

THE STATE
versus
STANDRECH CHIRINDA
and
MUKETIWA MUNEMO
and
LANGTON MUROZVI
and
PETER GUNURA CHASARA

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE. 29 July 2009

Criminal Review

UCHENA J: The convicted persons were tried and convicted by three different magistrates sitting at three different magisterial stations. Their cases landed on my desk for review, in the same bundle of review records. A common mistake occurred in each case. Each magistrate construed s 131 (1) (a) of the Criminal Law Codification and Reform Act [*Cap* 9:23], which I will call the Code, as if it creates an offence of unlawful entry and theft. It therefore became convenient to deal with the issues arising in each case in one review judgment.

The convicted persons in cases (1) and (2) were tried and convicted separately by the same provincial magistrate sitting at Chivhu Magistrate's Court. They were both charged for contravening s 131 (1) (a) of the Code.

The convicted person in case (1) was charged as follows:

“Charged with the crime of unlawful entry and theft as defined in s 131 of the Criminal Law (Codification and Reform) Act [*Cap* 9:23].

In that on 23 May 2009 at Gwena village, Headman Chandiwana, Chief Neshangwe, Unyetu, Masasa Standreck Chirinda unlawfully entered into the house of Noget Chirinda without authority or any other authority from Noget Chirinda and took 2 x 2 litres cooking oil, five green bars washing soap, seven counter books, eleven Eversharp ball points, five kilograms salt, five kilograms baulgar, two cartons matches, two

kilograms flour, 2 kilograms sugar and five hundred grams vaseline with the intention of permanently depriving Noget Chirinda of her property”.

He was convicted on his own plea of guilty. The facts on which the charge is premised are that the accused entered the house of Noget Chirinda by forcing the key to open. He then stole property mentioned in the charge. The convicted person confirmed that he agreed with the facts. The elements of unlawful entry and theft of property were put to the accused person, who admitted that he entered the house without the owner’s authority and stole the complainant’s property intending to deprive the complainant permanently. The stolen property is valued at US\$140-00, and property valued at US\$15-00 was recovered. He was sentenced to four years imprisonment of which one year was suspended for five years on conditions of good behaviour. The issue is on whether s 131 (1) (a) creates the crime of unlawful entry and theft.

The convicted person in case (2) is a seventeen year old who, was charged with two counts of unlawful entry and theft. He was charged as follows:

Count One

“Charged with the crime of unlawful entry and theft as defined in s 131 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*].

In that on 3 June 2009 at house number F4 Chivhu location, Chivhu, Muketiwa Munemo unlawfully entered the house of Joseph Tangwanda without authority or any other authority from Joseph Tangwanda and took two jackets, fifteen plates, one pair white tekkies and cash US\$ 8-00 with the intention of permanently depriving Joseph Tangwanda of his property”.

Count Two

“Charged with the crime of unlawful entry and theft as defined in s 131 of the Criminal Law (Codification and Reform Act) [*Cap 9:23*].

In that on 3 June 2009 at house number F4 Chivhu location Chivhu Muketiwa Munemo unlawfully entered the house of Farisai Mvumba without authority or any other authority from Farisai Mvumba and took three trousers, three shirts, one pair brown shoes, and one aluminum, pot with the intention of permanently depriving Farisai Mvumba of her property.”

The facts are that in count one he displaced a plank in order to gain entry. While inside he stole the property mentioned in the charge valued at US\$50-00 of which property valued at US\$15-00 was recovered. He tendered a limited plea admitting that he stole fewer items than

had been alleged by the State. The State accepted his limited plea without ascertaining the value of the stolen property.

In count two he opened a closed window to gain entry into the complainant's house. He stole the property mentioned in the charge valued at US\$40-00 of which property valued at US\$15-00 was recovered. The issue is on whether s 131 (1) (a) enacts the crime of unlawful entry and theft.

The convicted person in case (3) was tried and convicted by a magistrate sitting at Murambinda Magistrate's Court. He pleaded guilty to a charge of contravening s 131 (1) of the Code. The charge sheet was framed as follows:

“Charged with the offence of contravening s 131 of the Criminal Law Codification and Reform Act [*Cap 9: 23*]; unlawful entry and theft.

In that on 5 February 2009 and at Jefnos Vengesai's homestead Chipwanyira village Headman Neshava, Chief Nyashanu, Langton Murozvi unlawfully and intentionally entered the house of Jefnos Vengesai without his or any other lawful authority and stole one by eight pane window frame, one green blanket, one plough wheel, three dinner plates, six by five m deformed iron bars the property of Jefnos Vengesai in his lawful custody”.

The convicted person removed a portion of the complainant's thatched roof in order to gain entry. He admitted entering the premises without lawful authority and stealing the items mentioned in the charge.

The convicted person in case (4) appeared before a provincial magistrate sitting at Nyanga and pleaded guilty to a charge of contravening s 131 (1) of the code.

He was charged with the contravention of s 131 (1), and in the alternative, the contravention of s 113 of the code. In the main charge which is the relevant charge in this judgment he was charged as follows:

“Charged with unlawful entry into premises as defined in s 131 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*].

In that on the date to the prosecutor (sic) but during the month of September 2008 and at Mapani Store, Mapani Business Centre, Nyanga Peter Gunura intentionally and without permission of the lawful occupier Naume Kupeta entered into the shop.”

The alternative charge which I need not reproduce in this judgment alleged that the convicted person stole from the complainant's store and gave particulars of the stolen property. The magistrate correctly canvassed the elements of unlawful entry. After dealing with the aspects of intention and unlawful entry he canvassed the theft aspect as follows:

“Q: Do you admit that after gaining entry you took complainant's property listed in the charge sheet?

A: Yes”

The magistrate then asked the convicted person if he had any defence to offer, to which he answered “No”. The convicted person was then convicted as pleaded. The prosecutor withdrew the alternative charge after plea. The magistrate then acquitted him on the alternative charge.

The issues which arise are:

- 1) Should the theft have been treated as an alternative charge?
- 2) Should the magistrate have canvassed the elements of the contravention of s 113 (1) of the Code, under the charge for the contravention of s 131 (1) of the Code?
- 3) Was the prosecutor correct in withdrawing the alternative charge?
- 4) Was the magistrate correct in acquitting the accused on the alternative charge?

The first issue can be answered in the affirmative and the second in the negative. In terms of s 131 (1) (a) of the code the fact that a convicted person stole from the premises he will have entered unlawfully will be used as an aggravating factor in assessing the appropriate punishment. Once the sentence for unlawful entry takes into consideration the value of the stolen property there will be little or no hope of the convicted person being sentenced to a stiffer sentence for the unlawful entry and theft charges. It is therefore competent to charge the accused with theft as an alternative to the charge of unlawful entry but not because the crime of unlawful entry includes theft. It is because that crime is aggravated by theft. The value of the stolen property is essential in assessing the appropriate sentence. The convicted person did not therefore suffer any prejudice because of the canvassing of the theft elements at the time the magistrate was canvassing the elements of unlawful entry. It must however be stressed that

the fact that the accused stole from the premises must be properly dealt with in aggravation to avoid the misconception that the crime committed is that of unlawful entry and theft.

As the contravention of s 131 (1) (a) considers the stealing of property from the premises and uses the value of the stolen property to determine the appropriate sentence, the prosecutor was entitled to withdraw the alternative charge of theft as the accused was not likely to receive a different sentence on being convicted of both the unlawful entry and theft charges. Once the prosecutor is entitled to withdraw the charge the magistrate is equally entitled to acquit the accused person when the charge is withdrawn after plea.

The magistrate seems from the way he canvassed the elements of unlawful entry to have construed s 131 (1) of the code to create a combined offence of unlawful entry and theft. This however did not, cause, a miscarriage of justice as the convicted person was from his admission of the facts for both counts aware of what was being alleged he stole from the complaint's store.

The questions arising in case (4) slightly distinguish it from cases (1) to (3) but the real issue is on the correct interpretation of s 131 (1) (a) of the code by the three different magistrates. They all construed it as if it combines the offences of unlawful entry and theft. The common issue is therefore whether or not s 131 (1) (a) of the code creates an offence of unlawful entry and theft.

The facts of each case are akin to those of the offence which prior to the codification of our criminal law was known as housebreaking with intent to steal and theft. The charges in cases (1) to (3) allege that the convicted persons were being charged with the crime of unlawful entry and theft. The framing of the unlawful entry charge in case (4) though close to how a charge for unlawful entry should be framed leaves out other important averments. The magistrate however canvassed the elements for the contravention of s 131 (1) (a) of the code as if he was dealing with the crime of unlawful entry and theft.

I sought the Attorney General's comments on the interpretation of s 131 (1) (a) of the code, and the framing of charges for the contravention of that section. He in response commented as follows:

“Section 131 (1) (a) of the Code creates the offence of unlawful entry into premises. The crime is completed once the unlawful entry into premises is effected regardless of

the fact that no other crime has been committed in the premises. It follows therefore that the charge should be framed within that context.

To be specific the charge should read as follows:

Charged with unlawful entry into premises as defined in s 131 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*].

In that on the and at ... A unlawfully, intentionally and without permission or authority from B, the lawful occupier of the premises concerned, or without other lawful authority, entered B's premises by climbing into those premises through an open window.

If however the Crime is committed clearly in contravention of s 131 (2) of the code then the charge should be cited as follows:

Charged with unlawful entry into premises as defined in s 131 (1) (a) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] and read with s 131(2) (a-e), (whichever is applicable) of the said Act.

I agree indeed that unlawful entry into premises is aggravated in circumstances provided under s 131 (2) of the code.

With reference to the four review records above, it is apparent that:

- i) The charge sheets were wrongly framed as they combined the crime of unlawful entry and that of theft yet they should only reflect unlawful entry.
- ii) The theft perpetrated by the four accused persons after the unlawful entry should have been reflected in the State outlines only. The relevant trial magistrates should then have factored in those aspects of theft as aggravating in considering relevant sentences.

Also note that under s 131 of the code one cannot be charged for any other separate crime apart from unlawful entry, as that would amount to a double jeopardy. Suffice to say that the crime committed after the unlawful entry should only be reflected in the State outline and not in the charge sheet”.

I agree with the Attorney General's interpretation of s 131 (1) (a) of the Code and his comments on the framing of charges for the contravention of that section. I would however add that the crime of unlawful entry is also aggravated if it is committed in circumstances described in s 131 (1) (a) of the Code.

The charge sheets in cases 1 to 3 apart from the personal details of the accused persons, the complainants, and the presence or absence of the details of the stolen property though not

correctly framed followed the wording of s 131 (1) and 113 (1) of the Code. Section 131 (1) (a), (b) and (2) provides as follows:

- “(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 subs (2); 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 para (a) of subs (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”.

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:

- a) an intentional entry into premises; and
- b) without the authority of the lawful occupier or other lawful authority.

The crime is simply that of unlawful entry without authority, and is punishable at two levels depending on whether or not it is aggravated by theft, damage or destruction of property, or the circumstances mentioned in subs (2). The State in framing the charge must distinguish between unlawful entry during which the accused person steals the complainant’s property, or destroys or damages property, or the entry is aggravated by circumstances

mentioned in subs (2), and a simple unlawful entry. The former is charged under s 131(1) (a) while the later is charged under s 131 (1) (b). The distinction is relevant when the court considers the appropriate sentence. If it is aggravated the punishment is a fine not exceeding level thirteen or not exceeding twice the value of any property stolen, destroyed or damaged, which ever is the greater, or imprisonment for a period not exceeding fifteen years, or both. If the unlawful entry is a simple entry not accompanied by a theft, destruction or damage, and is not aggravated by the circumstances mentioned in subs (2) the fine should not exceed level ten or twice the value of any property destroyed or damaged by the person as a result of the crime which ever is the greater, or imprisonment not exceeding ten years or both. The punishment at the lower level is determined by the extent of damage or destruction which resulted from the unlawful entry. This means an unlawful entry which is not aggravated, and causes no damage or destruction receives the least punishment. The punishment increases depending on whether or not the convicted person's crime is aggravated by theft, destruction or damage to property or the aggravating circumstances mentioned in subs (2) of s 131 of the Code.

The crime of theft is enacted by s 113 (1) of the Code, which provides as follows:

“(1) Any person who takes property capable of being stolen –

- (a) knowing that another person is entitled to own, possess or control the property or realizing that there is a real risk or possibility that another person may be so entitled; and
 - (b) intending to deprive the other person permanently of his or her ownership, possession or other person of his or her ownership, possession or control, or realizing that there is a real risk or possibility that he or she may so deprive the other person of his or her ownership, possession or control;
- shall be guilty of the theft and liable to either or both of the following”.

A person charged with the contravention of s 131 (1) (a) can only be convicted of unlawful entry. He can not be convicted of unlawful entry and theft even if the facts establish that he stole from the premises he unlawfully entered. An accused person who steals from the premises he unlawfully enters must be charged with the contravention of s 131 (1) (a) of the Code for unlawful entry. He can also be charged for contravening s 113 (1) of the Code for stealing from those premises if the State hopes the court may impose a stiffer sentence if the accused is charged with both offences. I am however of the view that once the details of the

theft have been used as an aggravating factor for the unlawful entry charge, they can not again be used to punish the convicted person on a theft charge, as that would amount to punishing the convicted person twice for the theft which will have been taken into account in sentencing him for unlawful entry.

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.

The value of the stolen property becomes a standard for the sentence to be imposed, and justifies a stiffer sentence of imprisonment if a fine is not an appropriate sentence. A reading of s 131 (2)(a) confirms that the various forms of unlawful entry are aggravated, by the various factors there mentioned while the offence created and for which punishment is provided is unlawful entry and nothing else.

I am therefore satisfied that the convicted persons in cases (1) to (3) were improperly convicted of theft on charges which did not charge them with the contravention of s 113 of the Code. Even if, reference to theft, is made in the charge and agreed facts the accused persons, can not be charged of a combined crime of unlawful entry and theft as that crime does not exist. They should for each entry and theft have been charged with unlawful entry as defined by s 131 (1)(a) of the Code.

The convicted persons' convictions for contravening s 131 (1) can not be vitiated by the inclusion of the particulars and elements of theft, as the elements of unlawful entry were properly canvassed and admitted by the convicted persons. The charges should however be amended so that they comply with the provisions of s 131 (1) of the Code. The charges are amended as follows.

Case One

Charged with the crime of unlawful entry into premises as defined in s 131 (1) (a) of the Criminal Law Codification and Reform Act [*Cap 9:23*].

In that on 23 May 2009 at Gwena Village, Headman Chandiwana, Chief Neshangwe, Unyetu, Masasa Standreck Chirinda unlawfully, intentionally and without permission or authority from Noget Chirinda the lawful occupier of the premises concerned or without other lawful authority entered Noget Chirinda's house by forcing the key to open.

Case Two

Count One

Charged with unlawful entry into premises as defined in s 131 (1) (a) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*].

In that on 3 June 2009 at house number F4 Chivhu location, Chivhu, Muketiwa Munemo unlawfully, intentionally and without permission or authority from Joseph Tangwanda, the lawful occupier of the premises concerned, or without other lawful authority, entered Joseph Tangwanda's premises by removing a plank to gain entry.

Count Two

Charged with unlawful entry into premises as defined in s 131 (1) (a) of the Criminal Law Codification and Reform) Act [*Cap 9:23*].

In that on 3 June 2009 at house number F4 Chivhu location Chivhu Muketiwa Munemo unlawfully, intentionally and without permission or authority from Farisai Mvumba, the lawful occupier of the premises concerned, or without other lawful authority, entered Farisai Mvumba's premises by opening a closed window to gain entry.

Case Three

In that on 5 February 2009 and at Jefinos Vengesai's homestead Chipwanyira village Headman Neshava, Chief Nyashanu, Langton Murozvi unlawfully, intentionally and without permission or authority from Jefnos Vengesai, the lawful occupier of the premises concerned, or without other lawful authority, entered Jefnos Vengesai's premises by removing a portion of the thatched roof to gain entry.

The charge sheet in case four must also be amended to make it comply with the correct framing of charges for the contravention of s 131 (1) (a) of the Code.

Case Four

Charged with unlawful entry into premises as defined in s 131 (1) (a) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*].

In that on the date to the prosecutor unknown but during the month of September 2008 and at Mapani Store Mapani Business Centre, Nyanga Peter Gunura, intentionally and without permission or authority from Naume Kupeta, the lawful occupier of the premises concerned, or without other lawful authority, entered Naume Kupeta's shop, by breaking a window to gain entry.

I must now proceed to assess the appropriateness of the sentences imposed in cases (1) to (3) because those sentences were imposed under the mistaken belief that the convicted persons had been convicted of unlawful entry and theft. This means, the sentences, took in consideration, convictions for theft for which the convicted persons had not been charged. In case four the canvassing of theft elements under unlawful entry means the magistrate took into consideration the conviction for unlawful entry and theft even though the theft charge had been withdrawn. The sentence for an unlawful entry which is accompanied by theft of property from the premises can in most cases be the same as that which can be imposed if the convicted person is convicted of unlawful entry as defined in s 131 (1) and theft as defined in s 113 (1) of the Code.

The fact that s 131 (1) (a), provides that the value of the stolen property determines the fine, if double the value of the stolen property is greater than the fine imposable under level thirteen means if the convicted person is convicted of both unlawful entry and theft his punishment would be the same or almost the same as that for unlawful entry as defined in s 131 (1) (a). It is in my view clear that the legislature in enacting s 131 (1) (a) did not intend to create the former offence of house breaking with intent to steal and theft, but that of an aggravated unlawful entry. It is therefore important to note that a convicted person can be sentenced using the value of the stolen property without first being convicted of theft as defined in s 113 (1) of the Code. All that is required in terms of s 131(1) (a) is for him to admit it as an aggravating factor, the most important factor being his admission of the value of the

property. It is therefore in my view possible to consider the appropriate sentences in these cases even though the convicted persons' convictions under s 131 (1) (a) purported to be convictions for unlawful entry and theft. The amendment of the charges to confine them to the crime of unlawful entry does not affect the sentences imposed by the magistrates unless the sentences were not appropriate for other reasons.

This conclusion means the magistrate and prosecutor in case four were within their rights when they treated the theft charge as an alternative and withdrew it after securing a conviction for unlawful entry. This is so because the punishment for theft is taken into consideration under s 131 (1) (a).

The sentence imposed in each case must therefore be reviewed to assess its appropriateness. If it is appropriate it will be confirmed, if not it will be set aside and be substituted by an appropriate sentence.

The convicted person in case one is a first offender who pleaded guilty to contravening s 131 (1). He is twenty seven years old. The magistrate took into consideration the fact that he is a first offender who pleaded guilty. The value stolen during the unlawful entry is US\$140-00 of which property valued at US\$15-00 was recovered. The accused therefore benefited to the amount of US\$125-00. He was sentenced to four years imprisonment of which one year was suspended on conditions of good behaviour. The magistrate said a fine or community service would trivialize this otherwise serious offence. The legislature provided for a fine not exceeding level thirteen or a fine not exceeding double the value of the property stolen during the unlawful entry or imprisonment for a period not exceeding fifteen years. In this case the convicted person merely forced a key open. His manner of breaking into the premises was not out of the ordinary to deserve four years imprisonment. In my view the sentence imposed on this first offender, who, should ordinarily, be kept out of prison is so severe as to warrant the interference of this court. The legislature provided for a fine not exceeding level thirteen as the starting point and fifteen years imprisonment for the worst offence. It was therefore aware of the seriousness of the crime of unlawful entry but gave the courts a very wide discretion in considering the appropriate sentence. This must be because unlawful entry can be for various purposes and can cause damage and destruction of property. The facts of each case must therefore be carefully considered in arriving at an appropriate sentence. The courts must sentence accused persons in accordance with the statutes which created the offence. In this

case the only damage the accused person may have caused could be to the key he forced open. The offence is further aggravated by his entering a dwelling house during the night. See s 131 (2) (a). In my view while a fine may have the effect of trivializing the offence there are other sentencing options which would suit this offence and the offender without having to send him to prison for a long time. The ill gotten gains can be disgorged against a suspended term of imprisonment. His future conduct can be guided by a suspended term of imprisonment. The sentence of four years imprisonment is too severe and cannot be allowed to stand. A sentence in the region of two years would be appropriate. The sentence imposed by the magistrate is set aside and is substituted by the following:

“Two years imprisonment of which one year is suspended for five years on condition the convicted person does not during that period commit any offence involving unlawful entry for which he will be imprisoned without the option of a fine. A further eight months imprisonment is suspended on condition the convicted person restitutes the complainant in the sum of US\$125-00 by 30 October 2009 through the clerk of court Chivhu Magistrate’s court.”

The convicted person in case two was sentenced to thirty six months imprisonment of which twelve months were suspended on conditions of good behaviour. Both counts were treated as one for sentence. He is a seventeen year old first offender who pleaded guilty. He on 3 June 2009 unlawfully entered two premises without the owner’s consent. The fact that he unlawfully entered two premises on the same day portrays him as a persistent offender who has to be dealt with firmly even though he is a juvenile first offender. He has clearly started from the deep end. He has to be dissuaded from the life of crime by an effective sentence. He in count one stole property whose value was not established when the State accepted his limited plea that he had only stolen the property he stated. In the absence of proof of the value stolen and the fact that property worth US\$15-00 was recovered out of the original total value of US\$50-00 the value not recovered can be deemed to be negligible. He therefore did not benefit from the crime he committed in count one. In count two he stole property worthy US\$40-00 of which property worth US\$15-00 was recovered. He gained US\$25-00. Crime should not benefit the offender, so the ill gotten gains should have been disgorged. The convicted person is however a juvenile whose parents are deceased. He stays with a friend. He should have been sentenced to corporal punishment in terms of s 353 of the Criminal Procedure and Evidence Act [*Cap 9:07*] plus a suspended sentence instead of the long term of

imprisonment imposed by the magistrate. The magistrate therefore misdirected himself by failing to consider corporal punishment. In view of his having started at the deep end a suspended prison term is called for, but should be suspended on conditions of good behaviour and restitution.

The convicted person is in the business of buying and selling, raising an income of 400 rands per month. He has assets valued at 1500 rands. He is therefore able to pay restitution to the complainant in count two. Courts should where ever possible enhance justice by ordering restitution to the complainant. Restitution disgorges the offender of the ill gotten gains and sends a message that crime does not pay. It affords the complainant a cheaper way of recovering the value of the stolen property. The convicted person will serve a shorter sentence and society will sustain him in prison for a shorter period. The convicted person was sentenced on 12 June 2009. He has therefore spent more than a month and half in prison. It is in my view no longer necessary to subject him to corporal punishment when he has already felt the sting of imprisonment. The period he has served should be equated to the corporal punishment which should have been imposed. He is therefore entitled to his immediate release from prison. The sentence imposed by the magistrate will be set aside and be substituted by a prison term suspended on condition of good behaviour and restitution. The sentence imposed by the magistrate is set aside and is substituted by the following:

Both counts being treated as one for sentence

Fourteen months imprisonment of which ten months is suspended for five years on condition the accused does not during that period commit any offence involving unlawful entry for which he will be imprisoned without the option of a fine. A further two months is suspended on condition the convicted person pays restitution to the second complainant in the sum of US\$25-00 by 30 October 2009 through the Clerk of Court Chivhu Magistrates' Court.

As the convicted person has already served for more than one and half months, he is entitled to his immediate release from prison.

The convicted person in case three was sentenced to fifteen months of which eight months were suspended on conditions of good behaviour. The sentence is within the magistrate's discretion. The proceedings in that case, will after the amendment of the charge sheet be allowed to stand.

The convicted person in case four stole property valued at US\$225-00 of which property valued at US\$37-00 was recovered. He stole a considerable amount of property, most of which was not recovered. The magistrate took all the factors into consideration and sentenced him to thirty months imprisonment of which eight months was suspended on conditions of good behaviour and a further ten months on condition the convicted person paid restitution to the complainant. The sentence took into consideration the accused's future conduct, restitution, and his moral blameworthiness. The sentence is therefore within the magistrate's discretion and appropriate.

UCHENA J:

BHUNU J: agrees,