that the facts surrounding the commission of the offence and the subsequent events leave room for the possibility that the complainant had represented to the appellant that she was over 16 years of age. Secondly, that the lower court erred by arriving at a decision which is not supported by the evidence led in that the proved facts are consistent with the appellant's defence, thus entitling the appellant to the benefit of the doubt. Thirdly, that lower court erred in that the manner in which the trial was conducted was less than fair to an unrepresented accused person. As the concession that the conviction of the appellant was not proper is justified on the evidence on record, it will not be necessary to spell out the grounds of appeal against sentence.

The appellant admitted having sexual intercourse with the complainant but said that he was in love with her and that she had told him that she was 16 years of age. Before then, he had also inquired from his friend's wife who resided at the same homestead with the complainant and who was also the one who initiated the idea that he meets with the complainant, whether the complainant was not a minor. He said that his friend's wife told him that she had seen the complainant's birth certificate and that the complainant was not a minor. A birth certificate produced in evidence showed that the complainant was born on 27 August 1995. This would mean that when the appellant had sexual intercourse with her on 19 December 2010 and 9 January 2011, the complainant was about 15 years and 4 months old.

In *S* v *Hove* 1992 (1) ZLR 70 (S), "the appellant admitted having intercourse with the complainant but stated that he was in love with her and that she had told him that she was nineteen years of age. A dentist's report produced in evidence showed her to be between the ages of fourteen and fifteen years of age." Commenting therein at p. 71C, EBRAHIM JA said:

"In order for him to escape conviction it was incumbent upon him, therefore, to prove on a balance of probability:

(i) that he *bona fide* believed the complainant to be above the age of sixteen years; and

(ii) that he had reasonable cause for such belief. See *R* v *Carmody* 1969 (2) RLR 525 (AD) at 527E."

and further at 71E:

" … only in rare instances is there room for a finding that the belief, though not reasonable, was nevertheless *bona fide."*

More importantly, at 71F the learned judge stated:

"The appellant was not legally represented at his trial and there is nothing on the record to indicate that he was advised of the onus which rested on him in terms of the proviso to s 3(a) of the Act. It seems to me that where there is an onus placed upon an accused person a trial court should advise him accordingly, see *R* v *Henstock* 1950 SR 252."

In *casu* the appellant was not legally represented. Subs 3 of s 70 section in terms of which he was charged and convicted provides:

"(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 years at the time of the alleged crime:

Provided that the apparent physical maturity of the young person concerned shall not, on its own, constitute reasonable cause for the purposes of this subsection".

There is nothing on the record to indicate that the lower court advised the appellant of the provisions of s 70(3) of the Act. That was a misdirection on the part of the lower court.

The appellant maintained his defence that he believed that the complainant was 16 years old and he stated the reasons for his belief. The appellant's wife's friend, one Mai Tinevimbo also referred to as Mrs Kajese, was therefore a crucial and material witness. She was never called to testify. Whilst the lower court was entitled to convict the appellant on the single evidence of the complainant, this was a proper case for it to approach her evidence with caution and look for corroboration. In *S* v *Hove* (*supra*) the following was said at 72D – E:

"The court *a quo* was entitled to convict the appellant on the single evidence of the complainant: *S* v *Zimbowora* 1992 (1) ZLR 41 (S) and the cases cited therein. But here the complainant was a witness with an interest to serve and therefore there was

need to approach her evidence with caution and to produce corroborative evidence, if available: *S* v *Zimbowora supra.* The failure by the prosecutor to lead evidence of a corroborative nature seriously weakened his case and does not inspire confidence leading to the acceptance of the evidence of the complainant, a single witness."

The above remarks hold true for the present case and Mai Tinevimbo was a crucial evidence for the lower court to arrive at the truth of what happened. The prosecutor having not called Mai Tinevimbo, the lower court ought to have, in terms of s 232 of The Criminal Procedure and Evidence Act, [*Cap 9:07*], *mero motu* subpoenaed Mai Tinevimbo in the interests of justice. The section provides:

"**232 Subpoenaing of witnesses or examination of persons in attendance by court**

The court—

(*a*) may at any stage subpoena any person as a witness or examine any person in attendance though not subpoenaed as a witness, or may recall and re-examine any person already examined;

(*b*) shall subpoena and examine or recall and re-examine any person if his evidence appears to it essential to the just decision of the case."

Despite the fact that it was not disputed by the State that Mai Tinevimbo had engineered the meeting between the two and the appellant's evidence as to what Mai Tinevimbo told him about the complainant, in addition to and in agreement with what the complainant also told him, neither the prosecutor nor the court found it necessary to call her to testify. The need for Mai Tinevimbo's evidence is called into greater focus regard being had to the provisions of s 70(3) of the Criminal Law (Codification and Reform) Act (*supra).* The lower court would then have been in a position to determine whether or not the appellant had a reasonable cause for the belief that the complainant was not a minor. Sight is not lost in this regard that the appellant's evidence that he had been advised that the complainant was repeating Form 3 and that the complainant's behaviour also led him to believe that the complainant was 16 was never challenged.

A further unsatisfactory feature of this matter is the fact that the learned trial magistrate merely said that there was nothing in the complainant's physical appearance that would have justified a belief that she was over 15 without giving his reasons for making such a conclusion. In *S* v *Ryce* S – 138-88 at p 11 GUBBAY JA as he then was, stated:

> "the magistrate was entitled to take into account his estimation of the complainant's age from her appearance in deciding whether or not the appellant had reasonable cause to believe that she was of the age of sixteen years or above. But it is unfortunate that he did not record what caused the impression in his mind that she was between fourteen and fifteen years old. Was she small of stature and of slight build? Was her body not fully developed? Was her face childlike? Was she an unsophisticated and timid girl? These are matters of which this court should have been advised, for without any reference being made to them there is merely a personal opinion of appearance without the factual evidence in support of it. Regrettably therefore, little weight may be attached to the magistrate's estimation of the complainant's age."

In *casu* the learned trial magistrate did not state the basis for his conclusion that the complainant was under the age of sixteen years of age. Little weight may therefore be attached to his estimation of the complainant's age.

For the reasons discussed above I agree with the concession made by the Attorney-General and I accordingly quash the conviction and set aside the sentence.

HUNGWE J agrees.

Kantor & Immerman, appellant's legal practitioners
The Attorney General, respondent's legal practitioners