IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Criminal Appeal No. 0015 of 2017

In the matter between

UGANDA **APPELLANT**

And

1. OPIRA SIMON

2. OCAN CHA **RESPONDENTS**

Heard: 23 June, 2020.
Delivered: 14 August, 2020.

Criminal Law *— Malicious Damage to Property C/s 335 (1) of The Penal Code Act. — Malice under this section in not considered in the old vague sense of wickedness in general but as requiring either; (i) an actual intention to do the particular kind of harm that was done; or (ii) recklessness as to whether such harm should occur or not— The general rule in the law of malicious damage is that a person may do what he or she likes with his or her own property, provided that he or she does not injure the rights of others or it is not done dishonestly with an ulterior intent such as to commit a fraud. Property belongs not only to the owner but also to persons having other, lesser interests. The complainant should have custody, control or a proprietary right or interest in the property. — The prosecution should prove beyond reasonable doubt that the accused did or participated in destroying the property; belonging to another, damaged or destructed the property and that the act that caused the damage or destruction was willful and was unlawful— To "damage" means the permanent or temporary reduction of functionality, utility or value of some tangible property and the damage need not be permanent. When an act is said to have been done wilfully it means that it was done deliberately and intentionally, not by accident or inadvertence.*

Criminal Procedure *— Sentencing — An appellate Court can only interfere with a sentence imposed by a trial Court where the sentence is either illegal, is founded upon a wrong principle of the law, or Court has failed to consider a material factor, or is harsh and manifestly excessive or low as to amount to a miscarriage of justice in the circumstances of the case or where a trial Court ignores to consider an important matter or circumstance which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle. — the High Court has the inherent power to suspend a sentence after its imposition as long as the suspension is for a specific period of time and that period of time is reasonable; Unless exceptional circumstances exist, a court may not suspend the sentence if the person is being sentenced for a serious offence involving physical violence, organised crime or a serious sexual offence — Magistrates' courts do not possess inherent powers to suspend sentences.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondents were jointly charged with the offence of Malicious Damage to Property C/s 335 (1) of *The Penal Code Act*. It was alleged that the respondents and another still at large, on 17th June, 2013 at Awoo-Anyim village in Gulu District, willfully and unlawfully damaged crops, to wit millet and peas, the property of Ayat Ajulina. Both respondents were convicted and subjected to a 12 months suspended sentence of imprisonment and an order of compensation in the sum of shs. 200,000/= each, payable within 30 days of the judgment.

Appellant's evidence in the court below.

[2] The prosecution case was that there was a dispute between the complainant and the respondents over the land. On the fateful morning, the respondent ploughed the land on which the complainant had established a garden of peas and millet that had just sprouted. In his defence as D.W.1 the 1st respondent Opira Simon testified that on 17th June, 2013 at around 8.00 am he was in his garden digging when he was accosted by the complainant accusing him of having destroyed her

crops. There were no growing crops on the land but only bush. His uncle advised him to report to the sub-county but when he did he was arrested. That had been earlier litigation over that land in which the complainant lost and was evicted. As D.W.2, the 2nd respondent Ocan Charles testified that he lives on land belonging to D.W.1 and the complainant does not have any crops on that land. On the fateful day he was in court at the High Court from 9.00 am to 6.00 pm. D.W.3 Onen Denis testified that D.W.2 the 2nd respondent Ocan Charles was in Gulu Town on the fateful day. He was not at home.

Judgment of the court below.

[3] In his judgment, the trial Magistrate found that although the respondents contended that the dispute over the land had been resolved, it appears to have continued between the complainant and the respondents. The complainant was not a party to the prior civil litigation over the same piece of land. The respondents dug up her crops under the guise of enforcing a court order, yet none of them was a bailiff. The destruction of the crops was thus both wilful and unlawful. D.W.2 and D.W.3 conspired to mislead court regarding the whereabouts of D.W.2 that morning and accordingly their evidence is rejected. The prosecution evidence placed both respondents at the scene of crime and accordingly the alibi defence raised by D.W.2 was rejected. Both were convicted of the offence.

