

**THE STATE**

**VERSUS**

**EDWARD MARIPFONDE**

**AND**

**GIFT BANDA**

IN THE HIGH COURT OF ZIMBABWE

MUTEMA J

BULAWAYO 25 APRIL 2013

Criminal Review

**MUTEMA J:** This matter emanated from Mvurwi and found its way to my desk *via* the automatic review process. I discerned a number of irregularities which prompted me to write to the trial magistrates thus:

“Two issues are of concern to me:

1. The two accused persons were each charged with four counts with each count framed thus: “charged with contravening s 131 as read with 113 of the Criminal Law Codification and Reform Act [Cap 9:23] “Unlawful entry into premises and theft.” The allegations were that on four occasions each accused unlawfully entered the various complainants’ dormitories and stole property therefrom. Sections 113 and 131 of [Cap 9:23] create two stand alone offences of theft and unlawful entry into premises respectively. Either of the two crimes cannot be read with the other. Where one commits the offence of unlawful entry into premises in contravention of s 131 and steals property therefrom, that offence of unlawful entry into premises is then committed in aggravated circumstances and one must be charged only with the offence of unlawful entry into premises in aggravating circumstances in contravention of s 131 (1)(a) as read with subs (2)(a) or (b) or (c) or (d).

In the result, were the four counts properly framed?

2. (a) Both accused pleaded guilty to all four counts. After taking the accused through the essential elements the trial magistrate on verdict wrote:-  
“V-Guilty as pleaded both counts and both accused”.  
Both counts mean two counts yet there were four counts. Whence did the “guilty as pleaded both counts” come?

- (b) As if that was not enough misdirection, regarding sentence, the trial magistrate wrote:-  
“S- a 1 (for accused 1) – 2 years imprisonment (3 months suspended on Gve 627/12 brought into effect and incorporate (sic) in the 2 years imprisonment).  
A 11 (for accused 2) – 1 year imprisonment”.
- (c) The trial magistrate did not, following production of accused 1’s certificate of previous conviction, bother to find out from him whether he was admitting the previous conviction and if he had any cause to show why the suspended sentence should not be brought into operation.
- (d) Further, the trial magistrate did not indicate in respect of which count or counts each accused person’s sentence related to. Was this proper? Could I have the trial magistrate’s comments?”

The trial magistrate’s response was as follows:

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1. In relation to the charge contravening section 131 as read with 113 of the criminal law codification and reform act I stand guided by the Honourable Judge’s decision. This has been a grey area and has created a lot of confusion with some learned Judges preferring count 1 unlawful entry, count 11 Theft other review matter with unlawful entry and theft have been confirmed. However your decision is quite commendable.
2. (a) There was an oversight the count took the accused persons through the essential elements of the 4 counts which they were facing instead of indicating verdict- Guilty as pleaded all 4 counts for both accused persons. The court proceeded to indicate guilty as pleaded both counts.
- (b) In failing to question the accused person about the certificate of previous conviction I erred this was a serious misdirection. I also failed to indicate to which count the sentence was relating to. Intended to treat all 4 counts as one for sentence globular approach since these offences were committed on single day, almost at the same time, the offence being similar in nature i.e. the essential elements.

It is my humble submission that if the matter be referred back to me so that I recall the accuseds explain to them that the guilty plea was in respect of all 4 counts, explain the essence of the previous conviction to the first accused – show cause why it should not be brought into effect and then sentence the accused accordingly.”

As regards the first issue *supra*, I have noted that it is not settled as to what charge(s) should be preferred in a case where one unlawfully enters into premises and steals property therefrom. In the majority of cases depicting the scenario postulated above the prosecution is

preferring two separate charges, *viz* contravening section 131 (1) (unlawful entry into premises) and contravening section 113(1) (theft) of the Criminal Law (Codification and Reform) Act, [Chapter 9:23]. Most Judges have found this acceptable and have confirmed the proceedings.

It has been indeed a grey area as stated by the trial magistrate in his response *supra*. However, I have not been privy to the other scenario he alluded to, *viz* that some Judges have been confirming proceedings such as *in casu* where the charge is framed “charged with contravening section 131 as read with section 113 of the Criminal law (Codification and Reform) Act, [Chapter 9:23] (unlawful entry into premises and theft).

As observed *supra* in my query to the trial magistrate, the two sections 113 and 131 of [Chapter 9:23] create two separate or two stand alone offences of theft and unlawful entry into premises respectively. Neither of these two crimes can be read with the other as was done in case at hand. Probably the old adage that old habits die hard can be ascribed to the failure by the prosecution to separate these two now distinct offences, emanating from the old offence called housebreaking with intent to steal and theft. That old offence has now been codified into two stand alone offences. It is accordingly procedurally both wrong and incompetent to charge one as read with the other.

I will stop short of holding that it is also wrong and incompetent to charge one with both unlawful entry into premises in contravention of section 131 and theft in contravention of section 113 of the Criminal Law (Codification and Reform) Act, [Chapter 9:23] in the scenario I postulated above without according the matter the benefit of informed sufficient argument by the relevant stakeholders. However, it is my considered humble and respectful opinion that by creating the two stand alone offences of unlawful entry into premises (section 131(1) and theft in section 113) and then providing in section 131(1) (a) as read with subsection (2) (e) of that section, the Legislature was clear that it intended those two offences to be stand alone. Where one unlawfully enters premises and steals property therefrom, the aspect of theft remains encompassed in section 131 and should not be ascribed separately to section 113. A close reading of section 131 should make this not difficult to comprehend.

The section reads:

**“131 Unlawful entry into premises.**

(1) Any person who, intentionally and without permission or authority from the

- lawful occupier of the premises concerned, or without other lawful authority, enters the premises shall be guilty of unlawful entry into premises and liable-
- (a) to a fine not exceeding level thirteen or not exceeding twice the value of any property stolen, destroyed or damaged by the person as a result of the crime, whichever is the greater, or imprisonment for a period not exceeding fifteen years, or both, if the crime was committed in any one or more of the aggravating circumstances set out in subsection (2); (my emphasis) or
  - (b) in any other case, to a fine not exceeding level ten or not exceeding twice the value of any property destroyed or damaged by the person as a result of the crime, whichever is the greater, or imprisonment for a period not exceeding ten years, or both.
- (2) For the purposes of paragraph (a) of Subsection (1) the crime of unlawful entry into premises is committed in aggravating circumstances, if on the occasion on which the crime was committed, the convicted person-
- (a) entered a dwelling house; or
  - (b) knew were people present in the premises; or
  - (c) carried a weapon; or
  - (d) used violence against any person, or damaged or destroyed any property, in effecting the entry; or
  - (e) committed or intended to commit some other crime.”

The wording of the statutory provision cited above is so clear and unambiguous that it admits of no other canons of interpretation save its ordinary grammatical meaning. This meaning is that where one unlawfully enters into premises and steals property therefrom and the premises were a dwelling house, or one knew that there were people in the premises or one carried a weapon or used violence against anyone in effecting the entry, there is absolutely no procedural legal justification to charge one with two offences of unlawful entry into premises and theft. The proper charge is simply one of unlawful entry into premises in aggravating circumstances in contravention of section 131(1) (a) as read with subsection (2) (a) or (b) or (c) or (d) of this Code in respect of each count.

In the event, if the above interpretation be correct, which I respectfully think it is, then on the facts of the present case of the accused persons unlawfully entering on each of the four occasions, St, Alberts High School Girls’ quarters and stealing property therefrom, each accused should simply have been charged with four counts of unlawful entry into premises in aggravating circumstances in contravention of section 131 (1)(a) as read with subsection (2) (a) of the Criminal Law (Codification and Reform) Act, [Chapter 9:23]. Since all the essential

elements relevant to the proper offence were canvassed with both accused persons, there will be no prejudice occasioned to each if each count is corrected to read the proper one as crafted above and each count is accordingly so amended.

Regarding query 2(a) *supra*, it is clear that this was as an error in grammar of the English language -not a mother tongue. The verdict should read- each accused, guilty as pleaded all four counts. The verdict is accordingly so amended as no prejudice will be suffered by either accused as a result.

Regarding query 2(b) and (c), *supra*, in terms of section 327 (3) of the Criminal Procedure and Evidence Act, [Chapter 9:07] the trial magistrate was enjoined to ask accused whether he admitted the previous conviction or not. And as per practice, to also ask accused 1 if he had any cause to show why the suspended sentence should not be brought into effect. This was not done. Also, in terms of query 2 (d) *supra* the trial magistrate did not indicate in respect of which count(s) each accused person's sentence related to.

In the result, the trial magistrate is directed to recall both accused persons and do the following:

- (1) explain to them the two amendments I have effected above, *viz* relating to the correct charge for all counts;
- (2) explain to both accused that the correct verdict is: each accused is found guilty as pleaded in respect of all the four counts;
- (3) explain to both accused that all the four counts were treated as one for sentence; and
- (4) in respect of accused one, an enquiry be made whether he is the person so alleged to have been previously convicted and if so to show cause why the suspended sentence of 3 months imprisonment should not be brought into operation.

Thereafter the proceedings shall be re-submitted for review.

Mutema J.....

Takuva J agrees.....