HB 161/17
HCA 04/15

PETER NSINDANE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MATHONSI & MAKONESE JJ
BULAWAYO 12 & 15 JUNE 2017

Criminal Appeal

T. Chivasa for the appellant
K. Ndlovu for the respondent

MAKONESE J: The appellant appeared before a magistrate at Zvishavane facing a charge of contravening section 3(1)(a) as read with s4(1) of the Domestic Violence Act (Chapter 5:16), that is physical abuse. Appellant pleaded guilty and was convicted and sentenced to an effective sentence of 2 months imprisonment. The appellant noted an appeal against sentence arguing that the sentence was excessive and induces a sense of shock. The state conceded that the sentence imposed in the court *a quo* is inappropriate.

In his reasons for sentence the learned trial magistrate had this to say:

> "Accused is a first offender and he pleaded guilty and by pleading guilty he did not waste time and he showed contrition. This is domestic violence at its best. The complainant has been assaulted for a period of 2 years to such an extent that she lost count. This is not acceptable. The court has considered the complainant's withdrawing (sic) affidavit and it's of the opinion that it's just and fair to give accused a short term of imprisonment."

It is clear from the magistrate's reasoning that the short sentence was meant to punish the appellant and not to rehabilitate him. Such a short sentence serves no useful purpose. The appellant who readily admitted his guilt expressed remorse and contrition by tendering a plea of guilty. In this particular instance the complainant as the victim testified that she did not want her husband (appellant) to go to prison. The complainant went further to swear to an affidavit intimating her intention to withdraw criminal charges against the appellant. In such cases of domestic violence, it is my view that the courts must not disregard the view of the victim who is

likely to suffer as a direct result of the breadwinner being sent to prison. Inspite of the express desire of the complainant to withdraw charges, the trial magistrate appears to have been determined to send the appellant to prison. In arriving at an appropriate sentence in cases of domestic violence, the court must take into account such factors as the extent of the complainant's injuries, the possibility of permanent injuries, the relationship between the complainant and the accused, and whether the accused pleaded guilty, showed contrition and whether the accused is a repeat offender. In the court *a quo*, the court took the view that appellant's level of moral blameworthiness was high in that he was in the habit of assaulting his wife for an extended period of 2 years. The court treated the appellant as a repeat offender without noting that there was no factual basis to treat appellant as a person with previous convictions when in fact he was not. The court took the complainant's word on her mere say so without canvassing further evidence on the alleged previous assaults. This is not desirable.

Further, and in any event, the appellant ought to have been treated as a first offender who pleaded guilty and showed remorse. The court should have taken into account the attitude of the victim who expressed the view that it was not appropriate to sentence the appellant to a custodial sentence. The court must always strive wherever possible to keep first offenders out of prison. The appellant did not use a weapon and the mitigating features far outweigh the aggravating factors. The complainant did not sustain life threatening injuries as a result of the assault and there were no permanent injuries and no danger to life.

In *S* v *Zulu* 2003 (1) ZLR 529 the court observed that over the years the courts have emphasised that imprisonment is a severe and rigorous form of punishment to be imposed as a last resort when no other form of punishment would be appropriate.

In my view this is not one of those worst cases of domestic violence which would warrant the imposition of a custodial sentence. The failure by the trial magistrate to consider the imposition of an alternative form of punishment such as community service is a mis-direction. This court is therefore at large as regards sentence.

In the circumstances, and accordingly the following order is made:

1. The appeal against sentence succeeds.
2. The sentence of the court *a quo* is set aside and substituted with the following:
   "Accused is ordered to pay a fine of $100 in default of payment 2 months imprisonment. In addition accused is sentenced to 2 months imprisonment wholly suspended for 3 years on condition accused does not within that period commits an offence involving violence upon the person of another and for which upon conviction he is sentenced to a term of imprisonment without the option of a fine."

Mathonsi J …….... I agree

Chivasa & Associates, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners