THE STATE

versus

PANASHE TAGWIREYI

HIGH COURT OF ZIMBABWE

NDEWERE & CHITAPI JJ

HARARE, 30 January, 2018

**Review judgment**

CHITAPI J: The record in this matter was first placed before me on review on 23 September, 2016. I addressed a query to the magistrate who convicted the accused person. I reproduce the query hereunder.

“REVIEW MINUTE: THE STATE v PANASHE TAGWIREYI CRB MSVP 1236- 28/16

I refer to the above record where there is only one summary jurisdiction sheet being the charge sheet enclosed therein. It reflects count 1 but at the back of this form the magistrate endorsed that “accused pleaded all 3 counts 20/07/16.” There is no charge sheet for counts 2 and 3. How was this dealt with?

Apart from the charge to which the accused pleaded showing the date of commission of the offence as 3 June, 2016, while the state outline indicates 4 April 2016, the accused is alleged to have broken into a co-owned premises and made away with goods from the common premises. If this was the case, on what basis is the accused charged and convicted of 3 counts of unlawful entry?

Does the magistrate not agree that the facts reveal one count of unlawful entry and that the accused having unlawfully entered the premises stole property which turned out to belong to different people.

Do the essential elements canvassed as pertaining to counts 2 and 3 not relate to a contravention of s 113 of the Criminal Code [theft] as opposed to the charge for which the accused was convicted of and consequently sentenced.

As this review has delayed in its completion, may the magistrate respond by 17th October, 2016.”

The magistrate responded to the query in the following terms:

“RE: PANASHE TAGWIREYI CRB MSVP 1236-38/16

I would like to concede that the charges ought to have been distinct as regards counts 2 and 3 and should not have been bundled and moreso counts 2 and 3 relate to contravening s 113 of the code and accused should have been charged accordingly. The court ought to have correctly identified unlawful entry and proceeded to theft. The error is regretted. The delay was occasions by the fact that the magistrate was away.”

There has been an inordinate delay in disposal of the review owing to the delays in returning the record to me following its return from the court *a quo*.

Turning to the substance of the matter, the accused appeared before the provincial magistrate at Masvingo Magistrates Court on 6 June, 2016. He was co-charged with two other accused persons namely Joseph Baloyi and Oscar Chiriga. The accused was listed as the 2nd accused. As detailed in the query which I raised with the magistrate, the charge sheet comprised one count of contravening s 131 of the Criminal Law (Codification & Reform) Act [*Chapter 9:23*]. It reads as follows as against all the 3 accused persons

“UNLAWFUL ENTRY INTO PREMISES AS DEFINED IN SECTION 131 OF THE CRIMINAL LAW (CODIFICATION AND REFORM) ACT, CHAPTER 9:23.

In that on the 4th day of June 2016 and at stand number 56 Hellet street, Mutendi building, Masvingo JOSEPH BALOYI, PANASHE TAGWIREI and OSCAR CHIRIKA one or more of them unlawfully and intentionally without authority from GODFREY RUZENGWA the lawful occupiers of the premises concerned or without other lawful authority entered the said premises …..”

When the 3 accused first appeared before the magistrate on 6 June, 2016, the record shows that they offered guilty pleas as endorsed at the back of the charge sheet. There is a further endorsement that the pleas were altered to NOT guilty in respect of all the three. The record does not reflect what took place that led to the alteration of the pleas. The magistrate should have recorded what transpired. The case was postponed to 20 June, 2016.

On 29 June, 2016 there was ordered a separation of trials with the accused *in casu* offering a guilty plea. As detailed in my query to the magistrate, apart from the charge sheet being inconsistent with the agreed facts in respect of dates of commission of the offence and further the facts revealing a splitting of charges, the accused was also convicted of contravening s 131 (unlawful entry into premises) instead of contravening s 113 (theft) in respect of two of the counts. The magistrate has accepted the error.

A reading of the record shows that with respect to count1, the elements of the offence which the magistrate put to the accused person related to a charge of unlawful entry into premises. For counts 2 and 3, the elements which the magistrate canvassed related to charges of theft. There is however confusion as to what offence or offences the accused was found guilty of.

The facts were read to the accused and he agreed with them. The question however is, “what are these facts?” The State outline is poorly drafted and confusing. The confusion appears to have arisen from the fact that there was focus on the different complainants instead of the acts committed by the accused. A careful synthesis of the facts shows that the accused and his accomplices broke into a business premises which is co-owned by one Godfrey Ruzengwe and Maggie Masawi. The break in occurred on 4 April, 2016. The accused and his accomplices jumped over a durawall surrounding the premises and forced their way into the premises through the back door. The accused admitted to stealing various goods. When the break in and theft was discovered, it turned out that the stolen property belonged to more than one complainant. This is where the confusion arose which culminated in a splitting of charges.

The accused committed one act of unlawful entry into one premises in one night of 4 April, 2016. When inside the premises, he stole various items of property. When the offence was discovered, it turned out that more than one person had been deprived of property. The fact that several persons may have kept their property in the same premises did not justify singularizing the complainants for purpose of charging the accused person. To draw a parallel, if a thief breaks into a family home and steals, a suit belonging to the father, a jacket belonging to the mother, and shoes belonging to a child, it amounts to a splitting of charges to prefer three separate charges of unlawful entry and/or theft because the accused will in fact have committed one act.

