STATE
versus
HONEST MATEMA

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 4 June 2021.

Criminal Review

MANZUNZU J The accused was initially jointly charged with another before their trials were separated. He was convicted on his own plea of guilty for unlawful entry into premises in aggravating circumstances as defined in section 131 (1) as read with section 131 (2)(e) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23]* (the Act). The accused was then sentenced to 12 months imprisonment of which 6 months were suspended for 5 years on the usual condition of good behaviour. The other 6 months imprisonment were made effective.

The record was placed before the Regional Magistrate, Eastern Division for scrutiny who made certain observations and raised queries with the trial magistrate.

The Regional Magistrate observed that the charge was improperly drafted to include two offences, that of unlawful entry and theft. The trial magistrate took the view that there was nothing wrong with the way the charge was drafted because the accused did not only unlawfully enter the complainant's premises but also stole some property therefrom.

The record is clear as to what offence the accused was charged with. The charge sheet reads a contravention of s 131 (1) as read with s 131 (2) (e) of the Act. Section 131 (1) constitutes the offence of unlawful entry into premises and is worded as follows;

> "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."

Section 131 (2)(e) lays out one of the aggravating circumstances in the commission of the crime of unlawful entry in the following words;

> "(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*) …
> (*b*)…
> (*c*) …

(*d*) …
(*e*) committed or intended to commit some other crime."

Section 131 (1) therefore creates a separate offence with its own ingredients for both *actus reus* and *mens rea* to create criminal liability. The accused must intentionally enter the premises without permission or authority from the lawful occupier of the premises or without other lawful authority. But is this what we find in the charge against the accused.

A recite of the charge against the accused will assist to see its propriety or otherwise. It reads;

> "UNLAWFUL ENTRY INTO PREMISES IN AGGRAVATING CIRCUMSTANCES AS DEFINED IN SECTION 131 (1) AS READ WITH SECTION 131 (2) (e) OF THE CRIMINAL LAW (CODIFICATION AND REFORM) ACT CHAPTER 9:23.
> In that on the 10th November 2018 and at Tobacco Graders Bromely, Goromonzi, Honest Matema and Liberty Mupofu one or both of them unlawfully and without unlawful (sic) permission or authority from Tore Zvanyadza, the lawful occupier of the premises concerned, or without other lawful authority entered the house of Tore Zvanyadza through spare bed door (sic) as entrance and while inside the said premises Liberty Mupofu and Honest Matema unlawfully took one black and white in colour blanket, six plastic plates, two white dinner plates, one blue bowl, three pots, one frying pan, one table spoon, three metal oplaes, one plastic dish and one small bucket knowing that Tore Zvanyadza was entitled to own or possess the property and intending to deprive Tore Zvanyadza permanently of her ownership, possession or control of the property or realizing that she may be deprived thereof."

It is clear from the reading of this charge that it combines two offences, one of unlawful entry and the other of theft. This is improper. The charge resembles one under the common law offence, as it then was, of housebreaking with intent to steal and theft. The criminal law code has now separated the offence of unlawful entry into premises (housebreaking) and that of theft. Section 131 and 113 of the Act cannot be housed in the same charge although theft can be an aggravation following the conviction of unlawful entry. This means the charge was wrongly framed as it combined the crime of unlawful entry and that of theft. The theft committed by the accused person after unlawful entry should have been reflected in the State outline. It was also not necessary for the trial magistrate to canvass the essential elements of theft. See *S* v *Chidziva and others* 2009 (2) ZLR 82 where the court also said;

> "Section 131 (1) (a), enacts the crime of unlawful entry which is aggravated by the fact that the accused person stole property from the premises or caused damage or destruction to property. It does not create the offence of unlawful entry and theft as the magistrates seem to have construed it to. The elements of the crime created by s 131 (1) are:
> 1. an intentional entry into premises; and
> 2. without the authority of the lawful occupier or other lawful authority."

The court also further stated;

> "It is incompetent to charge an accused person for unlawful entry and theft, as defined by s 131 (1)(a) as that section does not create a combined offence of unlawful entry and theft. It merely provides for a stiffer punishment if the unlawful entry is accompanied by the stealing of property from the premises. The elements of theft need not be canvassed as they would for purposes of securing a conviction for theft. The stealing of property can merely be mentioned in the agreed facts or the State outline, or in the prosecutor's address in aggravation. If the convicted person admits them at any of these stages then he can be sentenced in terms of s 131 (1) (a) of the Code. The canvassing of theft elements will however not vitiate the conviction as it is a relevant fact in passing sentence as long as it remains clear that s 131 (1)(a) does not create an offence of unlawful entry and theft, but provides that it should be used as an aggravating factor." (my emphasis).

Where an accused commits the offence of unlawful entry but also steals property from the premises, the discretion lies with the prosecution to either charge the accused for unlawful entry of premises or use the theft as aggravation or to charge the accused of two counts one of unlawful entry and the other for theft. The latter option may however, result in a stiffer penalty for the accused. Invariably the prosecution opts for the former because a person who unlawfully enters a premise does so with the primary objective which might be to steal property.

Be that as it may, the accused person's conviction for contravening s 131 (1) cannot be vitiated by the inclusion of the particulars and elements of theft, where the elements of unlawful entry were properly canvassed and admitted by the accused person. In *casu*, the charge should be amended so that it complies with the provisions of s 131 (1) of the Code. The charge is amended as follows.

> "UNLAWFUL ENTRY INTO PREMISES IN AGGRAVATING CIRCUMSTANCES AS DEFINED IN SECTION 131 (1) (a) AS READ WITH SECTION 131 (2) (a) & (e) OF THE CRIMINAL LAW (CODIFICATION AND REFORM) ACT CHAPTER 9:23.
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> In that on the 10th November 2018 and at Tobacco Graders Bromely, Goromonzi, Honest Matema unlawfully, intentionally and without permission or authority from Tore Zvanyadza, the lawful occupier of the premises concerned or without other lawful authority entered the house of Tore Zvanyadza by forcing open the kitchen door to gain entry."

The second observation by the regional magistrate was the use of the words "unlawful" and "lawful" in putting the essential elements of the offence to the accused. The accused was not legally represented neither is there evidence that he is a legally trained person. The questions put to the accused were; "Admit on 10/11/18 at Tobacco Graders Bromely you unlawfully entered into Tore Zvanyadza's house without his consent? Any lawful right?"

The purpose of language is to communicate. Any technical words must be simplified to a lay person. The words "unlawfully enter" could have been simplified and the trial magistrate concedes to that in her response to the Regional Magistrate. However, I find that

the absence of the simplification is cured by the second part of the same question where the accused admits entering complainant's house without her consent. I did not find any harm with the question, "Any lawful right?" because there is never an unlawful right otherwise it ceases to be a right.

In the final analysis I am satisfied that the essential elements of the offence were put to the accused and his conviction was proper and is hereby confirmed.

The last point raised by the Regional Magistrate is the appropriateness of the sentence. The accused was convicted on a single count of unlawful entry into premises. In aggravation he stole property worth $144.50 of which property worth $105.00 was recovered. The other aggravating factor is that he entered a dwelling house. On the method of entry, the accused said he entered through a kitchen door which he found open and he was not challenged for that assertion. Accused is a 35 year old first offender, a divorcee with 3 children. He survives on buying and selling maize realizing a meagre income of $80 per month. He showed contrition as he pleaded guilty and asked for the court's leniency in sentencing him. Health wise, he claimed to be diabetic and HIV positive.

In her reasons for sentence the trial magistrate was alive to the need to keep first offenders out of prison. The court took into account that which was in favour of accused. The court then stated "The accused used violence in gaining entry they forced open the kitchen door which was locked," yet in answer to the question by the court that; "How did you gain entry?" he said, "I found open the kitchen door." And he was not challenged. A further reading of the reasons for sentence by the court one can read some emotions attached to it. While accepting that the property stolen was negligible the court further stated; "People are having sleepless nights because of hooligans like the accused person who would reap where they did not sow. A clear message must be sent out there that people who reap where they did not sow cannot be left scot free." The court concluded by saying a fine or community service were not suitable options. The court then imposed 12 months imprisonment and suspended 6 months leaving 6 months to run effective.

This court will not ordinarily interfere with the trial magistrate's sentencing discretion, to merely substitute its opinion, unless there is a misdirection. *S* v *Mundowa* 1998 (2) ZLR 392 (H); *S* v *De Jager and Anor* 1965 (2) SA 616.

It is trite that community service should be considered in all cases warranting an effective prison sentence of 24 months or less. This means the trial court should carry out a full enquiry, not only as to the accused's means, but also his general suitability for community

service. See *S* v *Shariwa* 2003 (1) ZLR 314 (H); *Silume* v *State* HB 12/16; *S* v *Mabhena* 1996 (1) ZLR 134 (H); *S* v *Chireyi and Others* 2011 (1) ZLR 254 (H).

In *casu*, there was no inquiry as to the general suitability of the accused for community service. The only comment is in the reasons for sentence where the court said,

" a fine or community service will offend the ends of justice on its leniency…"

The trial court misdirected itself by its failure to conduct a suitability inquiry into community service.

While the conviction is confirmed the same cannot be said about the sentence. However the accused must by now have long served the six months.

While the conviction is confirmed, the effective sentence of 6 months imprisonment is too harsh and therefore is not in accordance with real and substantial justice hence I withhold my certificate.

MUZOFA J AGREES:……..