

THE STATE
versus
NHAMO CHAKARA

HIGH COURT OF ZIMBABWE
CHITAPI & MUSITHU JJ
HARARE, 28 April 2021

Criminal Review

MUSITHU J: This review was placed before me in terms of section 58(3) (b) of the Magistrates Court Act.¹ The charge was phrased as follows: “*PHYSICAL ABUSE*” AS DEFINED IN SECTION 4 ARW SECTION 3(1)(A) OF THE DOMESTIC VIOLENCE ACT CHAPTER 5:16”.

The circumstances were:

“In that on the 22nd day of November 2020 and at Chadley farm, Marondera, Nhamo Chakara unlawfully committed an act of physical abuse upon Jesman Mabhaure his former wife by stabbing her once on the back with a knife intending to cause Jesman Mabhaure bodily harm or realizing that there was a real risk or possibility that bodily harm may result.....”

The physical abuse was committed in a rather barbarous and savage manner. The complainant, one Jesman Mabhaure is a former wife of the accused. The accused person who was holding a knife, accosted the complainant as she was walking home through a bushy area. Complainant tried to run away but the accused person caught up with her and stabbed her once on her back with the knife. He then made good his escape. The medical report described the injury as “*laceration (cut) 3 x 1 cm at the back below scapula*”. The report also states that the stab wound was inflicted using a sharp object. Severe force was used in order to inflict the injury. The report concludes by stating that the injury was serious. The possibility of permanent injuries was however unlikely.

The accused person pleaded guilty to the charge and was sentenced on 6 December 2020 as follows:

“12 months imprisonment of which 3 months imprisonment are suspended for 5 years on condition each accused does not within that period commit any offence involving physical abuse or violence on the person of another and for which accused is sentenced to imprisonment without the option of a fine.

¹ [Chapter 7:10]

The remaining 9 months are suspended on condition accused completes 315 hours of Community Service Maringari Primary School Marondera”

The record of proceedings was placed before a regional magistrate for scrutiny, and he wrote to the trial magistrate as follows:

“RE: S V NHAMO CHAKARA

Can the trial magistrate comment on the sentence imposed which appears too lenient considering the complainant was attacked and stabbed with a knife a lethal weapon. The medical report shows the injuries were serious, the force used severe. The offence it is shown was also pre meditated and the accused waylaid the complainant. They used a lethal weapon to inflict the injuries....”

The trial magistrate responded as follows:

“RE: STATE – versus – NHAMO CHAKARA MRDP 1181/20

In imposing the sentence, the court gave more weight to the mitigatory factors that accused pleaded guilty, he was a first offender at the age of 48, and that he was a family man with 5 children, 3 of which are minors. The court also considered that even though the injuries were serious, complainant was stabbed once at the back and there was no possibility of permanent injury.

The court was of the view that the mitigatory factors outweighed the aggravatory factors and the aim of the sentence in the form of community service was to rehabilitate the accused as opposed to exposing him to hardened criminals in prison.

However, the court will humbly stand guided by any corrections made and directions given...”

The response by the trial magistrate prompted the acting regional magistrate to request the registrar to place the record of the proceedings before a judge in terms of section 58(3)(b) of the Magistrates Court Act. His own view was that the sentence was on the lenient side. A custodial sentence was called for. He reasoned that the trial magistrate failed to give a proper assessment of the circumstances surrounding the commission of the offence. More crucially, the court failed to consider that this was an unprovoked attack on a defenceless woman. The weapon used showed that the accused person intended to inflict serious bodily harm on the victim. The injury was inflicted on the scapula region of the shoulder blade which shields vital organs of the human anatomy. The learned regional magistrate cited case law authority in which this kind of assault attracted a prison term.²

A perusal of the trial magistrate’s reasons for sentence leaves one with no doubt that a custodial sentence was called for. After acknowledging that: the accused was aged 48 and this was his first brush with the law; he pleaded guilty; was married with a wife and five children, three of

² *S v Ndlovu* HB 57/83 and *S v Ndlovu* HB 197/87

whom were still minors; was a farmer but was now surviving on piece jobs because of the incessant droughts; that he realized about \$1000.00 *per* day, the trial magistrate said:

“In mitigation the court considered that the accused pleaded guilty to the offence: did not unnecessarily drag the court through a full trial. It is trite law that a plea of guilty is rewarded with a discount on the sentence. This is the accused person’s 1st brush with the law at the age of 48. First offenders like the accused must be treated with leniency. However, the court has not lost sight of the gravity of the matter. The State tendered a medical affidavit showing that accused used a sharp object with severe force to inflict serious injuries in form of a 3 x 1 cm deep laceration at the complainant’s back.

