THE STATE
versus
WALTER GARANEWAKO

HIGH COURT OF ZIMBABWE
MUTEMA J
HARARE, 30 September, 2010

Review Judgment

MUTEMA J: The accused in this case was arraigned before a magistrate sitting at Chitungwiza facing a charge of contravening s 131 of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*]. The section criminalises unlawful entry into premises.

The charge was framed thus, "In that on the 6 day of April, 2010 and at Number 133 Svinurai Phase 1, Dema, Walter Garanewako unlawfully and intentionally and without permission from Babra Mhizha the lawful occupier of the premises concerned or without lawful authority entered the premises at Number 133 Svinurai Phase 1, Dema by opening the sliding gate". (my emphasis).

The pertinent facts read:

"4. On 6 day of April, 2010 and at around 03.00 hours the complainant entered her homestead and was surprised to see that her sliding gate was opened.

5. When she entered the gate she found the accused person standing aimlessly (*sic*) near her motor vehicle.

6. She called him asking him who he was but he kept quiet and later moved towards her.

7. The accused person then took the state of a drunkard (*sic*) person and began stammering."

He was subsequently arrested. He pleaded guilty to the charge as framed *supra* and was duly convicted and sentenced to 8 months imprisonment wholly suspended on condition he performed 280 hours of community service at Kunaka Hospital in Dema.

The scrutinising Senior Regional Magistrate was not satisfied with the propriety of the charge given the attendant facts of the case. He then referred the matter for review commenting *inter alia*, "The accused person is said to have gained entry into the complainant's yard enclosed by a durawall on 6 April, 2010. He accessed the yard by opening

a sliding gate. He did not enter the house but was interrupted whilst in the yard. The issue is whether the enclosed yard is a structure or premises for the purposes of unlawful entry …
I talked to the learned magistrate and she felt her interpretation was correct. I also talked to fellow regional magistrates and other magistrates in the provincial courts and the answers I got made me to write this scrutiny minute (*sic*) so that we would be guided by the Higher Court. I feel that the proper charge should have been trespass under s 132 ..."

The observations made herein are pertinent in that from a substantial number of review matters it has been gleaned that a sizeable number of magistrates have no clue regarding the distinction between the offences of unlawful entry into premises in terms of s 131 and criminal trespass in terms of s 132 of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*].

Section 131(1) provides:

"(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…"

Subsection (2) spells out aggravating
Circumstances to include, where the convicted person:-

"(a) entered a dwelling house; or
(b) knew there were people present <u>in the premises</u> ; or
(c) ……
(d) ……
(e) ……"
(emphasis supplied).

Section 132 provides:

"(1) Any person who –
(a) enters any land knowing or realising that there is a real risk or possibility that such entry is forbidden;
or

(b) having entered any land, fails or refuses without lawful excuse to leave the land when called upon to do so by the lawful occupier or any other person with apparent authority to require him or her to leave; shall be guilty of criminal trespass and liable to a fine not exceeding level five or imprisonment for a period not exceeding six months or both.

(2) It shall be presumed, unless the contrary is shown, that a person accused of criminal trespass knew or realised that there was a real risk or possibility that entry into the land in question was forbidden where the land was an enclosed area.

(3) For the purposes of subs (2)-(a) an "enclosed area" means an area of land the perimeter of which is enclosed by a sufficient wall, fence or hedge that is continuous except for one or more entrances that are barred or capable of being barred by a gate or other means;"

Section 130 defines the word "premises" as "any movable or immovable building or structure which is used for human habitation or for storage, and includes an outbuilding, a shed a caravan, a boat or a tent". (emphasis supplied)

Now, the definition of "premises" in s 130 above is so clear and unambiguous that it admits of no other rule of statutory interpretation except the ordinary grammatical meaning of the words employed. Premises for purposes of unlawful entry means any movable or immovable building or structure used for human habitation or storage. Apart from those structures mentioned in the section the term also includes such structures as a house or storeroom-buildings or structures ordinarily used for human habitation or storage of property. The legislature deliberately employed the phrase "in the premises" in subs (2) para (b) of s 131 cited *supra* in spelling out aggravating circumstances – where the convicted person knew there were people present "in the premises" when he committed the unlawful entry. It did not use the phrase "on the premises" which would mean outside the dwelling house or storage structure. It is pertinent to note that the crime of unlawful entry into premises is nothing more that a codified version of the old offence that used to be called housebreaking with intent to commit a specified crime within the premises so broken into. There is certainly and patently a world of difference between this offence and the one of criminal trespass which relates to and is limited to land as we know it (usually with written signs prohibiting entry) or an enclosed area on which is situated a building or structure ordinarily used for human habitation or for storage of property and is outside that building but is surrounded by a sufficient wall, fence or hedge that is continuous and has an entrance(s) either barred or capable of being barred by a gate or other means (what is commonly referred to as a yard).

A brief look at case law authorities that have dealt with the definition of premises for purposes of unlawful entry would be salutary in unravelling this seeming confusion exitant in some judicial officers of the lower courts. In *R.V. Piet M'tech* 1912 TPD 1132 a tent wagon used as a residence for a person or his family was held to be a structure and therefore a dwelling within the meaning of the relevant statute for the purposes of an offence of housebreaking.

In *Rex v Makoelman* 1932 EDL 194, the accused was convicted of housebreaking with intent to steal and theft (our present day unlawful entry into premises). The evidence showed that the accused broke open a yard door (the equivalent of a durawall gate) and stole a ladder kept in a cellar (an underground room ordinarily used for storage purposes especially for wine). It was not shown that the cellar door was locked or closed or even that it had a door. It was held that as the evidence was consistent with the cellar having been entered through an open door, window or other aperture, or the ladder having projected from the cellar and having been removed with entry of the cellar, and as the breaking into the yard was not housebreaking, the conviction should be altered to one of "not guilty of housebreaking; guilty of theft". Of pertinence to note from the case is that the breaking open of the yard door and entry into the yard itself as well as into the cellar itself without displacing any obstacle to facilitate the entry did not constitute housebreaking (unlawful entry). By the same token, in the instant case, the opening of the sliding gate and the entry into the yard did not and cannot amount to unlawful entry into premises. At best, it is criminal trespass – simple and straightforward.

In *R. v Lawrence* 1954(2) SALR 408 breaking into a cabin of an officer on a ship in dock with intent to steal was held to be correctly designated as housebreaking (unlawful entry into premises). OGILVIE THOMPSON J, at p 409 F-G holding that the cabin of the ship broken into was ordinarily used for human habitation by the ship's Second Officer and hence the crime was correctly designated as housebreaking, relied on the learned authors *Gardiner & Landsdown*, vol. 2 p 1553 (5th ed) where they state that to constitute the crime of housebreaking with intent to commit a crime, "the premises broken must be such as are, or might ordinarily be, used for human habitation or for the storage or housing of property of some kind".

In *R v Rayiti* 1984 (1) ZLR 269 (HC) it was stated that the word "house," as applied to the crime of housebreaking, is a term of art covering premises or structures that are not houses in ordinary parlance. The test whether a structure or premises can be broken into is whether it is such as is, or might ordinarily be used for human habitation, or for the housing or storage of property of some kind. There must, in addition, be some degree of permanence about the purpose for which the structure is used. Items such as caravans and camping tents, which are specifically designed and intended for human habitation would constitute "premises" even

though, by their very nature, they are more likely than not to stand empty and unused or to be folded up and not used for substantial periods.

Given the foregoing, it is as clear as day follows night that the mere opening of a sliding gate of a perimeter wall surrounding the yard of a dwelling premises and only entering that yard as what happened in *casu* can never legally found the crime of unlawful entry into premises as envisaged by s 131 of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*]. On the facts of the case, the competent charge should have been criminal trespass as defined in s 132 (1)(a) of that Act, whose maximum sentence of a custodial term is imprisonment for a period not exceeding six months, not the eight months that was meted out.

In the result, I am unable to confirm that the proceedings in this case are in accordance with true and substantial justice. I accordingly refuse my certificate. It is hoped that this judgment is brought to the urgent attention of the acting chief magistrate for circulation to all her magisterial stations to avoid recurrence of similar errors.