

SOUTH AFRICA / JUDGMENT

S v Qhekisi (166/2015) [2015]

ZAFSHC 182 (17 September 2015)

[2015] ZAFSHC 182

COURT

Free State High Court, Bloemfontein

BEFORE

Kruger, Rampai

CASE / FILE NUMBER

166/2015

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Review No: 166/2015

DATE: 17 SEPTEMBER 2015

In the review of:

THE STATE

And

TEBOHO QHEKISI

CORAM: KRUGER et RAMPAL, JJ

JUDGMENT BY: KRUGER, J

DELIVERED ON: 17 SEPTEMBER 2015

- [1] This case was sent on special review under section 304(4) of the Criminal Procedure Act 51 of 1977. The accused was charged with a contravention of section 17(a) of the Domestic Violence Act 116 of 1998, a contravention of a protection order on 2 April 2009 instructing him not to assault, threaten, insult or verbally abuse the complainant (his mother).
- [2] The complainant testified that on 26 March 2015 the accused came to her house and asked for sugar. She told him she did not have any, and even showed him the empty sugar packet. Accused got angry and hit her at the back of her head with the cup he was carrying. The impact caused a bump at the back of her head. The accused swore at her calling her by her and her mother's

private parts, saying she is a bitch and he wants to kill her. The complainant testified that what hurt her the most was that accused burnt everything that was in the house:

“I am hurting because I do not do anything to him and he keeps on hurting me. I am doing everything for him, I am feeding him, I am doing everything for him but he keeps on hurting me.”

“Every time when he is around I am always scared, always afraid, I am even now suffering from high blood.”

- [3] The accused was legally represented. He pleaded not guilty. After the evidence of the complainant his attorney asked for an adjournment. After the adjournment the accused changed his plea to one of guilty. There was no cross-examination of the complainant. In her address the legal representative of the accused admitted that he threatened the complainant and hit her with a mug in contravention of the protection order that was issued against him on 2 April 2009.
- [4] The magistrate convicted the accused as charged and heard argument on sentence. The accused has a previous conviction for the contravention of the same protection order against the same complainant. He was convicted of that offence on 11 October 2014 and was given a wholly suspended sentence. That sentence did not deter the accused from committing the same offence on 26 March 2015. The magistrate sentenced the accused to five years' imprisonment, the maximum allowed in terms of section 17 of the Domestic Violence Act 116 of 1998.
- [5] The magistrate who is the judicial head at Ladybrand sent the matter on special review under section 304
- (4) of Act 51 of 1977 because in her view the trial magistrate exceeded her punitive jurisdiction of three years. She says there is nothing in the Domestic Violence Act which allows a magistrate to go beyond its punitive jurisdiction. For the reasons that follow we believe that the judicial head is wrong.
- [6] District magistrates' courts derive their punitive jurisdiction from section 92(1) of the Magistrates' Courts Act 32 of 1944:

“Save as otherwise in this Act or in any other law specially provided, the court, whenever it may punish a person for an offence-

 - (a) by imprisonment, may impose a sentence of imprisonment for a period not exceeding three years, where the court is not the court of a regional division, or not exceeding 15 years, where the court is the court of a regional division; ”
- [7] There are other statutes, referred to by the judicial head, that allow for higher sentences to be imposed in district magistrates' courts:
 - (i) The Drugs and Drug Trafficking Act 140 of 1992 provides in section 64:

“A magistrates’ court shall have jurisdiction –

- (a) to impose any penalty mentioned in section 17, even though that penalty may exceed the punitive jurisdiction of a magistrate’s court.”

- (ii) The National Road Traffic Act 93 of 1996 provides in section 89(7):

“Notwithstanding anything to the contrary in any law contained, a magistrate’s court shall be competent to impose any penalty provided for in this Act.”

