

SOUTH AFRICA / JUDGMENT

S v Mhlongo (A671/2005) [2005] ZAGPHC 259 (30 May 2005)

[2005] ZAGPHC 259

COURT

High Courts - Gauteng

BEFORE

E M Patel, L O Bosielo

CASE / FILE NUMBER

A671/2005

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A671/2005 IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

DATE: 30/5/2005

REPORTABLE

Magistrate

HEIDELBERG (G)

Case no: A1382/04

Supreme court ref no: 641

THE STATE v MANDLA MHLONGO

REVIEW JUDGMENT

PATEL, J

- [1] This is an automatic review from the Heidelberg magistrate's court. The accused, who was unrepresented, pleaded guilty on a charge of contravening section 17(a) of the Domestic Violence Act 116 of 1998. He was sentenced to eighteen months imprisonment which is wholly suspended for a period of five years on the condition that he is not convicted of contravening section 17(a) of the Act.
- [2] In the charge it was alleged that on or about 14 October 2004 a family violence interdict was issued against the accused by the Heidelberg magistrate's court since it met the requirements stated in section 7 of the Act. A copy of the interdict was not annexed to the charge-sheet. However, it is apparent from the charge-sheet that "the accused may not assault or threaten to assault Ruth Mhlongo". It was also alleged that the accused was "guilty

of contravening any prohibition, condition, obligation or order imposed in terms of section 7, in that upon or about 7/11/2004 he did the following: Assault complainant by slapping her with open hands".

- [3] Upon the accused pleading guilty to the charge, the following exchange took place between the presiding magistrate and the accused:

"...

HOF: Is dit korrek dat u skuldig pleit en is daardie pleit vrywillig?

BESKULDIGDE: Ek doen dit vrywillig, dit is so Edelagbare.

HOF: Is dit korrek dat op 14 Oktober van hierdie jaar deur hierdie hof 'n beskermingsbevel teen u uitgereik is?

BESKULDIGDE: Dit is korrek.

HOF: Wat was die bepalings van daardie beskermingsbevel?

TOLK: Hulle sê dit is 'n – dit is in Engels soos hy sê, hulle het gesê 'he must not abuse the children or his wife or assault them'.

HOF: Is dit korrek soos die aanklaer beweer nie aanrand of met aanranding dreig nie?

BESKULDIGDE: Die ding is Edelagbare ek kan nie Engels mooi verstaan nie. Ek ken nie so goed Afrikaans nie en daardie bevel was in Engels geskryf.

HOF: Wil u vir my sê u het die beskermingsbevel nie verstaan nie?

BESKULDIGDE: Ek verstaan 'n ander (onduidelik) Edelagbare maar die ander het ek nie mooi verstaan nie.

HOF: Wat het jy verstaan?

BESKULDIGDE: Dat ek mag nie my vrou aanrand nie, of ... (onvoltooid)

..."

- [4] This exchange between the magistrate and the accused raise a critical question: Did the accused understand the contents of the charge as well as the contents of the protection order? It is clearly evident from accused's reply that he understood some parts of the protection order but he certainly did not understand other parts of the order. The order was in English and in court it had to be interpreted to him.

- [5] The order stated:

"he must not abuse the children or his wife or assault them."

But in the charge it was stated:

"that the accused may not assault or threaten to assault Ruth Mhlongo."

- [6] It is clear that the charge does not capture the precise wording of the protection order. In setting out the legal position, an apt starting point is section 84(1) of the Criminal Procedure Act 51 of 1977. This subsection requires that the charge must set forth the alleged offence in such manner, and with such particularity as to the alleged time, place of its commission and the person, if any, against whom it was committed as may be reasonably sufficient to inform the accused of the nature of the charge. (See: *R v Mahlatse* 1949 4 SA 455 (O).) Where the offence to some extent depends on a protection order then the words contained in the order must be set out with precision because in the proceedings of this nature, the existence and contents of the protection order are cardinal elements of the state's case and have to be proved by the leading of admissible evidence. (See: *S v Leeuw* [2001] 4 All SA 42 (NC) at 43e.) The court should not countenance slovenly drafted charge since every accused person has the fundamental right to be informed of the charge with sufficient detail to answer it. Therefore, the lack of clarity in capturing the nature, essence and content of the protection order may render the charge defective. The court should also not countenance the practice in some cases of merely attaching the order to the charge sheet (see: *S v Leeuw*, above).
- [7] The more pertinent question is: Did the accused understand the contents of the protection order? It is clear from the accused's response that he did not understand English or Afrikaans well. Concomitantly he may not have understood the full import of the order which was in English.
- [8] Section 35(4) of the Constitution provides that whenever the whole of section 35 requires information to be given to an arrested person, a detainee or an accused then such information must be given in a language that the person understands. This constitutional injunction brings into focus the question of language in court processes and proceedings. Without laying down a rule, I am of the view the court orders, such as protection orders should be in a language which the accused fully understands and not in a language which he understands partially. (See: *S v Ngubane* 1995(1) BCLR 121 (T) at 122.)
- [9] The accused pleaded guilty to the charge in that he pushed his wife by slapping her with an open hand. But the question is, was he justly and fairly sentenced. In my view the answer is in the negative since the sentence imposed by the lower court is disproportionate to the offence. It is unjustifiably severe and induces a sense of shock. Therefore, this review court is justified in interfering with the sentence.
- [10] Briefly, the accused by pleading guilty to the offence took the court into his confidence. He is a first offender, employed and a bread-winner providing for his wife and children. On the other side of the scale is that the complainant had obtained a protection order against the accused. It is indicative of some kind of violence or aggression on the accused's part, however, there is no evidence of the nature and degree of violence. Further, there is no evidence of any injuries sustained by the complainant. Without diminishing the seriousness of the crime of violence against women and the high incidence of domestic violence, it is in the interest of society that the courts should send out a clear message to offenders perpetrating domestic violence by imposing a balanced sentence rather than unduly harsh

sentences. Prolonged suspended sentences will not have a beneficial effect in matters of family reconciliation. The sentence must be such that it must have a deterrent effect to curb domestic violence.

[11] Having regard to the particular factual circumstances of this case the following order is made:

(a) The sentence imposed on the accused is set aside and the following is substituted therefor:

"The accused is sentenced to three months imprisonment which is wholly suspended for a period of nine months on the condition that he is not convicted of contravening

section 17(a) of the Domestic Violence Act 116 of 1998 during the period of suspension."

(b) The clerk of the magistrate's court Heidelberg is ordered forthwith to inform the accused in a language he understands of the substituted sentence referred to in paragraph (a).

E M PATEL

JUDGE OF THE HIGH COURT

I agree

L O BOSIELO

A1382-04

IN THE ORDINARY COURSE OF EVENTS

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