

THE STATE

Versus

ONESIMO NYENGE

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 22 & 29 APRIL 2021

Criminal review

DUBE-BANDA J: This matter was placed before me on automatic review. The accused was arraigned before the Magistrate’s court sitting in Binga. He was charged with the crime of contravening section 4 as read with section 3(1) (a) of the Domestic Violence Act [Chapter 5:16] “Physical Abuse.” It being alleged that he committed an act of physical abuse upon the complainant by striking her with open hands and a switch all over the body intending to cause bodily harm realising that there is a real risk or possibility that bodily harm may result. He pleaded guilty and was duly convicted. Nothing turns on the conviction. The accused was sentenced as follows:

“9 months imprisonment of which 3 months imprisonment is suspended for 5 years on condition the offender does not within that period commit any offence of which contravening of the Domestic Violence Act is an element for which upon conviction he is sentenced to imprisonment without the option of a fine. The remainder 6 months imprisonment is suspended on condition he completes 210 hours of community service

The record of proceedings was forwarded to the Regional Magistrate for scrutiny. The Regional Magistrate raised an issue in respect to the propriety of the condition upon which the suspension of the three months was anchored. The Regional Magistrate then referred the record to this court, under cover of a letter which I quote in *extensio*, hereunder:

“Re: State v Onesimo Nyenge BNG 226/20 S54/20

Kindly find attached a record of proceedings to be placed before any Honourable Judge of the High Court with the following comments.

“Accused appeared before a Magistrate in Binga facing a charge of having contravened section 4 as read with section 3(1) of the Domestic Violence Act Chapter 5:16 that is Physical Abuse.”

He was convicted on his own plea and sentenced as follows:

9 months imprisonment of which 3 months imprisonment is suspended for 5 years on condition the offender does not within that period commit any offence of which contravening of the Domestic Violence Act is an element for which upon conviction he is sentenced to imprisonment without the option of a fine. The remainder 6 months imprisonment is suspended on condition he completes 210 hours of community service

I raised a query with the trial magistrate regarding the condition of the suspended prison term. The trial magistrate's response to the query is that he explained to the accused what he should avoid in order not to retransgress and what the Domestic Violence Act entails. He concedes that his explanation is not on record.

Is it my considered view that the condition of suspension is too wide. Accused was not defended, he needs to read the whole Domestic Act to know what he is supposed to do and not to do. Clearly the trial magistrate's formulation of the condition of suspension of the prison term is inappropriate.

It is my considered view that part of the prison term should have been suspended on condition that the accused did not commit any offence involving physical abuse.

May the Honourable Judge take corrective measures.

Regional Magistrate. “

First, the Magistrates' Court is a court of record.¹ The record must be complete and tell a full and accurate story of what transpired in court. The presiding officer cannot start to add and explain what is not in the record. The record must speak for itself. The record must not be aided by evidence that is not in the record. See: *The State v Luckson Bhuru* HB 191/20. I take the view that the explanation by the trial magistrate that “The trial magistrate's response to the query is that he explained to the accused what he should avoid in order not to retransgress and what the Domestic Violence Act entails.” is inconsequential. It serves no useful purpose. The record does not have such an explanation. This court can only review what is on record, not in the mind of the trial magistrate.

Second, in terms of section 358 of the Criminal Procedure and Evidence Act [Chapter 9:07], a court may suspend a sentence on a number of conditions specified therein. It is trite

¹ Section 5(1) of the Magistrates Court [Chapter 7:10].

that the condition must be reasonable and related to the offence concerned, i.e. it must not be too wide that it has no *nexus* with the offence committed. See: *S v Van den Berg* 1976 (2) SA 232 (T) 234-5; *R v Mokwena* 1948 (4) SA 378 (O); *S v Mjware* 1990 (1) SACR 388 (N). In *S v Grobler* 1992 (1) SACR 184 (C) it was decided that conditions of suspension should not be unduly onerous and should remain reasonably possible for the accused to comply with. The condition must be clear and the accused should know exactly what conduct may lead to his having to serve the sentence. See: *S v Valashia* 1973 (3) SA 934 (O); *S v Xhaba* 1971 (1) SA 232 (T). In *S v Gabriels* 2004 (2) SACR 156 (C) it was held that the conditions of suspension should be formulated in such a way that they do not cause future unfairness or injustice. They must also be framed to take account of human fallibility and it was held that no condition should unjustifiably infringe upon accused's basic human rights.