In *S* v *Mpumelelo Moyo* HB 9/11, Mathonsi J after quoting various authorities namely *R* v *Peter* 1965 (3) SA 19 (SR); *S* v *Mutawarira & Another* 1973 (3) SA 902 RAD and *S* v *Rayiti* 1984 (1) ZLR 269 H stated as follows:

“The rule against the duplication of convictions is designed to prevent the multiplicity of convictions of an accused person where the whole of the criminal conduct imputed to him in substance constitutes only one offence which could be contained in a single but all embracing charge. This is meant to avoid prejudice to the accused person.”

The rule against splitting of charges is a common sense one. It aids the court to determine whether or not the accused person has in fact committed one offence. The court considers the accussed’s dominant intent.

The accused should in this matter have been convicted of one count of unlawful entry as defined in s 131 of the Criminal Law (Codification & Reform) Act. The provisions of s 131 of the said Act provide for punishment upon conviction of a fine not exceeding level thirteen or not exceeding twice the value of the property stolen or damage caused as a result of the crime, whichever is greater or imprisonment for a period not exceeding 15 years or both where there are aggravating circumstances. Where there are no aggravating circumstances the sentencing pattern is the same, save that, the maximum fine is reduced to level ten instead of thirteen and the period of imprisonment is reduced to ten years maximum instead of 15 years.

In determining whether or not the crime of unlawful entry has been committed in aggravating circumstances or not, s 131 (2) lists five instances which if present on the occasion the crime was committed constitute aggravating circumstances. These are, 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 or destroyed any property, in effecting entry; or

(e) committed or intended to commit some other crime.

In assessing sentence, the magistrate made a number of errors. The first one was to

sentence the accused on the basis that the accused committed three offences. I have already corrected the magistrate in this regard when I ruled that there was a splitting or duplication of convictions. The second error was the failure by the magistrate to have regard to the sentencing provisions of s 131 in not considering whether or not the offence was committed with or without aggravation. The magistrate’s reasons for sentence were very brief and he stated as follows:

“You are a young offender who pleaded guilty to the three counts. I will consider that you have a record which awaits sentence before the appropriate court. The three counts as one as they were continuous.”

The magistrate then imposed a sentence of 3 years. The accused had a previous

conviction for theft. He was convicted before the same court in CRB MSVP 903/15 on 1 June, 2015. Passing of sentence was postponed for 5 years on condition that within that period the accused does not commit a similar offence. In *casu*, the accused was not charged with theft. Therefore technically speaking he did not commit a similar offence. The accused was lucky because of the manner the condition of the postponement of the passing of sentence was framed. Had it been framed that the accused does not commit any offence of which theft is an element, then he would have become liable to be sentenced on record CBR MSVP 903/15.

On account of the errors made by the magistrate, it cannot be said that the magistrate was properly directed when he passed sentence. Had the magistrate assessed sentence on the basis that the accused was guilty of one count instead of 3 counts, he would in all probability have passed a different sentence. The proceedings in the matter do not accord with real and substantial justice.

The record needs to be corrected to reflect that the accused was guilty of one count of unlawful entry. The sentence imposed on the accused is in the circumstances so excessive as to warrant interference. The magistrate did not consider alternative sentences to imprisonment. This was a gross misdirection. See *S* v *Mugwenhe & Anor* 1991 (2) ZLR 66 where Ebrahim JA approved the ratio in the case *S* v *Scheepers* 1977 (2) SA 145 to the effect that where the interests of society given the nature of the offence can be safeguarded by imposing an alternative sentence to imprisonment, the alternative forms of punishment to imprisonment ought to be considered first. In *casu*, the sentence provisions actually provide the alternatives. To that extent the magistrate erred in not giving them consideration.

The ends of justice call for a re-visitation of the sentence. The accused albeit being a youthful offender aged 18 years committed a serious offence in respect of which the legislature has provided heavy sentences. The accused after unlawfully entering the premises in question committed another offence of theft of goods. Therefore the crime was committed in aggravating circumstances. Of the total value of the property stolen in the sum of $1 204-00 following the unlawful, property worth $511-00 was recovered meaning that property worth $693-00 was not recovered.

Under the circumstances, the accused pleaded guilty and showed contrition. However an effective term of imprisonment was appropriate given the fact that they had a relevant previous conviction. He also committed the offence *in casu* in aggravating circumstances. The overall sentence without a portion suspended nonetheless induces a sense of shock in the circumstances of this case and the misdirections committed by the magistrate. An appropriate sentence is one whereof a greater portion is suspended so that the accused, given his youth does not stay in prison for too long and will be deterred sufficiently by the suspended sentence hanging over his head upon his release.

Accordingly the proceedings are altered to the extent following:

(1) That the accused is guilty of one count of unlawful entry as defined in s 131 of

the Criminal Law (Codification & Reform) Act [*Chapter 9:23*].

(2) That the accused is sentenced to 20 months imprisonment of which 8 months imprisonment is suspended for 5 years on condition that the accused is not within that period convicted of any offence involving unlawful entry into premises, theft, criminal trespass, robbery or receiving stolen property knowing it to have been stolen following which conviction the accused is sentenced to imprisonment without the option of a fine.

Effective prison sentence is 12 months.

The accused has served more than the substituted sentence of 12 months. He shall be

released immediately and the Registrar is ordered to issue a warrant for the accused’s liberation.

NDEWERE J, agrees ………………………