

THE STATE
versus
JUSTIN MAZHAKATA

HIGH COURT OF ZIMBABWE
MABHIKWA J
HARARE, 6 June 2018

Criminal Review

MABHIKWA J: This matter was placed before me for review. The accused, a 20 year old man was charged with the crime of physical abuse as defined in s 3 (1) (a) of the Domestic Violence Act, [*Chapter 5:16*]. He was convicted on his own plea of guilt and was sentenced to 5 years' imprisonment of which 2 years' imprisonment were suspended for 5 years on condition he does not within that period commit any offence contravening section 3 of the Domestic Violence Act and for which upon conviction that accused would be sentenced to imprisonment without an option of a fine. Effective 3 years' imprisonment.

What immediately caught my attention is that s 3 (1) (a) and in fact the whole of s 3 of the Domestic Violence Act, does not create an offence. It simply defines the meaning of domestic violence and its scope.

The section itself is actually headed – “**Meaning of domestic violence and its scope**” and goes on

“3 (1) For the purposes of this Act, domestic violence means any unlawful act, omission or behaviour which results in death or the direct infliction of physical, sexual or mental injury to any complainant by a respondent and includes the following.”
(a) physical abuse [...]

As can be seen, the section simply lists a host of actions, or omissions that may be defined or interpreted as domestic violence. It is s 4 (1) that creates an offence and is actually headed as follows: - “**Offence of Domestic Violence and its acts excluded from its scope**”

This observation appears to have eluded both the prosecutor and the trial magistrate. It follows that the accused was in effect charged with a wrong charge. He should have been charged with contravening section 4 (1) as read with s 3 (1) (a) of the Domestic Violence Act [*Chapter 5:16*]

Secondly I noted, again with great concern that the trial court did not explain to the accused the provisions of s 191 of the Criminal Procedure and Evidence Act in compliance with the requirement of s 163 A of the same act.

Section 163 A is peremptory as can be seen by the use of the word “shall” but the magistrate simply proceeded to record the accused’s plea and went on to the essential elements without advising him of his rights.

The fact that an accused wishes to plead guilty is not a reason to be cursory in dealing with this case.

Apart from the above, I will not interfere with the rest of the proceedings, conviction and sentence. The essential elements were canvassed as if the accused had been properly charged. The facts were quite bad and the medical report was equally bad. The accused is a repeat offender involving the same offence.

I will therefore encourage the trial magistrate to be more diligent next time but will not withhold my certificate as I believe that by and large, the proceedings were in accordance with real and substantial justice.

Accordingly, the conviction and sentence will stand.