- (iii) Further, the Firearms Control Act 60 of 2000, section 151 provides:

“Despite any law to the contrary, any magistrates’ court has jurisdiction to impose any penalty provided for in terms of this Act.”

- [8] The judicial head says there is no provision in the Domestic Violence Act that allows a magistrates’ court to go beyond its punitive jurisdiction. The penalty clause of the Domestic Violence Act, section 17 reads as follows:

“Notwithstanding the provisions of any other law any person who –

- (a) contravenes any prohibition, condition, obligation or order imposed in terms of section 7;
- (b) contravenes the provisions of section 11 (2) (a);
- (c) fails to comply with any direction in terms of the provisions of section 11 (2) (b); or
- (d) in an affidavit referred to section 8 (4) (a), wilfully makes a false statement in a material respect,

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 for a period not exceeding five years or to both such fine and such imprisonment, and in the case of an offence contemplated in paragraph (b), (c), or (d), to a fine or imprisonment for a period not exceeding two years or to both such fine and such imprisonment.”

- [9] The Domestic Violence Act defines a court in section 1:

“‘court’ means any court for a district contemplated in the Magistrates’ Courts Act, 1944 (Act 32 of 1944).”

The only court that can issue a protection order under section 6 of Act 116 of 1998 is a magistrates’ court. It is also only a magistrates’ court which can deal with a contravention of a protection order under section 17. The legislature wanted to make it simple for persons to obtain and enforce protection orders, that is why all processes under Act 116 of 1998 are dealt with in the district magistrates’ court. To put matters beyond doubt, section 17 of Act 116 of 1998 contains the rider:

“Notwithstanding the provisions of any other law.”

The legislature regards domestic violence in a very serious light, and that is why a maximum penalty of five years is allowed. That maximum penalty can be imposed in district magistrates' courts.

[10] The courts regard domestic violence in a serious light. In *Omar v Government of the Republic of South Africa and Others (Commission for Gender Equality, Amicus Curiae)* [2005] ZACC 17; 2006 (2) SA 289 (CC) the Constitutional Court said:

"[12] The High Court referred to the prevalence of domestic violence in South Africa, the response of the legislature thereto, and the obligation of our country under international law to protect women and families from domestic violence. The amicus and respondents presented detailed arguments in this regard.

[13] The high incidence of domestic violence in our society is utterly unacceptable. It causes severe psychological and social damage. There is clearly a need for an adequate legal response to it. Whereas women, men and children can be victims of domestic violence, the gendered nature and effects of violence and abuse as it mostly occurs in the family, and the unequal power relations implicit therein, are obvious. As disempowered and vulnerable members of our society, women and children are most often the victims of domestic violence.

[14] The criminal justice system has not been effective in addressing family violence, for a range of reasons. The need for effective domestic violence legislation was recognised by the legislature. It thus enacted the Prevention of Family Violence Act 133 of 1993, which preceded the Domestic Violence Act. Aspects of the Prevention of Family Violence Act resulted in a constitutional challenge involving several issues related to the right of an accused person to a fair trial. In overturning the order of the Pretoria High Court declaring section 3(5) unconstitutional,

this Court expressed itself on a number of points relevant to the present enquiry."

[11] In *Mudau v State* (547/13) [2014] ZASCA 43 (31 March 2014) the Supreme Court of Appeal said:

"[6] Domestic violence has become a scourge in our society and should not be treated lightly, but deplored and also severely punished. Hardly a day passes without a report in the media of a woman or child being beaten, raped or even killed in this country. Many women and children live in constant fear. This is in some respects a negation of many of their fundamental rights such as equality, human dignity and bodily integrity. This was well articulated in S v Chapman [1997] ZASCA 45; 1997 (3) SA 341 (SCA) at 345A-B when this Court said the following:

'Women in this country have a legitimate claim to walk peacefully on the streets to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.'

See also *S v Baloyi* [1999] ZACC 19; 2000 (1) SACR 81(CC) at para 11.”

