

THE STATE
versus
TRYMORE ZHAKATA

HIGH COURT OF ZIMBABWE
PATEL & HUNGWE JJ
HARARE, 25 January 2013

Criminal Review

PATEL J: The accused in this matter was convicted on his plea of guilty to a charge of unlawful entry in aggravating circumstances as defined in section 131(2)(e) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. Although the process of conviction is otherwise in order, the framing of the charge warrants further scrutiny.

The accused is 34 years old and is married with two children. He is unemployed and has no savings or assets of any value. He is not a first offender, having been previously convicted for armed robbery in February 2011 under CRB No. MW153/11. His offence *in casu* involved breaking into the complainant's house and stealing various items of electrical equipment, a firearm with ammunition and other household goods. The value of the property stolen was US\$1,800 and the amount recovered was US\$1,250.

In sentencing the accused, the trial magistrate took into account his admitted theft of property and found that this, coupled with the previous conviction for armed robbery, aggravated the offence in this case. He then sentenced the accused to a term of 6 years imprisonment and suspended 1 year on condition of restitution, leaving an effective custodial sentence of 5 years. The 8 years previously suspended in CRB No. MW153/11 was further suspended for the next 5 years. The effective sentence of 5 years was to run concurrently with the sentence in CRB No. MW153/11.

On initial review, a query was raised through the Registrar. It was noted that the accused was charged and convicted of unlawful entry in aggravating circumstances. The charge avers unlawful entry but is silent on the theft of property within the premises in question. The trial magistrate was directed to explain why this omission was not corrected.

In his response, the trial magistrate states that in his understanding of the charge “what should be established are the essential elements of unlawful entry. The issue of theft can only arise as an aggravating circumstance in the commission of the offence. Furthermore, theft may nonetheless be taken into account in assessing sentence only”. In support of these propositions, the learned magistrate relies upon the decision of UCHENA J (with BHUNU J concurring) in *The State v Chirinda & Others* HH 87-2009.

Section 131 of the Criminal Law (Codification and Reform) Act [Cap 9:23] 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 subsection (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 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.”

A plain reading of section 131(1) makes it clear that it enacts the crime of unlawful entry, the essential elements of which are intentional entry without permission or authority. This statutory offence repeals and replaces the common law crime of burglary or housebreaking with intent to steal, but with certain additional features. By virtue of paragraph (a) of subsection (1), as read with paragraphs (a) to (e) of subsection (2), the offence is aggravated by any of the circumstances set out in subsection (2). As was made abundantly clear in *Chirinda’s* case (*supra*), section

131(1)(a) 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 therefor, in the event of any one or more of the circumstances enumerated in subsection (2) being established.

To this extent, I am in total agreement with the very detailed views expressed by UCHENA J in *Chirinda's* case. However, I must 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. I note that this position accords with the comments elicited from the Attorney-General on the interpretation of section 131.

In my view, it is necessary for the State to prove or otherwise establish the relevant aggravating factor if it is to sustain a charge under section 131(1)(a). If it fails to do so, that factor cannot be taken into account for the purposes of assessing and imposing the more severe sentence stipulated by that provision (or for ordering restitution as was done in the case under review). 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 s131(1)(a). It cannot simply be left to be dealt with at some later stage in the proceedings. In the event that the State fails to prove or otherwise establish the aggravating circumstance stated in the charge, this will not be fatal to the conviction of the accused on the primary charge. It would still be possible to properly convict him of unlawful entry *simpliciter* under section 131(1)(b).

It is axiomatic that 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 allude to the alleged aggravating circumstance, the accused would obviously be prejudiced in the preparation and presentation of his defence. For instance, the crime of robbery under section 126 of the Criminal Law Code attracts a considerably more severe punishment if the crime is committed in aggravating circumstances, such as possession of a firearm or dangerous weapon or the infliction of serious bodily injury. In any such case, it cannot be doubted that the State must both charge the particular aggravating factor alleged and prove it in order to invoke the more severe penalty prescribed. In my view, the same principle must apply to all crimes that provide for increased sentences when those crimes are committed in aggravating circumstances.

This is clearly recognised in subsections (1) and (2) of section 146 of the Criminal Procedure and Evidence Act [*Cap 9:07*] which delineate the essentials of an indictment or charge as follows:

“(1) Subject to this Act and except as otherwise provided in any other enactment, each count of the indictment, summons or charge shall set forth the offence with which the accused is charged in such manner, and with such particulars as to the alleged time and place of committing the offence and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.

(2) Subject to this Act and except as otherwise provided in any other enactment, the following provisions shall apply to criminal proceedings in any court, that is to say –

(a) the description of any offence in the words of any enactment creating the offence, or in similar words, shall be sufficient; and

(b) any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the enactment creating the offence, may be proved by the accused, but need not be specified or negated in the indictment, summons or charge, and, if so specified or negated, no proof in relation to the matter so specified or negated shall be required on the part of the prosecution.” [my emphasis]

Before turning to the specific charge *in casu*, I should add that the structure and wording of section 131, taken as a whole, leaves much to be desired, particularly in the infelicitous marriage of subsections (1) and (2). It is therefore not surprising that the provision has generated substantial confusion and contradiction in the framing of charges and the conduct of criminal proceedings thereunder. I would therefore strongly recommend that the Minister of Justice and the Attorney-General take steps to reconsider and redraft section 131 in its entirety.

In light of the views expressed herein, it is necessary to amend the charge under which the accused in this matter was convicted and sentenced. It is accordingly amended to read as follows:

“Charged with unlawful entry into premises as defined in section 131(1)(a) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] as read with section 131(2)(e) of the said Act

In that on 16 October 2009 and at No. 1657 Glen Norah A, Harare, Trymore Netsai Zhakata unlawfully, intentionally and without permission or authority from Watson Goredema, the lawful occupier of the premises concerned, or without other lawful authority, entered the said premises by means of forcibly opening the main entrance door to gain entry; and that, whilst inside the said premises, Trymore Netsai Zhakata took the property

listed in the State outline, knowing or realising that Watson Goredema was or may be entitled to own, possess or control the property, and intending to deprive Watson Goredema permanently of his ownership, possession or control of the property or realising that he may be so deprived thereof.”

With the charge being amended as above, the conviction of the accused and the sentence imposed upon him are hereby confirmed as being in accordance with real and substantial justice.

HUNGWE J: I concur.