**THE STATE**
**versus**
**EN (redacted)**

HIGH COURT OF ZIMBABWE
MUTEVEDZI & NDUNA JJ
BULAWAYO, 23 AUGUST 2024

**Criminal Review**

**MUTEVEDZI J:** When you are a boy, as young as twelve years, there is no reasoning with sexual matters because even adult men can be completely blinded by bouts of passion. The criminal law and criminal punishment couldn't therefore have been intended to result in the horror apparent from these proceedings. The stories of what befell both the boy and the girl involved in this case illustrate a complete destruction of the social fabric. It is apocalyptic. Faced with this, judicial officers must think away from the box and even there, must be able to employ legal ingenuity to protect children against inclement laws which do not cease to be law because of their severity. Even where they convict the children of the preferred crime the law provides various avenues which may be exploited to mitigate the punishment imposed on them.

[1] In this case, EN a boy barely thirteen (13) years old was charged with and convicted of the crime of rape in contravention of s 65 (1) of the Criminal Law (Codification and reform) Act [Chapter 9:23] (the Code) by the court of a regional magistrate sitting at Gokwe. The allegations were that on 12 February 2024 at Mafa village under Chief Nemangwe in Gokwe South, the accused unlawfully and intentionally had sexual intercourse with RM (not her real name) a female girl aged five (5) years and incapable of consenting to sexual intercourse. The proper description would have been that the victim was an infant. She was the accused's niece in that her mother was a sister to him. The infant had presumably been left in the care of the accused's mother. When the rape occurred, the grandmother had gone to attend a meeting at a nearby preschool and left the victim in the custody of the accused. He called her into a bedroom at the homestead, directed her to remove her pants and ravished her. She suffered serious genital injuries as stated in the papers and as pointedly described by the trial magistrate in his sentencing judgment.

[2] At his trial the accused appeared with Blessed Mutangamberi. He is simply described in the papers as a guardian. Their relationship is not disclosed. His level of education or other credentials are equally not stated. The importance of those aspects will become apparent in the later parts of this judgment. Before the accused pleaded to the charges, the trial magistrate explained in a manner that appeared like a mere formality that the accused was entitled to legal representation if he so wished. Not surprisingly, both the accused and his guardian said they did not need such assistance. The charge was then read and the accused said he admitted it.

[3] Legal representation is a cornerstone of a fair trial. Its centrality to criminal trials is the reason why the right to legal representation was elevated to a constitutional right. Section 70 (1) (d) of the Constitution provides that

> 70 Rights of accused persons
> (1) Any person accused of an offence has the following rights-
> (a) …
> (b) …
> (c) …
> (d) to choose a legal practitioner and, at their own expense, to be represented by that legal practitioner
> (e) to be represented by a legal practitioner assigned by the state and at state expense, if substantial injustice would otherwise result

[4] More often than not magistrates betray the thinking that once they explain to an accused that he has the right to be represented by a legal practitioner of their choice then they will have discharged their duties. In many instances that is not enough. As shown above subparagraph (e) of subsection (1) of section 70 of the Constitution places an obligation on the court to ensure that in cases where substantial injustice may occur, the accused is assigned a legal practitioner whose expenses are paid for by the state. In turn the Legal Aid Act [Chapter 7:16] has expansive provisions for appointment of legal practitioners to represent indigent litigants. In section 10 it reposes power in a court to recommend to the Legal Aid Director that such person be assigned a state appointed legal practitioner. I can not envisage a more deserving case for these purposes than a child who is accused of rape and potentially faces imprisonment for a minimum mandatory fifteen years. Such cases cry out for the application of s 70(1) (e) and kindred provisions. In my view where an unrepresented child appears before a court facing any offence where he/she runs the risk of being imprisoned, the court cannot ignore the question of having a legal practitioner assigned to assist that child. The need is heightened in cases such as the instant one where imprisonment is inescapable. The

court must as of necessity approach the matter with single minded benevolence. As a general rule therefore, because of the severity of sentences imposable for rape convictions, a court must not proceed to try and convict a child without legal representation. If that is done it will be evident that there is no power to match that of a court which protects children.

[5] In *casu,* the trial magistrate not only completely failed to apply the cited provisions but equally neglected even to advise the accused and his guardian that on conviction the accused risked being sentenced to lengthy imprisonment. Had the magistrate diligently performed his role, the guardian may have had a change of mind about legal representation. He possibly thought the boy was going to get away with a beating because when he was asked at the presentencing hearing what penalty he expected he, without hesitation said he expected corporal punishment. When the accused was finally sentenced and the guardian was asked if he understood the sentence his reaction was utter astonishment. He could only manage to exclaim "15 years!" I could have quashed this conviction on this basis alone but there is worse problems with it.

