

THE STATE
versus
JOHNSON SHONHIWA

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 1 March 2020

Criminal Review

ZISENGWE J: The accused was convicted following his plea of guilty to a charge of “Rape” (contravening section 65 (1) of the Criminal Law codification and Reform) Act, [Chapter 9:23] (The Criminal Code). The agreed facts are that on numerous occasions he had sexual intercourse with Samantha Maregedze (the complainant) a female juvenile aged 7 years who at law is incapable of consenting to sexual intercourse. He was subsequently sentenced to 3 years imprisonment which was wholly suspended for 5 years on the usual conditions and the record of proceedings was submitted to this court for automatic review.

That the accused did have sexual intercourse with the complainant on several occasions is common cause. That much is borne out by the record of proceedings wherein the accused candidly admitted the same.

What is problematic, however, is the question of the accused’s criminal capacity. This is on account of the fact that at the material time between January 2018 and August 2019, he was aged 13 years (he was born on 10 November 2006). He therefore falls into that category of offenders where the rebuttable presumption of lack of criminal capacity operates.

Under the common law children below the age of 7 years are deemed irrebuttably presumed to be *doli incapax* and cannot be held criminally responsible for their conduct. However, although the presumption of *doli incapax* is still applicable in respect of children aged between seven and fourteen, it is now rebuttable. It can be rebutted by proof to the effect that the

child in fact possessed insight and self-control. This is now captured in section 7 of the Criminal Code which provides as follows:

7. Criminal capacity of children between seven and fourteen years of age

" A child who is over 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 reasonable doubt-

(a) to lack the capacity to form the intention necessary to commit the crime; or

(b) where negligence is an element of the crime, to lack the capacity to behave in the way that a reasonable adult would have behaved in the circumstances"

Section 230 of the Criminal Code on the other hand sets out the circumstances under which a child within the seven to fourteen years group may be held criminally liable for his or her conduct as well as some of the factors which may be considered in arriving at that conclusion. It provides 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."

Subsection (2) sets out some of the factors which may serve as indicators of existence of criminal capacity and these include the nature of the crime, the child's level of maturity and background, the child's knowledge, education and experience and the child's conduct before, during and after the commission of the alleged offence.

Upon perusal of the record of proceedings I observed that the question of capacity had not been canvassed at all during the questioning by the magistrate in terms of section 271(2)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] and I directed a query to the Magistrate in the following terms;

"On what basis was the learned Regional Magistrate satisfied that the presumption of doli incapax applicable to children between seven and fourteen years was rebutted (see Section 230 of the (Criminal codification and Reform) Act, [Chapter 9:23]).

In response the Regional Magistrate referred to the provisions of Section 230 (3) of the Criminal Code and wrote *inter alia* as follows:

"In the present matter the trial Magistrate took into consideration that though the accused was 13 years old when he committed the Rape on divers occasions he was cunning his actions such that the Magistrate came to [the] conclusion that he was a mature person. This is confirmed by paragraph 8 of the state outline which states that the accused would make sure that whenever he visited the complainant's homestead in the absence of elders he would have sexual intimate with complainant (on divers occasions) This particular behaviour of "divers occasions" is different from a once of rape by a 13 year old boy. The accused person though young now had the experience and maturity to continue with his modus operandi. His behaviour before the rape, during and after the initial rape confirms that he was capable of committing the offence rape despite his tender age of 13."

Evidently, the Magistrate missed the point. Since this was a plea of guilty, it was incumbent upon the Magistrate to satisfy herself through posing the appropriate questions that the requisite criminal capacity was admitted. It was incorrect, in my view, for the Magistrate in a guilty plea to surmise, as she did that such criminal capacity was present. This is particularly so in view of the fact that the accused was not legally represented during the trial and no- one explained to him the existence, nature and implications of the presumption in question.

Sight must not be lost that the test for capacity in this regard consists of two parts (as provided from Section 230) namely that the child was sufficiently mature to firstly appreciate that his or her conduct was unlawful or morally wrong and secondly the ability to conform with the requirements of the law.

In this regard in Snyman CR Criminal Law Fifth Edition page 179 under the sub heading "*Test to determine criminal capacity of children*" the following is stated. "The test to determine whether a child between the ages of eight and fifteen has capacity ought in principle to correspond with the test to determine criminal capacity as set above. The test ought to be whether such a child in spite of his age, is nonetheless capable of appreciating the nature and consequence of his conduct and that it is wrong. (This is the cognitive part of the test). And further whether he is capable of acting in accordance with that appreciation (this is the conative part of the test).

In *S v C (a juvenile)* 1997(2) ZLR 395 (H) at 397 C-D Gillespie J had this to say:

“The law presumes a child under fourteen to be doli incapax. This does not mean unable to do wrong. It does not mean lacking the capacity to differentiate between right and wrong. It means that the child is regarded as incapable of formulating a criminal intent to break the law. He has not the maturity or knowledge to make up his mind to do something to do something knowing it not only to be wrong but also knowing that it is against the law and susceptible to criminal punishment”

A perusal by the Magistrate of the probation officers’ report should have instantly alerted her of the possibility of lack of capacity on the part of the accused. I will shortly advert to the “diagnostic evaluation” of the accused by the Probation Officer, suffice it to say that those were pertinent observations brought to the attention of the court which it could not afford to ignore or disregard.

