

THE

versus

FORGET NGUVO

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO 16 JUNE, 2020

Criminal Review

ZISENGWE J: The whole point of this review judgement is to once again stress the importance, in a contested criminal trial, of observing the peremptory provisions of section 200 of the Criminal Procedure and Evidence Act, [*Chapter 9:07*].

This section provides as follows:

"200 summing up

After all the evidence has been adduced, the prosecutor shall be entitled to address the court, summing up the whole case, and the accused, or each of the accused if more than one, shall be entitled by himself or his legal representative to address the court and if, in his address, the accused or his legal representative raises any matter of law, the prosecutor shall be entitled to reply, but only on the matter of law so raised."

From a perusal of cases submitted on review there appears to be a tendency to completely disregard this important provision. It is often treated as an unnecessary and time wasting inconvenience, yet it is evidently not, particularly where the accused is unrepresented.

The section presents an opportunity to tie up all the often discrete pieces of evidence, to comment on the credibility or otherwise of the various witnesses that may have testified. It affords the competing parties a chance to make concessions, if any, and to highlight the strengths and weaknesses of the respective cases. It also gives an opportunity to the parties to persuade the court

to accept or reject the versions presented during the trial in light of the nature of the offence and the applicable principles related to onus and burden of proof.

In this case the accused was charged with the crime of rape (i.e. contravening section 65(1) Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]). The allegations were that he had forcible non-consensual sexual intercourse with the complainant, a girl aged 13 years at the time.

The accused pleaded not guilty and denied throughout the trial ever having engaged in any sexual activity with the complainant. However, at the conclusion of the trial in which 3 witnesses testified for the state and the accused was the sole witness for the defence, he was found guilty as charged and sentenced to 13 years imprisonment of which 2 years imprisonment was conditionally suspended.

Upon a perusal of the record of proceedings when same was referred to this court for review in the ordinary course, I observed that the accused who was unrepresented had not been made aware of the provisions of section 200 let alone afforded the opportunity by the court to address it. I accordingly directed a query to the Magistrate for an explanation and in response the Magistrate conceded her error in failing to do so.

As alluded earlier, the provisions of section 200 are peremptory and there are several implications that flow from this a few of which will be highlighted below.

Firstly, the trial court is enjoined not only to bring to the unrepresented accused the provision in question but also to provide a succinct explanation of the same. Failure to explain to the unrepresented accused this right may amount to an irregularity vitiating the proceedings (*S v Parmand* 1954 (3) SA 833(A), *S v Mabote and Another* 1983 (1) SA 745 OPD, *R v Cooke* 1959 (3) SA 449).

Some decisions have labelled this right as a fundamental one in a criminal trial and that failure to observe it constitutes a gross irregularity.

In the *S v Mabote and Another* (*supra*) the headnote reads:

"They are basic principles of our Criminal Law that an accused has the right to address the court which is trying him before judgement on the merits of the offence charged against him and that the opportunity to exercise that right is afforded him regardless of the prospects of success. A failure to afford him that opportunity affects the essence of the administration of criminal justice and cannot be regarded as anything other or less than a gross irregularity. Such an irregularity destroys the fairness and accordingly also the legal validity of the proceedings in question. "See also S v Kwindu 1993 (2) SACR 408 (v) and S v Mbeje 1996 (2) SACR 252 (N)."

It is pertinent to note that s175 of the South African " Criminal Procedure Act," 51/77 on which those decisions are based is similarly worded to our Section 200.

Some authorities have gone as far as holding that a failure by the court to afford accused the opportunity address it, even unintentionally, is a serious irregularity which violates his constitutional right to a fair trial unless it can be shown that there was no prejudice to the accused (*S v Zingilo* 1995 (a) BCLR 1186 (O), *S v Mbeje* (supra) at 257e-h).

The accused can, of course waive his right to so address the court, needless to say that he can do so upon being apprised of its existence and import: suffice it to say that both the explanation and the election to waive it must be recorded and must appear *ex facie* the record of proceedings.

Ultimately, however, the primary consideration whether or not to set aside the proceedings for want of compliance with section 200 is that of prejudice occasioned to the accused thereby. In *S v Kwindu* (supra) at 411 b-d LIEBENBERG J after considering various authorities on the subject said the following:

"In terms of the above authorities the position can therefore be summarised as follows. The failure to afford an accused the opportunity to address the court before judgement is a gross irregularity which will result in the setting aside of the proceedings unless it is clear that the accused was not prejudiced thereby or that the failure was due to his fault or where it is clear that he has waived his right of address. The judicial officer must afford the accused the opportunity to address the court by enquiring from him whether he wishes to avail himself of his right to do so and must record the response of the accused."

Determining whether or not prejudice resulted from an omission such is the one under discussion can be elusive. In *S v Davids; S v Dladla* 1989 (4) SA 172 at 193 E-F NIENABER J had this to say

"Not every irregularity, however, is fatal. To be fatal to the proceedings the irregularity must result in a failure of justice. There will be no failure of justice if there is no prejudice to the accused, and there will be no prejudice to him if he would have been convicted, in any event, irrespective of the irregularity"

However, the court proceeded to caution against cursory speculation that there was no prejudice to the accused. The following was stated in this regard:

"For criminal proceedings to be vitiated and a conviction to be quashed there must first be an irregularity. An irregularity occurs whenever there is a departure from those formalities, rules and principles of procedure with which the law requires such a trial to be vitiated or conducted: (S v Xaba 1983 (3) SA 717 (A) at 728 D). An irregularity will

thus be committed if a rule of practice, procedure or evidence, or a precept of natural Justice recognised in our law is disregarded."

At 193 F-h the learned judge further remarked:-

"Prejudice must, in principle be proved. But there is a qualification which is fundamental to a proper administration of justice, the proceedings as a whole are tainted; when, as a result, there is a failure of the proceedings as a whole, there is by the same taken a failure of justice. It would then be idle to speculate, in addition, on what, but for the irregularity, the fate of the accused would have been. A failure of justice will thus be taken for granted whenever the irregularity compromises for instance a) the reliability, competence, integrity or impartiality to the tribunal; or b) the competence or ability of the accused to follow the proceedings, or c) his prerogative to present his defence; or d) his right to arrange legal representation; or e) the propriety of the prosecution as a whole or f) the rehabilitee of the evidence as a whole, for instance when the testimony on its entirety was not properly sworn, affirmed or duly interpreted; or when the accused's selected or assigned counsel is afterwards found not to have been legally qualified to act as such."

In the present matter, however, a thorough examination of the evidence does not appear to suggest prejudice to the accused. The evidence of the complainant was to the effect that accused was employed at the farm where she resided and also shared the same homestead. She testified how on several occasions accused would grab her, fondle her breasts before engaging in forcible non-consensual sexual intercourse with her. She indicated that accused warned her not to divulge the abuse to anyone and threatened to decapitate her should she do. She however let the cat out of the bag when she disclosed her fate at the hands of the accused to her school teacher. This followed a lesson on child sexual abuse.

The evidence also shows that the complainant's mother was not only unfortunately afflicted by some mental illness (suggesting that the abuse could very well have taken place right under her nose without her detecting it) but also that at certain intervals she resided elsewhere.

The complainant's school teacher essentially confirmed the circumstances that led to the disclosure by the complainant of the abuse and the steps she took to have the matter brought to the attention of the police.

The investigating officer also testified in this trial and recounted her investigation which included her interview with the complainant and the revelations of the sexual abuse she made to her. She also testified about having taken the complainant for a medical examination which confirmed sexual penetration.

The evidence of the accused as stated earlier amounted to a denial of any sexual contact with the complainant. He explained that he unceremoniously left the farm in question at roughly the same time that the rape allegations surfaced because he was disgruntled about the non-payment of his salary and wages. Implicit in his explanation is the suggestion that this was a mere coincidence of two separate and unrelated events.

From a reading of the judgment it is hard to imagine how the magistrate's reasons in accepting the version of the state witnesses and rejecting that of the accused were affected by the failure to afford the accused the right to address the court in terms of s200. I could not find any suggestion of prejudice to the accused brought about by the said failure. And accordingly the proceedings are hereby confirmed.

ZISENGWE J.....

WAMAMBO J. agrees.....