[6] After the accused had pleaded guilty, the trail magistrate explained the essential elements of the charge. The explanation is contained in the following exchange with the accused and his guardian:

> Q. You admit that on 12 February 2024 at village Mafa, chief Nemangwe, Gokwe South, you had sexual intercourse with RM
> A. yes G. I confirm the admission.
> Q. Admit that when you had sexual intercourse with RM she was 5 years old
> A. Yes G. I also confirm the age
> Q. admit that when you had sexual intercourse with RM she was 5 years, she was below 12 years and incapable of consenting to sexual intercourse
> A. Yes G. I confirm the answer
> Q. When you had sexual intercourse with RM did she consent to the intercourse?
> A. No

Surprisingly, the guardian was not asked to respond to the above question. The interrogation however continued in the following manner.

> Q. Why did you have sexual intercourse with RM?
> A. I wronged

Once more the guardian was not asked to answer the question. The next questions were posed as follows:

> Q. Any right?
> A. No G. I confirm no right

Q. Any defence?
A. No

The guardian was equally ignored on this aspect before the last dice was rolled.

Q. Is your admission an admission to the charge, facts and essential elements of the offence?
A. Yes G. I confirm the admission is correct
Q. Are you freely, voluntarily, understandingly and advisedly admitting this offence?
A. Yes G. I confirm he is freely and voluntarily admitting the offence
V. Guilty as charged

[7] As demonstrated above, the accused was then duly convicted. After a fairly long sentencing judgement, the offender was then sentenced to 15 years imprisonment. The trial magistrate referred to various decisions of this court including *S v TG and Another* HH 51/24 in which after a review of the enabling provision I made the following remarks:

> "Everyone convicted of rape must be imprisoned either for a minimum fifteen years or a minimum five years depending on the existence or otherwise of aggravating factors in the commission of the crime. Worse still, even if this court were, in a proper case and after fuller argument, to declare the constitutional invalidity of Amendment Act No. 10/2023 that declaration would be of no force or effect until it is confirmed by the Constitutional Court given the requirements of s 175(1) of the Constitution. If it was the intention of the legislature that children below the age of eighteen years must not be covered by the minimum mandatory sentences introduced by the amendment, that intention does not appear from the provision. It cannot possibly be given life by the courts because the courts do not act against the intentions of parliament."

[8] The above views have been debated widely. I do not intend to reopen that debate here because it is unnecessary. What matters is that the trial magistrate's proceedings in this case were then placed before me for review in terms of 57(1) of the Magistrates' Court Act [Chapter 7;10]. I am worried about the propriety of the conviction given the age of the accused. By the trial court's own admission, the boy was barely thirteen. In fact at the time of the commission of the offence he was twelve years and five months old.

[9] Section 7 of the Code provides that:

> 7 **Criminal Capacity of children between seven and fourteen years of age**
> A child who is of or over the age of seven years but below the age of fourteen years at the time of the conduct constituting any crime which he or she is alleged to have committed shall be presumed, unless the contrary is proved beyond a reasonable doubt –
> (a) to lack the capacity to form the intention necessary to commit the crime, or
> (b) …

Section 6 of the Code deals with criminal capacity of children below seven years. It is categoric that such children cannot under any circumstances commit crimes because they irrefutably lack the mental capacity to do so. In other words, they are what is oft-regarded as *doli inacapax.* Section 7 creates a similar presumption the only difference being that in

its case, that presumption can be controverted. Put differently, the starting point when a minor between the ages of seven and fourteen years is brought for trial, is that he/she was incapable of committing the crime with which he/she is charged. The burden of proof lies with prosecution. The child need not do anything unless prosecution has availed evidence to rebut the presumption. Otherwise, it is his or her age that vouches for him/her. The threshold of proof is high. Like ZISENGWE J put it in the case of *S v Shonhiwa* HMA 6/ 20 where the trial is pursuant to a plea of guilty, a trial court is required to satisfy itself through asking the accused questions directed at establishing the presence of the requisite criminal capacity.

[10] The nature of the questions which a court can pose to elicit the necessary information is apparent from s 230 of the Code. It is couched as follows:

> **230. When a child between seven and fourteen years may be held criminally liable**
>
> (1) The presumption referred to in Section Seven as to the criminal incapacity of a child between the age of seven and below the age of fourteen years may be rebutted if, at the time of the commission of the crime for which the child is charged, the child was sufficiently mature-
>
> (a) to understand that his or her conduct was unlawful or morally wrong; and
>
> (b) to be capable of conforming with the requirements of the law."

[11] The above provision clearly shows that there is a two-stage test which must be undertaken by a court to determine the mental capacity to commit the crime by a child between the material ages. The first stage is whether or not regardless of his tender age the child was still capable of appreciating the essence and effects of his action and its wrongfulness thereof. By that is meant the cognitive aspect of the test. The second part relates to the child's ability to act in accordance with the appreciation that his actions may be wrong. It is called the conative aspect. See Snyman CR Criminal Law Fifth Edition page 179 under the sub heading *"Test to determine criminal capacity of children"* quoted with approval by this court in *S v Shonhiwa* (supra).

[12] What the two-stage test means is simply that where the child could not appreciate the nature of his/her action and its effects the matter ends there. He/she is deemed to lack the requisite mental capacity. However, the law also recognises that there could be instances where the child is reposed with such appreciation. It is then that the second leg of the test is activated. Prosecution is required to show that in

addition to the appreciation of the nature and effects of the crime, the concerned child was capable of acting in accordance with that appreciation.

[13] The process is not a walk in the park. It is complex. It needed to be so given the fragility and malleability of children's minds. I could not explain this better than GILLESPIE J did in the case of *S v C* (*a juvenile)* 1997(2) ZLR 395 (H) where he remarked that the law imagines that children below the age of fourteen are incapable of committing crimes. He cautioned that the understanding must not be that such children cannot distinguish between right and wrong or that they are incapable of doing wrong. All it means is that the child is presumed to be unable to formulate an intention to commit a crime. That is so because the child lacks the maturity or reasoning to decide to do something knowing that it is not only wrong but also aware that he/she is breaking the law and that if he/she does he/she will be liable to criminal punishment.

[14] In my opinion, to understand the law as stated above is crucial. Magistrates must not fall into the error that because a child committed an offence therefore, they had the requisite intention because this particular law has nothing to do with children who are not in conflict with the law. It is meant to protect those that have broken the law but have done so without the requisite intention.

[15] Section 230 (3) of the Code enumerates some of the factors which must be taken into account when conducting the two-stage-test indicated above. It provides that:

> (2) in deciding for the purposes of subsection (1) whether or not the understanding and capacity referred to in that subsection a court shall take into account the following factors, in addition to any others that are relevant in the particular case-
> (a) the nature of the crime with which the child is charged; and
> (b) the child's general maturity and family background; and
> (c) the child's knowledge, education and experience; and
> (d) the child's behaviour before and after the conduct which forms the subject of the charge

[16] In this case, nothing close to this was ever done. The trial magistrate did not even begin to attempt to deal with any of the factors. I am not sure whether he was blinded by the presence of the juvenile accused's guardian in the proceedings. A guardian who is a lay person does not assume the role of a legal practitioner. His confirmation of the answers given by the juvenile accused to the questions asked by the magistrate could not suddenly convert the child into a major. The presence of the guardian must never be equated to legal representation. At best it only has a calming

effect on the kid. It was the duty of prosecution to rebut the presumption of *doli inacapax* operating in favour of the accused child. The omissions by the trial magistrate are conspicuous. First, he did not bother to explain this presumption to the accused. Had he done so and drawn the accused's attention to it the possibility that the accused would have led some evidence or said something which showed that he was a child who did not know what he was doing is very high even though he did not have such onus. That interrogation would then have assisted the magistrate in determining whether or not the child had criminal capacity. Second, the magistrate did not explain anything to the guardian regarding his responsibilities towards the child. The guardian remained as clueless as the boy himself. A child appearing with a guardian who knows nothing about the law cannot be expected from nowhere to be aware of the existence of a legal presumption which operates in his favour.

[17] Rape is a complex crime. It involves many technicalities which elude even adults and trained lawyers. The exchange between the trial court and the accused and his guardian shows that nothing was broken down. Terms such as 'sexual intercourse,' 'incapacity to consent' among others were consistently used in the proceedings. They were left raw. It is unimaginable what the accused was actually admitting to. He was never asked what his understanding of rape or sexual intercourse was. It could have only been through questions directed at those areas that the trial court could have established the presence or absence in the accused of the capacity to commit the rape.

[18] In his sentencing judgment the magistrate approbated and reprobated. His contradictory approach was graphic. In one breath he stated as follows:

> "The offender is aged 12 years but judging by the results of sexual abuse he is mature enough to understand his act and its criminality."

Immediately after he concluded thus:

> "I take the view that on account of his age at the time of the commission of the offence he had a level of immaturity."

The two findings are wrong for two reasons. The first is that they are mutually exclusive. The second and more poignant one is that the question of criminal capacity has nothing to do with sentencing. It has everything to do with liability. It speaks to whether or not the accused is guilty. It is erroneous therefore to address it at sentencing stage. It ought to have been dealt with before the accused was convicted. In the end the indisputable fact is that the trial court did not make any finding as to whether or not the

child had criminal capacity. That finding is a prerequisite. It must be separately investigated and made before the question of whether the offence was committed or not is dealt with.

[19] If the age of the accused was to be deleted from the proceedings, there would be nothing to show that the court was dealing with a child. Anyone would be forgiven to think that the trial court was dealing with an adult because the questions which it asked as illustrated above are the same questions that are likely to be asked and even be misunderstood by adult men. They are intended not to ascertain whether the boy had criminal capacity but to establish whether he committed the crime of rape. That unfortunately is beside the point.

[20] In the investigation to ascertain if the accused had criminal capacity, the general maturity and family background of the child must be considered. Based on the sentencing judgment it appears that the magistrate did not consider the probation officer's report. If he did, he gave it scant recognition yet it is the very basis on which he should have formulated his opinion on whether or not the child had the necessary criminal capacity. It never ceases to surprise me, that legal minds no matter how many times caution is sounded, continue to hold the view that every problem has a legal solution. Only a few problems can be solved legally. Many others have their solutions in other disciplines. In cases involving children, psychologists invariably know better than lawyers. Had the magistrate in this case taken heed of this he would have decided the case in another way.

[21] The evidence as gleaned from the probation officer's report is that in the formative years of his life the accused was staying with his mother's sister. His parents both worked in South Africa. He stayed with that aunt from grade zero to grade five. He only started staying with his mother when she returned from South Africa. My calculations show that if he is now in grade seven, he has only been staying with her for less than two years. His father is still absent. Clearly therefore he is a boy who has never had proper fatherly guidance for almost all of his life. Further the report highlighted that the accused may have committed the offence due to peer pressure exerted by his friends called Trevor and Pride. The psychologist was blunt that the kid was not aware of the degree of the crime he had committed. From the investigations the child thought that he was playing with the complainant when they had sexual

intercourse. The reported added that the living conditions at the child's homestead may also have contributed to the delinquency. He added that children mimic what they perceive adults doing and very often tend to experiment with such practices. It is possible this child may have unfortunately stumbled upon elders performing sexual acts due to the living conditions at their homestead as highlighted by the probation officer. He experimented with the little girl but that trial went awry and resulted in severe injuries to the girl. The gravity of the consequences from a child's actions plays no part in the determination of his/her criminal capacity. Children may even kill but would still lack criminal capacity.

[22] The trial magistrate ignored all the above findings. Why he chose to do so is not clear. He instead, elected to make his own findings devoid of any basis. His decision is not supported by any facts on the ground. I cannot allow it to stand.

[23] Before I conclude, I wish to also point that magistrates must not think that the authority to prosecute which is given by the Prosecutor -General in terms of section 231 of the Code is a substitute for the state's burden to prove that a child under the age of fourteen years had criminal capacity at the material time. If that certificate is granted after consideration of the relevant issues, such evidence must not remain in the offices of prosecutors. It must be presented to the trial court for its benefit in the determination of the matter. The considerations which I discussed above still come into play. The certificate simply authorises the court to proceed to investigate the issues.

[24] Having said the above, the next challenge is what to do with the proceedings. In the earlier cases cited, this court opted for the convenient route of withholding its certificate and refusing to certify the proceedings. That way, it protected the accused from being dragged back for a retrial. That avenue was navigable because the juveniles involved had not been effectively imprisoned. It is closed in this case. I cannot simply withhold my certificate. I have above, demonstrated that this criminal trial was fraught with irregularities which are material. I am constrained to hold that there was a substantial miscarriage of justice by failing to investigate whether or not the boy had the requisite criminal capacity. The conviction must be vacated. In the premises IT IS ORDERED THAT:

**a. The entirety of the proceedings in this case are quashed**

**b. For the avoidance of doubt, the conviction of the accused on a charge of rape and the subsequent sentence imposed be and are hereby set aside**

**c. In the unlikely and undesirable event that the Prosecutor General decides to pursue the matter it shall be tried before a different regional magistrate**

**d. The registrar of this court id directed to without delay, issue a warrant for the immediate liberation of the accused**

I have sought the views of my brother NDUNA J who is in agreement with both my findings and the attendant order.

MUTEVEDZI J……. NDUNA J ……AGREES