HB 308/17
HCAR 1680/17
CRB GWP 1287/17

**THE STATE**

**Versus**

**TAPIWA HOVE**

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 19 OCTOBER 2017

**Review Judgment**

**BERE J:** The accused was properly convicted on his plea of guilty of contravening section 131 (1) and 113 (1) (a) (b) of the Criminal Law (Codification and Reform) Act, Chapter 9:23.

Upon being convicted the accused was sentenced to 42 months imprisonment of which 1 month was suspended on condition the accused restitutes $60 to the complainant within a specified date. It is this approach to sentence which has not sat well with me.

The salient facts of this matter which the accused accepted are that on the 21st day of September 2017 the accused jumped over the durawall and unlawfully entered the complainant's yard. Whilst inside the accused wrongfully and unlawfully opened the complainant's shed and stole seven window frames valued at $490. Upon his arrest the bulk of the window frames were recovered except for one window frame valued at $60. It is these facts which informed the magistrate's sentence.

The accused was found to have a relevant previous conviction of 2015 which the learned magistrate rightly considered as aggravatory.

I am concerned with the one month term of imprisonment suspended on condition of restitution. When one decides to suspend part of the prison term the suspended portion must be meaningful and sufficient to act as an incentive to encourage positive conduct. The positive conduct which the learned magistrate sought to achieve in his sentence was the payment of

restitution. I do not believe the miserable one month period of imprisonment was sufficient to achieve the desired objective.

Secondly, and more importantly, there is no room in our law for unilateral imposition of a suspended sentence on condition of restitution. It is imperative that before such a suspension is imposed, the magistrate seized with the matter conducts an enquiry to satisfy himself/herself that the accused is willing and able to fulfill the condition otherwise without carrying out such n enquiry the whole objective might be lost. In the case of *S* v *Jakachi*[1] the court had this to say:

> "The propriety of imposing a condition of this sort depends on the condition being reasonably capable of fulfillment. There must be a real likelihood that such a condition can be fulfilled, otherwise the objective of the condition to keep the accused out of prison or to reduce the length of the prison term imposed, to compensate the complainant, could be defeated … To ensure that there is a prospect of fulfillment the court should satisfy itself as to the accused's means and, applying the *audi alteram partem* rule, should give the accused an opportunity to address argument to the court on the details of the proposal. Even where the accused expresses a wish to pay compensation, a proper and thorough investigation into the capacity of the accused to do so is required." (my emphasis)

In *State* v *Zumbika*, GUBBAY J (as he then was) had this to say:

> "The object of a condition of this type were considered by CILLIE JP, in *S* v *Tshondeni; S* v *Villakazi*, 1971 (4) SA 79 (T) at pages 82H … The condition must be reasonably capable of fulfillment. If it is reasonably clear that it will not be met, there is no point in granting a suspended sentence …"[2]

In the instant case, there is nothing in the learned magistrate's record of proceedings that shows that he made an enquiry before imposing the suspended sentence.

It is precisely for these reasons that I am unable to certify these proceedings to be in accordance with real and substantial justice. I withhold my certificate.

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[1] HS-50-82 at pp 4-5

[2] 1978 RLR 192 at pp 193-194A