IN THE EASTERN CAPE HIGH COURT, BHISHO

CASE NO: CA&R2/09

REVIEW CASE NO: 08/09

IN THE MATTER BETWEEN:

THE STATE

and

MILTON MAZOMBA

REVIEW JUDGMENT

ZILWA AJ:

[1] The accused person in this matter appeared before Mdantsane Magistrate, a Mr Ngomthi, charged with contravention of a protection order in contravention of Section 17 (a) read with Section 1 , 5, 6, and 17 of the Domestic Violence Act of 1998 (Act no. 116 of 1998). The allegation against the accused was that he had breached a protection order that was issued against him on 21 September 2006 at Mdantsane, and in terms of which he was prohibited from entering the residence of the complainant, Nomathamsanqa Vellem, at no. 2[...] N[...] Mdantsane, and to refrain from insulting, assaulting or abusing the complainant either physically or emotionally. The alleged breach of the order, which was allegedly served by one Andile Mkojo on the accused person on 15 September 2006, consisted in the accused person assaulting the complainant with an open hand and a knob kierrie.

[2] It is apposite to mention at this stage that together with the original charge sheet reflecting the charge of the contravention of a protection order as set out above, a pro forma annexure for a charge of assault with intent to do grievous bodily harm has been attached but left blank, clearly indicating that the state had never intended to charge the accused person with that offence.

[3] The accused person, who was legally represented by a Ms Sicwebu, had pleaded not guilty to charge without outlining the basis of his defence, as he was entitled to.

[4] After all the evidence, both for the state and for the defence, had been led, the Magistrate convicted the accused person of assault with intent to do grievous bodily harm and sentenced him to pay a fine of R3000,00 or in default of payment to undergo two years imprisonment. The accused person was further declared unfit to possess a firearm in terms of Section 103(1) of Act no.60 of 2000.

[5] After the proceedings had come to the attention of the Acting Senior Magistrate of Mdantsane, a Mr D. Van Lamp, the Acting Senior Magistrate submitted the matter to this Court to a special review on two bases, namely;

(i) the verdict of the Magistrate was incompetent in that the essential elements of the crime of assault with intent to do grievous bodily harm are not included in the offence of contravention of a protection order which the accused had been charged of;

(ii) with regard to the sentence imposed on the accused, the alternative of two years imprisonment is disproportionate to the amount of the fine of R3000,00 imposed, especially in the light of the relatively minor injuries sustained by the complainant.

[6] Upon consideration of the special review by the reviewing Judge to whom the matter had been submitted, the Judge directed a query to the Magistrate with

regard to his finding that the protection order was invalid on the basis that the service thereof was not carried out by a member of the South African Police Services, and his contention that the Domestic Violence Act of 1998 is very clear and specific that under no circumstances shall a protection order be served by anyone other than a police official. The reviewing Judge referred to Regulation 15 of the Domestic Violence Act of 1998 (the Act) which provides that service of any document, except where otherwise provided, may be effected by the clerk of the court, the sheriff or a peace officer. The reviewing Judge further posed the following query;

(i) If the protection order remained valid, how would this affect the outcome of the matter? Would the High Court be able to correct the conviction on review and refer the matter back to the Magistrate's court for reconsideration of sentencing?;

(ii) If it is accepted that assault with intent to do grievous bodily harm could be a competent verdict on a charge of contravention of the Domestic Violence Act, such as the present, if the charge were to be amended to include the allegation that the assault had been committed with the intent to commit grievous bodily harm would the accused not be prejudiced in that he could for instance have called expert evidence to rebut the evidence tendered by the State, or was at the very least lulled into an acceptance that he would not have to challenge the severity of the injuries, as he did not stand at risk to be convicted of assault with intent to commit grievous bodily harm, but only of assault common? The Magistrate's comments on the queries were invited.

[7] In his response to the reviewing Judge's query, the presiding Magistrate furnished the following reasons;

(i) Even though the accused had been charged with contravention of a protection order only "*just by looking at the charge leaves one in no doubt that a serious assault is alleged by the State, in contravention of the Protection Order. The evidence placed (sic) by the State, which*

was accepted by Court, proves beyond reasonable doubt an intent to cause Complainant grievous bodily harm, (see Exhibit B). The fact that Assault GBH was not specifically alleged in the charge will not, on its own, render it incompetent to convict the accused of Assault GBH because, in my view, Assault GBH or Assault are competent verdicts on this charge; as long as the charge refers to Assault as the essential element and the weapon used, by its very nature, could cause grievous bodily harm. My view is therefore that, the conviction was in order and the sentence imposed fits the crime, the accused and the interest of society,"

(ii) *"Having had the benefit of reading Regulation 15 of the Domestic Violence Act 116 of 1998, it does indeed provide service of any document, except where otherwise provided, by the Clerk of the Court, the Sheriff or a peace officer. As it would now appear (Exhibit A) is valid, the accused should have been convicted of the Contravention of Section 17 (a) of the Domestic Violence Act for assaulting the Complainant with open hands and a knob-stick. My view is that the High Court could correct the conviction to reflect such. If the charges were to amended (sic) to include the allegation of Assault GBH, the Magistrate does not believe that the accused would be prejudiced at all because he was competently defended by an experienced legal representative and the defence knew before hand the nature and gravity of the assault, having had the copies of the docket including the Medical Report. There is no question of having been lulled into an acceptance that he would not have to challenge the severity of the injuries. If the defence had wanted to call expert evidence he would have done so, as it was clear from the outset this was an aggravated assault which resulted in serious injuries being sustained. As argued earlier, there is nothing on the charge that even remotely suggests this was " Assault common,", if one takes into account the dangerous weapon alleged to have been used (In addition to open hands); the nature and number of injuries and their location on the "hypertensive" woman's body (See Exhibit B). My view therefore is that the High Court could correct the conviction on review by amending the charge sheet accordingly. Also, it is my view that the defence would have remained the*

same if the charge had originally contained the necessary averments."

[8] Having gone through the record of the proceedings and having considered the presiding Magistrate's submissions, we are of the view that the presiding Magistrate indeed erred in convicting the accused of Assault with intent to do grievous bodily harm in the circumstances of this case.

[9] The presiding Magistrate seems to concede that his finding that the protection order was invalid only by virtue of the fact that it had not been served on the accused person by a police officer, was incorrect. Such concession is well founded in our view. Indeed Regulation 15 of the Act that deals with service of documents referred to in the Act, removes all doubts that the Magistrate was wrong in his judgement in stating that the Act clearly stipulates that under no circumstances can a protection order be served by anyone other than a police official. In the circumstances the Magistrate's finding of the invalidity of the protection order on that score only, is without basis. However, in our view, that is not the end of the relevant inquiry and it does not mean that just because the protection order is held to be valid, the accused should have been convicted of the contravention thereof without further ado as the presiding Magistrate suggests should be the position. Since one of the elements that would need to be proved by the state to secure a conviction for such contravention is intent on the part of the accused person, it would be incumbent upon the State to prove that the accused person had intentionally violated the provisions of the protection order after it had been duly and properly served on him and he had been properly advised of, or had become aware of the provisions thereof. Indeed the certificate in the pro forma return of service of process in terms of Domestic Violence Act no.116 of 1998, which forms part of Exhibit A that was handed in (consisting of the protection order and the return of service thereof), provides that the functionary serving the order must certify that he/she has handed the original of the notice to the respondent and that he/she had explained

the contents thereof to the third respondent.

[10] During the cross-examination of the complainant by the accused attorney, Ms Sicwebu, it was put to the complainant that the accused's version would be that when the protection order was served on the accused it was never read or explained to him and all that happened was that he was called and asked to sign a piece of paper by an old man who was wearing a black hat and when the accused had asked why he was required to sign that piece of paper the old man had promised to explain it later to the accused, but after the accused had signed the paper the old man had cut the paper and left without explaining anything to the accused and the accused had left the document at the entrance without knowing that it was a protection order. In his testimony during the defence case the accused repeated the above contention and emphasised that the document that he was caused to sign was never explained to him and he never got to know that it was a protection order or what its contents were.