[4] Counsel for the appellant filed a notice of appeal but did not file a memorandum of appeal nor submissions in support of the appeal, despite having been notified and given a month's period to do so. Consequently, neither did the respondents file submissions. However, considering that under section 28 (1) of *The Criminal Procedure Code Act*, a criminal appeal is commenced by a notice in writing signed by the appellant or an advocate on his or her behalf, it was incumbent upon this court to consider the merits of the appeal, despite the lapses of the appellant.

Duties of the first appellate court.

[5] This being a first appeal, this court is under a duty to reappraise the evidence, subject it to an exhaustive scrutiny and draw its own inferences of fact, to facilitate its coming to its own independent conclusion, as to whether or not, the decision of the trial court can be sustained (see *Bogere Moses v. Uganda S. C. Criminal Appeal No.1 of 1997* and *Kifamunte Henry v. Uganda, S. C. Criminal Appeal No.10 of 1997*, where it was held that: "the first appellate Court has a duty to review the evidence and reconsider the materials before the trial judge. The appellate Court must then make up its own mind, not disregarding the judgment appealed against, but carefully weighing and considering it").

[6] An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination, (see *Pandya v. Republic [1957] EA. 336*) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (see *Shantilal M. Ruwala v. R. [1957] EA. 570*). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (see *Peters v. Sunday Post [1958] E.A 424*).

Ingredients of the offence of Malicious Damage to Property.

[7] For the respondents to be convicted of the offence of Malicious Damage to Property C/s 335 (1) of *The Penal Code Act*, the prosecution had to prove each of the following essential ingredients beyond reasonable doubt;

1. Property belonging to another or the accused and another person.

2. Damage to or destruction of that property.
3. The act that caused the damage or destruction was wilful.
4. The act that caused the damage or destruction was unlawful.
5. The accused did or participated damaging or destroying the property.

1st issue; <u>whether the property in issue belongs to another or the accused and another person</u>.

[8] The general rule in the law of malicious damage is that a person may do what he or she likes with his or her own property, provided that he or she does not injure the rights of others (see *Breeme's Case (1780) 2 East P.C.1026*), or it is not done dishonestly with an ulterior intent such as to commit a fraud. Property belongs not only to the owner but also to persons having other, lesser interests. The complainant should have custody, control or a proprietary right or interest in the property. A person may be convicted of damaging a tangible object if some other person has an interest, of a possessory or proprietary nature, in it.

[9] P.W.1 Ayat Ajulina testified that her father in law had given her the land on which she had planted millet and peas. She had been in possession of the land since her marriage in 1974. Her testimony on this point was not weakened by cross-examination and neither was any evidence adduced to controvert it. I therefore find that the prosecution proved beyond reasonable doubt that the complainant was in rightful and effective possession of a garden of crops, to wit millet and peas.

2nd issue; <u>whether the crop of millet and peas was damaged or destroyed</u>.

[10] To "damage" means the permanent or temporary reduction of functionality, utility or value of some tangible property. The damage or change to the property need not be permanent hence if the functionally is deranged or interference with function occurs this will satisfy the notion of “destroy or damage.” The concept of damage for the purposes of the crime includes tampering with property in such a

way as to require some cost or effort to restore it to its original form. The damage may include marking, defacing, removing or altering the property.

[11] P.W.1 Ayat Ajulina testified that her crops had germinated when the respondents destroyed them by ploughing the garden. P.W.2 Ebworine Simon testified that he visited the garden on 18th June, 2013 and found an area measuring approximately 140 x 40 meters of millet crop ploughed up. P.W.3 Awoo Anyim testified that he too saw the destroyed garden of millet and peas. The evidence on this point was not weakened by cross-examination and neither was any evidence adduced to controvert it. I therefore find that the prosecution proved beyond reasonable doubt that the complainant's crop of millet and peas was damaged or destroyed.

3rd issue; <u>whether the act that caused the damage or destruction was wilful</u>.

[12] The damage to or destruction of the property must have been done maliciously, with intent or recklessly. When an act is said to have been done wilfully it means that it was done deliberately and intentionally, not by accident or inadvertence. Malice under this section in not considered in the old vague sense of wickedness in general but as requiring either; (i) an actual intention to do the particular kind of harm that was done; or (ii) recklessness as to whether such harm should occur or not (i.e. the accused must have foreseen that the particular kind of harm might be done and yet had gone ahead on to take the risk of it). It is neither limited to nor does it indeed require any ill will towards the property destroyed or damaged, or its owner (see *R v. Cunningham [1957] 2 QB 396*).

[13] The ordinary meaning of "wilful" is deliberate" or "intentional." Therefore the state of mind contemplated by the word "wilfully" is that the accused had an intention to do the particular kind of harm that was done, or alternatively that he or she must have foreseen that that harm may occur, yet nevertheless continued recklessly to do the act. If a person intended to cause injury to a person, but

instead caused injury to property, the necessary intention would not have been established unless it is proved that the person acted recklessly, not caring whether the property was damaged or not (see *R. v. Senior [1899] 1 Q.B. 283* and *R. v. Pembliton [1874-80] All E.R. Rep. 1163*). Intention in this context is knowledge and recklessness (in the sense of foresight and disregard of consequences or awareness and disregard of the likelihood of the existence of circumstances).

[14] P.W.1 Ayat Ajulina testified that she found the respondents ploughing the garden. Her land is adjacent to theirs but separated by a tree at the common boundary. Her testimony on this point was not weakened by cross-examination and neither was any evidence adduced to controvert it. I therefore find that the prosecution proved beyond reasonable doubt that the acts resulting in damage and destruction of the complainant's crop of millet and peas were wilful and deliberate, not accidental.

4th issue; <u>whether the act that caused the damage or destruction was unlawful.</u>

[15] The damage to the property should not only be wilful but it should also be unlawful. With regard to the requirement of unlawfulness, it must be proved that the act was unlawful. Thus if an accused person had a lawful excuse for his wilful act, his act would not be unlawful. It must be unlawful, in that it does not fall within the ambit of a justification (for example, private defence, necessity, superior orders or consent), or be something that the accused is entitled to do in terms of the law of property or the provisions of a statute.

[16] It follows that if for instance an accused acted on honest belief in a right to do damage to the property of another in protection of one's own interests, that would be a defence. However, not only must the claim of right be honest but also the means employed for its protection must be reasonable in relation to the supposed rights. An honest (though erroneous) belief by the accused; (a) that he

had a right which he or she was entitled to protect; and (b) the means of protection used were proper in the circumstances, is a defence. An act which is in fact unreasonable in all the circumstances, for the purposes of criminal law, is evidence that the accused's beliefs were not honestly held.

[17] P.W.1 Ayat Ajulina testified that the land belongs to her. P.W.2 Ebworine Simon, the village Chainman L.C.1, testified that there is a dispute over that land between the complainant and the respondents. Each of the parties claims the land to be theirs. There is no clear boundary marker but to his knowledge the land belongs to the respondents. The 1st respondent in his defence stated that there were no growing crops on the land but only bush. The 2nd respondent Ocan Charles too testified that the complainant does not have any crops on that land.

[18] According to section 7 of *The Penal Code Act,* a person is not criminally responsible in respect of an offence relating to property if the act done or omitted to be done by the person with respect to the property was done in the exercise of an honest claim of right and without intention to defraud. The existence of an honest claim of right ordinarily excludes the criminal intention. A person has a claim of right if he or she is honestly asserting what he or she believes to be a lawful claim, even though it may be unfounded in law or in fact, (see *R v. Bernhard (1938) 26 Cr App R 137; [1938] 2 All ER 140; [1938] 2 KB 264] at page 145*).

[19] Anything “bona fide” connotes “good faith.” Thus, for a claim of right to qualify a bona fide claim of right, it must be made in good faith, without fraud or deceit. It must be sincere and genuine (see *Black’s Law Dictionary* 8th ed). In *Lubega Bernado v. Uganda [1985] HCB 9*, on a charge of attempted theft, the appellant raised the defence of bonafide claim of right. The court held that a person who takes property which he believes to be his own does not take it fraudulently however unfounded his claim. Similarly in *Oyat v. Uganda [1967] EA 827* that in a criminal proceeding, the defence of claim of right is available to an accused

person, however ill founded, where the accused firmly believed that he had a claim of right over the property. A similar holding can be found in *Nkwine Jackson v. Uganda, H.C. Criminal Appeal No. 59 of 1992, [1995] III KALR 113*.The belief therefore need not be reasonable provided it is must be sincere and genuine. The fact that the respondents denied the presence of crops on the land cast doubt on their defence claim of bona fide claim of right. They had no sincere and genuine belief in their right to destroy the complainant's crops.

5th issue; whether any or both respondents participated damaging or destroying the property.

[20] There should be credible direct or circumstantial evidence placing the accused at the scene of the crime as the perpetrator or an active participant in the commission of the offence. In his defence, as D.W.1 the 1st respondent Opira Simon stated that on 17th June, 2013 at around 8.00 am he was in his garden digging when he was accosted by the complainant accusing him of having destroyed her crops. As for D.W.2, the 2nd respondent Ocan Charles on that fateful day he was in court at the High Court from 9.00 am to 6.00 pm. This was corroborated by D.W.3 Onen Denis who testified that D.W.2 the 2nd respondent was in Gulu Town on the fateful day.

[21] The 1st respondent's defence was a bare denial since e placed himself at the scene of crime at the material time. As for the 2nd respondent, his defence was alibi. An accused does not have to prove that alibi. The burden is on the prosecution to place the accused at the scene of the crime, and sufficiently connect him to the commission of the offence (see *Uganda v. Sabuni Dusman [1981] HCB 1*; *Uganda v. Kayemba Francis [1983] HCB 25*; *Kagunda Fred v. Uganda S.C. Criminal Appeal No. 14 of 1998*; *Karekona Stephen v. Uganda, S.C. Criminal Appeal No. 46 of 1999* and *Bogere Moses and Kamba v. Uganda, S.C. Criminal Appeal No. 1 of 1997*). Where prosecution evidence places the

accused squarely at the scene of crime at the material time, the alibi is destroyed (see *Uganda v. Katusabe [1988-90] HCB 59*).

[22] To disprove that defence, the prosecution relied on the testimony of P.W.1 Ayat Ajulina testified that it was at around 8.00 am when she found the two respondents ploughing her garden. They fled only to be arrested two days later on 19th June, 2013. Where prosecution is based wholly or substantially on the correctness of the evidence of an identifying witness, the Court must exercise great care so as to satisfy itself that there is no danger of mistaken identity (see *Abdalla Bin Wendo and another v. R (1953) E.A.C.A 166*; *Roria v. Republic [1967] E.A 583*; *Abdalla Nabulere and two others v. Uganda [1975] HCB 77*; and *Bogere Moses and another v. Uganda, S.C. Cr. Appeal No. l of 1997)*. The prejudice often associated with identification evidence is that, although mistaken, it is frequently given with great force and assurance by the person who made the identification. A mistaken witness can be a convincing one and a number of such witnesses can all be mistaken (see *R v. Turnbull [1976] 3 All ER 54*).

[23] In order to satisfy itself that the evidence is free from the possibility of mistake or error, the court considers; whether the witness was familiar with the accused, whether there was light to aid visual identification, the length of time taken by the witness to observe and identify the accused and the proximity of the witness to the accused at the time of observing the accused. In the instant case, the single identifying witness witnesses knew the two respondents very well, as neighbours. She saw them him at very close range during day time. Her evidence is free from the possibility of mistake or error. It is further corroborated by the fact of their flight from the village only to be arrested two days later. The 2nd respondent's defence was further weakened by production of court process whose dates did not rhyme with the date of the offence. All in all both their defences were disproved beyond reasonable doubt. The trial court therefore came to the correct conclusion when it convicted them as charged.

5th issue; whether the sentence was lawful.

[24] An appellate court will not interfere with sentence imposed by a trial Court merely because it would have imposed a different sentence. It is now settled, that an appellate Court can only interfere with a sentence imposed by a trial Court where the sentence is either illegal, is founded upon a wrong principle of the law, or Court has failed to consider a material factor, or is harsh and manifestly excessive or low as to amount to a miscarriage of justice in the circumstances of the case or where a trial Court ignores to consider an important matter or circumstance which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle (see *James v. R. (1950) 18 E.A.C.A. 147; Ogalo s/o Owoura v. R. (1954) 24 E.A.C.A. 270; Kizito Senkula v. Uganda, S.C. Criminal Appeal No. 24 of 2001; Bashir Ssali v. Uganda, S.C. Criminal Appeal No. 40 of 2003*, and *Ninsiima Gilbert v. Uganda, C.A. Criminal Appeal No. 180 of 2010*). The impugned sentence in the instant case is one of a twelve (12) months' suspended sentence of imprisonment, and an order of compensation in the sum of shs. 200,000/= each, payable within 30 days of the judgment.

[25] There is no room in our system for an instinctive approach to sentencing. Sentencing should be a rational process. The sentencing court must always strive to find a punishment which will fit both the crime and the offender. Whatever the gravity of the offence and the interests of society, the most important factors in determining the sentence are the offender, and the character and circumstances of the offence. Punishment should as far as possible be individualised.

[26] Before passing sentence the magistrate must give careful thought and consideration to what is the appropriate sentence in the circumstances and he should give full reasons for imposing the sentence which he has decided upon. Sentencing requires a rational process in which the court weighs all the relevant

factors and decides what sentence is fair and appropriate. If the magistrate simply announces the sentence without giving reasons this may give the impression that sentencing is an arbitrary and unreasoned process. Failure to give reasons for sentence is a misdirection which warrants interference by the appellate court. However, such interference must be carefully considered as the sentence might be appropriate in spite of the magistrate's failure to give reasons for sentence.

[27] Section 197 of *The Magistrate's Courts Act* confers discretion upon a trial court, in addition to any other lawful punishment, to order the convicted person to pay another person such compensation as the court deems fair and reasonable, where it appears from the evidence that, that other person, whether or not he or she is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed and that substantial compensation is, in the opinion of the court, recoverable by that person by civil suit. The amount imposed, in the light of the size of the land and the size of the crops destroyed, does not seem to be an erroneous assessment of the compensable loss sustained by the complainant.

[28] The maximum punishment Malicious Damage to Property C/s 335 (1) of *The Penal Code Act* is five years' imprisonment. The decision to impose the maximum sentence would imply that the actual offence was at the highest level of seriousness in light of both the intrinsic quality of the offence and the personal circumstances of the offender. The sentence meted out in this case was 12 months' imprisonment. It is neither unlawful nor manifestly low in the circumstances. The only aspect that may be challenged is that it was suspended.

[29] A suspended sentence is a sentence of imprisonment, the operation of which is suspended by the sentencing court, in whole or in part, on condition that the individual enters into a bond to keep the peace and be of good behaviour for a specified period of time known as the operational period. The precise question

involved, therefore, is the power of a Magistrate's' court, exercising jurisdiction in criminal cases, to suspend a sentence of imprisonment after conviction.

