

THE STATE  
versus  
KUNDAI DAUS

HIGH COURT ZIMBABWE  
DUBE & TAGU JJ  
HARARE, 2 December 2016

### **Review Judgment**

DUBE J: The accused person appeared before a Mbare magistrate facing a charge of unlawful entry into premises as defined in s 131 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*], hereinafter referred to as the Code. The allegations against the accused are that he entered into Iris Biscuits Company's premises by entering through an opening on the durawall closed by some card board boxes. Upon entering he went to where some packs of Zapnax were placed. Zapnax should refer to some snacks that bear that name. When he was seen by a security guard on duty, he tried to run away and was apprehended. He pleaded guilty to the charge and he was sentenced to 8 months imprisonment wholly suspended for 5 years on condition that he does not within that period commit any offence involving unlawful entry to which upon conviction he shall be sentenced to imprisonment without the option of a fine.

My concerns are with both the conviction and sentence imposed on the accused. When essential elements were being put to the accused, he admitted that he had entered the premises by entering through a closed opening on the durawall. The trial court was of the view that the facts preferred and admitted disclosed an offence of unlawful entry. The offence of unlawful entry is provided for in s 131 which reads as follows:

“131 Unlawful entry into premises

- (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.”

A person is charged with contravening s 13 of the code where the evidence available discloses that he unlawfully and without permission or authority of an occupier of premises, entered some premises. The issue is whether the area he entered constitutes 'premises'. The Code defines premises in s 130 as follows,

“any movable or immovable building or structure which is used for human habitation or for storage and includes an out building a shed a caravan, a boat or tent.”

In *S v Jecha Ors* 1984 (1) SA 215 (ZH) the court considered the meaning of the word ‘premises’ in a charge of housebreaking with intent to commit theft involving an accused who had broken into a caravan and held as follows:

“The test that seems to emerge from the various judgments on the subject in our law is whether the structure or premises broken into is such as is, or might ordinarily be, used for human habitation, or for housing or storage of property of some kind. And, underlying that test, and part of it, is the requirement, outlined by the authors of *South African Criminal Law and Procedure* 2<sup>nd</sup> ed vol 2 at 712, that there must be some degree of permanence about such purpose for which the structure is used.” See also *R v Lawrence* 1954 (2) SA 408 (C).”

The offence of housebreaking with intent to steal and theft has now been codified. It is now provided for in s 131 of the Code as two separate offences of unlawful entry into premises and theft. The definition of ‘premises’ given in this case resonates with the definition of ‘premises’ as given in s 130. A ‘premises’ is one that is used for human habitation or for housing or storage of property. It includes an outbuilding, house, a shed caravan, boat or tent

The outline of the State’s case reveals that the accused entered the company’s premises through an opening on the durawall. The accused did not enter a building or structure used for human habitation. The Zapnax boxes appear to have been in the company yard. There were no premises involved in the commission of this offence. The facts disclose that the accused entered an enclosed area through an opening on the durawall closed by some cardboard boxes. A durawall does not suffice as ‘premises’ nor does the enclosed area that the accused entered.

“Enter ‘is defined in the code as follows, enter”, in relation to any premises, land or enclosed area, includes-

- (a) for the purposes of sections one hundred and thirty-one and one hundred and thirty-two, to insert any part of one’s body or an instrument into the premises, land or enclosed area;
- (b) to open or break open a door, window or gate or otherwise to remove an obstacle to entry into the premises, land or enclosed area;
- (c) to enter the premises, land or enclosed area without having removed an obstacle, as where entry is effected through an open door, window or gate.”

The accused removed an obstacle in order to gain entry into the enclosed area. The conduct of the accused of breaking the card board boxes to enter through the durawall falls squarely within the definition of 'enter' and suffices as entry into the enclosed area but not entry of any premises. An accused who enters an enclosed area or land through a broken durawall does not commit an offence of unlawful entry into premises. The label placed on the offence is wrong as the impression the charge creates is that the accused entered the company premises in the sense of a building or structure. By entering through an opening on the durawall closed by some card board boxes the accused entered an enclosed area.

The trial prosecutor placed a wrong label on the facts. The accused ought to have been charged with the offence of contravening s 132 of the Code. The section codified the offence of trespassing. Trespassing is a common law offence. At common law, the offence was committed when an offender enters or remains on another person's property without the owner or occupier's consent. The common law offence of trespassing was not committed unless it was accompanied by violence or a breach of the peace. The property involved could be a house, apartment, office building, a car or an aircraft.

The criminal code creates the offence of criminal trespass in s 132. The section reads as follows:

"132 Criminal trespass

(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."

Criminal trespass is an intrusion of another's property that interferes with that person's rights. It involves an unlawful and wrongful entry into an enclosed area or land. Mere entry into an enclosed area or land constitutes a criminal offence even if no theft or injury to the property concerned or property therein occurs. The motivation for the offence is to protect property and prevent breaches of peace and ensuring peaceful possession of property. An owner of property is entitled to exclusive use of the property and is entitled to prevent unauthorised entry into the property. Section 132 penalises any unauthorised entry into land only. The section does not cover all manner of property covered by the common law offence of trespassing. The reason for this is obvious. The legislature has created a separate

offence of unlawful entry into premises under s 131. The trial magistrate overlooked the error in the charge incidentally; criminal trespass is a permissible verdict to a charge of unlawful entry into premises. There is therefore no basis for interfering with the conviction. The conviction therefore remains proper.

Criminal trespass is a fairly minor offence and does not warrant the imposition of stiff sentences. Imprisonment is imposed in deserving and fairly serious offences of criminal trespass. The sentence for criminal trespass is prescribed in the penalty section of s 132. The section dictates a sentence or a fine not exceeding level 5 or to imprisonment for a period not exceeding 6 months or both. The sentence imposed does not suit the circumstances of the commission of the offence and becomes excessive. It must be brought in line with that imposed in crimes of criminal trespass. The sentence is set aside. And altered as follows,

“6 months imprisonment wholly suspended for years on condition the accused does not during that period commit an offence involving criminal trespass to which upon conviction he is sentenced to imprisonment without the option of a fine.”

TAGU J, agrees .....