[11] We are of the view that since it was indicated even during the State case that the accused was denying that the protection order was ever explained to him or that he ever got to know its contents, it was incumbent upon the State to call the official that had actually served the order on the accused person to rebut the accused's contention that the order was never read or explained to him. For reasons that are not apparent from the record the State failed to call such evidence. Moreover, the cross-examination of the accused person by the prosecutor could not show beyond reasonable doubt, in our view, that the accused was untruthful on this aspect. In the circumstances we are of the view that the State failed to prove that the accused had intentionally and knowingly violated or contravened a protection order as he was charged and that he could not be convicted of such offence.

[12] This, however, does not mean that the accused stands to be acquitted if there is tangible evidence that he did commit an offence on that day.

After all, Section 270 of the Criminal Procedure Act no.51 of 1977 provides, that if the evidence on a charge for any offence not referred to in the preceding sections of chapter 26 thereof (which deals with competent verdicts) does not prove the commission of the offence so charged but proves the commission an offence which by reason of the essential elements of that offence is included in the offence so charged, the accused may be found guilty of the offence so proved. Contravention of a protection order is not one of the offences referred to in chapter 26. The charge sheet alleges that the accused person had contravened the protection order by assaulting the complainant with open hands and a knob kierrie. In the circumstances the offence with which the accused was charged does refer to assault, thereby making the essential elements of the offence of assault to be included in the offence with which the accused was charged. Accordingly the provisions of section 270 aforesaid are clearly applicable in this matter. The only question that remains is whether the accused could be convicted of common assault or assault with intent to do grievous bodily harm.

[13] As already indicated in a previous paragraph, an annexure in the charge sheet that refers to assault with intent to do grievous bodily harm was left unfilled, thereby indicating that the State had no intention to charge the accused with assault with intent to do grievous bodily harm. In any event, for the reasons that will follow, we are not convinced that the evidence indicates beyond reasonable doubt that in assaulting the complainant the accused had the requisite intent to cause her grievous bodily harm. It is worth mentioning at this stage that there is a vast difference between a common assault and assault with intent to do grievous bodily harm. The requisite intent to cause grievous bodily harm is one of the elements that have to be proved by the State before it can secure a conviction of assault with intent to do grievous bodily harm (Assault GBH). In this case, at no stage was the accused charged with Assault GBH and nowhere during the trial was it ever put to the accused that in assaulting the complainant he intended

to cause her grievous bodily harm. Had the charge sheet so alleged or, at the very least, had the State even put to the accused that such was his intention, he could have produced evidence to disprove such alleged intent on his part. Since the allegation was never made either in the charge sheet or during the evidence in the trial, we are of the view that it would be totally unjust and improper to convict the accused of the offence of Assault GBH for which he was never charged and in respect of which he was never given an opportunity to rebut the requisite intent to cause grievous bodily harm.

[14] In any event, despite the fact that the charge sheet alleges that in assaulting the complainant the accused had used a knob kierrie, in her evidence the complainant never made any reference to a knob kierrie as having been used in assaulting her. Instead she testified that she was assaulted with hands and a tube. The nature of the tube was never explained and, as such, there is no basis from which it could be inferred that the use of that tube could only have been intended by the accused to cause the complainant grievous bodily harm. Furthermore, the injuries sustained by the complainant as reflected in the medical report are not such as to give rise to an inescapable to inference that she was assaulted with intent to cause her grievous bodily harm. The swelling and abrasions on various parts of the complainant's body observed by the doctor cannot, in our view, without further evidence give rise to an inevitable inference that the assault on her was meant to cause her grievous bodily harm.

[15] In the circumstances, since there is compelling evidence that the accused did assault the complainant on the day in question, we are off the view that the accused should have been convicted of common assault and not Assault GBH. We are also of the view that with regard to sentence for such common assault, a fine of R3000,00 with an alternative prison sentence of six (6) months would meet the justice of the case.

[16] In the result, both the conviction and the sentence imposed by the Magistrate are set aside and substituted with the following:

“The accused is found guilty of common assault and sentenced to pay a fine of R3000,00 or in default of payment to undergo six (6) months imprisonment. The accused is declared unfit to possess a firearm in terms of Section 103 (1) of Act no. 60 of 2000.”

P.H.S ZILWA
ACTING JUDGE OF THE HIGH COURT
I agree
AEB DHLODHLO
ACTING DEPUTY JUDGE PRESIDENT

Date delivered : 31 March 2009