

THE STATE
versus
NEVER MUFWEZHI
and
TASARA MAHAPA

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE 4 September 2002

HUNGWE J: I queried with the trial magistrate why no portion of the sentence was suspended on condition of good behaviour as is the normal practice where first offenders are being sentenced. The trial magistrate conceded that he ought to have done so.

Although a trial court is not under any obligation to suspend a portion of the sentence it passes on a first offender, it is accepted practice in our jurisdiction that unless there are compelling factors, this must be done.

Writing on this subject REYNOLD J in *S v Chiwara & Others* 1990 (2) ZLR 156 at 158E – 159E:

“The rationale behind the suspension of a sentence is normally said to include the following desirable features:

1. the offender is deterred from repeating his misconduct by having a suspended sentence hanging over his head like the classical “sword of Damocles”. The consequences of breaching the conditions of suspension are known and certain, and this is regarded as a more effective deterrent than the mere possibility of a more severe punishment for a subsequent offence.
2. A sentencing tribunal will often wish to give due and effective recognition to the frailties and deficiencies of youth and immaturity, and to give a first offender a second chance, as it were, to refrain from offending again. A suspended sentence serves to temper another wise severe penalty, and recognizes the veniality of many youthful transgressions.
3. When deciding upon an appropriate penalty for a youthful offender, a court will usually consider it desirable to formulate some type of sentence which, hopefully, will be rehabilitative in effect. A suspended sentence is based on this consideration.
4. It is well recognized that a sentence which, for good reason, keeps first offenders out of prison, or at least reduces the period of incarceration that would otherwise be served is very often both desirable and appropriate. As stated by Ashworth in *Sentencing & Penal Policy* at 318, “custodial sentences should be used as sparing as possible”. One of the principal reasons for this statement is the “deleterious effects of penal institution”, (at 320), and the unfortunate results that regularly follow the imposition of custodial punishment. See *S v Matanhire, supra*.

5. It is also a valid consideration in my view that the use of a suspended sentence not only allows the court to avoid sending an offender to an already overcrowded prison, but at the same time recognizes the gravity of the offence committed. Statistics from England show that “some 80 percent of first offenders never return to prison”, and it is suggested that “the suspended sentence might be equally effective as a deterrent with little cost to the state in the majority of cases”. (Brian Leighton’s report to the Royal Commission on the Penal System, 1962). It is appreciated that statistics of this nature in Zimbabwe may be different, but any measure which reduces the prison population without prejudicing the interests of justice is, in my view, desirable”

In the present case there is no doubt that the complainant suffered loss not only in respect of the goods stolen but not recovered, but also in respect of the breakage to his motor vehicle as well as the cut fence. The offence is prevalent.

However society gains very little from the incarceration of young first offenders. Studies carried out in other jurisdiction show that about 80% of first offenders do not return to prison. In short the rate of recidivism in first offenders is very low. It is the reason why they should not be sent to prison in the first place. With the advent of the community service programme, magistrate should wherever possible resort to it. It saves the offender the risk of being influenced by hardened criminals. It saves society from having to fund an idle convict. It offers a chance for reformation to the accused it is a real of sentencing option.

In the present case for some reason the record was not placed before me on time. By now these two have served about 8 months equivalent of 12 months.

I consider that adequate punishment for theft of the nature in question

The sentence imposed by the trial magistrate is set aside and the following substituted:

“Each: 16 months imprisonment of which 4 months is suspended for 5 years on condition the accused does not, during that period, commit any offence involving dishonesty for which he is sentenced to imprisonment without the option of a fine.”

Since the accused have served an equivalent of 12 months, they are entitled to their immediate release.

I have issued the warrants of liberation and ordered their release forthwith.

Chinhengo J, I agrees.