LESIUS MUGUMIRE
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & MANGOTA JJ
HARARE, 07 & 14 October, 2014

Criminal appeal

F. Murisi, for the appellant
E. Mavuto, for the respondent

MANGOTA J: The appellant was charged with, and convicted of, the crime of rape as defined in s 65 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. He allegedly committed the offence when he was 13 years of age. He was 19 years old when the trial commenced.

The court *a quo* sentenced him to 4 years imprisonment. It suspended 2, of the 4 year prison term for 5 years on condition of good future conduct on the part of the appellant. He, in that regard, was sentenced to an effective 2 years imprisonment. He successfully applied for bail pending his appeal against both conviction and sentence. He is, therefore, on bail pending this appeal.

The State's allegations against the appellant were that, on 27 October 2006, and behind Rimuka Stadium which is in Kadoma, the appellant did have forceable carnal knowledge of one Alice Amon who was 10 years of age at the time of the alleged offence. The State cited Alice Amon as the complainant.

The State, it is observed, did not prosecute the appellant at the time that the offence was allegedly committed. It waited for six (6) years before it commenced his prosecution. The reasons for its inaction remain unknown. Whatever those reasons were, or are, would not engage the court's mind at this stage of the matter. What the court can only state is that the appellant was, by that conduct of the State, denied his constitutional right to a fair trial within a reasonable time.

Children who are between 7 and 14 years of age are presumed to be *doli incapax*. Burchell and Hunt discuss this presumption in their *South African Criminal Law and Procedure, Volume1*. The learned authors state at p 186 of their book that:

> "A child who has completed the seventh but not the fourteenth year is ……presumed to be *doli incapax*; but in the case of such a child, the presumption may be rebutted, either by direct or indirect evidence. The *onus* rests on the prosecution and may be discharged by proving that at the time of commission the accused knew his act was wrongful. In other words, a child between the ages of 7 and 14 is exempt from liability unless it is proved, not only that he did the *actus reus* with *mens rea*, but also that he had criminal capacity in the sense that he knew his act was wrongful…." (emphasis added)

The question which begs the answer in the circumstances of the present case is whether, or not, at 13 years of age, the appellant knew that his act, if such had been proved, was wrongful. Evidence which is filed of record showed that the State did not rebut the presumption which operates in the appellant's favour. All what the State did was to endeavour to establish what it said the appellant did and nothing more.

The State jumped the gun, as it were, when it conducted itself as it did. The court does not know, at this stage, whether or not the appellant knew that his action, if such was proved, was wrongful. The appellant's gravamen of appeal rests on this matter more than on any other matter(s). He referred the court to such pertinent case authorities as *S* v *F*, 1988 (1) ZLR 327(HC) and *S* v *Chabata*, 1980 ZLR376 where the conviction of each accused person was quashed and the sentence which had been imposed was set aside on the basis that the requisite inquiry had not been conducted to establish that the accused knew that his act was wrongful when he allegedly committed the offence.

During the appeal, the court drew the respondent's attention to the observed anomaly and the respondent conceded that the conviction of the appellant cannot stand. The respondent's concession was properly made in the circumstances of the present case. What the State did was not only wrongful but it was also unjust and prejudicial to the interests of the appellant. It is on the basis of the abovementioned matter, therefore, that the court remains of the view that the conviction and sentence of the appellant cannot be allowed to stand.

The court has considered all the circumstances of this appeal. It is satisfied that the appellant was wrongly convicted and sentenced. It is, in the result, ordered as follows:

1. That the appeal be and is hereby upheld;
2. That the conviction is quashed and the sentence set aside;

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

HUNGWE J agrees _____

Murisi & Associates, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners