STATE
versus
TAPIWA MADYAMBUDZI

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 31 May 2017

Criminal Review

HUNGWE J The accused was convicted on his own plea of guilty to physical abuse as defined in section 4 (1) as read with section 3 (1) (a) of the Domestic Violence Act, [*Chapter 5:16*]. He was sentenced to 14 months imprisonment of which 7 months imprisonment is suspended on condition he performed community service. The brief facts upon which he was convicted are that the accused stays together with his uncle, the complainant Stanley Madyambudzi, aged 56. There was a misunderstanding over food. The accused then assaulted the complainant using clenched fists and booted feet all over his body. He also head-butted the complainant who reported the assault to police. There is no indication that the complainant needed medical attention after the assault or is there an indication that police requested a medical examination to assess the degree of injury suffered by the complainant.

I queried why the offence of physical abuse as defined in s 4 (1) as read with s 3 (1) (a) of the Domestic Violence Act was preferred as opposed to assault as defined in s 89 (1) (a) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. The learned trial magistrate's response was that because it was stated that the accused physically abused the complainant therefore she proceeded on the preferred charge. The term "physical abuse" is one of art which has been specially defined in the Domestic Violence Act, [*Chapter 5:16*]. It is instructive that even both the prosecutor as well as the magistrate herself got it all wrong from the outset when they accepted the charge framed as:

> "Physical abuse as defined in section 4 (1) as read with section 3 (1) (a) of the Domestic Violence Act, *[Chapter 5:16]* in that on the 30th day of October 2016 and at house number 23 Gakava Close St Mary's, Tapiwa Madyambudzi committed an act of domestic violence upon Stanley Madyambudzi by head-butting him on the eye and assaulted him with fists all over the body resulting in him sustaining a bleeding eye."

The first point to make is that the charge was wrongly framed as the section criminalising the accused's admitted conduct is s 4 (1) of the Act. Section 3 (1) (a) defines the conduct which is then criminalised in the next section. The charge should therefore be cited as

> "Physical abuse as defined in s 3 (1) (a) as read with s 4 (1) of the Domestic Violence Act [*Chapter 5:16*] in that on the 30th day of October 2016 and at house number 23 Gakava Close St Mary's, Tapiwa Madyambudzi committed an act of domestic violence upon Stanley Madyambudzi his uncle, by head-butting him on the eye and assaulted him with fists all over the body resulting in him sustaining a bleeding eye."

The second point to make is that unless there is an allegation of a pattern of violence in its various forms against the victim, a single incident ideally, should only be charged as an ordinary assault. The rationale behind the Act is to give the courts a wider latitude to impose stiffer penalties because of repeated incidence of the abuse. It could not have been the intention of the legislature to substitute the offence of common assault with the more serious one of domestic violence. Unless this is borne in mind, the danger is that the police (or victim for that matter) would prefer this offence where in fact only an assault would have met the justice of the case for various reasons least of which is sheer lack of knowledge. See *S* v *Shonhiwa* 2015 (2) ZLR 436 and the observations which I make therein.

In light of the above the conviction under the Domestic Violence Act is substituted with the following: assault as defined in s 89 (1) (a) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*].

Since the accused has only been convicted of a less serious offence, it follows that there should be a proportionate reduction in his sentence. It is instructive that there was no medical affidavit produced to give an indication of the extent of the injuries suffered by the complainant. This does not mean that he did not suffer any, but that there was nothing to prove it at court. Consequently, a lighter sentence was indicated. The sentence imposed in the court a quo is set aside and in its place the following is substituted:

> "7 months imprisonment of which 4 months imprisonment is suspended on condition the accused is not during that period, convicted of any offence involving violence for which he is sentenced to imprisonment without the option of a fine."

The accused would have completed the performance of the order for community service imposed as an alternative to imprisonment. He therefore does not need to serve the new sentence. The above sentence should be explained to him.

MANGOTA J: agrees…….