

# THE RHODESIAN LAW JOURNAL

Editor: R. H. CHRISTIE, Q.C.

October, 1972

1972 R.L.J.

Vol. 12, Part 2

## CONTENTS

<i>EDITORIAL: THE AFRICAN BAR ASSOCIATION</i> .....	133
<i>NOTES ON CASES</i>	
The advantage element in extortion— <i>S. v. Munyani</i> .....	137
Restoration on fulfilment of resolute condition— <i>Lieberman v. Woodhouse</i> .....	144
Annexing photocopies to pleadings— <i>Glenburn Hotels         (Pvt.) Ltd. v. England</i> .....	145
Garnishee failing to pay— <i>African Distillers, Ltd. and         others v. Honiball and Another</i> .....	147
<i>Animus injuriandi</i> — <i>Smith N.O. and Lardner-Burke N.O.         v. Wonesayi</i> .....	149
<i>ARTICLES</i>	
“ILLEGAL” RHODESIAN ANTI-SANCTIONS LEGIS- LATION (concluded), by A. A. le Roux .....	160
POLICE, LAW AND RIOTS, by R. H. Christie .....	219
IMPRISONMENT, ITS EFFECTIVENESS AND RE- SULTS, by R. G. Nairn .....	232
IRREGULARITY IN THE HIGH COURT: APPEAL OR REVIEW?, by K. Godfrey .....	240
<i>POLICE NOTES</i> .....	247
<i>ODDS</i>	
Death of Sir Ernest Lucas Guest .....	254
<i>REPORTS</i>	
<i>Kelly v. Minister of Local Government and Housing         (T.P.)</i> .....	262
<i>Veronneau v. Moss and Others (T.P.)</i> .....	264
<i>Brian J. Rhodes (Pvt.) Ltd. v. John New (Pvt.) Ltd.; John         New (Pvt.) Ltd. v. Karoi Properties (Pvt.) Ltd. and         Brian J. Rhodes (Pvt.) Ltd. (T.P.)</i> .....	268
<i>REVIEWS</i>	
<i>Indirect Rule and the Search for Justice</i> , by H. F. Morris and James S. Read .....	276
<i>South African Criminal Law and Procedure, Vol. I</i> , by E. M. Burchell and P. M. A. Hunt .....	278
<i>South African Criminal Law and Procedure, Vol. II</i> , by P. M. A. Hunt .....	291
<i>South African Criminal Law and Procedure, Vol. III</i> , by J. R. L. Milton assisted by N. M. Fuller .....	306

DEPARTMENT OF LAW  
UNIVERSITY OF RHODESIA

**THE  
RHODESIAN LAW JOURNAL  
1972**

(1972 *R.L.J.*)

*Editor:*

R. H. CHRISTIE, Q.C., M.A., LL.B.(Cantab.)  
Professor of Law at the University of Rhodesia

*Book Review Editor:*

G. R. J. HACKWILL, M.A. (Oxon.), Ph.D.(Lond.)  
Senior Lecturer in Law at the University of Rhodesia

## IMPRISONMENT: ITS EFFECTIVENESS AND RESULTS

BY

R. G. NAIRN, LL.B. (Lond.), Dip. Crim. (Edin.)

Advocate of the High Court of Rhodesia,

Lecturer in Law at the University of Rhodesia

*Imprisonment is ill-suited to achieve any of the traditional objects of punishment, and in practice produces the undesirable results of contamination with experienced criminals, loss of employment, character re-definition as a criminal and institutionalisation, all at considerable financial cost.*

*Some of these results could be avoided by more careful classification of offenders, by a system of conditional discharge and by putting more emphasis on reconciliation and restitution.*

*This paper was read to a conference of police officers, who found little fault with the arguments put forward but expressed very grave doubts about the practicality of any alternative to imprisonment in this country.*

“‘What sort of things do you remember best?’ Alice ventured to ask.

