MARIA TAGAMA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO & KWENDA JJ
HARARE, 24 March 2021 and 17 May 2021

Criminal appeal

M.H. Chitsanga, for the appellant
R. Chikosha, for the respondent

CHIKOWERO J: This is an appeal against conviction. The appellant was convicted of one count of physical abuse as defined in s 4(1)(a) as read with s 3 of the Domestic Violence Act [*Chapter 5:16*] ("the DVA"). The Magistrates Court sitting at Chivhu sentenced him to 9 months imprisonment of which 3 months imprisonment was suspended on condition that the appellant does not within the next 5 years commit any offence involving physical abuse and for which upon conviction the appellant is sentenced to a term of imprisonment without the option of a fine. The remaining 6 months imprisonment was suspended on condition the appellant performs community service.

The charge was wrongly drafted. It is section 3 (1) (a) of the DVA which defines domestic violence as including physical abuse with s 4 of the Act creating the offence of domestic violence and providing the penalty therefor.

The charge should have read:

> "Physical abuse as defined in section 3 (1) (a) as read with s 4 (1) of the Domestic Violence Act [Chapter 5:16] in that on the 2nd day of December 2019 and at Plot 7 Steelfontein, Featherstone, Maria Tagama unlawfully committed an act of physical abuse upon Pardon Tagama her nephew by striking him several times with an iron bar on the forehead."

See also *State* v *Madyambudzi* HH 333/17. In the circumstances of this matter, besides the fact that the appellant suffered no prejudice as a result of the error in drafting the charge, the incorrect formulation of the charge does not affect the outcome of this appeal.

Section 3(2)(a) of the DVA defines physical abuse as including any act or threatened act of physical violence towards a complainant. Section 2 (1) of the same Act defines a complainant, in relation to a respondent, to mean:

> "(a)…..
> (b)….
> (c) any person who is or has been living with the respondent, whether related to the respondent or not."

Section 2(1) then goes on to define a respondent as meaning:

> "a person who is alleged be the perpetrator of an actual or threatened act of domestic violence."

The magistrates court found that the appellant was a respondent in terms of the DVA because he once lived with the complainant before the occurrence of the incident on which the charge was founded. The court *a quo* also found that as at 2 December 2019 the parties lived so close to each other that, being in a rural set up, they must be taken to have been living together in terms of the DVA. This is how the Court below, at p 25 of the judgment, put it:

> "Defence counsel had filed an exception to this fact and indicated that the accused never lived with the complainant. However it is the State's evidence that the accused and complainant once lived together. It was also submitted by the accused that their homesteads are 200metres apart. Taking into account a typical rural set up, this would mean that the accused and complainant would encounter each other on a daily basis as they are in very close proximity. This would imply that they practically live at the same place." (the underlining is mine)

The first ground of appeal attacks the learned magistrate's finding that Pardon Tagama ("Pardon") was a complainant in terms of the DVA. In other words, appellant takes issue with the finding that she once lived with Pardon and that the additional circumstance of them living close to each other means that appellant was living with Pardon at the time of the alleged commission of the offence.

Mr *Chikosha* conceded that there was no evidence that appellant one lived with Pardon. He also conceded that the learned magistrate misdirected herself on the evidence by finding that appellant was living with Pardon on 2 December 2019 when all that the evidence disclosed was that the parties were neighbours. My view is that these concessions are sound. Complainant

himself said that he did not live with appellant. It is my finding that, since the parties are not the "complainant" and "respondent" contemplated in the Domestic Violence Act the appeal succeeds without even adverting to the merits of the matter.

