

THE STATE
versus
ANDREW POPO

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 29 March 2019

Review Judgment

CHITAPI J: The accused was convicted on his own plea by the magistrate sitting at Chitungwiza Magistrate Court on 27 March 2018 for the offence of “Unlawful Entry into premises in Aggravating Circumstances” as defined in s 131 (2) (e) of the Criminal Law (Codification & Reform) Act [*Chapter 9:23*]. The magistrate sentenced the accused person as follows:

“48 months imprisonment of which 6 months is suspended for 5 years on condition that the accused does not during that period commit an offence involving unlawful entry or dishonesty for which he will be sentenced to imprisonment without the option of a fine. The remaining 42 months – 6 months is suspended on condition accused restitutes complainant \$40.80 by 31 May 2018. 36 months effective. In addition suspended sentence on CRB 913/16 is hereby put to effect sentence (sic)”

The conviction is certifiable as being in accordance with real and substantial justice. It would have been more meticulous for the magistrate when canvassing the essential elements to have asked the accused to confirm that he stole the property which he was accused of having taken and the value thereof. Since the accused admitted the facts as read to him from the State outline as being correct, the omission by the magistrate to canvas the issue of the property stolen and its value is not fatal to the conviction *albeit* the magistrate must be guided in future. The importance of canvassing the issue lies in that the commission of another offence or the intention to commit another offence following the unlawful entry constitutes one of the factors which differentiate ordinary unlawful entry into premises from unlawful entry into premises committed in aggravating

circumstances. Equally, the fact that the accused used an iron bar to break into the premises should have been canvassed as well because the fact that the accused who commits an unlawful entry carried a weapon is also a factor that qualifies the unlawful entry to be described as having been committed in aggravating circumstances.

It follows that whenever the prosecution or the court is dealing with a case of unlawful entry into premises as defined in s 131 of the Criminal Law Codification and Reform Act, the provisions of the section must always be borne in mind. For the avoidance of doubt, s 131 (1) (a) creates the offence and penalty of what can be termed ordinary unlawful entry which is constituted by the mere entry into a premises without the authority of the lawful occupier of the premises concerned. The words “enter” “lawful occupier” and “premises” are defined in the section aforesaid. I do not dwell on this aspect of definitions because it does not arise for review. Section 131 (1) (b) provides for a heavier sentence where aggravating circumstances are present in the commission of the offence. Section 131 (2) lists the factors which differentiates an ordinary unlawful entry and one committed in aggravating circumstances. The circumstances are listed as, where 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 any property in effecting the entry;
or
- (e) committed or intended to commit some other offence.

The circumstances are disjunctive and the presence of any one of them qualifies the offence as having been committed in aggravating circumstances. The presence and proof of more than one factor or circumstance will logically bear on the assessment of the sentence to aggravate the sentence. Unlawful entry attracts a fine not exceeding level thirteen or not exceeding twice the value of any property stolen, destroyed or damaged whichever is greater or imprisonment not exceeding fifteen years or both if the crime is committed in any one of the aggravating circumstances. If there are no aggravating circumstances the maximum fines level is level ten and the imprisonment maximum limit is 10 years. The rest of the sentence options are the same irrespective of whether the unlawful entry is aggravated or ordinary. This court has previously

directed magistrates on how to deal with contraventions of s 131 of the code in regard to framing charges and what the state must prove (See *S v Felix Phiri* HH 116/15 and *S v Maripfonde* HB 81/13, *S v Zhakata* HH 13/13).

I therefore need not overemphasize the importance of paying attention to detail during investigations, prosecution and trial when dealing with cases of unlawful entry. Quantification of damage and value of any stolen property must be canvassed as well as the details of the manner of entry among other factors. These factors have a bearing on sentence assessment.

Reverting to the facts of this case, the accused was a 22 year old offender and unemployed. He broke into the complainant house on 24 March, 2018 in Chitungwiza. The accused and the complainant were both Chitungwiza residents. The accused used an iron bar to break the complainant's locked bedroom door. In the bedroom, the accused stole \$50 cash, some clothes and an assortment of video editing paraphernalia used by the complainant. The accused was however seen coming out of the complainant's house by a neighbour who alerted the complainant . The complainant in turn reported the offence to the police who reacted quickly and arrested the accused, The property stolen was said to be valued at \$220 and property worth \$188.50 was recovered. The agreed prejudice was the difference between the two figures which is \$31.50. It is not apparent from the record as to why the magistrate ordered restitution of \$40.50. Whilst it is generally accepted that lawyers, judicial officers included are not disciples of mathematics, it is not expected that they should fail to perform simple additions and subtractions. Be that as it may, the anomaly will not be important because of the manner that it is intended to interfere with the sentence.

I have considered the overall sentence of 48 months in the circumstances of the case. It is my view that the sentence is so excessive as not to pass the test of real and substantial justice. In terms of s 51 (3) of the Magistrates Court Act [*Chapter 7:10*] an ordinary magistrate notwithstanding his or her ordinary and special jurisdictional limits is empowered to impose the sentence provided for in s 131 of the Criminal Code for Unlawful Entry. The special jurisdiction so given should not result in magistrates getting carried away with the increased power and to impose unduly harsh sentences.

Whilst it is trite that sentence is the preserve of the trial court, where the trial court has committed a misdirection or gone overboard, this court will be at large to interfere with the sentence on appeal or review. *In casu*, in assessing sentence, the magistrate considered that the

accused person had a previous conviction which was produced by the State. The accused admitted the previous conviction. It was relevant and related to a similar conviction for unlawful entry in respect of which he was on 4 March, 2016 sentenced to 12 months imprisonment of which 4 months was suspended for 5 years on conditions of good behaviour.

The magistrate did comment that the accused “forced open a closed bedroom door”. This was an aggravating circumstance although the magistrate according to the record states that this was a mitigatory circumstance, no doubt an error in recording. I will accept that the magistrate indicated that he considered that the accused person pleaded guilty showing remorse, was a youthful 22 years old and was single with no children. The magistrate concluded that the moral blameworthiness of the accused was high and so it was.

It does not however appear that the magistrate placed sufficient weight on the factors of mitigation which the magistrate recorded and if he or she did so, the magistrate did not consider other relevant factors like the fact that the bulk of the stolen property was recovered. Indeed the prejudice was in my calculation \$31.50 as already alluded to. There was no evidence led of any damages caused by the unlawful entry. Despite the accused being a repeat offender, the magistrate ought to have nonetheless been more lenient given the accused’s age. The magistrate pointed out in the reasons for sentence that “imprisonment may confirm an offender as a criminal rather than rehabilitate the offender.” The magistrate paid lip service to this otherwise correct observation. An overall sentence of 4 years and effective sentence of 3 years for the offence *in casu* has the effect of confirming the convict as a hard core criminal.

The accused had previously been sentenced to 12 months or 1 year imprisonment and was not obviously deterred. However to jump from 12 months to 48 months amounts to such a giant leap forward as to require sound and well-grounded justification. Other than the forcing open of the bedroom door and the theft of items almost all of which were recovered, there are no extraordinary circumstances to warrant the huge jump to 48 months particularly in the case of a youthful offender. In this case the sentence should justifiably be interfered with in a manner that does not remove the serious nature of the offence and the incorrigible behaviour of the accused as a repeat offender. In setting aside the trial court’s sentence, and substituting it with a lessor penalty, consideration has been taken that the accused was ordered to make restitution. However, the 6 months which the accused would serve for failure to retribute bear no resemblance or relation to

the \$40.80 which he was ordered to retribute. In any event the accused does not have the capacity to retribute.

In all the circumstances the sentence imposed by the magistrate is set aside and in its place, the following sentence substituted taking into account that the accused was not deterred by the suspension of the previous sentence imposed under case No. CHT 913/16-

18 months imprisonment. In addition the 4 months suspended sentence imposed on the accused under case No CHT 913/16 on 4 March, 2016 is brought into effect. The accused must be brought before the court *a quo* and the substituted sentence explained to him.

CHATUKUTA J agrees.....