

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Review No. : 634/2005

In the review between:

THE STATE

versus

MYAMO MICHAEL POPO

CORAM: RAMPAI J *et* VAN DER MERWE J

JUDGMENT: RAMPAI J

DELIVERED ON: 23 JUNE 2005

[1] The charge against the accused was contravention of section 17(a) Domestic Violence Act No. 116/1998. Apparently a protection order was issued against the accused at Tshepong on 23 March 2004 prohibiting him from physically or emotionally abusing the complainant. It was alleged that the protection order was duly served on the accused. It was further alleged that the protection order or

abusive behaviour interdict was still in force.

[2] The first difficulty I have with the matter is that the first leg of the charge was not properly formulated for instance the following defects will highlight my concerns:

- In which magisterial district is Tshepong?
- What was the identity of the victim the order sought to protect from abuse?
- When was the protection order served on the accused?

It is necessary to aver in the charge sheet that the protection order was still in force as on 5 December 2004. Such an averment provides the legal nexus between the protective order and the subsequent abusive behaviour of the accused.

[3] The second difficulty I have is that the magistrate's questioning in terms of section 112(1)(b) of the Criminal Procedure Act No. 51/1977 was restricted to the accused's subsequent abusive conduct of 5 December 2004 and virtually no question was asked to show that by behaving as he did he thereby violated an existing protection order which prohibited him from abusing a specified person.

- [4] Needless to say the victim as specified in both the protective order and the subsequent violation or charge sheet must be one and the same person. Care should be taken not to treat cases of domestic violence as though they were ordinary cases of assault. The offender, in certain circumstances, may first have to be convicted and sentenced for the subsequent assault separately and thereafter be again convicted and sentenced for the violation of the existing protective order. The situation is more or less analogous to the situation in cases involving breach of an existing maintenance order.
- [5] In her response to my query the court *a guo* concedes that the questioning of the accused in terms of section 112(1)(b) of Act No. 51/1977 was inadequate. Her request is that I should set the conviction and the sentence aside.
- [6] Her concession and her request are meritorious. The charge sheet was materially defective. The defects remained uncured even after the judicial questioning in terms of

section 112(1)(b). The questioning in terms of section 112(1)(b) should be thoroughly done and fully recorded. (Vide **S v MAXEKWA** 1978 (1) SA 419 (O) at 420E and Du Toit *et alii*: Commentary on the Criminal Procedure Act (2004) ed at 17 – 19.) Such proceedings were not in accordance with justice. Therefore I would set the entire proceedings aside in accordance with the request of the magistrate.

[7] Accordingly I make the following order:

7.1 The conviction and the sentence are set aside.

7.2 The matter is remitted to the court *a quo* so that the magistrate can now deal with it in terms of section 312 Criminal Procedure Act No. 51/1977.

M.H. RAMPAL, J

I agree.

C.H.G. VAN DER MERWE, J

/sp