HB 151/17
HCA 167/16

INNOCENT MUDZINGIRI

Versus

THE STATE

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

Criminal Appeal

E. Mandipa, for the appellant
Ms S. Ndlovu, for the respondent

BERE J: The appellant pleaded guilty to one count of physical abuse in contravention of section 3(1) as read with section 4 of the Domestic Violence Act [Chapter 5:16] and for which upon conviction he was sentenced to 2 years imprisonment of which 6 months imprisonment were suspended for 5 years on the usual conditions of good behaviour leaving him with an effective prison sentence of 1 year and 6 months.

The allegations against the appellant were that on the day in question the appellant inflicted injuries on his wife by pulling her braids, forcing her under the space between the car seat and the dash board and poking her on the back of her neck with a knife.

Aggrieved by the sentence imposed the appellant filed this appeal arguing that:

1. The court *a quo* erred in imposing a sentence that was excessive as to induce a sense of shock.
2. The court *a quo* erred in not imposing a sentence of a fine, and
3. Further that the court *a quo* erred in not considering the imposition of community service as an alternative to a straight term of imprisonment.

Counsel for the respondent has conceded that in her assessment the sentence imposed was so severe as to induce a sense of shock, and that consequently she could not support same.

When the magistrate was afforded an opportunity to comment on the notice of appeal, the learned magistrate maintained that the sentence imposed was appropriate and he went on to state that the imposition of a fine would have trivialized the offence.

In mitigation before the court it became clear that the appellant was the sole breadwinner with one child with the complainant who was both a student and an expecting mother. When asked why he had committed this offence the appellant stated that the complainant's friend was frequenting bars so he wanted to intimidate the complainant presumably to force her to tell her the truth about her own conduct.

In his reasons for sentence, the learned magistrate properly captured both the factors in mitigation and aggravation and was swayed into imposing the sentence now under consideration by what he termed the traumatic experience that the complainant was subjected to by the appellant.

Accepted, this was an unacceptable assault, and the use of a knife in threatening the complainant compounded to appellant's position. But in my view the question which ought to have exercised the mind of the learned magistrate was whether a prison term was the only punishment he could mete out in these circumstances.

It is clear to me and as supported by the respondent that a prison term was inappropriate in this case especially if regard is had to the following considerations. The complainant and the appellant are husband and wife and the wife is in university and exclusively dependent on the appellant for both her upkeep and that of the minor child of the marriage.

In the case of the *State* v *Velaphi Sibanda*[1] I emphasised the point that the promulgation of the Domestic Violence Act was not motivated by the desire to fast track the destruction of marriages into oblivion by forced separation of those in matrimony through excitedly sending offenders in that set up to prison.

1. HB-98-17

The Act must be viewed as a desperate plea by the nation to keep marriages intact.

In the same case I did indicate that as demanded by section 4 of the Act, when it comes to sentencing, the first serious consideration by a magistrate must be the imposition of a fine. It is only when circumstances do not permit that consideration must then be made for probably the imposition of community service before one thinks of a custodial sentence. This is so because a prison term must not be lightly considered because of its devastating effect on a marriage. A marriage by its very nature is an important institution and courts must move slowly or must not derive misplaced joy by destroying it at the stroke of a pen. See *S* v *Ndabankulu Mlilo*[2].

It must be in extremely exceptional circumstances that a wife or husband is plucked out of the marriage set up. There are more compelling reasons why this should be so. The current reality of our economy is that free social services to our populace have literally collapsed and one does not want to create destitutes by depriving the family members of their sole breadwinners for every act in violation of the Domestic Violence Act. A sentence as in this case does not only break the offender but the complainant as well.

The need to spare first offenders the agony of prison life has been emphasised in a plethora of cases and in my view this is one such case where the learned magistrate imposed a penalty that was too harsh as to induce a sense of shock and must therefore be set aside.

It is ordered:

1. That the sentence of the court a quo be and is hereby set aside.
2. The appellant is ordered to pay a fine of $100 or in default of payment to undergo 2 months imprisonment. In addition 3 months imprisonment is suspended for 5 years on condition the appellant does not within that period commit any offence involving violence upon the person of another and for which upon conviction he shall be sentenced to a term of imprisonment without the option of a fine.

2. HB-131-10

Mathonsi J ……I agree

Gundu & Dube legal Practitioners, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners