

THE STATE  
versus  
FARAI TUHWE

HIGH COURT OF ZIMBABWE  
MUREMBA J  
HARARE, 17 February 2015

### **Criminal Review**

MUREMBA J: The accused was charged with two counts of physical abuse as defined in s 4 (1) (a) as read with s 3 (1) (a) of the Domestic Violence Act [*Chapter 5:16*].

The accused was convicted on his own pleas and was sentenced to 10 months imprisonment of which four months imprisonment was suspended for five years on condition of future good behaviour. The remainder of six months was suspended on condition of performance of community service. In addition to the sentence the trial magistrate said:-

“The one month imprisonment on G12/12 is not brought into effect.”

The record was referred to the regional magistrate for scrutiny. The regional magistrate raised three queries and then sent it to this court for review. The first query was that it was not clear from the sentence that was imposed on the accused whether it was for both counts or for one of the counts. In response the trial magistrate stated that the sentence was for the two counts as he had treated them as one for the purposes of sentence.

As correctly stated by the regional magistrate in sentencing the accused the court should, for the avoidance of doubt, always make it clear that the sentence relates to both counts if that is the position. If the sentence relates to one of the counts, that should also be made clear. This should be reflected on the charge sheet and on the review cover. A pronouncement to this effect should also be made to the accused as the sentence is pronounced to him.

The second query related to the previous conviction that the accused had. After the accused had been convicted the previous conviction record was produced as an exhibit. The

regional magistrate queried if the accused had been given three days' notice of the intention by the State to produce this previous conviction record. However, the regional magistrate did not state the provision which makes it a requirement that the accused be given three days' notice.

In response to the query the trial magistrate said that he had advised the accused of his right to three days' notice, but had over-looked recording the question when the accused responded that he had no objections to the previous conviction record being produced.

In terms of the Criminal Procedure and Evidence Act [*Chapter 9:07*] previous convictions are produced in terms of s 327. According to that section's subsection 3 the procedure for producing previous convictions is fairly straight forward. After conviction the prosecutor will state whether the accused has any previous convictions. If he or she has, the prosecutor should tender the record thereof and read out the previous convictions to the accused. The court will then ask the accused if he admits these previous convictions. In terms of s 327 (4) if the accused admits to the previous conviction the court shall proceed to sentence him or her taking those previous convictions into consideration. There is nowhere in that section where it is indicated that the accused should be given three days' notice of the intended production of previous convictions.

In *casu*, the prosecutor stated that the accused had a previous conviction and went on to produce the record. The prosecutor further said that in the previous conviction the accused had used a different name from the one he was using now. In response the accused admitted that indeed that was his previous conviction and confirmed the names on it. He said that he had no objection to the production of the previous conviction.

I find no irregularity in the manner the previous conviction record was produced as it is in conformity with the requirements of s 327.

The third query relates to the last part of the sentence which reads:-

“The one month imprisonment on G12/12 is not brought into effect.”

As correctly stated by the regional magistrate this part of the sentence does not make any sense. On this query the trial magistrate said that his intention was not to bring into effect the one month imprisonment which was suspended in the accused's previous conviction in G12/12. He said that his intention had been to further suspend the previous conviction so as to spare the accused an effective prison term. The previous conviction

relates to an assault charge, but despite that the trial magistrate was inclined to keep the accused with his family.

I have reservations with the trial magistrate's reasons for sparing the accused an effective custodial sentence. The trial magistrate ought to have shown the accused that he cannot continue to assault other people and think that he can get away with community service all the time.

In the previous conviction he committed assault and had four months imprisonment imposed on him. One month thereof was suspended on condition of future good behaviour. The remainder of three months' imprisonment was suspended on condition of performance of 145 hours of community service. He was sentenced on 9 January 2012. Hardly, three years later he committed the current two offences of assaulting his wife on two consecutive days. On the first day he came home from a beer drink at night. He found his wife and their five month old son already asleep. In his drunken stupor he tried to wake up the five month old baby and the wife stopped him. He responded by slapping her three times on the face with an open hand before she escaped to her grandmother's place. On the next day in the morning he approached his wife as she was doing her chores and struck her several times on the face and head using open hands. The wife's grandmother came to her rescue.

What is mitigatory about the accused's case is that he is 29 years old, he has a family made up of himself, the complainant and the five month old son. He pleaded guilty to the charges. The accused is not formally employed and survives on part-time jobs realising \$60-00 to \$80-00 per month.

The fact that the accused has now been convicted of a total of three counts of assault shows that the accused is a person of a violent disposition. If he continues like this there is a great risk that he may end up committing a more serious offence like murder. His explanation in the present cases that he acted in that manner because he was very drunk is in my view a lame excuse. On the second day in the morning he was no longer drunk but he went on to further assault his wife, more severely this time until she was rescued by her grandmother.

The court did not ask him to explain why he committed the second assault. The accused is a person who committed the current offences knowing fully well that he had a one month suspended sentence hanging over his head. His actions show a total disregard and disrespect for the law. If he continues to benefit from community service he might end up thinking that he can always assault other people and get away with community service. It is

unfortunate that the court never asked the accused the person whom he assaulted in the previous conviction. In order to arrive at an appropriate sentence the court ought to have made a thorough pre-sentence inquiry especially considering that the accused had a previous conviction of the same nature.

I do not believe that under the circumstances the accused ought to have benefited from community service once more. A sentence in the region of six months imprisonment with half suspended on condition of good behaviour would have met the justice of the case. The suspended sentence should also have been brought into effect.

I therefore withhold my certificate.