WELLINGTON TARUGARIRA

Versus

THE STATE

HIGH COURT OF ZIMBABWE

WAMAMBO J & ZISENGWE J

MASVINGO, 30 June & 22 September, 2021

Mr.O. Mafa for the Appellant
Ms M. Mutumhe for the Respondent

Criminal Appeal

WAMAMBO J: Appellant pleaded guilty to the offence of contravening section 10 (7) of the Domestic Violence Act [*Chapter 5:16*] (fail to comply with terms and conditions of a protection order).

He was sentenced to 15 months imprisonment.In addition 3 months imprisonment suspended under CRB GT 17/18 were brought into effect. He now appeals against sentence. On 30 June 2021 we dismissed the appeal and gave an *ex tempore* judgement. Appellant through his legal practitioners has since requested for full reasons for the dismissal of the appeal.

The State outline reflects the following facts which appellant confirmed.

Appellant is a teacher while complainant his wife is a veterinary officer. They are both based in Gutu District of Masvingo. On 15 October 2018 at Gutu Magistrates court appellant was ordered by the court not to physically abuse, threaten or use insulting language to the complainant under case DV 81/18. In contravention of the said order on 15 August 2020 appellant assaulted complainant several times all over her body using open hands and booted feet. He also grabbed her upon the neck. Complainant was medically examined and a medical report was compiled.

The medical report compiled by a Medical doctor stationed at Gutu Mission Hospital reveals the following:

Complainant had a bruise on the face and neck. She was observed to have gross *"swelling of arytenorid folds (throat) gross induration of the proximal larynx gross swelling of epiglotis"*

Severe force was used. The possibility of permanent injury was found to be present as residual harshness of voice. The injuries were found to be severe.

The grounds in the notice of appeal are the following:

1. The trial magistrate erred in relying on inconsistent medical reports by different medical practitioners.
2. The sentence of 15 months imprisonment without an option of fine induces a sense of shock in the circumstances.
3. The learned Magistrate erred in finding that a second or repeat offender should always be sent to prison.
4. The court should have considered other possible non-custodial sentences

Appellant's heads of argument provided some detail to the grounds of appeal. On 5 October 2020 Dr Porian Takayidza indicated that the patient was admitted under the care of Dr Zulu,a general surgeon. Dr Zulu should have compiled the report not Dr Ndou, so it was submitted.

Reference is made to Doctors Denga and Takayidza's reports which appear at pages 16 and 17 of the record respectively.

The reports are self-explanatory. Doctor Denga in his report indicated that he could not determine whether the injuries were caused by a sharp or blunt object, whether or not there was potential of permanent disability. On potential danger to life he also could not decide. The Doctor notes in his report as follows*." N.B Biopsy of gastroesophageal fruition taken and to be seen by physician."*

The above note reports that a sample was taken and complainant was to be seen by a physician.

Dr Brian Takayidza's report confirms that complainant was under Mr Zulu (general surgeon) care and notes further as follows:

"As she is still undergoing treatment it is not possible to determine the level of disability. We recommend that the medical report be completed after fill recovery or discharge."

The same report notes that complainant was actually admitted at the private ward.

Dr Ndou is the one who compiled the main report (Exhibit 1).

Contrary to the submissions by counsel for the appellant the reports by Drs Ndou, Denga and Takayidza are supportive of each other.

The offence was committed on 15 August 2020 and as later as 15 October 2020 complainant was admitted at the private ward.

There is no rule of practise or law that we have been refered to or are aware of that provides that the Doctor under whose care a patient is at some stage is the only one who should compile the medical report. We thus find that the first ground of appeal has no merit.

Moving to the second ground of appeal. This ground indicates shock at the quantum of the sentence. Why it is shocking is not elaborated.

In *State v Giannoulis* 1975 (4) SA 867 (AD) the headnote reads as follows:

> *"In every appeal against sentence whether imposed by a Magistrate or a Judge the court hearing the appeal should be guided by the principle that sentence is preeminently a matter for the discretion of the court and should be careful not to erode such discretion hence the further principle that sentence should only the altered if the discretion has not been judicially and properly exercised. The test under (b) is whether the sentence is initiated by irregularity, misdirection or is disturbingly inappropriate."*

No case law was cited to demonstrate that the sentence imposed is shocking. No misdirection in the balancing act in reaching sentence was specifically pointed out.

In the reasons for sentence there is no mention by the trial court that repeat offenders should always be sent to prison. The reasons for sentence reflect the factors that the Trial Magistrate took into account in sentencing appellant. These can be summarised as follows:

Appellant is a repeat offender with a relevant previous conviction whose condition of suspension has been breached. Appellant pleaded guilty and did not waste the court's precious time and resources. The appellant is a family man. The nature of the assault reflects that it was of a severe manner and that permanent injury is likely. Further aggravating the assault is the fact that appellant had a Court order hanging over his head ordering him not to assault complainant.

Despite the court order appellant severely assaulted complainant.

The Trial Magistrate was aware of the effects and consequences of an imprisonment term for he refered to it as follows:

"imprisonment by nature is a rigourous form of sentence which is only resorted to as a last option. Regrettably a custodial term under the circumstances meets the justice of the case."

The above pronouncements by the Trial court shows that other forms of punishment were considered by it before finally deciding that imprisonment would meet the justice of the case.

Appellant's previous conviction which was brought into effect is for contravening section 3 (i) of the Domestic Violence Act [*Chapter 5:16*]. In that matter a fine was imposed and in addition 3 months were suspended on conditions of good behaviour.

One notes that the sentence imposed on the previous conviction gave the appellant a chance to reform. The suspended sentence was to demonstrate to him that was being warned not to transgress again and that if he did transgress imprisonment would follow. Appellant did not take heed of this very loud warning.

The assault of a woman by a man is by its nature not only considered serious but goes to indignify the woman at the same time. When people are in a domestic relationship especially man and wife issues of assault are not supposed to feature at all. Marriage is among other features a relationship of love, affection, companionship and not violence of any sort. In *State v Ningisai Wakeni* HH 15/18 HUNGWE J (as he then was) said at page 7.

"I need only to say that the solution to an unhappy marriage is not violence or the killing of a spouse. The solution is either conciliation through mediation or when everything else fails to go for divorce ……"

The serious nature of the assault is spoken to by the medical report.

We find that this was not a matter for the imposition of community service due to the serious circumstances of the matter.

Section 10 (7) of the Domestic Violence Act [*Chapter 5:16*] provides as follows:

"(7) Any respondent who fails to comply with the terms and conditions of a protection order shall be guilty of an offence and liable to a fine not exceeding level five years or to both such fine and such imprisonment."

The sentence passed was well within the penalty clause of the offence committed. Appellant had a suspended sentence hanging over his head for a related offence. He did not take heed of this strong warning. He persisted with his errant ways and this time around the Trial Magistrate decided not to suspend any portion of the sentence. Society abhors domestic violence

and expects the courts to pass sentences reflective of the revulsion with which such cases are viewed.

We find the sentence proper and fair in the full circumstances of the case.

To that end we order as follows:

The appeal is dismissed

WAMAMBO J…….

ZISENGWE J agrees…….

Ndlovu & Hwacha, Appellants Legal Practitioners

National Prosecuting Authority, Respondents Legal Practitioners