STATE
versus
ALLEN GUDYANGA

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 18 February 2015

Criminal Review

CHIGUMBA J: This matter was placed before me for review by the regional magistrate for the Eastern Division in Mutare. In his letter to the review Judge, penned ten days after the accused was sentenced, on 7 November 2014, the regional magistrate advised that he had sent the record for review without seeking comments from the trial magistrate for fear of further prejudicing the accused because of lapse of time.

The opinion of the Regional magistrate was that the sentence imposed was too harsh in the circumstances and would alienate the parties and destroy their marriage. In his view a community service sentence would have met the justice of the case.

The approach to sentencing by judicial officers who are faced with accused persons charged with contravening the provisions of the Domestic Violence Act has been heavily criticized by the High Court in numerous review judgments, and appeals. The main concern appears to be that judicial officers misdirect themselves by failing to consider that the intention of the legislature in enacting the Domestic Violence Act [*Chapter 5: 16*] (the DVA) was not only to promote the eradication of domestic violence, but to promote harmony in families. This has been interpreted to mean that a custodial sentence, especially for a first offender, is not only inappropriate, it is incompetent.

The accused was charged with physical abuse, as defined in s 4 (1) (a), as read with s 3 (1) (9a) of the DVA, it being alleged that, on 15 October 2014 at Gudyanga homestead, he

unlawfully slapped Delly Gororo several times on her face with open hands intending to cause bodily harm or realizing that there was a real risk or possibility that bodily harm would result.

According to the outline of the state case, the complainant is an eighteen year old female, and the accused is twenty years old, male, and unemployed. They are husband and wife. It is alleged that accused assaulted complainant over a denial of conjugal rights. Complainant sustained a swollen mouth and did not seek medical attention. The accused was sentenced to two months imprisonment. A further two months imprisonment which had been suspended on CRB N332/14 was brought into operation, and the effective custodial sentence of four months imprisonment was imposed.

In mitigation, the accused had submitted that he and the complainant had a minor child together aged one year. He had no money, no assets of value, and was unemployed. In assessing sentence the court considered that the accused person had pleaded guilty and not wasted its time, that he showed contrition, and that he was frustrated by the denial of conjugal rights. In aggravation, the court took into consideration the fact that the accused person was a repeat offender who had previously been convicted of a similar offence.

> "Cases of domestic violence are on the increase and in some instances, death has resulted. Unless sufficiently deterrent sentences are imposed by the courts as provided by the Domestic Violence Act…the whole purpose of this piece of legislation will never be realized. Men will continue to brutalise their wives and, equally so, some men will continue to be subjected to physical abuse by their spouses in the knowledge that they will go to court and pay a small fine. Whilst each case should be decided on its own merits, in serious cases custodial sentences are appropriate". See *State* v *Muchekayawa*[1]

The reviewing judge in that case found the sentence to have been 'disturbingly lenient'. The accused in that case was aged 29 and employed as a small scale miner. He pleaded guilty to contravening s 4 (1) as read with s 3 of the DVA. He was sentenced to pay a fine of USD$150-00 or in default thirty days imprisonment. In addition, three months imprisonment was wholly suspended for three years on condition that he refrained from committing a similar offence. The facts of the matter were that the accused had assaulted the complainant all over her body with a log until she fell to the ground. She had sustained a deep cut over her right eye when the accused had stoned her while she was on the ground. The trial magistrate in his reasons for sentence had

[1] Criminal Review Judgment; HB42-2012- 2012 ZLR 272

considered that the complainant did not sustain serious injuries as evidenced by the fact that she did not seek medical attention.

The reviewing judge had this to say at p 273F-G

> "Magistrates should always request the complainants in such cases to obtain medical reports for the court to assess not only the degree of injuries suffered but the likelihood of any permanent disability I note here that both prosecutors and magistrates pay scant regard to section 5 of the Domestic Violence Act which places duties on police officers in relation to domestic violence in the following terms under section 5(2):
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> > 'A police officer to whom a complaint of domestic violence is made or who investigates such complaint shall…obtain for the complainant, or advise the complainant how to obtain, shelter or medical treatment, or assist the complainant in any other suitable way".

Muchekayava's case can be distinguished from the case under consideration for a number of reasons, the first of which is that the reviewing judge in that case found the sentence imposed to be too lenient as opposed to this case where we have been asked to consider whether the sentence imposed is so severe as to induce a sense of shock. The second thing is that from the circumstances described in Muchekayava, the complainant sustained more serious injuries, although in both cases the complainants did not seek medical attention, and were not guided to seek medical attention for the assistance of the court by the police, by the court, or by the prosecutor. Finally, the accused person in this case, is not a first offender.

The grounds for review are set out in s 27 (1) of the High Court Act [*Chapter 7: 06*] as follows:

> "(*a*) absence of jurisdiction on the part of the court, tribunal or authority concerned;
> (*b*) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;
> (*c*) gross irregularity in the proceedings or the decision."

