

THE STATE
versus
ENOCK MANGWENDE

HIGH COURT OF ZIMBABWE
CHITAPI & MUSITHU JJ
HARARE, 28 October 2020

Criminal Review

CHITAPI J: The accused was convicted by the regional magistrate at Chinhoyi on two counts for the offences, firstly, rape as defined in s 65 (1) (a) of the Criminal Law Codification & Reform Act [*Chapter 9:23*] and, secondly for the offence of deliberate transmission of HIV as defined in s 79 (1) (a) of the same enactment. The accused was sentenced on the first count to 20 years imprisonment with 3 years suspended on condition of good behaviour and in respect of the second count to 17 years imprisonment. The total effective sentence is 34 years in relation to both counts.

The charges on which the convictions arose were that the accused on 7 November 2016 raped the complainant, a 12-year-old juvenile at Nyandebvu Village, Kutama. The accused was said to have raped the complainant in the full knowledge that he was HIV positive and therefore knew or realized the real risk or possibility that the accused could infect the complainant with the HIV virus. The accused was therefore separately charged with deliberate transmission of HIV as already noted.

The facts of the matter were that the complainant was a grade 6 female pupil at a local school in Chief Zvimba where she resided. Complainant was aged 12 years and the accused who was a neighbour was aged 40 years old. The accused met up with the complainant under a tree as the complainant emerged from the bushes where she had been chasing away some goats. The goats had accessed a vegetable garden under the charge of the complainant. On meeting with the complainant, the accused grabbed the complainant's hand, held her waist, pushed her to the ground and raped her once. The accused then threatened to assault the complainant if ever she reported the rape to anyone. The complainant only revealed the rape

after the accused was seen at night behind the back of the house occupied by the complainant. The complainant's mother then asked the complainant about the presence of the accused who apparently ran away. It appears that he had been stalking the complainant.

The facts in the 2nd count were that the accused had sexual intercourse with the complainant knowing that he was HIV positive and that he foresaw the real risk or possibility that he could infect the complainant with the HIV virus.

The trial of the accused was disposed of by way of guilty plea in terms of the provisions of s 271 (2) (b) of the Criminal Procedure & Evidence Act [*Chapter 9:07*]. I have considered the manner in which the learned regional magistrate disposed of the guilty plea. The learned regional magistrate did not comply with the express and peremptory provisions of s 271 (3) of the Criminal Procedure & Evidence Act either. The provisions of s 271 (3) are clear that *inter alia*, the charge must be explained to the accused and such explanation shall be recorded. In *casu*, the learned regional magistrate recorded that:

“Charges – Put to accused and understood.”

The learned regional magistrate did not comply with the provisions of s 163A of the Criminal Procedure & Evidence Act. The proceedings in this matter were held on 14 November 2016. Section 163A was inserted by s 34 of Act No. 2 of 2016. Act No. 2 was the General Laws Amendment which came into force on 10 June 2016. It is clear from the manner that the plea was dealt with by the learned regional magistrate that he was oblivious to the provisions of s 163A aforesaid because he did not adopt the peremptory procedure set out therein.

The provisions of s 163A provides as follows

“163A accused in Magistrates Court to be informed of s 191 rights

- (1) At the commencement of any trial in a Magistrate Court, before the accused is called upon to plead to the summons or charge, the accused shall be informed by the magistrate of his or her right in terms of s 191 to legal or other representation in terms of that section.
- (2) The magistrate shall record the fact that the accused has been given the information referred to in subs (1) and the accused's response to it.”

The provisions of s 191 provides as follows

“191 legal representation

Every person charged with an offence may make his defence at his trial and have the witness examined or cross-examined –

- (a) by a legal practitioner representing him; or
- (b) in the case of an accused person under the age of sixteen years who is being tried in a Magistrate Court, by his natural or legal guardian; or
- (c) where the court considers he requires the assistance of another person and has permitted him to be so assisted by that other person.”

The provisions of s 163A are peremptory and not directory. They require the court to give effect to a constitutional imperative, which is the right of the accused to legal representation. Section 70 of the constitution provides for rights of an accused person. Of concern in this matter are rights listed in paras (d – f) of subs 1 of s 70. The details of the provisions are as follows –

“70 Rights of accused persons

- (1) Any person accused of an offence has the following rights –
 - (a – 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.
 - (f) to be informed promptly of the rights conferred by paras (a) and (e).”

The legislature enacted s 163A to align the Criminal Procedure & Evidence Act with the constitution. The legislature commendably made the exercise of the accused person’s right to legal representation the first step to be complied with to kick start a trial. There can be no doubt that the legislature appreciated the critical and pivotal role of legal representation and made the step a mandatory one. The learned regional magistrate did not comply with the peremptory provisions of s 163A as aforesaid. In this regard, he conducted a trial which is not the one provided for in s 163A. It is in my view not possible to pass as legal, a trial which is procedurally irregular as regular.

When a judge reviews criminal proceedings, the provisions of s 29 (3) of the High Court Act [*Chapter 7:06*] must be kept in mind. The provisions thereof provide as follows:

“No conviction or sentence shall be quashed or set aside in terms of subs (2) by reason of any irregularity or defect in the record or proceedings unless the High Court or a judge thereof as the case may be considers that a substantial miscarriage of justice has actually occurred.”

The issue therefore becomes whether or not the learned regional magistrate’s omission to comply with the provisions of s 163A being an irregularity resulted in an actual substantial miscarriage of justice. In my view the legislature cannot have intended that s 29 (3) be used to give effect to an irregular trial. The legislature cannot have enacted the provisions of s 163A in peremptory terms and without allowing for exceptions to the rule, only to then give effect to the violation of s 163A through s 29 (3) of the High Court Act. A trial conducted other than by following the provisions of s 163A is therefore irregular. A procedural irregularity which involves the holding of a trial using a procedure that is foreign to the one set out in s 163A by omission or commission does not constitute a fair trial as envisaged in s 69 of the Constitution. The right to a fair trial cannot be abrogated and is safeguarded from legislative interference by

s 86 (2) and (3) (e) of the constitution which provides that no law may limit the right. I hold the view that the provisions of s 29 (3) of the High Court Act, cannot cure an irregular trial and hold it regular on the basis that a substantial miscarriage of justice has not occurred.

This court has recently dealt with the effects of a failure to comply with s 163A aforesaid. See *S v Sawaka* HH 262/20 and *S v Muketiwa Tapiwa and Ors* HH 649/20. These judgments were not in existence when the learned regional magistrate dealt with this matter in November 2016. They are referred to for the learned regional magistrate and his peers to read and be directed on the purport of s 163A and consequences of failure to observe and apply its provisions.

There is also another matter which arises for comment so that should the matter be revisited, the irregularity noted is not repeated. The learned magistrate was misdirected in convicting the accused of contravening s 79 (1) (a) of the Criminal Law Codification & Reform Act. Section 79 (1) (a) provides as follows –

“79 Deliberate transmission of HIV

(1) Any person who—

(a) Knowing that he or she is infected with HIV; or

(b) realizing that there is a real risk or possibility that he or she is infected with HIV; intentionally does anything or permits the doing of anything which he or she knows will infect, or does anything which he or she realizes involves a risk or possibility of infecting another person with HIV, shall be guilty of deliberate transmission of HIV, whether or not he or she is married to that other person; and shall be liable to imprisonment for a period not exceeding 20 years.

(2) It shall be a defence to a charge under sub-section (1) for the accused to prove that the other person concerned-

(a) knew that the accused was infected with HIV; and

(b) consented to the act in question appreciating the nature of HIV, and the possibility of becoming infected with it.”

It seems to me that to charge the accused with both offences of rape and deliberate transmission of HIV may well amount to an improper splitting of charges. I have not been addressed on that point in argument. I do not make an authoritative or final pronouncement on whether or not to charge rape under s 65 of the Criminal Law Codification and Reform Act and deliberate transmission of HIV under s 79 amounts to a duplication of charges. The dominant intention of the accused in a rape charge is to intentionally and unlawfully have forced sexual intercourse with the victim. The offence in s 79 connotes engaging in a deliberate act with intent to infect another person with HIV or foreseeing the real risk or possibility that through the conduct in question, another person may be infected with HIV.

It is noted that the legislature was alive to the fact that a rape committed by a person who is HIV positive must be punished more severely than where the accused is HIV negative.

Section 80 provides as follows:

“80 Sentence for certain crimes where accused is infected with HIV

- (1) where the person is convicted of-
 - (a) rape, or
 - (b) aggravated indecent assault; or
 - (c) sexual intercourse or performing an indecent act with a young person involving any penetration of any part of his or her or another person’s body that incurs a risk of transmission of HIV;

And it is proved that, at the time of the commission of the crime, the convicted person was infected with HIV, whether or not he or she was aware of his or her infection, he or she shall be sentenced to imprisonment for a period of not less than 10 years.