‘Oh, things that happened the week after next,’ the Queen replied in a careless tone. ‘For instance, now,’ she went on, sticking a huge piece of plaster on her finger as she spoke, ‘there’s the King’s Messenger. He’s in prison now, being punished, and the trial doesn’t even begin till next Wednesday; and, of course, the crime comes last of all.’

‘Suppose he never commits the crime?’ said Alice.

‘That would be all the better, wouldn’t it?’ the Queen said, as she bound the plaster round her finger with a bit of ribbon.”

(Lewis Carrol : *Alice Through the Looking Glass.*)

Is our attitude to imprisonment any more rational than that of the Red Queen? There are some modern penologists who would say no, that we have lost our perspective on punishment in general and imprisonment in particular. In Rhodesia imprisonment is used far more freely as a means of punishment

than in many other countries<sup>1</sup>. It would therefore be useful to take a critical look at imprisonment and its ramifications, and then perhaps ask ourselves if we shouldn't be thinking more carefully of alternatives.

Suppose one were to begin at the beginning and ask, "why do we imprison people?" Perhaps a rather foolishly naive question, because the answer is so obvious — "in order to punish them, of course." But why use imprisonment as the punishment? If you are going to reply, "because that's how we have always punished criminals" you are going to be wrong. Imprisonment as a method of disposing of convicted people is a relatively recent invention. Admittedly, it has replaced more brutal forms of treatment such as hanging, beheading, maiming, whipping, banishing and conscripting into the army or sending to the galleys, but it has also replaced more rational approaches based on such ideas as compensation, restitution and reconciliation of the parties. This development is probably the product of the Protestant ethic which demands not only that we should refrain from brutality towards our fellow men, but also that we see to it that wrongdoers are punished — thus taking unto ourselves the power to express the wrath of God in our own chosen manner. This approach, which found expression in the 18th Century Quaker-inspired Pennsylvania system of solitary confinement, joined hands with the ideals of an increasingly materialistic age which demanded that every property offender should be punished, and it spread throughout America, Europe and eventually parts of Africa. We have now reached the point where to question the validity of imprisonment is generally considered to be absurd. The following arguments may therefore be regarded as absurd, because they challenge the logic of using imprisonment as the major form of punishment. (I do not offer a total challenge, because I accept that it may have its uses in a limited number of instances).

1.	Country.	Population, in millions	Daily average prison population	Per 100 000 of the population.
	Netherlands	12,9	3 280	25,4
	Norway	3,85	1 700	44,0
	Sweden	8,0	4 900	61,0
	Belgium	9,5	6 000	63,2
	France	50	35 000	70,0
	Denmark	4,6	3 300	71,7
	England	45,5	33 000	72,5
	Finland	4,7	4 700	100,0
	Rhodesia	5,45	8 363	155,0
	South Africa	21,3	90 555	425,0

Source : 1972 (2) *Crime Punishment and Correction*, p.3.

To return to the beginning, we imprison people because we want to punish them. Punishment itself is not a straightforward matter because we punish from different motives and in order to achieve different objectives. In fact the whole concept of punishment has been rationalised according to four main theories — retribution, deterrence, rehabilitation and prevention. Thus when we imprison a person we are theoretically aiming to be revenged upon him, or to deter him and/or others from offending again, or to rehabilitate him, or to prevent him, while he is in jail, from offending. This, it seems, is where the matter ends. However, it is possible — and it happens — that four men convicted of four different offences, sentenced in terms of the four different theories, could all land up at the end of the day in the same cell serving the same kind of sentence. So in the ultimate analysis, one is left wondering why we bother to rationalise our urge to obtain revenge through punishment. However, we must accept that this has been done, and that prisons and similar institutions have been selected as the appropriate vehicles through which these ideas may be expressed. We should therefore examine the effect of imprisonment in terms of each theory.

### 1. **Retribution.**

Sir James Fitzjames Stephen extolled the value of retribution above all other reasons for punishment. The community, he maintained, must show its abhorrence of the criminal act by punishing the wrongdoer. Other writers have pointed out that the cohesion of society depends upon its right and ability to be revenged upon its deviants; and recent events in such countries as Zambia have shown that if the criminal does not receive appropriate attention from the state, his fellow citizens will be forthcoming with the remedy in the form of lynch law. We must accept therefore that our society in its present stage of development must have revenge. But is imprisonment the most appropriate method of expressing that revenge? If a man steals your wristwatch and is imprisoned, does that make you feel any better? (He probably still has your watch). If the gardener buries his hatchet in the cook's head and is imprisoned, are you or the cook going to feel any better? (You will probably end up cooking dinner, digging the garden and paying the doctor's bill!) If an uninsured drunken driver smashes into your car, writes it off and goes to jail, are you going to feel any better? (His family will probably starve). The point is that in almost every situation where imprisonment is used as an expression of retribution, the side effects are such that considerable suffering or hardship results to innocent people. So society is cutting off its nose to spite its face.

### 2. **Deterrence.**

If little Johnny is naughty, you hit him. That's your way of warning him not to be naughty. Little Willie meanwhile has seen what happened and got

the message, so he won't be naughty again either — or so you hope. The average intelligent parent will tell you that this simply does not work, and research into the effect of deterrent punishments has come up with the same answer. Deterrent punishments — which in Rhodesia almost invariably find expression in long terms of imprisonment — are effective only in a limited range of cases (broadly speaking, those concerned with public order offences). The average thief, assaulter, murderer, rapist is not deterred by the thought of going to jail. The result is that most people — particularly thieves — who have decided to offend, will simply fall into a repeating pattern of crime, detection, prosecution and imprisonment with no real advance being made.

### 3. **Rehabilitation.**

The object of rehabilitation is not to brainwash the offender into accepting the outlook and values of those who are punishing him. It is rather to show him that certain ways of behaving are not accepted by society, and to demonstrate that those who insist on behaving in unacceptable — harmful — ways will suffer for it. In other words, when we set out to rehabilitate a person we are setting out to improve his social learning and possibly help him to make up some lack in his character. It must be obvious even to the most amateur psychologist that the correct milieu for this process is within the society against which he has been offending. But we don't do the obvious. We lock the offender away in an institution where he will probably mix with hardened criminals, where he may be taught a criminal trade, and where he will learn to adjust to a life which has little or no meaning to him, and no connection with the outside world. He is turned loose after a specified period in this environment and we pretend to ourselves that he has been reformed and rehabilitated.

An interesting thought arises at this point: if we adhere to the deterrent and rehabilitation theories of punishment, we must believe that the prisoner will come out of jail a reformed character. Why then do the police, when investigating a crime and looking for a suspect, nearly always think first of known criminals? I am not criticising this approach, because it is probably very logical and practical, but does it not also amount to a tacit acceptance that individual deterrence and rehabilitation do not work? Is this not therefore an unspoken indictment of our system of punishment?

### 4. **Prevention.**

Prevention works. There can be no doubt about that. If you put a man in prison for three years he will not be able to prey on the public during those three years. But the chances are that he will return to his predatory ways upon release. In fact, he will probably be able to improve his *modus operandi* as a result of the information and contacts made during his term of imprisonment. So ultimately this approach is futile and cannot be regarded as of more

than short-term value. It in fact leads one to the realisation that some people stop offending in spite of imprisonment — not because of it.

Perhaps this discussion of the theories of punishment appears a little sceptical of their value. Perhaps this is justified, particularly when one realises that regardless of the reason motivating a judicial officer (retribution, deterrence, etc.) when he passes a sentence of imprisonment, when the prisoner arrives in jail he is absorbed into a relatively indiscriminating system which classifies him according to security and very little else. This being the case, we should recognise that we are using imprisonment, not as a sensitive tool, but rather as a dustbin into which we throw cases when we can't be bothered to think what else we should do about them.

Having dealt with the theoretical aspect of imprisonment, it would be valuable to examine in a general way some of the real developments that take place when a man is imprisoned. These can take any of a variety of forms, among which the most serious are:

#### 1. Contamination.

Unless a prison is very big and elaborately built, it is going to be impossible to prevent "old lags" mixing with the relatively innocent first, second or third offender. This is a serious problem because a high proportion of people who are imprisoned are either first offenders, people who have fallen temporarily by the wayside and would soon return to the straight and narrow, or those who should not be in prison at all. In fact statistics show that as many as 50% of our prisoners are men who were given the option of a fine but found themselves unable to raise the money. The implication here is that the sentencing magistrate or judge did not consider that imprisonment was the most appropriate punishment and simply added it on to his sentence as a sanction in the event of the chosen punishment failing. The result of this state of affairs is that we have a hard core of either habitual or confirmed criminals serving long sentences in our jails, and a constant stream of peripheral offenders passing through and being exposed to their malign influence. Add to this the fact that the values of a subculture (which is what your prison population becomes) are very readily absorbed by new members in preference to those of the dominant group, and you have a perfect "school for crime" with the top men being kept conveniently together, ready and willing to provide tuition to the novices.

#### 2. Loss of employment.

This is a fairly obvious consequence of imprisonment which not only makes it more difficult for the offender to pull himself out of a life of crime, but may also impoverish his family. This could lead ultimately to an extra load being placed upon the state and the taxpayer. From one point of view this

consequence amounts to a double punishment and from the rehabilitation angle it is of course counterproductive.

### 3. **Character re-definition.**

A person's image of himself is important. If you convict him for a petty offence and put him behind bars, you are doing a number of fairly drastic things to him. The first and worst is that you are telling him that he is a criminal and henceforth will be known as a criminal, because he has a criminal record and has been in jail. In fact he may not be a criminal at all and may under other circumstances never have offended again. But once in prison he is exposed to such powerful pressures that he will probably redefine himself in accordance with the definition that society has forced upon him. Once he has done this he has nothing to lose, because he has abandoned the old law-abiding image and now thinks of himself instead as a criminal. He will therefore fall easily into the criminal sub-culture and be more inclined to take to a life of crime upon his release. Another and perhaps more subtle change can also occur — as soon as you lock a man up, you turn him into a security risk. He may have been perfectly innocuous before the door clanged shut, but once caged he will feel caged and will once again react in some way. Experiments with open prisons have proved that in fact a very small percentage of convicts are security risks, so why go to the expense and trouble of treating them all as such?

### 4. **Institutionalisation.**

This is like a creeping paralysis of the character. The short term prisoner may escape its worst effects but as time goes by the average man will succumb to the routine and authority of a prison regime. The more you tell a person what to do, the less he thinks it out for himself, and the longer this process continues the less able he is ultimately to think a plan out for himself. As a result a moral cripple is created who finds that unless he is in the supportive atmosphere of an institution he is anxious, unstable and unable to cope with life. So before long he sees to it that he is back in a secure environment — via the courts. This result is clearly a product of the system.

### 5. **Finally — cost.**

The 1970-71 prisons vote was \$2 669 600. In effect the country was paying for the board and lodging of a large number of people who should not have been in prison at all, a large number of people who were low to minimal security risks, a handful of recidivists, and a collection of institutionalised wrecks. Is this wise spending? Are there not better and more effective ways of disposing of the taxpayer's money? Thinkers in Britain, America, Japan and Europe have experimented with a variety of alternative methods

of institutionalised treatment. They have tried expensive hostels with carefully trained staff; they have tried clinics, borstals, open, closed, island and farm prisons and combinations of all of these. With few exceptions the success rates in these institutions have been disappointingly low and the reason is that the institutionalised approach creates a paradox: first, if you set out to punish a person, you are very likely to make him bitter and anti-social — thus destroying any chance of absorbing him back into society. Thus punishment-orientated sentences are almost wholly incompatible with the concept of rehabilitation. Secondly, if you are thinking of rehabilitation, you cannot think of it in isolation — you have to see it in the context of the society in which the offender will ultimately live. This approach is impossible if you are trying to rehabilitate him within an institution; an obvious contradiction is created — false (i.e. incompatible with the outside world) treatment is attempted in a false environment. As a result, when the offender is released, he is no better equipped to deal with life's problems in the outside world, and he is no more able to appreciate or comply with prevailing social values than he was prior to imprisonment.

