

THE STATE

Versus

EPHRAIM MANUWERE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 4 May 2023

Review judgment

DUBE-BANDA J:

[1] This review is at the instance of the scrutinising Regional Magistrate. The accused appeared before the magistrates' court sitting at Gweru, in the Midlands Province. He was charged with the crime of contravening s 3(1)(a) as read with s 4(1) of the Domestic Violence Act [Chapter 5:16]. It being alleged that on 2 February 2023 the accused committed physical abuse upon the complainant, his wife by strangling her and kicking her all over the body with a wooden log three times on the right arm and three times on the right leg. The accused pleaded guilty and was duly convicted. The sentence reads as follows: "2 months suspended on CRB 1446/22 and 2 months suspended on CRB 2055/21 is hereby brought into effect. Sentence(s) to run concurrently."

[2] The conviction is proper and nothing turns on it. It is the sentence that is subject to this review.

[3] This record was referred to this court for review by the Regional Magistrate. In the covering letter accompanying the request for a review, the Regional Magistrate made the following comments and observations:

"The accused person in this matter was convicted on his plea of guilty for physical abuse as defined by s 3(1)(a) as read with s 4(1) of the Domestic Violence Act.

I had issues with the sentence imposed by the trial magistrate. The accused person is a repeat offender with 2 relevant previous convictions which were duly tendered. Two months imprisonment were suspended on condition of good behaviour in respect of each of the tendered previous conviction.

The trial magistrate in considering an appropriate sentence brought into effect the suspended sentences and ended there. She did not consider punishing the accused for the current offence.

Also to note is that the trial magistrate made reference to 2 previous convictions but only one was tendered and is attached to the record. The trial magistrate was also expected to conduct an inquiry on whether to bring the suspended sentences into effect. (S v Moyo HH 220/15). That was not done.”

[4] A perusal of the record shows that the accused was not sentenced for the current offence. The trial court merely brought into effect the two suspended terms of imprisonment from previous convictions. A court cannot just bring into effect a suspended prison term and say nothing about the current crime. The main issue before the trial court was not the suspended sentences but the current offence for which the accused was convicted and had to be sentenced. A suspended sentence cannot just be brought into effect, where the prosecutor applies for a suspended sentence to be brought into operation after the accused has been convicted of the current offence, the magistrate must examine the following things: whether the new offence was committed before the period of suspension expired; and if the period of suspension has not expired, whether the present crime amounts to a breach of the conditions of suspension. See: Prof. Feltoe G. *Magistrates' Handbook* (Revised August 2021) 435.

[5] If the above requirements have been met, a further requirement must be satisfied, i.e., the condition precedent for bringing it into effect. For example, in CRB 2055/21 the accused was sentenced to four (4) months imprisonment of which two (2) were suspended for five (5) years on condition he does not commit an offence of which domestic violence is an element and for which upon conviction is sentenced to imprisonment without the option of a fine. This means the suspended prison term can only be brought into effect in respect of the current crime if the accused is sentenced to a term of imprisonment without the option of a fine. Therefore, the court must assess the appropriate sentence for the current crime, and if it is a term of imprisonment without the option of a fine, then the trial court can bring into effect the suspended term. If the appropriate sentence for the current offence is not imprisonment without the option of a fine, the enquiry about bringing into effect the suspended sentence does not even arise. To side step the current crime and merely bring into effect the previous suspended prison term is irregular.

[5] For the reasons outlined above, I am satisfied that the proceedings were not in accordance with real and substantial justice and have to be set aside. A substantial miscarriage of justice has actually occurred. See: *S v Moyo* HH 220/15. In the circumstances the sentence cannot be permitted to stand.

In the result, it is ordered that:

- i. The conviction be and is hereby confirmed.
- ii. The sentence be and is hereby set aside.
- iii. The matter is remitted to the learned trial magistrate to re-sentence the accused in terms of the law.

DUBE-BANDA J.....

KABASA JAGREES