THE STATE
versus
SIKOMBE GEORGE
and
INNOCENT TAKAWIRA
and
BISERK FERENANDO

HIGH COURT OF ZIMBABWE
HUNGWE & MANGOTA JJ
HARARE, 29 August, 2017

Criminal review

MANGOTA J: An accused person who pleads guilty to a charge must have all the essential elements of the offence put to him, each in turn. He must be accorded an opportunity to respond to each element of the crime. Where he is convicted when some element(s) of the offence has/ have not been put to him, his conviction is improper. It cannot, therefore, stand.

The above described set of circumstances occurred in the present case. Three accused persons were arraigned before the court on a charge of contravening s 132 of the Criminal Law [Codification and Reform] Act [*Chapter:23*] ["the Act"]. All of them pleaded guilty to the charge. They were convicted on their guilty pleas. They were each sentenced to 7 months imprisonment all of which were suspended on the following two conditions:

(i) 3 months imprisonment were suspended for 5 years on the usual condition of good behaviour- and

(ii) 4 months imprisonment were suspended on condition that each accused performed 140 hours of community service.

The State allegations were that on 26 January, 2016 the three accused persons trespassed the premise (*sic*) of one Lovisa Banda. The premise (*sic*) at T.I. Dombotombo Business Centre in Marondera.

Following upon the accused persons' conviction and sentence, the record of proceedings was referred to the regional magistrate for scrutiny. The learned regional magistrate who scrutinised the proceedings had no difficulty in picking upon what, in his

view, were the shortfalls of the court *a quo*'s work. He raised three queries with the trial magistrate.

The regional magistrate's first query centred on why the magistrate did not canvass all the essential elements of the offence as they appear in para (a) of subsection (1) of s 132 of the Act. In his second query, he sought to know why the magistrate did not canvass all the elements of the crime as they appear in para (b) of subsection (1) of s 132 of the Act. His third query, which I think is open to debate, was whether or not the accused persons were properly charged under section 132 of the Act. He maintained the view that they should have been charges under s 131 of the Act.

The trial magistrate conceded that his work was not up to the accepted standard in regard to the regional magistrate's first two queries. He said he did not canvass the elements of the offence as he should have done. He, however, held a different view from that of the regional magistrate in regard to the latter's third query. He maintained the position that the accused persons were property charged under s 132 of the Act.

The record of proceedings showed that the trial magistrate canvassed with the accused persons some, and not all, the elements of the offence with which they were charged under para (a) of subsection (1) of s 132 of the Act. The accused persons were not accorded an opportunity to respond to each element of the offence. Their conviction, under the observed set of circumstances, was improper. It cannot, therefore, stand.

The trial magistrate's concession to the learned regional magistrate's second query was made without him having applied his mind to the same. The crime of criminal trespass, as defined in s 132 of the Act, is couched in the alternative. A person may be prosecuted under para (a) or under para (b) of subsection (1) of s 132 of the Act. He cannot be prosecuted under both paragraphs.

Paragraphs (a) envisages a situation where an accused person enters the land of someone knowing or realising that there is a real risk or possibility that such entry is forbidden. Paragraph (b) refers to a situation where an accused person, having entered someone's land, fails or refuses, without lawful excuse, to leave the land when he is called upon to do so by the lawful occupier of the land or by any other person who has apparent authority to require him or her to leave such land.

The agreed statement of facts shows that the accused persons were prosecuted under para (a) of subsection (1) of s 132 of the Act. They were on the land of Lovisa Banda. He did not request them to leave the land which they had taken occupation of. He simply reported

their presence on his land to the police who, in turn, arrested and charged them with the offence of criminal trespass as defined in s 132 (1) (a) of the Act.

The regional magistrate missed the point when he stated that the trial magistrate should have canvassed with the accused persons the elements of the offence as they appear in paragraph (b) of subsection (1) of s 132 of the Act. He lost it altogether when he insisted, as he did, that the contents of para (b) of subsection (1) of s 132 should have been included in the charge. He failed to realise that s 132 of the Act is couched in the alternative.

It is pertinent for me to capture the learned regional magistrate's third query in the exact words that he put to the trial magistrate. The query reads:

> "3. Since the accused (*sic*) allegedly entered a shop (premises as per definition in section 130 (c) of the Code) as opposed to entering or trespassing onto "land" , was the proper charge not supposed to be contravening s 131 (1) of the code i.e. 'Unlawful entry into premises'"

The trial magistrate's response was that he made inquiries on why the state preferred to charge the accused persons under s 132, and not under s 131 of the **Act. He said the State advised him that the structure in which the accused persons were found was not used for human habitation or for storage. He stated that the structure was a building which was still under construction. It had, according to him, two walls on either side, a third wall which was at window level and had no roof.**

It requires little, if any, debate to realise that the structure as described in the foregoing paragraph does not fall into the definition of premises as it appears in s 130 of the Act. Premises, as defined in the section, refers to any movable or immovable building or structure which is used for *human habitation* or *for storage* and it includes an outbuilding, a shed, a caravan, a boat or a tent. The key words which define premises for purposes of s 131 of the Act are the use to which such is put. Any building or structure which is used for human habitation or for storage fall under the definition of premises as it appears in s 131 of the Act. Any building or structure which falls outside either word/phrase-*human habitation or storage*-is not premises as defined in s 131 of the Act.

The trial magistrate did his homework and got convinced, as I am, that the accused persons were properly charged under s 132 of the Act. No evidence was led to show that the structure in which they were found was ordinarily used for human habitation or for storage of anything.

The accused persons did not enter a shop as the learned regional magistrate purported to suggest. Neither the charge nor the agreed statement of facts made reference to a shop. The charge reads, in part, as follows:

> "….. all of them unlawfully trespassed Lovisa Banda's premise (*sic*) knowing that the land belong (*sic*) to Lovisa Banda or realising that there is a real risk or possibility that such entry is forbidden."

The State, in my view, inappropriately used the word premise in the charge. The use of that word must have persuaded the regional magistrate to pose the question which he did. The trial magistrate's response was clear, cogent and to the point. He acquitted himself well on that aspect of the case.

On a proper analysis of the circumstances of the present case, the accused persons were improperly convicted. They were convicted before the trial magistrate satisfied himself that the plea which each one of them tendered was a genuine admission by him of the change and all the elements of the offence as some elements(s) was /were not canvassed with them. The conviction is, therefore, quashed and the sentence set aside. The case is remitted to the court *a quo* for a trial *de novo*.

The accused persons must, by now, have finished serving their sentence. That aspect of their case cannot be undone. The trial magistrate is, therefore, directed to remain alive to the sentence which the accused persons served when he imposes a new sentence upon them.

HUNGWE J agrees …………………………