[12] In the Constitutional Court, Judge Sachs said in *S v Baloyi* [1999] ZACC 19; 2000 (1) SACR 81 (CC):

“[11] All crime has harsh effects on society. What distinguishes domestic violence is its hidden, repetitive character and its immeasurable ripple effects on our society and, in particular, on family life. It cuts across class, race, culture and geography, and is all the more pernicious because it is so often concealed and so frequently goes unpunished.”

And in paragraph [12]:

“[12] To the extent that it is systemic, pervasive and overwhelmingly gender-specific, domestic violence both reflects and re-inforces patriarchal domination, and does so in a particularly brutal form.”

[13] The Supreme Court of Appeal has alluded to the disturbing prevalence of serious offences rooted in domestic violence (*The Director of Public Prosecutions v Larry Burt Phillips* (271/2011) [2011] ZASCA 192 (14 November 2011)).

“[25] On a reading of the record this case in my view reveals, like others, the disturbing prevalence of serious offences rooted in domestic violence. To my mind the court below over-emphasised the mitigating factors at the expense of aggravating factors.”

[14] In *D Mnisi v The State* (391/08)

[2009] ZASCA 17 (19 March 2009) Boruchowitz AJA said at par [9]:

“Domestic violence is rife and those who seek solutions to domestic and other problems through violence must be severely punished. Sentences imposed must send a deterrent message.”

[15] The Constitutional Court has said that domestic violence brutally offends the values and rights enshrined in the Constitution, see *Omar* (supra) par [17]:

*“[17] Domestic violence brutally offends the values and rights enshrined in the Constitution. According to section non-sexism is a founding value of our state. In addition, human dignity, the achievement of equality and the advancement of human rights and freedoms are recognised as founding values. Section 12(1)(c) provides that everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from public or private sources. This right must be understood in conjunction with the rights to dignity, life, equality (which includes the full and equal enjoyment of all rights and freedoms) and privacy. This Court has recognised the constitutional requirement to deal effectively with domestic violence. In *Carmichele* the Court furthermore pointed out that South Africa also has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights.”*

[16] In *S v Moagi* [2005] JOL 14519 (T) De Klerk and Smitt JJ dealt with a matter where the accused was charged with a contravention of section 17(a) of Act 116 of 1998 in that he contravened a protection order and that he assaulted the complainant. The magistrate took

the two counts together for purposes of sentence and imposed periodical imprisonment and a further sentence of five years' imprisonment or a fine of R25 000, wholly suspended. On review the judges expressed the view that the taking together of charges for the purpose of sentencing was undesirable. They did not say that the magistrate exceeded the court's jurisdiction by imposing a five year imprisonment

sentence.

[17] In *The Director of Public Prosecutions v Larry Burt Phillips* (supra) the following was said:

"[26] It goes without saying that a more balanced approach to sentencing was required (See S v Swart 2004 (2) SACR 370 (SCA) para 13). A clear message needs to be sent to both the respondent and those who might be minded to disregard protection orders granted in terms of the Domestic Violence Act that such conduct will not be countenanced by our courts. This court's abhorrence of the respondent's conduct in this regard must therefore be reflected in the imposition of an appropriate sentence."

[18] Finally one has to consider the facts of this case. The accused had a previous conviction for contravening the same protection order. The suspended sentence did not deter him. Within less than a year he committed the same offence against the same complainant, his mother. His conduct justified the maximum penalty. The violation of a protection order is a more serious offence than assault. Domestic violence is a problem in this country as is apparent from the preamble to Act 116 of 1998 and statements made by judges of the Constitutional Court and Supreme Court of Appeal as quoted above. In our view the trial magistrate did not exceed her jurisdiction. There is no basis to interfere with the sentence. The proceedings were in accordance with justice.

ORDER

The conviction and sentence are confirmed.

A. KRUGER, J

I agree.

M. H. RAMPAL, J

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