PARDON BODZO
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE &WAMAMBO JJ
HARARE, 7 & 12 June 2018 & 4 July 2018

**Criminal appeal**

*G Shumba*, for the appellant
*W Badalane*, for the respondent

WAMAMBO J: The appellant was charged of rape in terms of s 65 (1) of the Criminal (Codification and Reform) Act [*Chapter 9:23*]. After a trial the court *a quo* found him guilty of the competent verdict of having extra marital intercourse with a young person in contravention of s 70 (1) (a) of the Criminal (Codification and Reform) Act [*Chapter 9:23*]. He was sentenced to 2 ½ years' imprisonment of which 1 year imprisonment was suspended on the usual conditions of good behaviour.

At the hearing the appellant's counsel abandoned all the grounds of appeal (including the one against sentence) except for only one ground against conviction.

The sole ground of appeal for determination reads as follows:

> "1. The trial magistrate erred in finding as a matter of fact that the accused knew or realized the real risk or possibility that the complainant was below 16 years."

A young person is defined in s 61 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] as follows:-

> "young person means a boy or girl under the age of sixteen years."

Section 70 (3) provides a defence to the charge under s 70 (1) (a) as follows:-

> "(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."

The facts are that the complainant and appellant were in a sexual relationship spanning a number of months. In October 2016 the two had sexual intercourse, the subject of this appeal.

Appellant through his counsel, Mr *Shumba* strenuously argued that appellant "had reasonable cause to believe" complainant was aged above sixteen years. He advanced the reason for this as follows:- complainant was not credible as she had lied about being raped and drugged and this should not be believed when she testified that she told appellant she was 15 years old and still attending school. Further that appellant had met complainant at a bar at Waterfalls.

State counsel Ms *Badalane*'s argument was that the trial magistrate did not err when it found that appellant had no reasonable cause to believe complainant was over 16 years of age. Her reasons were that appellant and complainant had met at a school sports event, and that complainant had told appellant she was 15 years old and still attending school. Ms *Badalene* also submitted that to further support the fact that she was of tender age complainant would be dropped off by appellant at 6p.m.

While it is common cause that complainant probably out of shame and/or family pressure lied about the rape, it does not follow that everything else she said should not be believed. If complainant was intent on implicating appellant she could have falsely testified that for instance, she showed appellant her birth certificate and he would see her in her school uniform on numerous occasions.

The evidence reflected complainant was from a Christian family and was also in love with appellant.

In cross examination appellant conceded that he was aged 14 when he was in form three. He further conceded that had he known complainant was aged 15 he would have left her. Mr *Shumba* equally conceded in argument that if this court finds that complainant told appellant she was in form three then he had no reasonable cause to believe she was below 16.

In a bid to extricate himself from conviction the appellant gave a version that complainant had told him she was 19 years old. The appellant called his friend Tapiwa Murapa to testify on his behalf. The court *a quo* was not duped by the obviously trumped up evidence given by Tapiwa Murapa. Tapiwa Murapa in an excited bid to support appellant went further to provide details of him asking complainant how old she was and of singing for her on her birthday which evidence was not given by appellant.

Appellant and Tapiwa Murapa also gave evidence of meeting complainant at Zindoga in the evening. Even going by that evidence appellant said that she was walking along the main

road, not that they met at the "the popular drinking place Zindoga in Waterfalls" as given in the defence outline.

In a clearly exaggerated version appellant in the defence outline gives the impression that he had numerous sexual encounters with complainant. When he testified appellant never talked of a single bout of sexual intercourse with complainant.

Appellant's version is clearly embellished to reflect complainant as some "hussy".

Having reflected in full on the circumstances of the case the following has been proven:- appellant was aged 33 when he met complainant at a school sports event. Complainant according to her birth certificate produced as an exhibit was aged 15 when she had sexual intercourse with appellant. Complainant told appellant she was attending school and was in form 3.

In the light of the above circumstances we find that appellant's defence fails. The circumstances prove that he had reasonable cause to believe complainant was over 16 years of age. In the result we order as follows:-

The appeal is dismissed in its entity.

HUNGWE J agrees ……..

*Mtombeni, Mukwesha, Muzavazi and Associates*, appellant's legal practitioners
*National Prosecuting Authority,* respondent's legal practitioners