The conclusion that is being forced upon thinking people therefore is that institutionalised treatment is not the answer and that alternatives must be sought. Contrary to popular belief, a wide range of non-institutional methods of dealing with offenders are available, and three of them will be mentioned.

### 1. **More careful classification.**

As has already been mentioned, too many people are finding their way into prison. This problem has been recognised in most European countries where legislation has been passed to ensure that only the most serious offenders are incarcerated (e.g. the English Criminal Justice Act, 1967, made it compulsory for courts to suspend most sentences of six months or less). In Rhodesia, the problem could be met initially by more careful classification — perhaps when the offender is convicted. If this were done, the courts could be made more aware of the real problems of imprisonment and perhaps be persuaded to resort to this measure with less frequency. If this happened, greater use would have to be made of the suspended sentence and new variations upon that theme.

### 2. **Conditional Discharge.**

A system employed in the Netherlands since the end of the last century. Briefly, the principle behind this system is that offenders who should clearly not ultimately be imprisoned should be identified before they are placed in danger. (The criteria for deciding who should not be imprisoned are obviously going to be difficult to agree, but obvious ones that spring to mind —

and indeed govern the Dutch decisions — are : youth of the offender, absence of previous convictions, triviality of offence, personality disorder and rehabilitation potential). The Dutch equivalent of our Attorney General has power to intervene in most cases where the offender is prepared to admit his guilt, and enter into an agreement to discharge him from prosecution provided he fulfils certain conditions. The conditions imposed will vary in most cases to meet the particular needs of the offender and are very often similar to those imposed in the case of suspended sentences. This system has two clear advantages :

- (a) People who are unlikely to offend again can receive what often amounts to an effective punishment without being burdened for the rest of their lives with a previous conviction and all that that implies.
- (b) Corrective treatment can be given in appropriate cases without clogging up courts and prisons, and can also be attempted in the right environment.

### 3. Reconciliation and Restitution.

Criminal law as we understand it was virtually unknown among the Shona peoples before the advent of the pioneers. The emphasis within their society was upon reconciliation and restitution rather than punishment. This was achieved almost solely by mobilising public opinion to pressure the offender into seeing the error of his ways and making due correction. Our system of criminal law has removed this type of sanction — particularly as very few “European type” punishments carry any stigma within African society. It should be possible, by using such instruments as the suspended sentence, to design more punishments which entail an element of restitution. This should make the effect of the criminal proceeding more real to both African accused and complainants, because the outcome would accord more closely with the system of law which they know and understand, and would also entail a certain stigma.

In conclusion, when we view crime developments in both this country and other parts of the world where crime figures are mostly on the increase and prisons are bursting at the seams, we must be forced to one conclusion — imprisonment does not work. If, therefore, we are going to solve the problem of criminality, we will have to free our minds of institution-orientated attitudes and explore more rational — if adventurous — alternatives.

---

*(Beadle C.J.: “Is the accused in a position to pay a fine?”*

Counsel: “I think he must be, if he can afford to pay my fee.”



This work is licensed under a  
Creative Commons  
Attribution – NonCommercial - NoDerivs 3.0 License.

To view a copy of the license please see:  
<http://creativecommons.org/licenses/by-nc-nd/3.0/>

This is a download from the BLDS Digital Library on OpenDocs  
<http://opendocs.ids.ac.uk/opendocs/>