[30] Section 133 (2) of *The Magistrates Courts Act* and 98 of *The Trial on Indictments Act* require the Courts, before passing sentence, to may make such inquiries as they thinks fit, including the character and antecedents of the accused person, in order to inform themselves as to the proper sentence to be passed. These provisions impose a duty on a sentencing court to equip itself with sufficient information in any particular case to enable it to assess a sentence humanely and meaningfully, and to reach a decision based on fairness and proportion. Both provisions though offer no guidance as to whether a sentence of imprisonment imposed after such inquiry can be suspended. It such a power exits, then it must be an inherent one. Not all jurisdictions though recognise the inherent power of a court to suspend a sentence. In some jurisdictions, there must be a law specifically authorising suspended sentences before a court can do it.

[31] In the case of Uganda, with regard to the High Court, section 141 of *The Trial on Indictments Act* provides that when no express provision is made in the Act, the practice of the High Court in its criminal jurisdiction shall be assimilated, as nearly as circumstances will admit, to the practice of the High Court of Justice in its criminal jurisdiction and of Courts of Oyer and Terminer and General Goal Delivery in England.

[32] Courts of Oyer and Terminer and General Gaol Delivery in England are courts that have the power for the trial of cases of treason and felonies punishable by life imprisonment or death. They are courts of general jurisdiction with authority to try all treasons, felonies and misdemeanours whatever committed in the counties specified in the commission, and to hear and determine the same according to law. Therefore by virtue of section 141 of *The Trial on Indictments Act*, the High Court in Uganda has, generally, all the jurisdiction which, prior to the enactment of *The Trial on Indictments Act*, was vested in, or capable of being

exercised by Courts of Oyer and Terminer and Gaol Delivery, except so far as those powers have been changed or abrogated by statute. Outside that provision, the Suspended sentence though has never been placed upon a statutory footing in this jurisdiction.

[33] As courts possessing superior criminal jurisdiction with common law powers, Courts of Oyer and Terminer and General Gaol Delivery in England had inherent jurisdiction to suspend sentence during good behaviour for the suspended period, before that power became statutory with the enactment of *The Criminal Justice Act, 1967* (see *R v. Sapiano (1968) 52 Cr App R 674*, in which the Court of Appeal of England and Wales held that "the main object of a suspended sentence is to avoid sending an offender to prison at all. Section 11(3) of *The Criminal Justice Act, 1973* ensured that the rationale underpinning the use of suspended sentences in England and Wales was the avoidance of immediate imprisonment. See also *R v. Wightman [1950] NI 124*, where the Northern Irish Court of Criminal Appeal proclaimed the inherent power of the criminal courts to record a sentence of imprisonment and to bind a convict over on recognisance to come up for judgment on notice.

[34] Similarly in *The People (DPP) v. Foley [2014] IESC 2, [2014] 1 IR 360* at paragraph 48, the suspended sentence was recognised as having long been a part of the common law in Ireland before it became the subject of legislation by way of section 51 of *The Criminal Justice (Miscellaneous Provisions) Act, 2009* and section 99 of *The Criminal Justice Act, 2006* as amended by section 60 of *The Criminal Justice Act, 2007*). In *People Ex Rel. Forsyth v. Court of Sessions, 36 N.E. 386 (NY 1894*), the court observed;-

> There can, I think, be no doubt that the power to suspend sentence after conviction was inherent in all such courts at common law. The practice had its origin in the hardships resulting from peculiar rules of criminal procedure, when the court had no power to grant a new trial, either upon the same or additional evidence, and the verdict was not reviewable upon the facts by any higher court. The power as thus exercised is described in this

> language by Lord HALE: "Sometimes the judge reprieves before judgment, as where he is not satisfied with the verdict, or the evidence is uncertain, or the indictment is insufficient, or doubtful whether within clergy. Also when favourable or extenuating circumstances appear and when youths are convicted of their first offense. And these arbitrary reprieves may be granted or taken off by the justices of gaol delivery, although their sessions be adjourned or finished, and this by reason of common usage." (2 *Hale* P.C. ch. 58, p. 412.) This power belonged of common right to every tribunal invested with authority to award execution in a criminal case (1 *Chitty* Cr. L. [1st ed.] 617, 758).