The Domestic Violence Act contains a number of offences, i.e. physical abuse; sexual abuse; intimidation; harassment; stalking; malicious damage to property; forcible entry into the complainant's residence where the parties do not share the same residence; depriving the complainant of or hindering the complainant from access to or a reasonable share of the use of the facilities associated with the complainant's place of residence; the unreasonable disposal of household effects or other property in which the complainant has an interest; abuse derived from the following cultural or customary rites or practices that discriminate against or degrade women; forced virginity testing; female genital mutilation; pledging of women or girls for purposes of appeasing spirits; forced marriage; child marriage; forced wife inheritance; sexual intercourse between fathers-in-law and newly married daughters-in-law; abuse perpetrated on the complainant by virtue of complainant's age, or complainant's physical or mental incapacity; abuse perpetrated on the complainant by virtue of complainant's physical, mental or sensory disability, including a visual, hearing or speech functional disability; abuse perpetrated on the complainant by virtue of complainant's mental illness, arrested or incomplete development of the mind, psychopathic disorder or any other disorder or disability of the mind.²

² Section 3 of the Domestic Violence Act.

To suspend a prison term on condition the accused does not commit an offence of which Domestic Violence Act is an element for which upon conviction he is sentenced to imprisonment without the option of a fine, is too wide, vague, onerous, unreasonable and does not relate to the offence he was convicted of. The accused was convicted of physical abuse, as defined in the Domestic Violence Act, i.e. any act or threatened act of physical violence towards a complainant.³ He was for example, not convicted of sexual harassment, malicious injury to property etc. Any condition of suspension that speaks to other offences accused was not convicted of, is too wide, onerous and heavy on the accused. Such a condition is not clear and the accused would not know exactly what conduct may lead to his having to serve the sentence. The Regional Magistrate says such a condition of suspension is inappropriate. I agree. To illustrate how inappropriate this condition of suspension is, I use the example of a conviction arising from the Mines and Minerals Act [Chapter 21:05]. This Act contains a number of offences, e.g. an accused convicted for contravening section 368 (2) as read with 368 (4) of the Mines and Minerals Act [Chapter 21:05] (Prospect for Minerals without a Licence), a sentence *may* (where special circumstances exist) be suspended on condition he does not prospect for minerals without a licence. Such a sentence may not be suspended on condition an accused is not convicted of an offence where the contravention of the Mines and Minerals Act is an element. Such a condition would be too wide, heavy and unreasonable. In this case, the accused was convicted of contravening section 3 (1) (a) of the Domestic Violence Act “Physical Abuse,” this is what a condition of suspension must target and speak to, not the whole Act. This constituted a misdirection on the part of the trial court. It goes against the spirit of section 358 of the Criminal Procedure and Evidence Act [Chapter 9:07]. This court is therefore at large to intervene. This court cannot permit such a condition of suspension to stand.

In the result:

1. The conviction is confirmed.
2. The sentence of the trial court is amended by the substitution of:
 - i. 9 months imprisonment of which 3 months imprisonment is suspended for 5 years on condition the offender does not within that period commit any

³Section 3 (2)(a) of the Domestic Violence Act.

offence of which contravening of the Domestic Violence Act is an element for which upon conviction he is sentenced to imprisonment without the option of a fine.

With:

- ii. 9 months imprisonment of which 3 months imprisonment is suspended for 5 years on condition the offender does not within that period commit any offence of physical abuse as defined in the Domestic Violence Act is an element and for which upon conviction he is sentenced to imprisonment without the option of a fine.
- iii. The remainder of the sentence remains unchanged.

Lastly, in light of the above, the accused should be called and be properly advised of the amendments I made.

Kabasa J agrees