In my view the ground set out in s 27 (1) (c) would appear to most suit the nature of the query raised by the Regional Magistrate. The issue that falls for consideration in matters of this nature is what are the circumstances in which it is appropriate to interfere with the exercise of discretion by a judicial officer (in this case sentencing discretion), on the basis of gross irregularity in the proceedings or decision. The following dicta of the Supreme Court related to the exercise of judicial discretion in a civil appeal. In my view, any exercise of judicial discretion, whether on review or appeal, which is brought up for assessment of propriety by a higher court, should be held up to the following standard:

> "The exercise of this discretion may only be interfered with on limited grounds. It is not enough that the appellate court thinks that it would have taken a different course from the trial court. It must appear that some error had been made in exercising the discretion, such as acting on a wrong principle, allowing extraneous or irrelevant considerations to affect its decision, making mistakes of facts or not taking into account relevant considerations". *Barros & Anor* v *Chimpondah*[2]

It has been suggested by the Regional magistrate that the trial magistrate ought to have considered imposing a community service sentence, as opposed to sending the accused person to prison. For that reason it is postulated that the sentence imposed was too harsh in the circumstances, more particularly because the imposition of a custodial sentence was likely to break up the family, which runs contrary to the purpose of the DVA. What this court needs to consider is whether the trial magistrate, by imposing a custodial sentence, made an error in the exercise of his discretion. Did the trial magistrate act on a wrong principle, or allow extraneous or irrelevant considerations to affect the sentencing process? Did the trial magistrate make any mistakes of fact or fail to take into account relevant considerations in sentencing the accused person? We know from the reasons for sentence that the accused was not a first offender.

The DVA prescribes the penalty for repeat offenders:

> "Any respondent, who repeatedly breaches a protection order, whether or not that respondent has been previously prosecuted for such breach, shall be guilty of an offence and liable to imprisonment for a period not exceeding five years".[3]

My reading of s 10 (8) is that, once a court makes a finding that the respondent is a repeat offender in terms of the DVA, or that he has breached a protection order repeatedly, there is a custodial sentence, of up to five years imprisonment. In this case, the accused was a repeat offender who had one previously imposed custodial sentence that had been suspended on condition of good behaviour brought into effect. It is unfortunate that the Regional magistrate in his wisdom decided not to solicit the views of the trial magistrate before referring the record of proceedings to us. It is also unfortunate that the record of proceedings relating to the accused's previous conviction was not referred to us. We are hamstrung by the lack of detail regarding the circumstances of the accused's initial conviction.

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[2] 1999 (1) ZLR 58 (S)
[3] Section 10 (8)

Clearly the sentence imposed fell within the purview of section 10 (8) of the DVA. Where is the misdirection on the part of the trial magistrate? On the one hand sentences are being criticised as being too lenient. Now the charge is that the sentence was too harsh because the purpose of the DVA is to bring families closer together. In order for us to interfere with the sentence we must find a misdirection on the part of the trial court.

It would assist us to gauge the severity of the sentence imposed by the trial magistrate if we had knowledge of the accused's actions in the first charge, the severity of the complainant's injuries, whether permanent disability occurred, and most importantly, the sentenced imposed by the trail magistrate, As it is we cannot even consider the basis on which the regional magistrate is advocating for a sentence of community service, was he himself privy to the contents of the record of proceedings of the accused's first conviction? We are not at liberty to substitute the exercise of discretion by the trial court with our own discretion just because we would have come to a different conclusion. There is nothing in the record of proceedings that was placed before us, which convinces us that there were any gross irregularities in the exercise of sentencing jurisdiction by the trial magistrate. The sentence imposed is provided for in the DVA. The accused had a previous conviction. It cannot be said that taking his previous conviction into account amounted to taking into account an irrelevant consideration. As previously stated, insufficient information was placed before us to justify coming to the conclusion that the sentence imposed by the trial magistrate is so severe as to induce a sense of shock, and to warrant interference.

It is not a hard and fast rule that because the purpose of the DVA is to bring families closer together, custodial sentences must not be imposed. It depends on the circumstances. It is one of the factors that ought to guide a court in assessing sentence, but it is not the only relevant factor. Some but not all of the factors that a trial court may take into consideration in assessing sentence include:

(a) The extent of the complainant's injuries as evidenced by the medical affidavit.
(b) The possibility of permanent injuries.
(c) Whether any of the complainant's property was damaged.
(d) The relationship between the complainant and the accused (brother and sister/husband and wife.

(e) Whether the parties still reside at the same premises.
(f) Whether the accused pleaded guilty/showed contrition.
(g) Whether the relationship between the parties is now sour or still acrimonious. Or whether the parties have reconciled their differences
(h) Whether the accused made reparations/amends.
(i) Whether the accused was previously convicted of contravening the DVA.
(j) The accused's explanation as to why he committed the act of domestic violence.
(k) Whether the parties are willing to undergo counselling.

The DVA is unique in its recognition and promotion of family values, of adhesion and cohesion of the nuclear family. In recognition of its objective to bring families together as opposed to contributing to their break-up, provision is made in the act for the appointment of anti-domestic violence councilors by the Minister responsible for social welfare, health, child welfare and gender or women's affairs. There is a panel of anti-domestic violence councilors drawn from social welfare officers, members of Private Voluntary Organizations that deal with domestic violence issues, chiefs or headmen.

The functions of anti-domestic violence councilors include advising, counseling and mediating the solution of any problems in personal relationships that are likely to lead to domestic violence, investigating the financial status of the parties at the request of the court, investigating and making immediate accommodation arrangements for complainants prior to the issue of protection orders, arranging medical treatment and examination of any minors who are complainants. In carrying out these duties, the anti-domestic violence councilors may call upon the police for assistance. Judicial officers are reminded of the need to send families for counseling where the domestic violence complained of continues despite initial conviction or sentencing.

We find no misdirection on the part of that magistrate for the reasons stated above.