

1. THE STATE
versus
TAPIWA MAMBANGA

2. THE STATE
versus
ELIAS ZHUWAO

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 19 September 2017

Criminal Review

MUSAKWA J: The two matters came before me by way of automatic review. Since they were dealt with by the same magistrate and have a common flaw it is convenient to deal with the issue in one judgment.

Tapiwa Mambanga was convicted of two counts of contravening s 3 (1) (a) of the Domestic Violence Act [*Chapter 5:16*] to which he pleaded guilty. In the first count he was sentenced to a fine of \$200 or in default to undergo 3 months' imprisonment. In the second count he was sentenced to 48 months' imprisonment of which 4 months' imprisonment was suspended for 5 years on condition of future good behaviour.

The facts of the matter are that on 19 August 2017 the accused person had an altercation with his wife whom he accused of having an extra-marital affair with a fellow villager. The accused person then assaulted the complainant with a whip several times all over the body.

In respect of the second count (this was now on the 20th), the row between the accused and the complainant flared up again. This time the accused took an adze and forced the complainant to lie on the ground. He then cut off the complainant's left index and ring fingers. A medical report confirmed traumatic amputation of two fingers with a sharp instrument.

The accused was aged twenty three years and was a first offender. The trial court acknowledged his plea of guilty but quite appropriately condemned the use of violence to solve disputes.

Elias Zhuwao pleaded guilty to two counts of unlawful entry into premises in aggravating circumstances and three counts of theft. The accused was aged twenty three years. With each count being sentenced separately, the trial court imposed a total of 29 months' imprisonment of which 4 months' imprisonment was suspended for 5 years on condition of future good behaviour.

What has exercised my mind are the suspended sentences imposed in each case. It looks like the trial court displayed a routine approach to sentencing. The two matters were heard about a week apart. Somehow the same magistrate contrived to suspend identical portions despite the overall sentences being disparate. Did the trial court reflect on the purpose of the suspensions?

Section 358 (2) (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] permits a court to suspend the whole or any part of a sentence for a period not exceeding five years on such conditions as the court may specify. In *S v Gorogodo* 1988 (2) ZLR 378 (S) it was held that the main purpose of a suspended sentence is rehabilitative. The purpose of a suspended sentence was also elucidated by REYNOLDS J in *S v Chirara and Ors* 1990 (2) ZLR 156 (H) where at 158-160 he made the following remarks:

“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 an otherwise 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 sparingly as possible". One of the principal reasons for this statement is the "deleterious effects of penal institutions", (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 per cent 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 general terms, I believe that the interests of the individual offender, and those of the public generally are properly protected by the imposition of sentences which apply these principles. There are undoubtedly cases where the imposition of a partially or wholly suspended sentence would be inappropriate and unwarranted, but these, I venture to suggest, would be few in number. Furthermore, and in the Zimbabwean context where there are not many options available to the sentencing court, the suspended sentence has a particularly valuable role. For example, in *S v Mutize*, 1978 RLR 148 (A) at 153F-G, DAVIES JA said:

"In the case of first offenders, particular regard should be paid to the desirability of keeping such offenders out of prison if this is at all possible. It is unfortunate that at present there are no facilities for keeping first offenders separate from hardened criminals in our prisons, and there is little doubt that any first offender sent to prison runs a real risk of contamination from hardened criminals.

I would respectfully agree with these comments, and would add that if it is considered to be absolutely necessary, however, in the particular case in question to impose a custodial sentence, despite the convicted person being a young fast offender, then more often than not it is eminently desirable that a reasonable portion of the sentence should be suspended on suitable conditions. I would also add that in some other jurisdictions, where the usage of the suspended sentence does not find universal support, various other sentencing measures are readily available to those courts, and these are not always available in Zimbabwe."

I wholly associate myself with the observations made in the above excerpt. The two accused persons in the present matter are relatively young and can benefit from reasonable suspended terms of imprisonment. A suspended term of 4 months' imprisonment serves very little purpose if viewed against the overall sentences imposed against the accused persons. The suspended sentences would have been meaningful if the overall sentences were in the region of twelve to fifteen months. In addition, in my respectful view a person is likely to be deterred by the threat of a substantial term of imprisonment than an insignificant one. Like I said before, this was a perfunctory exercise, done without consideration as to the purpose of the suspended sentences. Therefore there is need to recast the sentences, in as far as the suspended sentences are concerned.

In the result, the sentences imposed against the accused persons in relation to the suspended portions are corrected as follows:

Tapiwa Mambanga

“15 months’ imprisonment is suspended for 5 years on condition the accused does not within that period commit any offence of which domestic violence is an element for which upon conviction he is sentenced to imprisonment without the option of a fine.”

Elias Zhuwao

“12 months’ imprisonment is suspended for 5 years on condition the accused does not within that period commit any offence of which unlawful entry into premises or dishonesty is an element for which upon conviction he is sentenced to imprisonment without the option of a fine.”

CHATUKUTA J agrees: