THE STATE
versus
THUTHU CHIGUVARE

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 29 July 2015

Criminal Review

HUNGWE J the learned scrutinising regional magistrate addressed the following correspondence to the registrar of this court in the following terms:

> "The accused was convicted of contravening section 106 of the Criminal Law (Codification & Reform) Act, [*Cap 9:23*]. She is alleged to have aborted a child and concealed the body in the garden outside the house. There is no medical report to confirm that the foetus had developed to the extent of becoming a child as required in section 105 of the same Act which reads as follows:
>
> > 'A child does not include a foetus which issued from its mother before the twenty-eighth week of pregnancy.'
>
> How it was known for a fact that it was a child as required by law without the medical report?"

The law requires that for an offence to have been committed, the foetus must have been twenty eight weeks or older. There is no proof on the record as to the age of the foetus or "child" in order to meet the legal thresh-hold demanded by the law. In *S* v *Maramba* 1994 (1) ZLR 326 (HC) this court held that unless it was established that the foetus was a "child" for the purpose of s 2 of the Concealment of Birth Act, [*Chapter 57*] a conviction for concealment of birth would not be competent. See also: *R* v *O* 1963 (1) SA 43 (R); *S* v *Maposa* 1994 (2) ZLR 252 (HC); *S* v *Madombwe* 1977 (3) SA 1008 (R); *S* v *Jasi* 1993 (2) ZLR 451 (HC); *S* v *Muguti* 1998 (1) 264 (HC).

In light of this the conviction in the present matter was clearly improper. It ought to be quashed for that reason.

In the result the conviction is quashed and the sentence set aside.

MANGOTA agrees:_____________________