It is necessary, however, to deal with *Mr Chikosha's* arguments. First, he argued that we should allow the appeal against conviction, substitute a verdict of not guilty and acquit on the charge preferred *a quo* and go on to convict the appellant of the offence of assault as defined in s 89(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ('the Code"). This argument can be disposed of without deciding the correctness or otherwise of the magistrates court's finding that appellant struck Pardon several times with an iron bar on the forehead. It is true that in the review judgment in *S* v *Madyambudzi* (supra) this court substituted a conviction of s 3 (1)(a) as read with s 4(1) of the Domestic Violence Act with one of assault as defined in s 89(1)(a) of the Code. It appears the court in that matter took the view, on the facts before it, that the offence disclosed was a contravention of s 89(1)(a) of the Code and not s 3(1)(a) as read with s 4(1) of the Domestic Violence Act. I do not think Mr *Chikosha's* reliance on *S* v *Madyambudzi* is apposite for a variety of reasons. Firstly, my view is that since the offence of assault, created under s 89(1)(a) of the Code, is not a competent verdict on a charge of contravening s 3 as read with s 4(1)(a) of the Domestic Violence Act a conviction is not competent for assault. This is the same principle applied by MAKARAU J (as she then was) with the concurrence of KARWI J in *S* v *Moyo* 2003 (1) ZLR 309 (H). There, at 131 D –E, HER LADYSHIP said:

> "The issue that I have to determine is whether on appeal I can substitute a conviction of contravening s 24 of the Act as the verdict. Both Mr Ndlovu and Mrs Ziyambi are agreed that I can. I am not convinced that I can.
> The appellant was charged with the common law offence of fraud. The evidence before the court is that she did commit another offence, contravening s 24(b) of the War Veterans Act. <u>This statutory offence is not a competent verdict on a charge of fraud</u>" (underlining is mine for emphasis)

In the instant appeal the statutory offence of assault under section 89(1)(a) of the Code is not a competent verdict on a charge of contravening the statutory crime of physical abuse as defined in s 3 as read with s 4(1)(a) of the Domestic Violence Act. In fact there are no competent verdicts on a charge of contravening s 3 as read with s 4(1)(a) of the Domestic Violence Act. Secondly, I do not think that it is correct to fall back on the provisions of another statute when it is conceded that the conviction on the statutory crime charged was wrong. Although the court was

dealing with the issue of sentence in setting aside a forfeiture order made in terms of 62(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] because the penalty provision for a charge of contravening s 78(1)(a) of the Forest Act [*Chapter 19:05*] do not make provision for forfeiture, I still find the words of MATHONSI J (as he then was), with whom TAGU J concurred, in *S* v *Chikandiwa and Others* HH 57/13 relevant in this regard. There, at pp 3 -4 of the cyclostyled judgment HIS LORDSHIP said:

> "Now the penalty for contravening section 78(1)(a) is set out in the Act. That penalty does not include the forfeiture of the instruments used in the commission of the offence be it the machete used to cut the firewood, a wheelbarrow, scotch cart or indeed motor vehicle used to carry the firewood. If the legislature intended to provide for the forfeiture of those items, it would have certainly said so in the penal section. It did not.
>
> In my view, it was not the business of the sentencing court to go beyond the penal provision and import further penalty provisions from another law when the law giver had specifically provided for the punishment to be imposed against the offender. In doing so, the trial court fell into error.
>
> The offence committed is a statutory one provided for in the Forest Act. It is undesirable to go further than the statute criminalising the conduct of the accused persons in search of further sentencing power when such power is specifically given in the Act. Doing so leads to imposition of a penalty not envisaged by the law giver and certainly leads to undue punishment.
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> The magistrate says he had to go to s62 (1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] in order to find jurisdiction and authority to forfeit the vehicle. He does not explain why he found it necessary to do so. This was as unnecessary as it was a misdirection".

By parity of reasoning I do not think that it was the intention of the legislature that where a conviction for contravening s3 as read with s4 (1) (a) of the DVA cannot be sustained on appeal because the elements of the offence of physical abuse are found to be conspicuous by their absence then the court should set aside that conviction and go on to substitute a conviction for another statutory offence for which no charge was preferred (s 89 (1)(a) of the Code). The preamble to the DVA makes it clear that the statute is law:

> "To make provision for the protection and relief of victims of domestic violence and to provide for matters connected with or incidental to the foregoing".

In enacting the DVA and creating the offence of physical abuse, the legislature was aware of the existence of the then common law offences of assault and assault with intention to do grievous bodily harm. Indeed, the same legislature, after enacting the DVA in 2007 went on to codify and reform the criminal law under the Code but still left the DVA existing as law.