Provided that—

(i) notwithstanding section 192, this subsection shall not apply to an incitement or conspiracy to commit any crime referred to in paragraph (a), (b) or (c), nor to an attempt to commit any such crime unless the attempt involved any penetration of any part of the body of the convicted person or of another person’s body that incurs a risk of transmission of HIV;

(ii) if a person convicted of any crime referred to in paragraph (a), (b) or (c) satisfies the court that there are special circumstances peculiar to the case, which circumstances shall be recorded by the court, why the penalty provided under this subsection should not be imposed, the convicted person shall be liable to the penalty provided under section 65, 66 or 70, as the case may be.

(2) For the purposes of this section—

- (a) the presence in a person’s body of HIV antibodies or antigens, detected through an appropriate test, shall be *prima facie* proof that the person concerned is infected with HIV;
- (b) if it is proved that a person was infected with HIV within thirty days after committing a crime referred to in those sections, it shall be presumed, unless the contrary is shown, that he or she was infected with HIV when he or she committed the crime.”

The provision of s 80 therefore prescribe a minimum sentence of 10 years for the offence of rape where the convicted accused is HIV positive knowingly or unknowingly. The accused is given an opportunity to satisfy the court that there are special circumstances peculiar to the case why the penalty of not less than 10 years should not be imposed. I am therefore not able to hold that the conviction on the second count would, had, I not determined that the trial was procedurally irregular as to render it a nullity, be certifiable. I deliberately adverted to this issue because it should be considered by the trial court in future.

The last issue related to a failure by the learned regional trial magistrate to comply with the peremptory provisions of s 271 (3) of the Criminal Procedure and Evidence Act. Guilty pleas are not disposed of in terms of s 271 (2) (b) only but as read with s 271 (3). Section 271 (3) provides as follows:

- “(3) Where a magistrate proceeds in terms of paragraph (b) of subsection (2)-
(a) the explanation of the charge and the essential elements of the offence; and
(b) any statement of the acts of or omission on which the charge is based referred to in subparagraph (i) of that paragraph; and
(c) the reply by the accused to the enquiry referred to in subparagraph (ii) of that paragraph; and
(d) any statement made to the court by the accused in connection with the offence to which he has pleaded guilty
Shall **be recorded**”

In *casu* the learned regional magistrate recorded that “charges – Put to accused and understood”. That is not what the learned regional magistrate was supposed to do. He was in terms of the provisions of s 271 (3) required to *inter alia* explain the charge to the accused and record the explanation so given in content. This and other requirements in s 271 (3) aforesaid make the plea procedure cumbersome and involved. The rationale is understandable. The accused would by his admission essentially be convicting himself and relieving the State of the burden to prove the charge against the accused beyond a reasonable doubt. The provisions of subs (3) of s 271 aforesaid are intended to ensure fairness to the accused by ensuring that the guilty plea is tendered deliberately and knowingly. The provisions of subs 4 of s 271 allow the magistrate, notwithstanding the accused’s plea of guilty to call upon the prosecutor to nonetheless adduce evidence on any aspect of the charge and in regard to sentence to receive evidence including hearsay evidence made by or on behalf of the accused. The accused may if he gives evidence on sentence be questioned by the court or the prosecutor in terms of subs (5) of s 271. The proceedings on review herein therefore suffered from a number of irregularities or misdirection on procedure. They are not certifiable as being in accordance with real and substantial justice. The proceedings must be set aside.

It is very unfortunate that the convictions and sentences on very serious charges are set aside on account of procedural irregularities. In *casu* the irregularities were committed by the regional magistrate who is charged with scrutinizing cases concluded by his subordinate magistrates where the case does not qualify for automatic review by a judge of the High Court. It is very important that a judicial officer always keeps abreast with the law. The failure to comply with peremptory procedural trial steps have resulted in a setting aside of the unprocedural trial. The failure to comply with s 271 (3) of the Criminal Procedure and Evidence Act have again further rendered the trial unfair because it cannot without the charge having been explained to him, to hold that the accused understood what the charge entailed since no explanation as required in terms of s 271 (3) was recorded as having been given to the accused.

Resultantly the following order is made:

1. The convictions and sentences imposed by the learned regional magistrate in case No. CRB CHNR 200/16 are set aside
2. The accused shall be forthwith released from custody
3. The Prosecutor General shall retain his right in his discretion to prosecute the accused afresh
4. In the event that a fresh prosecution is instituted:
 - (a) a different magistrate shall preside the trial
 - (b) in the event of a conviction, any sentence that was served by the accused before his release shall be factored into the sentence to be imposed as a served portion of the new sentence
 - (c) the accused shall not be sentenced to any sentence greater than that imposed in the proceedings which have been set aside.

MUSITHU J agrees.....