Parallels may be drawn with the case of *S v F (a juvenile)* 1988(1) ZLR 327 (H). In that case the Magistrate convicted a 10-year-old boy of indecent assault committed against an 8-year-old girl. The magistrate drew the ire of the reviewing judge by failing to ascertain whether the child had the requisite capacity. There, as in the present case, the accused was prosecuted despite the fact that the Probation Officer had stated that both accused and complainant were too young to appreciate the wrongfulness of what they were doing. GREENLAND J had this to say at 330 C – D:-

“Furthermore, a reading of the Probation Officers’ report admits of the clear implication that the accused was incapable of appreciating the wrongfulness of his alleged action, i.e. he was doli incapax. That is the overall impression given. It is common knowledge that young children necessarily internalize perceived behaviour of those around them and will often proceed to experiment themselves without being conscious of the wrongfulness of such behaviour. In this mimicking behaviour they are not acting criminally. The law recognizes this. Hence its insistence that, in regard to young offenders, the elements of knowledge of wrongfulness be proved”

The Probation Officer in his report in the instant case echoed exactly the same sentiments when he reported thus:

“The child could have lacked fatherly guidance and control. He could also have lacked supervision and monitoring. The child grew up in a peri-urban area and had exposure to Mpandawama Growth [point] an area associated with immorality. The child became

sexually precocious in this case. He noted that he committed the offence thinking he was playing with the girl and not knowing that it is wrong. His age group is interested in experimenting and he could have wanted to experiment.” (My emphasis)

What must have eluded the Magistrate is that the starting point is that a child in the age group in question has the presumption of *doli incapax* operating in his favour implying that he is devoid of the capacity to commit the crime. To sustain a conviction, the state must prove that the child in question was sufficiently mature to understand and that he did understand the wrongfulness of the conduct.

The inferential reasoning that the Magistrate purported to employ would have been permissible in instances of contestation as between the state and the accused regarding the existence or otherwise of such capacity. The state would have in those circumstances been required to establish criminal capacity beyond reasonable doubt. This means that after considering both sides of the argument, the magistrate would have been at liberty to use inferential reasoning to conclude that indeed the presumption in question had been rebutted. In other words the Magistrate fell into error by, without as much as posing pertinent questions to the accused on the question of capacity, concluding that the accused possessed the requisite criminal capacity.

She should have posed questions along the following lines: -

Q. When you had sexual intercourse with the complainant were you aware that your conduct was morally wrong and/or against the law and you could be punished for it?

A response in the affirmative would then have been followed up with:

Q. Do you admit that you had the self-control and ability to resist the temptation to behave in the manner you did?

In *S v C (supra)* the remarks of the reviewing judge are instructive:

“Whether the child is doli capax is fundamental. If the child is under fourteen then plainly in the absence of such enquiry there will be nothing to rebut the presumption that there was no criminal capacity attending the apparently wrongful conduct”

There was therefore a clear misdirection on the part of the Magistrate amounting to properly canvass the query of capacity on the part of the accused.

I have pondered over whether to remit the matter back to the Regional Magistrate to canvas the question of capacity or to simply set aside the conviction because of the misdirection discussed herein. There are obviously two competing interests in this regard. On the one hand there is a genuine societal interest in having offenders prosecuted and punished for their wrong doing, particularly in serious cases such as the present one. On the other hand, however, there is the equally compelling question of the desirability of dragging the accused who is a young boy presently of fourteen years of age through the criminal justice system all over again.

In *S v C* (supra) the reviewing judge battled with the same dilemma and captured same in the following words:

“To overturn the conviction and sentence is the work of but a moment. But the problem of what to do in mitigation remains... One is tempted to think that little Lydia (the accused) has suffered enough. Setting aside the sentence would leave Lydia now free to go about her business. I am sensible, however of considerable disquiet at merely letting her loose on the world. She is fourteen at most. Her parents are divorced... One can foresee for her, should she continue in this line, a future of greater and more damaging exploitation. She is not a criminal deserving of punishment. It is very clear to me that she is a child in need of care. She ought to be dealt with as such.”

Ultimately in that case the court settled for her referral to the juvenile court for an enquiry into in terms of s19 of the Children’s Protection and Adoption Act [*Chapter 5:06*] (now the Children’s Act [*Chapter 5:06*]).

In the present matter given the undesirability of once again dragging the young person through the criminal justice system with its attendant trauma, I have settled for withholding my certificate implying that I do not consider the proceedings to be in accordance with real and substantial justice.

I have also sought the views of my brother judge JUSTICE MAWADZE on the issue who in principle agrees with the course of action that I propose.

MAWADZE J: I have read the review judgment of my brother ZISENGWE J which is well articulated. I share the dilemma he finds himself in on how to dispose of the matter. I just wish to point out the following.

Firstly, a proper reading of the agreed facts at most discloses discernible 3 counts of rape; that is on the first day in count 1, on the last day when the other child witnessed the rape in count 2 and count 3 would that then be referred to as on divers occasions

Secondly, in dealing with juvenile offenders like the accused in this case questions posed in adducing the essential elements of the offence should not be the same as adult. For example the phrase “sexual intercourse” may not mean much to such an offender. There is need to inquire if indeed on all occasions the juvenile effected penile penetration.

Lastly, I entirely agree that the evidential burden in relation to the juveniles criminal capacity at law was not overcome as is well articulated by my brother ZISENGWE J.

Ordinarily my brother ZISENGWE J after withholding his certificate would have no cause to seek my views of any other Judge. I however agree that the course of action he took is proper in the circumstances.