

**JEMBO MKULI**

**APPELLANT**

**Versus**

**THE STATE**

**RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE  
NDOU J & CHEDA AJ  
BULAWAYO 22 OCTOBER & 15 NOVEMBER 2012

Appellant in person  
*Ms A. Munyeriwa* for respondent

Criminal Appeal

**CHEDA AJ:** This is an appeal from the Magistrates' Court against a sentence imposed on the appellant for rape.

The charge alleged that on an unknown date to the prosecutor but during the period extending from the 1<sup>st</sup> of October 2011 to the 31<sup>st</sup> October 2011 Jembo Mkuli a male had sexual intercourse with a girl aged 12 years who is in law incapable of consenting to sexual intercourse. The Regional Magistrate convicted the appellant and sentenced him to 20 years imprisonment.

The appellant's grounds of appeal were that the complainant consented and that she was in love with him. He said they fell in love in July and she wrote him several letters telling him that she loved him. He said she told him in a letter that she had started menstruating in December 2010. He was then tempted to have sexual intercourse with her. She agreed and told him she had had sexual intercourse with other men before. This was on 7<sup>th</sup> October 2011.

When the prosecutor sought admissions from the appellant at the start of the trial he said he would make the admissions but he did not know that she was 12 years old although he had previously pleaded guilty. I must say that strictly speaking it is not safe to ask for admissions from an undefended accused person, especially where the offence he is charged with has some legal technicalities such as in this case where the offence for which the accused is charged depends on some legal elements relating to the age of the complainant which might not be known to the accused. It is safer to leave it to the court to explain the essential elements of the charge. In this case the appellant had earlier on pleaded guilty but the plea was altered when the issue of consent was mentioned but the legal position of the age of the complainant was not pointed out to him. As a result the appellant resisted the charge on the basis of the complainant's consent without realizing the implication of the complainant's age.

On the date when the matter had been set down the respondent did not appear and had not filed heads of argument. When the matter resumed we had the respondent's heads of argument in which a concession was made regarding the fact that if the court accepted that the complainant consented, then the accused's guilt would not be for rape but for contravening section 64 (1) of the Criminal Law (Codification and Reform) Act 9:23 that is, having sexual intercourse with a girl under the age of 12 years, but below 14. The concession was made on the basis that the complainant was 12 years and 8 months at the time of the alleged sexual act and therefore a little above the age stipulated by section 64. Section 64 provides that:

- (1) Anyone who has sexual intercourse with a young person aged 12 years or under should be charged with rape, aggravated indecent assault or indecent assault as the case may be and not with sexual intercourse or performing indecent acts with a young person.
- (2) A person accused of engaging in sexual intercourse or other sexual conduct with a young person above the age of twelve years or below the age of fourteen years shall be charged with rape, aggravated indecent assault, as the case may be and not with sexual intercourse or performing an indecent assault with a young person or sodomy unless there is evidence that the young person – was capable of giving consent to the sexual intercourse, anal intercourse or other sexual conduct; and gave his or her consent thereto.

The concession is proper although I see nothing wrong with the charge. It is not wrong to charge the accused with rape in the circumstances, but it is the verdict which is returned as it comes after all the facts have been revealed to the court in evidence. It is clear that the complainant was consenting to several acts of sexual intercourse, but it is not clear what happened in the first act. It is therefore safe to give the appellant the benefit of the doubt in the first act as well.

On sentence, section 70 (1) (c) sets the period of imprisonment to the limit of 10 years. The appellant once stayed with the complainant's family. He knew her to be a very young person. His suggestion that he believed her to be big or a grown up person is false. He was very much aware of her youthfulness and had no excuse for what he did. A maximum sentence as provided by the Act for that offence is well justified.

The conviction of the appellant on a charge of rape is set aside. In its place the following is substituted.

1. The accused is found guilty of having sexual intercourse with a young person in contravening of section 64 (2) of the Criminal Law (Codification and Reform) Act 9:23.
2. The accused is sentenced to 10 years imprisonment with labour.

The Registrar is directed to amend the records and a new warrant for the accused to reflect the above.

Ndou J ..... I agree

*Criminal Division of the Attorney General's Office* respondent's legal practitioners