THE STATE
versus
FELIX PHIRI

HIGH COURT OF ZIMBABWE
CHIGUMBA & TAGU JJ
HARARE, 4 February 2015

Criminal Review

CHIGUMBA J: This matter was placed before me in chambers for review, in terms of s 57(1), as read with s 57(4) of the Magistrates Court Act [*Cap 7;10*], as read with s 29(1), and s 29(5) of the High Court Act [*Cap 7;06*]. The High Court is cloaked with powers to automatically review any and all matters in which a magistrate passes a sentence of twelve months imprisonment or more, and where the accused person was not legally represented, or a private limited company. In this case the sentence imposed was fourteen months, of which four months were suspended for 5 years on condition of good behavior, another four months was suspended on condition of restitution and a six month custodial sentence imposed. The grounds of review are set out in s 29 of the High Court Act. Although the process of conviction is in order, the framing of the charge warrants further scrutiny.

Magistrates should be alive to their duty to ensure that the charges brought against an accused person are proper and competent. Before charges are put to the accused, there is a duty on the presiding officer to cross check the efficacy of the charges, i.e.

(a) to check that the charges are spelt correctly and cited in full.
(b) to ensure that the charges are properly formulated as provided in terms of the CODE,
(c) to check that the facts as set out in the summary of the State case are sufficient to support the charge, not only in terms of particularity, but in terms of appropriateness.

The accused was charged with the crime of "unlawful entry" as defined in s 131

of the Criminal Law Codification and Reform Act", [*Cap 9; 23*], (the CODE). It was alleged that on 19 December 2014, at house number 300 Devonshire, Sakubva in Mutare, the accused person intentionally and without permission or authority from Kabhaso Yvonne, the lawful occupier of the premises concerned, or any other lawful authority, entered the premises and took some DVD's and cash amounting to USD$80-00. According to the outline of the state case, the accused unlawfully entered the complainant's premises and took complainant's tops, some DVD's and USD$80-00. When the accused was arrested a Vodafone cellular phone and DVD's were recovered. The total value of the stolen items was USD$200-00. The value of the recovered items was USD$100-00.

According to s 139 Of the Criminal Procedure and Evidence Act [*Cap 9; 07*], the CPEA:

> "Where a public prosecutor has, by virtue of his office, determined to prosecute any person in a magistrates court for any offence within the jurisdiction of that court, he shall forthwith lodge with the clerk of the court a statement in writing of the charge against that person, describing him by his forename, surname, place of abode and occupation and setting forth shortly and distinctly the nature of the offence and the time and place at which it was committed".

The question that arose before me was whether the statement lodged by the prosecutor in writing of the charge against the accused person in this case, set forth the "nature of the offence", distinctly as stipulated by s 139 of the CPEA. We are guided further, by s 146 of the CPEA which stipulates that, it is essential that the charge sets forth the offence with which the accused is charged with, in such a manner, and with such particulars as to the alleged time and place of committing the offence, that the person who is charged with committing the offence may be reasonably sufficiently informed of the nature of the charge. If the wording of the description of the offence matches the wording found in the enactment creating the offence, this shall be sufficient to reasonably inform the accused of the charge against him.[1]

The accused was charged with contravening s 131 (1) of the CODE, which provides that any person who intentionally and without permission from the lawful occupier of the premises, or other lawful authority, enters the premises shall be guilty of unlawful entry into premises and liable to:

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[1] Section 146(2)(a) CPEA

(a) A fine up to level thirteen or up to twice the value of the property stolen, destroyed or damaged as a result of the crime, or to imprisonment for a period up to fifteen years imprisonment, or both such fine and imprisonment if the crime was committed in one or more of the aggravating circumstances set out in subsection (2).

(b) In any other case, a fine up to level ten or not exceeding twice the value of the property stolen, destroyed or damaged or imprisonment for a period up to ten years.

It is my view that, for every case in which an accused person is charged with the crime of unlawful entry into premises, it is necessary to determine, from the facts set out in the outline of the state case, whether the crime was committed in aggravating circumstances. Failure to consider whether there were any aggravating circumstances, has the same effect as failing to consider any mitigatory factors in passing sentence, or whether special circumstances exist. The Legislature very graciously assisted us by proceeding to define aggravatory circumstances in s 131(2), as follows:

> "(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 there 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 outline of the State case clearly tells us that the accused person entered a dwelling house with intent to steal and that he did steal various items valued at USD$200-00. It is my view that the accused ought to have been properly charged with the offence of contravening s 131 (1) as read with s 131 (2) (a) and s 131 (2) (e), "unlawful entry into premises with intent to enter a dwelling house and commit the crime of theft".

An alternative couching of the charge would be "unlawful" entry into premises in aggravatory circumstances, where the prosecutor is unsure whether technically the accused gained entry or if, after gaining entry, any crime was committed inside the dwelling. It is important to note that not all premises are "dwellings". For example company offices, or a clinic, or a school may well qualify to be regarded as premises, but they are not "dwellings".

The intention of the legislature was to punish more severely an accused person who enters a place where people reside. It is a violation of the sanctity and privacy of one's home that is cherished in a civilized society. So, it is considered aggravatory simply to enter into a place where people live without invitation or authority. It is even more aggravatory to enter into a place where people live, with intent to commit some other crime.

The High Court has had occasion in the past to guide magistrates on the question of framing of the charges in circumstances similar to this case under consideration. In *S* v *Trymore Zhakata*[2] it was said that the crime of unlawful entry into premises is a statutory offence which repeals and replaces the common law crime of burglary or housebreaking with intent to steal, but with certain additional features. By virtue of para (a) of subs (1), as read with para(s) (a) to (e) of subs (2), the offence is aggravated by any of the circumstances set out in subs (2). In *S* v *Chirinda & Ors*[3] 131(1) (a) the court said that this offence does not create a combined offence of unlawful entry and theft. What it does is to aggravate the offence of unlawful entry, by prescribing a more severe penalty therefore, in the event of any one or more of the circumstances enumerated in subs (2) being established.

I wish to add my voice to that of other judges before me, who respectfully disagree with the position that the elements of theft or other aggravating circumstance need not be stated in the charge and can merely be mentioned in the State outline or agreed facts or in the prosecutor's address in aggravation. It is my view that, it is necessary for the state to prove or otherwise establish the relevant aggravating factor if it is to sustain a charge under s 131(1) as read with s 13 (2) (a) (e). The example has already been alluded to above that there is a difference between "mere unlawful entry into premises" and "unlawful entry into a dwelling". It would be necessary for the state to prove whether the accused entered into any other premises, or a dwelling. Where an accused enters into a dwelling that is a further aggravatory circumstance, as distinguished from entering any other premises such as a clinic. In some circumstances, unlawful entry into a church, for example might provide greater aggravation, depending on what the accused is alleged to have done on gaining entry into the church. Perhaps he might be alleged to have desecrated some holy relics held dear by the followers of that church, to such an extent

[2] HH 13 -2013

[3] HH 87-2009

that a severe sentence might be called for as a deterrent to other would be offenders. For these reasons in my view, it is necessary that the particulars of the alleged aggravatory features be specifically pleaded and proved, by the state, as part and parcel of the essential elements of the offence. Addressing the court on alleged agravatory factors from the bar is not the same as being required to prove, beyond a reasonable doubt, the essential elements of an offence, that the accused did indeed enter unlawfully onto premises in one or more aggravatory circumstances. If the aggravatory circumstances are not proved beyond a reasonable doubt, as part of the essential elements of the offence, how can a court rely on bald allegations by the prosecution from the bar? The allegations will constitute facts which must be proved not matters of law.

It follows that where the state fails to prove the essential elements of the unlawful entry or any of the aggravatory circumstances, the fact of aggravation cannot be taken into account for the purposes of assessing and imposing the more severe sentence stipulated by that provision (or for ordering restitution). Once this is accepted, it seems to me unavoidable that the aggravating factor or circumstance be specifically pleaded and spelt out in any charge under s 131 (1) as read with s 131 (2) (a) (e). Where the state fails to prove any of the aggravatory circumstances the accused can be convicted of simple unlawful entry. A criminal indictment must clearly set out all the particulars of the charge so that the accused fully grasps the basis of the charge so as to enable him to prepare his defence. If the charge does not particularize the alleged aggravating circumstances, the accused would obviously be prejudiced in the preparation and presentation of his defence.

In the case of *S* v *Simon Ngulube* [4] it was emphasised that the sentencing court, in deciding upon the appropriate punishment, must strive to find a punishment which will fit both the crime and the offender. The sentence must be fair and just instead of excessive, savage and draconian – see '*A Guide to Sentencing in Zimbabwe'* by G. Feltoe at p 1. The punishment must fit the criminal as well as the crime, be fair to the State and to the accused and be blended with a measure of mercy – see *Sparks and Another* 1972 (3) SA 396 A. In light of those sentencing principles, it was said to be essential that magistrates should equip themselves with sufficient information in any particular case to enable them to assess sentence humanely and meaningfully, and to reach a decision based on fairness and proportion. The needs of the individual and the

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[4] HH48-02

interests of society should be balanced with care and understanding' - see *S* v *Moyo* HH 63-84. It was also said that:

> "… pre-sentencing information is very important. Whilst the age, marital and family status, employment, savings and assets are important aspects in the assessment of sentence, magistrates should always bear in mind that the reason why the accused committed the offence and the circumstances of the offence is of equal importance. In some cases the reason is evident from the facts of the case. In other cases it is not. In such cases the magistrates must canvass these aspects with an unrepresented accused. Generally all the mitigatory and aggravating factors must be canvassed…"

The record does not show that the magistrate was aware of the need to canvass aggravatory circumstances as part of the essential elements of the offence, or even as part of the sentencing procedure. The conviction stands because the trial court satisfied itself that the essential elements of unlawful entry into premises were proved beyond a reasonable doubt, and meted out an appropriate sentence. For an appropriate example of how to correctly couch the charge, see page 4-5 of *S* v *Trymore Zhakata supra*. Similarly in this case, the charge is amended to read as follows: Contravening s 131 (1) as read with s 131 (2) (a) and 131(2) (e), i.e. Unlawful Entry into premises in aggravatory circumstances, in entering into a dwelling house with intent to enter into a dwelling house and with intent to steal, and to commit the offence of theft. The conviction was proper so we will not interfere with it. With the amendment of the charge, we accordingly certify that the proceedings are now in accordance with real and substantial justice.

CHIGUMBA J: ……………………

TAGU J: agrees…………………….