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CRB 2495-6/02

THE STATE versus
1. DONALD KUDAKWASHE NYAHUNA
2. GEORGE MAZHARA

HIGH COURT OF ZIMBABWE
SMITH J,
HARARE, 03 September, 2003

Criminal Review

SMITH J: The accused pleaded guilty to 9 counts of housebreaking with intent to steal and theft and were duly convicted. The offences were committed over a short period of one month, the first being on 30 October 2002 and the ninth on 30 November, 2002. The total value of the goods stolen amounted to \$2 939 755 with goods to the value of \$1 263 900 being recovered. In his reasons for sentence the magistrate pointed out that the accused had been subjected to severe torture by the police, "as is amply confirmed by your medical reports". The medical report on accused No 1 stated that he had conjunctivitis of the right eye, abrasions on the left arm and soft tissue injuries on the right arm and that severe force had been applied to inflict the injuries, which were serious. In the case of accused No 2, the medical report stated that he had soft tissue injuries and abrasions on the right arm and that a moderate degree of force had been applied to inflict the injuries, which were serious. Accused No 2 had been arrested on 29 November and accused No 1 on 2 December and they were medically examined on 6 December. Both accused said that they had not been forced to plead guilty but that they had been severely

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assaulted because the police wanted to fix them.

According to the record, the accused appeared in court on 5 December 2002 and were convicted on that date. They were examined by the doctor on 6 December so the magistrate must have requested the examination. They were sentenced on 21 February. In his reasons for sentence the magistrate said that the torture inflicted on the accused was a form of punishment and that the accused had spent about 4 months in custody awaiting sentence. In fact it was about 2½ months. He then proceeded to impose a custodial sentence on each count. The total sentence amounted to 13 years imprisonment, of which 4 years were suspended on condition of good conduct.

Whilst the sentence imposed in respect of each charge is appropriate, I consider that the totality of the sentences results in a sentence that is excessive and induces a sense of shock. The magistrate has mitigated the sentence to some extent by suspending 4 years on condition of good behaviour, but I consider that it is not right to suspend so long a period. It would mean that if, after his release, the accused commits an offence involving dishonesty which merits a sentence of 3 months imprisonment, the additional 4 years imprisonment would take effect. The better course would have been for the magistrate to order that some of the sentences run concurrently with others.

The convictions are confirmed, as are the sentences imposed on each count. It is ordered that the sentence of 2 years imprisonment imposed on count 5 and the sentence of 2 years imprisonment imposed on count 9 will run concurrently with the sentence imposed on count 4. That means that the total term of imprisonment is 9 years. Of that, 2 years are suspended for 5 years on condition the accused does not, within that period, commit any offence involving dishonesty for which he is sentenced to imprisonment without the option of a fine.

The magistrate does not indicate in the record whether or not he took any action over the assault by the police on the accused, other than have them medically examined. He should have reported the matter to the member in charge either of Kwekwe or of Midlands Province. If he has not done so I trust that he will do so without delay.

CHINHENGO J, agrees.