

THE STATE  
**versus**  
VELAPHI SIBANDA

HIGH COURT OF ZIMBABWE  
BERE J  
BULAWAYO, 27 APRIL 2017

### **Review Judgment**

**BERE J:** I am seized with matter by way of automatic review. The accused was properly convicted of the offence of physical abuse as defined in section 3 (1) (A) as read with section 4 (1) of the Domestic Violence Act [Chapter 5:16]. The accused was sentenced to 24 months imprisonment, 6 months of which were suspended on grounds of future good conduct leaving him to serve an effective of 18 months imprisonment. I am concerned with the sentence that was imposed by the court *a quo*- the sentence shows a high-handed approach.

The facts of this case show that the accused and the complainant are husband and wife with three minor children, the eldest being 6 years old. At the time of his conviction the accused was self-employed as a vendor realizing an income of US\$20 per week.

The accused and the complainant picked up a misunderstanding over the complainant's alleged adulterous conduct. When the accused asked his wife, the complainant, about the issue of this extra-marital affair with some known man in the neighbourhood, the complainant left the matrimonial house and on being followed, she was found outside the house.

On being confronted about the same issue outside the misunderstanding between the two got exacerbated with the result that the accused took out an axe from his trousers and started assaulting the complainant with the wooden handle of the axe.

The medical report which was tendered as part of the State case revealed that the complainant had suffered the following injuries as a result thereof:

“swollen left thigh with a dark mark on the lateral aspect of the thigh, swollen left foot, tender and swollen left wrist and hand.”

The medical report concluded that the injuries observed had been caused by a blunt object and that they were serious.

When the facts of the offence were read to him the accused was asked if he had any additions to make to which he responded in the affirmative and proceeded to say the following:

“--- I had a misunderstanding with her (the complainant) at around 7pm and I asked her to come back. At around midnight I realized that she was not at home. That is when I proceeded to the alleged boyfriend’s house. I knocked and was not attended to. I went and tried to open a window with an axe. I met the boyfriend who I asked to switch on the light but he refused. He proceeded to open the door. I tried to beat him but he went out running. I tried to chase him but feared that complainant would escape. I went back and found her about to leave. I got hold of her and ordered her to go home and she refused. I started assaulting her ordering her to go home with me.”

This fairly elaborate explanation given by the accused person as the background to the assault was never controverted by the prosecution. What followed after the accused’s explanation was the usual standard approach of canvassing the elements of the offence of assault in question and answer form.

In mitigation the accused advised the court *a quo* that he was married to the complainant and that the two had three minor children with the eldest being 6 years old and that he was a first offender.

In this court’s view, the court *a quo* ought to have considered as highly and additional mitigatory the unchallenged explanation given by the accused person when he was asked of any additional facts surrounding the reasons why he committed this offence. That explanation could not have been ignored by the court *a quo* because it largely influenced the conduct of the accused person. By not seeking to challenge it the prosecution accepted that indeed what the accused person stated was true.

In my view, without attempting to trivialize the seriousness of the offence the accused was convicted of, the sentence imposed by the court *a quo* was quite incompetent and outrageous.

I am concerned at the level of unjustified excitement which generally the lower court has when handling offences of domestic violence. The trend seems to be to start by opting for the deeper end of the penalty instead of trying wherever necessary to safeguard the fabric of the

matrimonial life especially where the accused and the complainant are husband and wife. It is my very strong view that where the court is faced with such a case, it must seriously consider the devastating nature of imprisonment especially where that might lead to the potential collapse of the marriage itself. I say so because, marriage as an institution is a very vital social fabric which must not easily be compromised by the rigors of imprisonment. Imprisonment yes, but it must be only considered as a last resort, when all other forms of punishment are deemed to be inappropriate.

I now come to consider the penalty provisions provided for by the Act itself. This is to be found in section 4 thereof and the section reads as follows:

“4. Offence of domestic violence and acts excluded from its scope

- (1) Subject to subsection (2), any person who commits an act of domestic violence within the meaning of section 3 shall be guilty of an offence and liable to a fine not exceeding level fourteen or imprisonment for a period not exceeding ten years or to both such fine and imprisonment.”<sup>1</sup>(My emphasis)

It is clear to me that whenever one is dealing with the offence of Domestic Violence the starting point must be to seriously consider the imposition of a fine of not more than US5000 as informed by level 14 as defined by the Code<sup>2</sup>. Only when a fine is found to be inappropriate should one then proceed to consider a prison term.

In this regard I am reminded of the wise and instructive words of EBRAHIM JA (as he then was) in the case of *S v Mugwenhe and Another*<sup>3</sup> when he commented as follows:

“It is my view, however, that judicial officers should avoid the tendency to approach sentence in the manner of automation. ----. The tendency to regard all cases of violence and in particular those of assault with intent to do grievous bodily harm as falling within the scope of those offences where prison sentences are desirable must be avoided--. There is also a tendency to regard “deterrent sentences” and “exemplary sentences” as being just; the view being that it is equitable to make an example of someone by punishing him more severely than he deserves so that others will be persuaded to desist from emulating him. (See also *S v Khulu* 1975 (2) SA s18 (N) at s22; *S v Matoma* 1981

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<sup>1</sup> . Domestic Violence Act [Chapter 5:16].

<sup>2</sup> . Criminal Law (Codification and Reform) Act [Chapter 9:23]

<sup>3</sup> . 1991 (2) ZLR 66 (SC) at 70

(3) SA 838 (A). Not only is the argument specious and fallacious; it is doubtful whether claims supporting its alleged efficacy are justified at all.”

In my view, the approach adopted in this case is what I would term a hysterical approach to sentence at the sight of a “domestic violence” case. That approach must of necessity be discouraged.

Domestic Violence Act as an Act of Parliament was not enacted to destroy marriages but to strengthen them. In this regard I am inclined to re-state the views expressed by my sister judge CHIGUMBA J in the case of *S v Allen Gudyanga* when she commented as follows;

“The DVA (Domestic Violence Act) is unique in its recognition and promotion of family values, of adhesion and cohesion of the nuclear family<sup>4</sup>.”

It is clear to me that in this case the court *a quo* completely missed a big chunk of strong mitigation as outlined by the accused and accepted by the prosecution as I have endeavoured to demonstrate. That omission by the court *a quo* means the review court is at large as regards sentence.

It will be important to compare the injuries sustained in this case with those noted by ROBISON J (as he then was) in the case of *Timothy Chivore and 2 others*<sup>5</sup> where the medical report revealed that the complainant had sustained the following injuries:

- “(1) Laceration 1cm right scalp on the head.
- (2) Multiple bruises at the back, and
- (3) fracture on the right ulna.”

In that case the court settled for a fine of \$300 with an additional two months imprisonment wholly suspended on the usual conditions of future good conduct. This was a gang assault obviously distinguishable from the case before me but relevant on the issue of sentence.

EBRAHIM JA (as he then was), in *S v Mugwenhe and Another (supra)* cautions against what he terms “the traffic” approach to sentencing which tends to advocate for a straight jacket approach which has the inherent dangers of depriving the court of using its wide discretion which it must judiciously exercised.

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<sup>4</sup>. State versus Allen Gudyanga HH 167-15 at p6.

<sup>5</sup>. Timothy Chivore and 2 Others versus The State HH-208/91

Again, in this case, the learned Judge of Appeal was dealing with a more serious gang assault where the complainant had suffered the following injuries:

“a cut on the forehead above the left eye, subconjunctival haemorrhage, and contusions on the right elbow and right angle.”

The doctor in this case concluded that in his opinion, the injuries were as a result of repeated blows having been inflicted on the complainant with moderate to severe force with a blunt heavy weapon.

The court went on to impose a sentence of a fine of \$250 coupled with two months imprisonment wholly suspended on conditions.

Whilst accepting the horrors of domestic violence and the need to curb it for the protection of the family as a special institution in this case, I do not believe a straight term of imprisonment was called for given the circumstances of this case.

Everything considered, I am more inclined to set aside the sentence imposed by the court *a quo* and substitute the same with the imposition of the following sentence;

“The accused is ordered to pay a fine of \$300 or in default of payment to serve 2 months imprisonment. In addition, the accused is sentenced to 3 months imprisonment wholly suspended for 5 years on condition the accused does not within that period commit any offence involving violence upon the person of another and for which upon conviction shall be sentenced to a term of imprisonment without the option of another.”

In view of the fact that the accused in this case had served a larger portion of the term of imprisonment imposed by the court *a quo*, the accused is entitled to his automatic release.

Mathonsi J agrees.....