

R. v. W. M. de BEER.

A CRIMINAL REVIEW CASE OF 1936.

Charge against Composition Order Debtor of obtaining credit after date of Composition Order—Subordinate Courts Ordinance section 56 (14)—plea of guilty—accused bound over to come up for sentence when called upon—bond executed—subsequent breach of condition—further proceedings—procedure to be followed.

In this case the High Court reviewed proceedings in the Court below and outlined the proper procedure to be followed in the circumstances.

In 1953 was enacted the Probation of Offenders Ordinance, which gives power to Courts to make Probation Orders. Sections 31 of the Penal Code and 287 of the Criminal Procedure Code are still in force and can be invoked when a Court does not consider it appropriate to make a Probation Order.

Francis, J.: This matter has been submitted for review by the Court at the instance of the Acting Resident Magistrate, Kitwe.

It is a case in which the accused was charged before the Court below, sitting on the 19th November, 1936, of an offence against section 56 (14) of the Subordinate Courts Ordinance, 1933. The accused pleaded guilty, and without recording evidence, or any statement of the facts of the case (which should have been done) the Magistrate entered, "Sentence: To be bound over in the sum of £25 (amended the next day on application of the accused to one surety in £50) to come up for sentence at any time when called upon within the next year as from 19-11-36. To enter into bond forthwith section 287 (1) C.P.C."

This is an indication that the Magistrate proposed to give the benefit of the "Probation of Offenders Act", the operative section of which is reflected both in the Penal Code section 31 and the Criminal Procedure Code section 287 (1). Incidentally these two sections seem to overlap. It will be observed that in the latter section an important provision is the avoidance of sentence; consequently the mere entry in the record, of the word "sentence" is wrong. The expression should have been "Order". There should then have followed the terms of the order in more specific language, and an appropriate entry might have been:

"It is ordered that the accused be discharged conditionally on his entering into a recognisance of £25 with two sureties in the sum of £25 each, subject to the following condition:

That he be of good behaviour and appear before the Court for sentence when called on at any time during the period of (twelve months) next ensuing."

Two additions may be made to orders in these cases:

- A. The first, a very usual one in limitation of residence; this is contemplated under Criminal Procedure Code section 289; and
- B. The other, a formal and occasionally necessary requirement, "that unless and until the said ——— shall enter into such recognisances with such sureties as aforesaid the said ——— shall be detained in prison for the term of (a nominal period)". With regard to this the magistrate should ascertain before passing an order whether the accused is likely to be able to give security immediately or within a reasonable time. cf. Penal Code section 31 (1).

Such an order in complete form as above may be made both under section 31 (1) Penal Code and Criminal Procedure Code, section 287 (1). The form of the order could be drawn from any of those appearing in Paley's *Summary Convictions*, 9th Ed., p. 1104 *et seq.* Such a form would be a "variation" of the Recognisance Form Crim. 15, Fourth Schedule Criminal Procedure Code.

The order of the Magistrate did not include the elementary condition "that in the meantime he keep the peace and be of good behaviour", nor is there anything included in limitation of residence. The form of recognisance used, though purporting to derive its authority from Criminal Procedure Code section 287 (1), is but an untidy adaptation of Crim. Form 15a and, in the view of this Court, faulty.

However, the recognisance having been signed the accused was apparently discharged.

On the 22nd of January, 1937, the accused seems to have been brought before the Court "to answer to the recognisance", but it is not stated in what respect the condition in the recognisance has not been observed. It is conjectured from the evidence taken on that occasion that he *intended* leaving Nkana and going to Mufulira. The accused admitted, "I realise I have no right to leave Nkana", but in the absence of any condition in the recognisance in limitation of residence, there was nothing to prevent him leaving Nkana. In any event he would not have been so far away at Mufulira as not to have been able to attend at Nkana if so summoned.

Apparently in view of his intended departure, the Court then reopened the case, and, having on the first occasion found the accused guilty of the charge, imposed a fine of £25 or one month I.H.L.

Now the whole of this procedure on the 22nd January is wrong.

It must be apparent that on the passing of the order on the 19th November the Court was *functus officio*, unless the accused within the period prescribed failed to observe some condition of his recognisance, and as there is no proof before the Court of any such failure the sentence imposed on 22nd of January must be quashed and the fine (if paid) returned.

The following order of this Court will be, "That the accused be discharged on probation from the conviction of 19th November, 1936, conditionally on his entering again into a recognisance of £25 in himself, with one surety in the sum of £50, subject to the following condition:

1. That he be of good behaviour and appear before the court of the Resident Magistrate, Kitwe, for sentence when called on at any time during the period commencing from the date of such recognisance and terminating on the 18th November, 1937.
2. That he continue during such period to reside within the Kitwe or Mufulira districts."