

SOUTH AFRICA / JUDGMENT

S v Nojozi (3/2022) [2022] ZAECBHC 3; 2022 (1) SACR 662 (ECB) (17 March 2022) [2022] ZAECBHC 3

COURT

Eastern Cape High Court, Bhisho

BEFORE

Hartle, I.T. Stretch

CASE / FILE NUMBER

3/2022

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, BHISHO)

Case No. 3/2022

Case reference A18/2022

THE STATE

and

LOYISO NOJOZI

REVIEW

JUDGMENT

HARTLE J

[1] This matter came before me by way of automatic review.

[2] The accused was charged with contravening section 17 (a), read with section 7 (1) of the Domestic Violence Act, No. 116 of 1998 (“DVA”). Section 17 (a) provides as follows concerning the nature of the offence:

“17. Offences

Notwithstanding the provisions of any other law, any person who—

(a) contravenes any prohibition, condition, obligation or order imposed in terms of section 7;

...

is guilty of an offence and liable on conviction in the case of an offence referred to in paragraph (a) to a fine or imprisonment ...”

[3] The court’s powers in respect of protection orders is set out in section 7 of the DVA as follows:

“(1) The court may, by means of a protection order referred to in section 5 or 6, prohibit the respondent from—

- (a) committing any act of domestic violence;
- (b) enlisting the help of another person to commit any such act;
- (c) entering a residence shared by the complainant and the respondent: Provided that the court may impose this prohibition only if it appears to be in the best interests of the complainant;
- (d) entering a specified part of such a shared residence;
- (e) entering the complainant’s residence;
- (f) entering the complainant’s place of employment;
- (g) preventing the complainant who ordinarily lives or lived in a shared residence as contemplated in subparagraph (c) from entering or remaining in the shared residence or a specified part of the shared residence; or
- (h) committing any other act as specified in the protection order.”

(Emphasis added)

[4] An act of domestic violence is defined in section 1 of the DVA as meaning:

“(a) physical abuse;

- (b) sexual abuse;
- (c) emotional, verbal and psychological abuse;
- (d) economic abuse;
- (e) intimidation;
- (f) harassment;
- (g) stalking;
- (h) damage to property;
- (i) entry into the complainant’s residence without consent, where the parties do not share the same residence; or

(i) any other controlling or abusive behaviour towards a complainant,

where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant;”

(Emphasis added for present purpose.)

[5] Emotional, verbal and psychological abuse is defined in section 1 of the DVA as meaning:

“a pattern of degrading or humiliating conduct towards a complainant, including-

(a) repeated insults, ridicule or name calling;”

[6] The accused pleaded guilty and after the magistrate questioned him in terms of section 112 (2) of the Criminal Procedure Act, No. 51 of 1997 (“CPA”) he was convicted and sentenced to twelve months imprisonment of which six months is suspended for a period of three years on condition that he is not found guilty of the violation of a protection order (contravening section 17 (a) of the Domestic Violence Act, 116 of 1998) committed during the period of suspension.

[7] I was concerned upon reading the record of the plea proceedings that what the accused was admitting to, and what conduct on his part he was alleged to have committed in the charge sheet, were at cross-purposes. The prosecutor made no comment regarding the facts admitted by him and the magistrate was ostensibly satisfied that the accused’s plea of guilty properly amounted

to an admission of guilt in respect of all the essential elements of the offence.

[8] I further had reason to doubt that his conviction was proper, given that the accused appeared to have admitted to insulting the complainant, but evidently not to her face, and in circumstances where the insult was perhaps not of the kind sought to be prohibited by the relevant protection order.

[9] In the result I addressed a query to the magistrate in the following terms:

“The Magistrate is required to URGENTLY comment on the following aspects regarding the plea proceedings in this matter:

1. Although the correct section is alluded to in the court’s recordal of the conviction of the accused, is it competent for the state to have charged him with an offence of having contravened “the provisions of section 7 (1) read with section 17 of the Domestic Violence Act 116 of 1999”?
2. The Protection Order, the terms of which the accused was alleged to have breached, was ostensibly only introduced “into evidence” after he was convicted. Should he not have been afforded an opportunity before he was convicted to have identified it and confirmed its contents insofar as it related to the alleged breach of its terms?

3. The breach of the Protection Order is described in the charge sheet as an insult by the accused in calling his mother “a witch” and “by her private parts,” yet his admission was confined to having said (evidently of and not to) his mother that she had a “bad heart, a devil’s heart.” According to him this was said after he had already been arrested, and to the officers who arrested him, which he believed to be fair comment. I assume that the state accepted (without any obvious clarification) that this was the insult that was taken to constitute the contravention of the protection order, but if that was so, what then led to the arrival of the police? It seems (based on the fact that the police were summoned at all) that the accused must have said or done something before the arrival of the arresting officer to warrant his arrest in terms of the protection order in the first place. In respect of this period however, that is before the arrest, he claimed to have not uttered any insult to his mother. Indeed, he lamented the fact that he had only asked her for spice and was firm that he had not been in the wrong in any respects in his interaction with her. Therefore, if the admitted words uttered by him (under the circumstances which he says prevailed) constituted “the offence”, can it be said that this amounted to an act of

domestic violence in breach of the protection order? Furthermore, did he have the requisite mens rea to commit the offence?

4. Assuming that the act of the accused saying what he did when he did warranted the conviction, was the sentence imposed for a first offender a fair one in all the circumstances and, if so, why?
5. Further and in any event, should the fact that the accused was held in custody from 22 January 2022 until his conviction awaiting trial not have been taken into account in reducing the time that he will serve in prison?

Given the fact that the accused is already serving a custodial sentence, the magistrate is requested to respond to this query by email addressed to the registrar on fmenze@judiciary.org.za by 16h00 on Wednesday, 9 March 2022.”

[10] He replied as follows:

“In response to your minute dated 07 March 2022 (your ref review 3/2022), I respectfully comment as follows:

1. I concede that the charge should rather read “contravention of Section 17 (a) read with provisions of Section 7 (21) of Domestic Violence Act 116 of 1998”. This issue will be brought to the attention of the Control Prosecutor.
2. I concede I have made an oversight by admitting the copy of the protection order after conviction, however the protection order was not in dispute.

3. Accused understood the charge when it was put to him. He pleaded guilty. During his explanation he never denied the allegations, instead he added more information. I humbly submit that he had the intention to commit the offence as he was aware of the conditions of the protection order.
4. It is my respectful submission that the sentence is fair in all circumstances. The protection order which was granted against the accused should have acted as a warning and deter the accused from abusing the complainant. It is clear that the intention of the legislation is that, people who commit domestic violence must get heavy sentence, that is gleaned from the penal clause of the domestic violence act. Secondly, there are many incidents of domestic violence in our district and in the whole of South Africa. The courts has a duty to make sure that their orders (protection orders) are respected.
5. The fact that the accused was in custody was considered that is why half of the sentence is suspended.”

[11] I am grateful for his instant response which reflects our mutual concern for the fact that the accused is already serving his custodial sentence.

[12] Despite the magistrate’s input, a careful perusal of the review record suggests that although the accused begrudgingly conceded that the complainant would have been insulted by him saying the words which he admitted to having said, or felt hurt, by what he said of her, it is not clear that he uttered the insult to the complainant herself or that it is the kind of insult intended to be covered under the protection order.

[13] Evidently the objective of the protection order is to protect the complainant from an insult constituting an act of domestic violence committed by the accused against her as specifically described in the order. The expressed object of the DVA is “to provide for the issuing of protection orders with regard to domestic violence”. Therefore not only must there be an insult in violation of the protection order, but it must in my view be the same kind of insult prohibited by the protection order.

[14] The interim protection order (which was confirmed on 9 April 2021) reads as follows:

“3. ORDER BY COURT AND PARTICULARS OF ORDER

3.1 The Court orders that :

3.1.1 *The application for a Protection Order is dismissed; or[1]

3.1.2 *An Interim Protection Order is granted; and the Respondent is ordered-

3.1.2.1 *not to commit the following act(s) of domestic violence

(1) Insult or harass the applicant and S [...] N [...].

(2) Assault or threaten the applicant and S [...] N [...].”

[15] It would in my view be far reaching to suggest that any insult concerning the accused's mother uttered to someone else about her, would constitute a breach of the terms of the protection order or amount to an act of domestic violence as described in the DVA. The terms of the order are very specific to the parties and the acts sought to be contained by the protection order must be of the kind that harm, or may cause imminent harm, to the safety, health or wellbeing of the complainant within the contemplation of the meaning of an act of domestic violence.

[16] Section 8 (4) of the DVA confirms that what is required before an arrest for allegedly committing the offence referred to in section 17 (a) is justified is that:

“there are reasonable grounds to suspect that the complainant may suffer imminent harm as a result of the alleged breach of the protection

order by the respondent.”

[17] Subsection (5) is also of relevance and provides as follows:

“(5) In considering whether or not the complainant may suffer imminent harm, as contemplated in subsection (4)(b), the member of the South African Police Service must take into account-

- (a) the risk to the safety, health or wellbeing of the complainant;
- (b) the seriousness of the conduct comprising an alleged breach of the protection order; and
- (c) the length of time since the alleged breach occurred.”

[18] Both these sections confirm to my mind that the violation (the breach) must be one that is serious, and does damage to the object of the DVA.

[19] Further, and self-evidently so, if the accused admitted to the fact that he uttered an insult of the complainant (as opposed to her), I cannot accept that he formed the requisite intention to have committed an offence by violating the terms of the protection order.

[20] My concern is demonstrated by the follow excerpt from the transcript which follows after the accused's explanation to the court of what had happened up to the point of the arrival of the arresting officers. This prequel involved an intervention by his uncle and an apology to his mother for whatever else he might have said to her, which was not canvassed by the court's questioning:[2]

“ACCUSED: But I was surprised when ... [indistinct] arrived there.

COURT: Who are they?

ACCUSED: The arresting officers.

COURT: Are they police officers?

ACCUSED: Yes

COURT: And then what happened on their arrival?

ACCUSED: It is then that I said something wrong, Your Worship, saying that she had a bad heart, a devil's heart.

COURT: Who was having a bad heart?

ACCUSED: I was referring to my mother, Your Worship.

COURT: Yes

ACCUSED: That was all and I was then arrested.

COURT: When you were uttering those words that she has a bad heart, a devil's heart?

INTERPRETER: Sorry, Your Worship?

COURT: When he was uttering those words that she has a bad heart, a devil's heart, was he not insulting her?

ACCUSED: I was insulting her but I did not understand it at the time.

COURT: What caused you not to understand it?

ACCUSED: It is because I didn't know that she can call the police for me because of spices.

COURT: Did you know that you were uttering insults when you call a person that she has got a devil heart?

ACCUSED: I didn't understand then, Your Worship, but I understand it now. I didn't go there ... [indistinct] but I said she has a devil's heart.

COURT: Yes, this is exactly what I am asking. When you say to a person he has got a devil's heart, are you not insulting that person?

ACCUSED: Because I am a believer, it is not an insult there at my church.

COURT: It is not an insult?

ACCUSED: Now that I understand it, Your Worship, that this is against the law, Your Worship.

COURT: No, I was just asking you is that the correct way of talking to a person?

ACCUSED: No, Your Worship.

COURT: When you were uttering those words, what was your purpose?

ACCUSED: I thought that I would feel better, Your Worship.

COURT: And how did you expect her to feel?

ACCUSED: It was not my intention to abuse her, Your Worship.

COURT: Do you think that she will feel happy?

ACCUSED: I only understand it now, Your Worship, that it was [indistinct] her, Your Worship.

COURT: Now that you now realise, what do you think those words did to her?

ACCUSED: I think they hurt her. That's the reason why I am pleading guilty.

COURT: And you were aware that according to the conditions of the protection order, you are not supposed to insult her?

ACCUSED: Yes.

COURT: And before you uttered those words, you were reminded by your uncle about the conditions of the protection order.

ACCUSED: Yes, Your Worship, I apologised, she accepted the apology but later called the police for me. That's why I say that ... [indistinct].

COURT: And you were aware at that time that if you contravene a protection order, that is punishable by law?

ACCUSED: Yes, it was explained to me, Your Worship.

COURT: Mr N [...], the Court is satisfied that indeed you are pleading guilty to the offence of violating the conditions of the protection order. You are found GUILTY as charged."

[21] Whilst I appreciate that acts of domestic violence are egregious and fall to be sentenced appropriately - I agree with the magistrate that the sentence would have been justified upon a proper conviction, I am not satisfied on the admitted facts that it can be established that the accused committed a breach of clause 3.1 of the protection order or that he had the necessary criminal intention to violate the terms of the order.

[22] I accept, given the magistrate's response above, that perhaps something may have been lost in the English translation.[3] It therefore appears necessary in my view and in the interests of justice (given the seriousness of the offence) for the conviction to be set aside and for the matter to be referred back to the magistrate's court for fresh plea proceedings to be undertaken,

should the prosecution wish to do so.

[23] In the result I issue the following order:

1. The conviction and sentence are set aside; and
2. The matter is referred back to the magistrate's court for proceedings to commence de novo, should the prosecution wish to do so.

B HARTLE

JUDGE OF THE HIGH COURT

I AGREE

I.T. STRETCH

DATE OF JUDGMENT: 17 March 2022

- [1] The issuing magistrate appears not to have made any election here, but since the “interim protection order” was made final, the application was obviously not dismissed.
- [2] The accused describes his mistake, up to that point, being that he argued back, or responded to the provocation of his mother’s

insults of him and his father. He did not however admit to any wrong or violation of the protection order that would have justified the suspended warrant for his arrest being carried into effect. I fear therefore that his arrest may have been effected for an unauthorised purpose under the guise of the provisional warrant for his arrest (see section 8 (1) of the DVA), although the police may have been summonsed for a different reason. These facts would however obviously have been within the purview of the prosecutor and ought if relevant to have been brought to the attention of the magistrate since the admitted facts seem different from what the charge sheet indicates.

- [3] There was but a vague suggestion, implied in the accused’s concession that this is not a correct way “of talking to a person” that he did mean to admit that he insulted the complainant directly. The question remains however, why would the utterance made under those circumstances amount to an insult prohibited by the protection order?

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