

ALLEN TAFADZWA BARE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
BERE & MATHONSI JJ
BULAWAYO 5 & 15 JUNE 2017

Criminal Appeal

Ms P. Mudisi, for the appellant
Ms S. Ndlovu for the respondent

BERE J: The appellant, a 25 year old police officer appeared at Zvishavane Magistrates' Court facing a charge of contravening section 4 as read with section 3 (1) (a) of the Domestic Violence Act¹. Upon tendering a plea of guilty to the charge he was sentenced to 12 months imprisonment of which 4 months were suspended on the usual grounds of future good conduct leaving him to serve an effective 8 months imprisonment.

Aggrieved by this sentence the appellant lodged this appeal. The grounds of appeal are simply that the court *a quo* erred by paying lip service to highly mitigatory factors which included *inter alia* the fact that the appellant was a first offender and that the complainant would suffer more if the appellant were to be incarcerated. It was further suggested that a fine would have sufficed in this case.

The respondent does not support the sentence imposed and it is necessary to provide the facts that led to the appellant's prosecution. The complainant is a wife to the appellant and was 6 months pregnant. On 5 July 2016 the two had a misunderstanding at the appellant's place of employment. The misunderstanding spilled over to 6 July 2016. As a result of the misunderstanding the appellant assaulted the complainant by grab-holding and twisting her hand.

1. CHAPTER 5:16

The appellant also kicked the complainant on the stomach with booted foot after which the assailant fled the scene. The medical report revealed that the complainant had sustained a swollen forehead. At the time of her examination the complainant revealed that she was having chest and neck pains. The force used was said to have been moderate and there was no permanent danger to life.

When called upon to address the court *a quo* in mitigation of sentence the appellant revealed that he reacted in the manner he did owing to the complainant's persistent demands for money for treatment which money he did not have. This triggered his anger and the assault. The appellant also revealed that he was employed by the Zimbabwe Republic Police as an officer earning a salary of \$475,00 per month. When asked by the court why he committed this offence he said he had erred.

There can be no denial that this was a bad assault against the expecting complainant. The appellant's conduct on the day in question was clearly reprehensible and the appellant ought to have been adequately punished.

However, as has been stated on times without number by these courts, sentencing is a culmination of a very delicate balancing exercise in weighing the mitigating and aggravating features in any given matter. The exercise must be dispassionate and rational. In a fairly recent case of the *State v Velaphi Sibanda*² I went out of my way to highlight what I perceive to be the basic issues that must exercise the court's mind when seized with matters such as the one before us. I did highlight in that case the need to consider the imposition of a fine as the first port of call, failing which a serious consideration for the imposition of community service if the contemplated sentence falls within the community service grid.

In so observing, I was not inventing the wheel but merely following a long line of rich precedent from our courts. See *S v Mugwenhi & Anor*³; *S v Shariwa*⁴; *S v Kinnard & Anor*⁵ and *S v Ntabankulu Mlilo*⁶. The list is endless.

Let me repeat that the legitimate expectation is that the sentences meted out by our courts must be both rational and proportionate. In a matrimonial set up the sentence imposed must not be so mesmeric to the complainant to the point of breaking her/him. Because the complainant is the major benefactor of the sentence imposed, that sentence must still find meaning in him or her. The sentence must not devastate such a complainant to the point of her mocking or condemning the whole idea of our criminal justice system. The point I make is that the sentencing court must be very slow to take away the sole breadwinner of a complainant in such a scenario to the point of killing the very basic means of the survival of such a complainant and her other dependants. Such a harsh and cruel sentence will not sit well with such a complainant and might actually end up as a form of discouragement to others in similar domestic violence situations to freely come out and report such cases. The concerned citizenry must never be pushed to regret having reported a case of domestic violence.

In the case before us the harsh reality which obviously the complainant may not have anticipated at the time of reporting this case is that her sole breadwinner will not be able to continue supporting her due to incarceration. The extreme result might be to push her into destitution. The situation could actually have been worse if there were other dependants looking up to the appellant for sustenance. These are the unintended consequences of meting out unduly harsh penalties.

3. 1991 (2) ZLR 66 (SC)
4. 2003 (1) ZLR 314 (H)
5. HB-87-15
6. HB 131-10

I note that the court *a quo* went to town in justifying the sentence of incarceration by emphasizing the fact that the appellant was a police officer who is supposed to uphold the laws of this country. This is correct but it must not be overemphasized because despite their station in life, police officers are not superhuman. In my view, the same conduct expected of a police officer is the same expected to be shown by a doctor, magistrate, judge or any other citizen of this country. The bar must not be unnecessarily or excitedly raised merely because one is a police officer. Every citizen is expected to observe the laws of this country.

It was disheartening that by the time this appeal was argued the appellant had already completed serving. The results of the appeal therefore become academic and possibly for future references.

In conclusion, I believe the sentence imposed by the court *a quo* was incompetent and therefore there was a misdirection. The proper sentence should have been as follows:

“The accused is sentenced to pay a fine of \$100 or in default of payment 2 months imprisonment. In addition the accused is sentenced to 3 months imprisonment which is wholly suspended for 5 years on condition the accused does not within that period commit any offence involving violence upon the person of another for which upon conviction the accused shall be sentenced to a term of imprisonment without the option of a fine.”

Mathonsi J I agree

Mutendi, Mudisi & Sumba, appellant’s legal practitioners
National Prosecuting Authority, respondent’s legal practitioners