

THE STATE
versus
LOVEMORE JUMA

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 20 November 2017

Review Judgment

DUBE J: This matter was placed before me for review. The Regional magistrate who scrutinized the record raised a query with the trial court. The matter has been placed before me for further consideration together with the trial magistrate's response to the query.

The accused, a 43 year old was convicted of theft of trust property as defined in Section 113(2) (d) of the Criminal Law Codification and Reform Act, [*Chapter 9:23*]. The allegations against the accused were that he was given 5 bales of tobacco by the complainant to sell on her behalf. The accused sold the tobacco and was paid US\$474.00. The accused did not surrender the money to the complainant. He went away from the area and was arrested in Mhangura. The proceeds of the sale of the tobacco were not recovered.

The accused pleaded guilty to the charge and was sentenced as follows;

“10 months imprisonment of which 3 months imprisonment is suspended on condition the accused pays a fine of \$200.00. The remaining 7 months imprisonment is suspended on condition the accused restitutes Shingirirai Mafuka US\$474.00, on or before 31 July 2017 through the clerk of court.”

The Regional magistrate who scrutinized the proceedings raised a query regarding the fact that the trial magistrate suspended a prison term on condition of payment of a fine. The trial magistrate accepted that he erred.

Section 358 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides for suspension of sentences. It provides as follows in s 358 (2) (b) and (c)

“S358 Powers of courts as to postponement or suspension of sentences

1)

2) When a person is convicted by any court of any offence other than an offence specified in the Eighth Schedule, it may-

a) postpone for a period not exceeding five years the passing of sentence and release the offender on such conditions as the court may specify in the order; or

b) pass sentence, but order the operation of the whole or any part of the sentence to be suspended for a period not exceeding five years on such conditions as the court may specify in the order; or

c) pass sentence of a fine or, in default of payment, imprisonment, but suspend the issue of a warrant for committing the offender to prison in default of payment until the expiry of such period, not exceeding twelve months, as the court may fix for payment, in instalments or otherwise, of the amount of the fine, or until default has been made by the offender in the payment of the fine or any such instalments, the amounts of any instalments and the dates of payment thereof being fixed by order of the court, and the court may in respect of the suspension of the issue of the warrant impose such conditions as it may think necessary or advisable in the interests of justice; or.....”

A criminal court sentencing an accused has inherent power to suspend a sentence. In this jurisdiction, suspension of sentences is authorized by s 358 (2) (b) and (c) of the Act. The imposition of a suspended sentence has the effect of delaying or postponing the execution of the sentence imposed. Section 358 (2) (a) and (b) permits suspension of a sentence where either a sentence of imprisonment or a fine has been passed. It permits the court to order the suspension of the operation of the whole or any part of the sentence for a period not exceeding five years on such conditions as the court may fix. An accused that has benefitted from a suspended sentence is required to comply with the terms of the suspended sentence, failure of which he will be required to serve the original imprisonment sentence or fine. In the case of a fine, where he has paid a portion of the fine imposed and is subsequently unable to pay the fine in full, he is required to serve the imprisonment sentence imposed in default on a pro rata basis, depending on how much he has paid.

In a case where a court has decided to impose a suspended sentence, the court must first impose a fine or imprisonment or both. It must then make a decision on whether to suspend it or a portion thereof and fix the conditions of suspension. A court which has decided to impose a sentence of imprisonment must then decide whether it is going to suspend the sentence and the conditions to impose. It may order that execution of the entire sentence or part of it be suspended on such terms and conditions it may fix. A part of an imprisonment sentence is usually suspended

on condition of good behavior, performance of community service or payment of restitution. If the terms of condition of suspension are not observed, the original sentence may be brought into effect.

Section 358 authorizes the suspension of a term of imprisonment or a fine on conditions the court may fix. It makes no provision for imposition of a fine as a condition of suspension of a custodial sentence or part thereof. Section s 358 does not authorize the imposition of a fine as a condition of suspension of a custodial sentence or part thereof. A fine cannot be imposed as a condition of suspension of a sentence of imprisonment.

Fines are a punishment ordinarily associated with minor transgressions of the law and are usually imposed in the case of first offenders. The rationale of imposing such a sentence is to afford an accused an opportunity of paying a fine and avoid serving a custodial sentence . Where a fine is imposed, this is to be done in terms of s 358 (2) (c).Section 358 (2) (c) authorizes a court where it imposes a fine, to suspend payment of same by imposing imprisonment in default of payment of a fine on conditions specified in the section. The effect of such a sentence is to suspend execution of sentence . Failure to comply is guarded with a prison sentence. The period of imprisonment is imposed as an alternative to a fine. The court may order that execution of the sentence be suspended until such a time as it shall fix. If the accused defaults, he is liable to serve the custodial sentence. The court usually specifies the time within which the fine should be paid. The offender is guarded with a custodial term. The issuance of a warrant committing the offender to prison in default of payment is suspended until the expiry of the specified period. If the accused fails to pay the fine by the appointed day, the accused will be in default and the sentence is brought into effect unless he applies for extension of time to pay the fine .

Having decided to impose a custodial sentence and suspend portions of it, the approach that the court ought to have taken is to suspend the sentence on condition of any other condition that is not a fine and then further suspend another portion on of restitution.. If the court had wanted to still impose a fine, it could have imposed it as an additional sentence. The effect of the sentence imposed is that the accused was sentenced to a fine. It is undesirable to suspend a custodial sentence on condition of payment of a fine. A fine is less onerous than a custodial sentence. What is likely to happen is that the accused will deliberately default and opt to pay the fine instead of serving the custodial sentence. I do not see the accused opting to go to jail instead of paying a fine.

The trial court misdirected itself when having imposed a custodial sentence it suspended it on condition of payment of fine.

The trial court decided to impose a sentence of 10 months imprisonment which sentence was appropriate in the circumstances of the case. I am not persuaded by the trial magistrate's suggestion that this court correct the sentence imposed by imposing a fine and suspending it on condition of restitution. That sort of sentence does not meet the justice of the case. I have in the exercise of my discretion decided to set aside the sentence and sentence the accused afresh. The accused stands convicted of a very serious offence of theft of trust property. Even first offenders are sent to jail for breaches of trust and such a serious offence. An offender who commits a serious offence does not ordinarily qualify for a fine. A custodial sentence was merited in the circumstances of this case. The sentence imposed on the accused is set aside and substituted with the following;

“10 months imprisonment of which three months imprisonment is suspended on condition the accused restitutes Shingirai Mafuka US\$474.00 on or before 31 July 2017 through the clerk of court.”

The trial court is directed to recall the accused and explain the sentence.

Tagu J, I agree:.....