[35] Under article 139 (1) of *The Constitution of the Republic of Uganda, 1995,* unlimited original jurisdiction “in all matters” is conferred upon the High court, which includes the exercise of control over the administration of justice in criminal proceedings within its territorial jurisdiction. This is to ensure that proceedings undertaken under the penal and related procedural laws secure the ends of justice. The High Court exercises general authority over all matters of jurisdiction. It declares its own jurisdiction and controls the jurisdiction and powers of inferior courts, tribunals and public bodies. The Legislature by section 141 of *The Trial on Indictments Act* clearly intended the vesting of inherent power in the High Court to control proceedings initiated under the penal and related procedural laws, such as are exercisable by Courts of Oyer and Terminer and General Gaol Delivery in England. The High Court thus possesses an inherent criminal jurisdiction which is derived partly from statute, partly from English common law, but also from the very nature of the Court itself as a superior court of law.

[36] For that reason, the High Court has the inherent power to suspend a sentence after its imposition as long as the suspension is for a specific period of time and that period of time is reasonable. This inherent jurisdiction includes the power to punish for contempt, to prevent abuse of process by summary proceedings, to control its own orders or judgments, and to supervise and review proceedings of inferior courts and the exercise of statutory powers of decision. The inherent jurisdiction of the High Court involves residual powers on which the court may

draw to protect the rights of the individual, and to give a remedy where the individual has been deprived of certain rights to which he is entitled. It is evident that inherent powers can be exercised only to prevent the abuse of the process of the court and to secure the ends of justice.

[37] Courts of unlimited criminal jurisdiction possess the inherent power at common law to suspend a sentence imposed after conviction, in deserving cases. This power is an attribute of superior courts of record. It is a power which the courts of record should possess in furtherance of justice, to be used wisely and exceptionally in light of their obligation to ensure that all sanctions are commensurate to the gravity of the offence. A sentence may be suspended because of factors relating to the convict (such as age or ill health) which suggest the convict should not immediately be imprisoned. “Exceptional circumstances” do not include relatively commonplace features, such as a guilty plea, previous good character, youth and adverse consequences of conviction (see *R v. Okinikan (1992) 14 Cr App R (S) 453; R v. Lowery (1992) 14 Cr App R (S) 485* and *R v. Sanderson (1992) 14 Cr App R (S) 561*).

[38] Unless exceptional circumstances exist, a court may not suspend the sentence if the person is being sentenced for a serious offence involving physical violence, organised crime or a serious sexual offence. For example in *R v. French (1994) 15 Cr App R (S) 194, [1993] Crim LR 893*, psychiatric evidence showed that an immediate custodial sentence would hamper recovery of the convict from clinical depression which further justified the imposition of a suspended sentence. After sentence has been suspended the court may, when deemed proper in the exercise of a sound discretion and in the interest of justice, such as when the condition of good behaviour is breached, inflict the punishment of imprisonment.

[39] The suspended sentence is an important and, where used appropriately, a beneficial sentencing option. A suspended sentence serves one or more of five purposes; - a) it is a means of avoiding an immediate custodial sentence; b) it

serves as a denunciation of the accused's behaviour; c) it is controlling and rehabilitative device; d) it has a deterrent effect on the individual offender; and e) it can serve as part of a crime prevention strategy focused on particular types of crime. It is a beneficial sentencing option aimed at keeping many offenders out of prison (particularly offenders who do not have a huge criminal history) while providing them with a powerful incentive to stay on the straight and narrow.

[40] Before one gets a suspended sentence at all, the Court must first go through the process of eliminating other possible courses, such as absolute discharge, conditional discharge, probation order, fines, and then say to itself: this is a case for imprisonment, and the final question, it being a case for imprisonment, should be: is immediate imprisonment required, or can a suspended sentence be given? When the court passes a suspended sentence, its first duty is to consider what would be the appropriate immediate custodial sentence, pass that and then go on to consider whether there are grounds for suspending it. What the court must not do is pass a longer custodial sentence than it would otherwise do, because it is suspended (see *R v. Mah-Wing (1983) 5 Cr App R (S) 347* and *R v. O'Keefe [1969] QB 29*). This principle emphasises the fact that the length of the operational period is considered part of the punishment such that a suspended sentence is essentially a custodial sentence, albeit one that is not served in prison.

[41] Thus, a court might impose three-year sentence but order that it be suspended for two years on condition that the offender is of good behaviour during that two-year period, and also that he or she must abide by any further conditions specified by the court. Typical further conditions are that the person must agree to be under the supervision of the Probation Service and, in some cases, must agree to stay away from a certain person or area or be subject to a night time house curfew. Failure to comply with these conditions means that the offender is brought back to court where the sentence can be activated and the offender can be imprisoned. Once the operational period has expired and the individual has

successfully complied with the conditions of suspension, he or she is discharged from any further obligation under the suspended sentence. However, should the individual reoffend or breach a condition of suspension during the operational period, he or she becomes liable to serve the whole or part of the term of imprisonment originally imposed by the court.

[42] It is at the court's discretion to fix the period of suspension (known as the operational period), which can be for any period up to two years. If during this time, the offender does not commit any further offences, the prison sentence will not be implemented. However, in the event that the offender does re-offend during the operational period, then the sentence is 'activated' and the offender will serve the suspended sentence along with any sentence given for the new offence.

[43] “Jurisdiction” and “power” are distinct concepts. Jurisdiction is conferred by the statute under which the court is constituted, as the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. On the other hand, all courts possess inherent powers which are incidental or ancillary to their substantive jurisdiction. These ancillary powers are procedural, rather than substantive, in nature. They enable a court to give effect to its jurisdiction, by enabling the court to regulate its procedure and protect its proceedings. The existence of the ancillary powers is parasitic on the court possessing jurisdiction. These ancillary powers are “inherent” to the court in order to function fairly and efficiently as a court.

[44] By their nature as subordinate courts, Magistrates Court are constituted with limited criminal jurisdiction, territorially and in terms of subject matter. Their sentencing powers are limited as well. For that reason the inherent powers to facilitate their statutory jurisdiction in criminal trials are curtailed by the limited nature of their criminal jurisdiction. Just like the High Court whose inherent criminal jurisdiction is derived partly from statute, by virtue of article 139 (1) of

The Constitution of the Republic of Uganda, 1995, section 17 (2) of *The Judicature Act* and section 141 of *The Trial on Indictments Act,* there has to be statutory basis for a Magistrate's power to suspend a sentence, yet there is none. The criminal jurisdiction and powers of Magistrates Courts are derived entirely from *The Magistrates Courts Act* and the statutory criminal procedural provisions; they have no inherent criminal jurisdiction of the High Court. Their inherent jurisdiction is in respect of civil matters by virtue of section 98 of *The Civil Procedure Act*. A power cannot exceed its own authority beyond its own creation. Implied powers are restricted to those powers which arise by necessary implication in the exercise of statutory jurisdiction. Magistrates courts as created under *The Magistrates Courts Act* are not clothed with such powers in exercise of their criminal jurisdiction an neither can they be inferred by necessary implication.

[45] Therefore, when the court below invoked what it supposed was an inherent power vested in it to suspend a sentence of imprisonment, it erred in law. That order is illegal and is accordingly set aside.

Order:

[46] In the final result, since the judgment has been delivered electronically, consequently a warrant of arrest returnable on 10th September, 2020 at 2.30 pm is issued for purposes of producing the respondents before court for committal to serve their sentence of imprisonment.

Delivered electronically this 14th day of August, 2020 ……Stephen Mubiru……..

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant :

For the respondents: