TAWANDA MURADZIKWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA and MANGOTA JJ
HARARE, 2 and 25, March, 2015

Criminal appeal

L. Goneso, for the appellant
E. Makoto, for respondent

MANGOTA J: The appellant pleaded not guilty to, but was convicted after trial of, two counts of rape as defined in s 65 of the Criminal Law [Codification and Reform] Act [*Chapter 9:23*]. He was sentenced to 20 years imprisonment 2 years of which were suspended for 5 years on condition of future good conduct.

The state allegations were that on dates to the prosecutor unknown but during the period which extended from 1-30 April, 2013 and at, or about, Nyamusanga Primary School, Buhera, he, on different occasions, did have forceable carnal knowledge of one H and one I. H and I were respectively 14 and 13 years of age at the time of the alleged offences.

The appellant appealed against conviction and sentence. His grounds of appeal were, in the main, that the state did not establish his guilt in respect of both counts beyond reasonable doubt and that the evidence of the complainants was not consistent with that of persons who had been raped. He stated that the trial court ignored his defence. He submitted that the sentence which was imposed was not only harsh and too severe but it also induced a sense of shock and disbelief.

The respondent agreed with the appellant that the latter was erroneously convicted of rape. It stated that the evidence of the complainants and other witnesses for the prosecution did not support the crime of rape. It said the complainants' conduct was on all fours with that of persons who had had consensual sexual intercourse with the appellant. It moved the court to convict the

appellant of contravening s 70 of the Criminal Law [Codification and Reform] Act.

The appellant's grounds of appeal related to the crime of rape which he stood convicted of. The court is satisfied that the court *a quo* misdirected itself when it convicted the appellant of two counts of rape. That conviction was not supported by evidence and was, therefore, unsafe.

H and I stated in clear and categorical terms that the appellant carnally knew them in April 2013. H's testimony was that, on a certain day during the April 2013 school holiday, the appellant whom she described as having been a very close friend of her father, approached and requested her to bring a CD to him. It was when she brought the CD to his house that the appellant allegedly carnally knew her. I stated that, on a certain Saturday in April 2013 and when she was on her way home from a barber's shop where she had gone for a haircut, the appellant met her by the river and indicated to her that he wanted to have sexual intercourse with her. She said he held her hand, pulled her off the road, laid her on the ground, removed her pair of pants, lowered his trousers to knee level and had sexual intercourse with her. She stated that on the evening of the following day, she went to the fireplace where she had been baking bread and she found the appellant waiting for her at the fireplace. She said he told her that he wanted to have sexual intercourse with her. It was her testimony that he leaned her against the wall and had carnal knowledge of her for the second time.

H and I were adamant that the appellant did have carnal knowledge of them. The medical reports which the state produced corroborated the two girls' stories on the aspect of sexual intercourse having taken place in respect of each one of them. The girls corroborated each other's stories on the point that the appellant gave to each of them some tablets which he asked her to take after the sexual acts. Each girl stated that she took and drank the tablets although the appellant did not reveal to her the purpose of taking them. H stated that there were occasions when the appellant would introduce her to his friends as his lover. I's testimony was that the appellant did have sexual intercourse with H and her. Both girls denied that they were fabricating stories with a view to incriminating him.

Evidence filed of record showed that the appellant and the complainants' family were very close friends. The girls stated that the friendship was so close that their father would, on occasions, leave the appellant in charge of them when he left home to visit their mother who was teaching at a different school. The appellant confirmed the good relationship which existed between the two families. His submission which was to the effect that the complainants' were influenced to fabricate the allegations against him cannot hold. The girls, in the court's view, made every effort to conceal what he had done. They, as he stated in one of his grounds of appeal, withheld information about the sexual acts from their parents/guardian, friends, teachers and other people they would have been

expected to open up to. The fact that the sexual act which took place in April 2013 only came to light in September 2013 and when the girls had been coerced to make reports showed in a conclusive manner that the complainants' did not want to expose but to protect the appellant.

The appellant insinuated that there was bad blood between the father or guardian of the complainants and him. T, who was H's father and I's brother gave testimony and, during cross examination, the alleged bad blood and its cause were not put to him. It is the court's view that the appellant made up the story pertaining to the alleged bad blood as a way of extricating himself from the charge. The court is satisfied that the appellant did have carnal knowledge of the complainants who were 14 and 13 years of age at the time. He, accordingly, stands convicted of two counts of having had unlawful extra marital sexual intercourse with young persons as defined in s 70 of the Criminal Law [Codification and Reform] Act.

The appellant's changed circumstances as regards conviction do have a ripple, but advantageous, effect on the sentence which must be imposed upon him. The appellant had consensual sexual intercourse with two minor girls. Both of them were attending school at the time of the offences. The appellant must consider himself fortunate that the state did not prefer two counts but one count of the offence against him in respect of Diana. He carnally knew her on two separate occasions.

The appellant took advantage of the close relationship which existed between the complainants' family and him. He proceeded to lead the young girls from the path of virtue into that of vice. His counsel conceded that a custodial sentence was warranted. The concession was proper. In his favour, the court remains alive to the fact that the appellant most likely lost his employment as a result of his unbridled sexual conduct. He is a young, first offender with family responsibilities. The court will, therefore, temper justice with some measure of mercy. It will suspend a fairly large portion of the sentence so that it would act as a deterrence on him in his future conduct.

It is, in the result, ordered as follows:

1. The conviction of the appellant on two counts of rape be and is hereby quashed;
2. The appellant be and is hereby convicted of two counts of contravening s 70 (1) (a) of the Criminal Law Codification and Reform Act [*Chapter 9:23*];
3. The sentence of 20 years imprisonment which was imposed on the appellant be and is hereby set aside and is substituted with the following sentence:

"[Both counts as one] 48 months imprisonment of which 12 months imprisonment are suspended for 5 years on condition the appellant does not, within that period,

commit any offence of a sexual nature for which he is sentenced to imprisonment without the option of a fine.
Effective sentence: 36 months imprisonment."

CHATUKUTA J agrees …….

Goneso and Ndhlovu, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners