

THE STATE  
versus  
CHENJERAI CHIKUPO

HIGH COURT OF ZIMBABWE  
CHIRAWU-MUGOMBA & CHIKOWERO JJ  
HARARE, 6 and 7 May 2019

## CRIMINAL REVIEW

CHIRAWU-MUGOMBA J: The accused person was charged with contravening s 70(c) of the Criminal Law Codification and Reform Act [*Chapter 9:23*], “having sexual intercourse with a young person”. After an initial not guilty plea, and having later engaged a legal practitioner, he changed his plea to guilty. He was convicted and sentenced on the 12<sup>th</sup> of April 2019 to 24 months imprisonment with 4 months suspended on the usual conditions.

The state outline indicates that the complainant is aged 15 years and that the offence occurred between the period January to March 2019. In his defence before he altered his plea, the accused person indicated that he did not agree with the age of the complainant as being 15. He said this is so because the complainant has a younger brother who is aged 15 years. The complainant in her-evidence in –chief stated that she is 19 years of age as was told to her by her mother. She insisted that she is 19 years of age despite an admission that she went for an age estimate which showed that she is 15 years of age. The complainant’s mother was deceased at the time of the trial.

Age estimation is provided for in terms of the Criminal Procedure and Evidence Act [*Chapter 9:07*] as follows:-

### **“387 Estimating age of person**

If in any criminal proceedings the age of any person is a relevant fact of which no or insufficient evidence is available in those proceedings, the judge or magistrate may estimate the age of such person by his appearance or from any information, including hearsay evidence, which may be available, and the age so estimated shall be deemed to be such person’s correct age unless it is subsequently proved that the said estimate was incorrect.”

In *State v Petros Ncube*, HH-703-14, MUREMBA J with the concurrence of MAWADZE J stated as follows:-

“The accused could have been convicted under s 70 of the Criminal Law Code for having sexual intercourse with the consent of a young person considering that the complainant said that she was 15 years old. The problem though is that the State did not seek to show that she

was indeed 15 years old. As stated above, she was not asked for her date of birth. The mother too was not asked about the complainants' date of birth. I presume that the age estimation report was produced because the complainant does not have a birth certificate. ....So knowing the complainant's date of birth would have helped since under s 70 of the Criminal Law Code for a conviction to suffice the young person should be under the age of 16 years."

In *casu*, apart from the age estimation report which is unscientific in nature, there is nothing else that the state did to prove that the complainant was below the age of 16 at the time of the alleged offence. Despite the death of her mother, evidence could have been led from her aunt (her mother's sister) whom she stays with. The complainant herself insisted that she was 19 years of age and therefore her age needed to be proved beyond a reasonable doubt.

MUREMBA J in the *Ncube* case, *supra* went on to state as follows;

"The other thing which complicates the conviction under s 70 is that the State did not lead any evidence to prove that the accused knew that the complainant was below 16 when he had sexual intercourse with her. So a conviction under s 70 is not sustainable."

Section 271(2) (b) (ii) of the Criminal Procedure and Evidence Act proviso states that,

"if the accused is legally represented, the court may, in lieu of the procedure provided in subparagraphs (i) and (ii), satisfy itself that the accused understands the charge and the essential elements of the offence and that he admits the elements of the offence and the acts or omissions on which the charge is based as stated in the charge or by the prosecutor by relying upon a statement to that effect by the legal representative of the accused."

In *casu*, the record shows that the accused's legal practitioner confirmed that he had explained the essential elements of the offence to the accused person. This however was premised on the age estimate of 15 years. In the absence of clear evidence that the accused knew that the complaint was below the age of 16 years, the conviction cannot be sustained.

Although the facts of the matter show that the accused did have sexual intercourse with his niece (a daughter to his wife's sister), the conviction cannot be sustained.

Accordingly, the conviction is quashed and the sentence be and is hereby set aside. The accused person is entitled to his liberty. A warrant for his liberation is issued.

CHIKOWERO J: Agrees:.....