

SOUTH AFRICA / JUDGMENT

S v Mbonde (CA&R251/2015, 86/2015) [2015] ZAE CGHC 93 (17 September 2015) [2015] ZAE CGHC 93

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M Roberson, D Pickering

CASE / FILE NUMBER

CA&R251/2015, 86/2015

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

REVIEW NO: CA&R251/2015

CASE NO: 86/2015

DATE: 17 SEPTEMBER 2015

In the matter between

THE STATE

And

THEMBEKA MBONDE

REVIEW JUDGMENT

ROBERSON J:-

- [1] The accused in the above matter was convicted by the Magistrate, Burgersdorp, of a contravention of s 17 (a) of the Domestic Violence Act 116 of 1998 (the DVA), in that she contravened a condition of a protection order which had been issued against her in terms of s 6 of the DVA. She was sentenced to two years' imprisonment half of which was suspended for three years on condition that she was not convicted of a contravention of the DVA during the period of suspension[1].
- [2] In terms of the protection order, which was granted on 15 October 2010, the accused was prohibited from visiting the “residential

place” of Zamuxolo Mkosana. It was alleged that on 15 February 2015 she did visit the complainant’s residence without his permission and thereafter insulted the complainant’s partner. I am satisfied that the accused was correctly

convicted.

- [3] The accused had two previous convictions: one for *crimen injuria* committed in 2011 for which she was sentenced to a fine with an alternative of imprisonment, wholly suspended; and assault with intent to do grievous bodily harm committed in 2013 for which she was sentenced to a fine with an alternative of imprisonment, again wholly suspended.
- [4] The accused was convicted on 13 May 2015 and thereafter was kept in custody until she was sentenced on 11 June 2015. The accused was unrepresented at her trial and the sentence was automatically reviewable. Unfortunately, owing to administrative problems at the magistrate’s court, the record only reached the Registrar of this court on 7 September 2015. For reasons which follow, on 8 September 2015 I ordered the immediate release of the accused from prison.
- [5] When it came to addressing the court in mitigation of sentence, the accused, who is 33 years old, stated that she was unemployed and was looking after her sister’s children who had lost their parents, as well as her own children. She said that while she was in custody awaiting sentence her children had suffered because she left them with neighbours. She requested a non-custodial sentence so that she could look after the children. In his address on sentence the prosecutor requested the court to impose direct imprisonment and made no reference to the accused’s children or her sister’s children.
- [6] In sentencing the accused, the magistrate made no mention of the accused’s children and focused on the purpose of the DVA and the accused’s conduct in deliberately disregarding the protection order and confronting the complainant’s partner.

He dealt with the sentencing provisions of the DVA (a maximum of 5 years’ imprisonment for a contravention of s 17 (a)) which he said showed how serious the Legislature was in enacting the DVA. He mentioned that the accused was not remorseful and considered that he should impose a sentence which would curb the conduct of the accused who had failed to have regard to her previously suspended sentences.

- [7] Leaving aside for the moment the interests of the accused’s children and her sister’s children, I am of the view that the sentence is too severe. While breaches of protection orders can be serious, for example assaulting a complainant when the protection order prohibits an assault, allowance should be made for the particular condition which is breached and the nature of the breach. In the present case although there was a threat of violence (the evidence was that the accused wanted to assault the complainant’s partner) no violence was inflicted because the complainant intervened. Other than that, the accused only entered the complainant’s premises and seems to have caused a disturbance by shouting and attracting the attention of neighbours. Regard should also be had to the fact

that the protection order had been in operation for about four and a half years before it was breached. I do not disregard the accused's previous convictions which show a lack of respect for the dignity and physical integrity of others. There was a similar lack of respect in the present matter. However in all the circumstances I am of the view that the sentence is disproportionately heavy.

[8] I now turn to the interests of the children. *S v M* (Centre for Child Law as Amicus Curiae)

[2007] ZACC 18; 2008 (3) SA 232 (CC) concerned the imposition of sentence when a convicted person is the primary caregiver of minor children. At paras [35] and [36] Sachs J said the following:

"[35] Thus, it is not the sentencing of the primary caregiver in and of itself that threatens to violate the interests of the children. It is the imposition of the sentence without paying appropriate attention to the need to have special regard for the children's interests that threatens to do so. The purpose of emphasising the duty of the sentencing court to acknowledge the interests of the children, then, is not to permit errant parents unreasonably to avoid appropriate punishment. Rather, it is to protect the innocent children as much as is reasonably possible in the circumstances from avoidable harm.

[36] There is no formula that can guarantee right results. However, the guidelines that follow would, I believe, promote uniformity

of principle, consistency of treatment and individualisation of outcome.

- (a) A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.
- (b) A probation officer's report is not needed to determine this in each case. The convicted person can be asked for the information and if the presiding officer has reason to doubt the answer, he or she can ask the convicted person to lead evidence to establish the fact. The prosecution should also contribute what information it can; its normal adversarial posture should be relaxed when the interests of children are involved. The court should also ascertain the effect on the children of a custodial sentence if such a sentence is being considered.
- (c) If on the Zinn-triad approach the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.
- (d) If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.
- (e) Finally, if there is a range of appropriate sentences on the Zinn approach, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose."

- [9] In the present matter a probation officer's report was clearly called for. All the indications were that the accused was a primary caregiver. One can infer that from the fact that she left the children with neighbours. The prosecutor did not dispute the accused's statements about the children. There was effectively no information before the court concerning the effect on the children if a custodial sentence was imposed and no indication that the magistrate applied his mind to the need to ensure that the children would be adequately cared for while the accused was incarcerated. The magistrate's omission in this regard was a material misdirection.
- [10] Had the accused not already served the portion of her sentence that she did, I would have set the sentence aside and remitted the matter to the magistrate with a direction to obtain a probation officer's report. That course would be futile now and one must deal with the factual situation that the accused has served a period of imprisonment.
- [11] At the time of her release the accused had served 90 days of her sentence. In all the circumstances, and taking into account the period spent in custody awaiting sentence, I regard that as a suitable term of direct imprisonment which hopefully would have brought home to the accused the seriousness of her repetitive violation of others' rights and the need to desist from future similar conduct.
- [12] In the result the sentence imposed on the accused is set aside and substituted with a sentence of 90 days' imprisonment,

ante-dated to 11 June 2015.

J M ROBERSON

JUDGE OF THE HIGH COURT

PICKERING J:-

I agree

J D PICKERING

- [1] The wording of the condition should have been that the accused was not convicted of such a contravention committed during the period of suspension but that is not the main difficulty with the sentence.

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