The respondent must simply prefer the correct charge on the facts of any particular case. See *S* v *Shonhiwa* 2015 (2) ZLR 436 (H).

Mr *Chikosha* also urged us to substitute a conviction for contravening s89 (1) (a) of the Code on the basis that although Pardon and the appellant were not, respectively, complainant and respondent in terms of the DVA and therefore the conviction for physical abuse could not be sustained the fact that a finding was made that appellant assaulted Pardon means there is a part of the offence which was proved, which part is the assault. Counsel said he relied on s207 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] ("the CPEA"). That section reads:

> "207 Conviction for part of crime charged. For the avoidance of doubt it is declared that where a court finds that part but not all of the facts of an offence charged have been proved, it shall nevertheless convict the accused of that offence if the facts that are proved disclose all the essential elements of that offence".

This appeal does not require us to determine whether s207 of the CPEA empowers us to substitute a conviction for contravening s89 (1) (a) of the Code on the basis that part of the facts proved show that appellant in any event struck Pardon several times with an iron bar on the forehead. The appellant impugned the finding that he assaulted the complainant in the face of inadequate evidence to ground such a conclusion. Mr *Chikosha* made a number of proper concessions in this regard. First, since the alleged assault occurred in a family environment, it was vital for the prosecution to have led evidence from Life Tito ("Tito"). The complainant and his wife testified that it was Tito, an adult, who brought the assault to an end by wrestling the iron bar from the appellant and took that weapon to the police station. Tito did not testify. No reason was given for this. The iron bar was not produced at the trial. There were also inconsistences between the complainant and his wife on whether Kudakwashe Tagama sat on the complainant's stomach while appellant was assaulting the complainant or whether Kudakwashe was standing behind the complainant, holding the victims' hands, while the appellant was perpetrating the assault. In any event Kudakwashe was neither charged nor brought to court to testify for the prosecution as an accomplice witness. Complainant never said he fainted. His spouse testified that the assault perpetrated on the complainant led to the latter falling unconscious for 40 minutes. The complainant corroborated the appellant's explanation that there was bad blood between him and the appellant emanating from the former accusing the latter of bewitching Precious Matamba, the complainant's spouse. Appellant explained that the allegations of assault were false, having been

raised only because of the strained relationship between the parties. Despite initially denying knowledge of such bad blood, the complainant's wife conceded under cross examination that indeed there was bad blood between the appellant and complainant.

Finally, the appellant contended that the court *a quo* erred in rejecting his defence. That defence was this. Complainant arrived at appellant's homestead. He kicked open the bedroom door. Once inside he commenced assaulting the appellant. To free herself, she pushed away the complainant. He fell onto a sewing machine, injuring himself on the face. This accounts for the multiple lacerations recorded in the medical report. Given that the same medical report was not clear the explanation tendered by the appellant was erroneously rejected as being beyond reasonable doubt false. The force used to inflict the injuries was recorded as moderate. This was more in accord with the defence proferred on how the injuries ensued rather than the alleged assault with an iron bar on the complainant's forehead, resulting in him falling unconscious for more than half an hour. There was no possibility of permanent injury. Rather strangely, the medical report indicates that both a sharp and blunt object was used to inflict the injuries.

It was on the basis of the medical report that Mr *Chikosha* supported the magistrates court's finding that the appellant struck the complainant on the forehead using an iron bar.

I consider that in view of the admitted inadequacies in the case for the prosecution, inclusive of the inadequacies of the medical report itself the trial was reduced to a boxing match pitting the appellant on the one hand against the complainant and his wife on the other. In the circumstances, even on the facts, the learned magistrate erred in finding that the appellant had assaulted the complainant in the manner alleged or at all.

In the result, the following order shall issue:

1. The appeal be and is allowed.
2. The conviction is quashed and the sentence is set aside. The following is substituted:

"The accused is found not guilty and is acquitted."

KWENDA J: Agrees……

Mutandiro, Chitsanga & Chitima, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners