THE STATE

Versus

TINASHE MOYO

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 4 May 2023

Review judgment

DUBE-BANDA J:

[1] This review is at the instance of the scrutinising Regional Magistrate. The accused was arraigned before the magistrates' court sitting at Zvishavane, in the Midlands Province. He was charged with the crime of contravening s 3(1)(a) as read with s 4(1) of the Domestic Violence Act [Chapter 5:16]. It being alleged that on 16 November 2022 the accused committed physical abuse upon the complainant, his wife by striking her with a wooden log three times on the right arm and three times on the right leg. The complainant developed a swollen leg. The accused pleaded guilty and was duly convicted and sentenced to $20 000. 00 in default of payment 120 days imprisonment.

[2] The conviction is proper and nothing turns on it. It is the sentence that is subject to this review.

[3] This record was referred to this court for review by the Regional Magistrate. In the covering letter accompanying the request for a review, the Regional Magistrate made the following comments and observations:

> "May this record be placed before the Honourable Judge of the High Court with the following comments:
>
> The accused person in this matter was convicted on his own plea of guilty for Physical Abuse as provided for by the Domestic Violence Act and sentenced to pay $20 000 in default payment 120 days imprisonment.
>
> I had no qualms with the conviction but with the sentence imposed by the trial magistrate.
>
> The accused person in this matter assaulted the complainant with a log on her arms and leg. He is a repeat offender with 2 relevant previous convictions. Accused person is clearly of violent disposition and unrepentant. He was once sentenced to an effective

term of imprisonment on one of the tendered previous conviction (*sic*). Whilst I appreciate that it is not cast in stone that repeat offenders ought to be sent to prison, there was no justification of not sending this particular offender to prison.

The trial magistrate remarked that the previous conviction have (*sic*)lapsed but what lapses is the discretion to bring in a suspended sentence. The previous conviction remain (*sic*) relevant and ought to be considered. *S v Hunyenye* HH 204/17.

Secondly, the procedure for the production of previous convictions was not followed by the trial magistrate. It was just produced by the State and accepted by the Court without being put to the accused person.

The trial magistrate in her response to both issues conceded that she erred and urged me to take steps to ensure that the anomalies are rectified.

Ultimately, the sentence imposed by the trial magistrate is lenient and does not suit the offender.

The procedure for production of previous convictions was also not followed.

May corrective action be taken."

[4] In replying to the query generated by the Regional Magistrate the trial magistrate made the following points:

i. I concede with the Regional Magistrate's observation. It was an oversight. May corrective measures be taken. I apologise for the mishap.
ii. The previous conviction was read out to the accused person. He did not object to the production of such. I apologise for not recording the accused's response.

[5] A perusal of the record of proceedings confirms the Regional Magistrate's observation that the production of previous convictions was irregular. The trial magistrate says he read out the convictions and the accused did not object to their production. However, the trial magistrate says he forgot to record his answer.

[6] In terms of s 51(1) The Magistrates' Court Act [Chapter 7:10] the magistrates' court is a court of record. The record must be complete and tell a full and accurate story of what transpired in court. See: *S v Chidavaenzi* HH 133-08; Prof. G Feltoe *Magistrates' Handbook* 446. The magistrate cannot start to add and explain what is not in the record. The record must speak for itself. I take the view that the explanation by the trial magistrate that "The previous conviction was read out to the accused person. He did not object to the production of such. I apologise for not recording the accused's response." is inconsequential. It serves no useful

purpose. What is on record is that the trial magistrate did not follow the procedure in dealing with previous convictions.

[7] The convictions were just produced by the State and accepted by the Court without being put to the accused person. In terms of s 327 of the Criminal Procedure and Evidence Act [Chapter 9:07] (CP & E Act) after the accused has pleaded guilty or been found guilty the prosecutor will state whether the person convicted has any previous convictions. If he has, the *onus* is on the State to prove the convictions. It is the responsibility of the prosecutor to produce the record of any previous convictions. The prosecutor will read out these previous convictions to the accused. The court will then ask the accused if he or she admits or denies these previous convictions. If previous convictions are disputed, the State must prove the convictions.

[8] Section 327 (3) of the CP & E Act is couched in peremptory terms. The court shall ask the accused whether he is the person so alleged to have been previously convicted. If the previous convictions are lawfully proved or the accused admits such conviction, the court shall take it into consideration in determining sentence for the offence to which he has pleaded or of which he has been found guilty. See: *The State v Chinyani* HH 70/23; *S v Hunyenye* HH 204/17. In *casu* the previous convictions were neither admitted nor proved.

[9] At this stage the question whether the sentence is lenient or not does not even arise. This question can only arise and be determined when the status of the previous convictions have been ascertained in terms of the law, i.e., whether or not the accused is the person alleged to have been previously convicted. The failure to comply with a peremptory or mandatory statutory provision renders the sentencing process irregular and invalid. This is a case where the matter must be remitted to the trial court to enable the trial magistrate to comply with the requirements of the law and determine whether or not it is the accused person who was previously convicted. See: *S v Mosoetsa* 2005(1) SACR 304 (T) 310 g-h.

[10] I take the view that a substantial miscarriage of justice occurred by reason of the trial court's failure to comply with the peremptory provision of s 327(3) of the CP & E Act which amounts to a gross irregularity that vitiates the sentence. In the circumstances the sentence cannot be permitted to stand.

In the result, it is ordered that:

i. The conviction of the accused in case number ZV 1047/22 be and is hereby is confirmed.

ii. The sentence be and is hereby set aside.

iii. The matter is remitted to the learned trial magistrate to comply with the s 327 (3) of the Criminal Procedure and Evidence Act [Chapter 9:07], and re-sentence the accused in terms of the law. Provided the new sentence must not be more severe than the sentence that has been set aside.

DUBE-BANDA J……

KABASA J ……AGREES