THE STATE
versus
MARVELLOUS CHIRAURO

HIGH COURT OF ZIMBABWE
MUNGWARI J
HARARE, 20 July 2022

Criminal Review

MUNGWARI J: This record of proceedings was placed before me on automatic review in terms of s 57 of the Magistrates Court Act [*Chapter 7:10*]. The accused was charged with and convicted of four counts of unlawful entry into premises. The circumstances were that he had on 27 February 2022 at Murehwa Mission, broken and entered into a dormitory which housed four school girls. Whilst inside he had proceeded to steal four satchels, a juice bottle, a mathematical set and a calculator all valued at **ZW$10 200** belonging to each of the school girls namely Yeukai, Bliss, Tanatswa and Rutendo. He made good his escape and hid his loot at a certain property in a location called new Magamba Stands in Murehwa.

The four girls later discovered the theft and reported it to police. On the 28 February two police officers received a tipoff that accused was in possession of the stolen items. Investigations led to the recovery of all the property and the arrest of accused. He was subsequently charged with four counts of unlawful entry into premises as defined in section 131(1) ARW 2(e) of the Criminal Law (Codification and Reform) Act [*Chapter* 9:23]. He was convicted on his own pleas of guilty by a provincial magistrate sitting at Murehwa. He was subsequently sentenced to a globular sentence which read as follows:

> "**All 4 counts as 1 for sentence:** 20 months imp of which 8 months imprisonment are suspended for 5 years on condition accused does not within that period commit any offence involving unlawful entry and or theft and for which accused is sentenced to imprisonment without the option of a fine. The remaining 12 months are suspended on condition accused completes 420hrs of community service…."

The issue which exercised my mind was whether there had not been an improper splitting of charges. Did charging the accused with four counts of unlawful entry in circumstances where he only entered the premises once and in which the theft of items from various complainants only aggravated the unlawful entry, not amount to an unnecessary splitting of charges?

The state outline is clear that the accused entered the same dormitory. His pleas are equally indicative that he entered the same dormitory. He did so by opening one door which was unlocked and entering therein. There is therefore no argument that there was a single act giving rise to the charges against accused.

This court has on many occasions explained the two tests which are utilized in cases of suspected improper splitting. They are the single intent test and the similar evidence test. In this instance, a test run of both methods on the facts would show that the accused had the single intention of unlawfully entering into a hostel. That he stole various items from four different complainants did not split into four, the single offence of unlawful entry into premises. It remained one. If accused were to stand different trials for the four counts, it is also clear that the same evidence would have to be resorted to by the state to prove each of the counts.

The difficulty which the trial magistrate created for herself in this case is apparent from the manner in which the essential elements for each count were canvassed. She appropriated the dormitory to each of the affected complainants. In doing so she made it seem like there were four separate dormitories which the accused broke and entered into yet there was only one. For instance in count 1 she asked the following question:

> "It is alleged that you committed an offence of unlawful entry in that on 27/02/22 at Murehwa Mission you entered Yeukai Nyamayedenga's hostel through an unlocked door without her authority..."

In count 2 she asked the same question and only substituted Yeukai Nyamayedenga with the second complainant Bliss Mukwada. She did the same for all the 4 counts. The magistrate was caught in a quandary as the hostel was the same one in which the four students resided.

I can do no better than to refer to the case of *The State* v *Amos Zakata* HH155/22 in which MUTEVEDZI J succinctly dealt with the approach which must be adopted.

Closer to the circumstances *in casu*, GARWE J (as he then was) in the case of *S* v *Mabwe* 1988(2) ZLR178 (H) at p179 quoted with approval the case of *R* v Peter 1965 RLR 155(G) a case which is on all fours with the case at hand. In that case the accused an employee at a school in Murehwa entered a school dormitory and stole various items from six different students. The theft of the property occurred at the same time and same day. He was convicted of six counts of theft. On review it was held that his actions still constituted one count of theft. The evidence showed that there had been theft of property from several persons at the same

time and in one transaction. As such there had been an improper splitting of charges. Only one verdict must have been entered instead of six.

In casu theft from the four complainants did not constitute four counts of unlawful entry. The unlawful entry charge remained one count which was in fact aggravated by the theft of property belonging to the four complainants. The theft from four different students was part of one transaction. There was therefore an improper splitting of charges. Only one verdict must have been entered instead of four.

One of the reasons why improper splitting of charges is discouraged is that it is possible that it can seriously prejudice an accused in future. A situation may arise where the accused's previous convictions have to be considered. He would be taken as having been convicted of four counts of unlawful entry in circumstances where the conviction should have been a single one. It is because of that potential prejudice to the accused that in the circumstances, the four convictions cannot stand as separate verdicts. The magistrate, correctly so, had attempted to mitigate the prejudice in relation to sentence by combining all the four counts for purposes of sentence. That unfortunately would not cure the kind of prejudice I adverted to above.

The only way to avoid that is to quash the convictions in counts 2, 3 and 4. They constitute splitting of charges and are therefore superfluous. The sentence remains proportionate to the offence which the accused stands convicted of regard being had to his personal circumstances and the interests of society.

It is therefore ordered as follows:

1. The conviction in count 1 is confirmed as being in accordance with real and substantial justice
2. The convictions in counts 2, 3 and 4 are set aside.
3. The sentence for the single remaining conviction is corrected by the deletion of the phrase *"all 4 counts as one for sentence"*.

MUNGWARI J: ……..……..…….

MUTEVEDZI J: Agrees……