IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA

CASE NO: CA & R: 150/2023

Delivered on 19 September 2023

In the matter between:

THE STATE

and

AMANDA NONKASU

REVIEW JUDGMENT

Bloem J

1. In count 1 the accused was charged with an offence contemplated in the now amended section 17(a) of the Domestic Violence Act 116 of 1998. It was alleged that she contravened a prohibition imposed on her in a protection order. In count 2 it was alleged that she assaulted the complainant with the intent to do grievous bodily harm. She was convicted on both counts. She was sentenced to pay a fine of R1 000 or to undergo four months' imprisonment, of which half the fine and half the term of imprisonment were suspended for three years on condition that she not be convicted of committing an offence contemplated in section 17(a) committed during the period of suspension. The matter was sent on review because the magistrate realised that he imposed only one sentence although the accused was convicted of two offences. He indicated that he had intended to order firstly, that the two counts be taken together for purposes of sentence; and secondly, that the above sentence be suspended for three years on condition that the

accused not be convicted of committing an offence contemplated in section 17(a) and/or assault with intent to do grievous bodily harm committed during the period of suspension.

2. I enquired from the magistrate whether the conviction on count 2 did not amount to splitting of charges. The magistrate's response was that, the accused should not have been convicted on count 2, in that "*count 2 is also covered in count number 1. Reason being that in both counts the intent is one, secondly both counts are based on the same piece of evidence/similar facts*". I now turn to the facts to determine whether it could be said that the accused's conviction on both counts was in accordance with justice.

3. On 23 September 2022 the magistrate at East London issued a protection order against the accused, at the instance of the complainant. She was prohibited from *inter alia* assaulting the complainant or entering her residence. The accused was thereafter charged with having contravened the protection order, it having been alleged that on 12 October 2022 she entered the "*complainant's residence and strangled her whilst sitting on top her*". In count 2 the accused was charged with assault with intent to do grievous bodily harm, it having been alleged that on 12 October 2022 she assaulted the complainant "*by strangling her and sitting on top of her with the intent of causing her grievous bodily harm*". The accused pleaded guilty on both counts. The magistrate convicted her on the basis of her statement which her legal representative handed into court, in which the accused set out the facts which she admitted and on which she pleaded guilty. In the statement she admitted that the "*protection order was duly served on me and is in force. And the accused did upon or about 12.10.22 and at or near C-section Duncan Village in the district of East London wrongfully and unlawfully contravene an order imposed on him/her, in that the accused: entered complainant's residence and strangled her while sitting on top of her. I plead guilty to contravention of protection order, as well with assault with intention of doing bodily harm*" (sic).

4. I have two difficulties with the conviction on count 2. Firstly, that conviction was not based on any facts. The accused simply said in her written statement that she pleaded guilty to having contravened the protection order "*as well as assault with intention of doing bodily harm*". Assault with intent to do grievous bodily harm consists in an assault with is accompanied with the intent to do grievously bodily harm.[1] For that offence to be committed, the assault must be committed with intent to do grievous bodily harm. The onus rests on the state to prove beyond reasonable doubt firstly, that the accused had the intent to assault the complainant; and secondly, that the accused had the intention to cause the complainant grievous bodily harm.

5. In *S v Mgcineni*[2] the accused was convicted in the magistrate's court of assault with intent to do grievous bodily harm. The evidence showed that he hit the complainant several times with his fists in her face, on her mouth and on her head. Despite the fact that the complainant lost 2 teeth and sustained swollen lips as a result of the assault on her by the accused, the court set aside the conviction of assault with intent to do grievous bodily harm and replaced it with a conviction of common assault. The court warned against it being inferred too easily from an ordinary attack with fists that an assailant not only wanted to injured his victim, but that he also intended to seriously injure his victims. The court found that the state failed to prove beyond reasonable doubt that the accused had the intention to seriously injure. The result was that he could not be convicted of assault with intent to do grievously bodily harm, but only common assault.

6. In the present matter, not only were there no facts to demonstrate that the accused had an intent to do grievous bodily harm, there were no facts to demonstrate that the accused assaulted the complainant, in the first place. For that reason, the conviction on count 2 cannot stand and must be set aside.

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[1] JRL Milton *South African Criminal Law and Procedure, Vol II Common-Law Crimes* 3 ed (1996) at 432.

[2] *S v Mgcineni* 1993 (1) SACR 746 (E).

7. But, assuming that the accused was convicted in respect of count 2 on the basis of the admission in the plea that she "*strangled [the complainant] whilst sitting on top of her*", the conviction can nevertheless not stand and must be set aside. The very same facts, namely that the accused strangled the complainant while sitting on her, cannot under these circumstances, be used to convict the accused on both counts, which are two different offences. Secondly, if the admissions amounted to an assault, there were no facts to demonstrate that the accused had the intent to seriously injure the complainant. On the basis of *S v Mgcineni*, the accused could not be convicted of assault with intent to grievously bodily harm. In the circumstances, the accused was wrongly convicted in respect of count 2. The conviction and sentence in respect thereof must be set aside.

8. The sentence imposed on count 1 seems to be appropriate. An interference with the sentence is accordingly not warranted.

9. In the circumstances, it is ordered that:

   9.1. The accused's conviction on count 1 be and is hereby confirmed.

   9.2. For the sake of clarity, the accused is sentenced on count 1, as follows: "The accused is sentenced to pay a fine of R1 000 or to undergo four months' imprisonment. Half of the fine is suspended for three years and, in the event of the accused failing to pay the sum of R500, half of the term of imprisonment is suspended. The sentence is suspended for three years on the condition that the accused shall not be convicted of committing an offence contemplated in section 17(a) of the Domestic Violence Act 116 of 1998 committed during the period of suspension."

   9.3. The sentence referred to in paragraph 2 above is antedated to 17 March 2023.

   9.4. The conviction and sentence on count 2 are set aside.

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GH BLOEM
Judge of the High Court

I agree.

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BR TOKOTA
Acting Deputy Judge President of the High Court