Even though there is no possibility of permanent injury, it is the act of domestic violence that the court frowns upon. This was premeditated as the accused planned to pounce on the unsuspecting complainant in the bush. The accused was not remorseful about what he did. He was at pains to justify why he committed the offence. In essence, he had no justifiable reason why he physically abused the complainant. He simply explained that “such things happen”. It is the duty of the court to protect the vulnerable members of the society. Physical abuse does not “just happen”. The court needs to send a clear message to would be perpetrators that physical abuse is not taken lightly by the courts. A lengthy *c/s* will meet the ends of justice. Accused person will reflect upon his wrong doings and consider changing.”

The offence itself attracts a fine not exceeding level fourteen or imprisonment for a period not exceeding ten years or to both such fine and such imprisonment.³ The trial magistrate was correct in stating that the barbaric manner in which the offence was committed against a defenceless woman required the court to send a message to would be perpetrators that courts do not take physical abuse lightly. The offence was premeditated. The accused was not remorseful. He was at pains to explain his conduct. Having noted all those factors, it is difficult to fathom the justification by the trial magistrate to impose community service as the most appropriate sentence. The accused behaved like a hardened criminal himself. He is not the kind of first offender whom exposure to prison conditions would leave worse off. His behaviour surely justified a term of imprisonment.

As correctly observed by the regional magistrate, the attitude of the courts to an assault of this nature is to impose a custodial sentence. In *S v Bukuta*⁴, the accused was charged of attempted murder for stabbing complainant with a flick knife on the left side of the back. The stab wound was 5cm deep and 2cm wide. The court sentenced him to 18 months imprisonment of which 6 months imprisonment were suspended for 5 years on the usual conditions of good behaviour,

³ Section 4 (1) of the Domestic Violence Act.

⁴ HMA 30/20

leaving an effective prison term of 12 months. On appeal the court upheld the sentence, and concluded that the court had actually erred on the side of lenience. It went on to state:

“It is wrong for the appellant to believe that first offenders cannot be sent to prison for effective prison terms of 24 months or less [*which is the threshold for which community service should be considered*]. There are appropriate cases where an accused person would justifiably be sent to prison for an effective term of imprisonment of 24 months or below”⁵

The court remarked that the use of a dangerous weapon, the fact that the attack was unprovoked and that the accused person showed no remorse, made the accused’s moral blameworthiness high.⁶

I am also indebted to the regional magistrate for the case law he cited in his minute to the registrar. The cited cases were summarized in the review judgment of *S v Dangarembwa*⁷ by CHINHENGO J. In *S v Ndlovu*⁸, a young man attacked his mother with an axe resulting in fairly severe injuries but no permanent disability. He was sentenced to an effective 2 years imprisonment. In *S v Ndlovu*⁹, the accused stabbed his ex-girlfriend with a knife in the stomach with severe force causing serious injuries. An effective 6 months imprisonment was found to be appropriate. In *S v Razawu*¹⁰ accused was drunk and provoked. He stabbed his wife in the face and side but did not cause serious injuries. He was sentenced to 8 months imprisonment of which 4 months were conditionally suspended.

While the views in the *Bukuta* case were expressed in the context of an attempted murder charge, they are without doubt apposite to the circumstances of this case. This was a senseless and unprovoked attack in which a dangerous weapon was used. As the trial magistrate correctly noted, the attack on the unsuspecting woman was premeditated. The accused showed no remorse and was unable to explain the motive for the attack. Instead he dismissed the attack with a simple remark “*such things happen*”. That just goes to show the type of offender the court was dealing with. His moral blameworthiness was demonstrably high and invited a short custodial sentence in the region of 6 to 9 months. In the court’s view, a sentence of community service was a misdirection more so

⁵ Per MAWADZE J on page 5 of the judgment

⁶ See also *S v Nkata* HH 661/15 where the court found a custodial sentence appropriate in a count in which a knife was used.

⁷ HH 123/03

⁸ HB 57/83

⁹ HB 197/87

¹⁰ HH 257/87

considering the sentiments that had been expressed by the trial magistrate in the reasons for sentence.

For the foregoing reasons, while confirming the conviction of the accused, I am unable to certify the proceedings as being in accordance with real and substantial justice on account of the sentence which was too lenient. Accordingly I withhold the certificate.

I have referred this review and my judgment to my brother CHITAPI J who agrees with my sentiments.

CHITAPI J agrees:.....