

A CRITIQUE OF THE LAWS ON VANDALISM IN ZAMBIA WITH SPECIAL
REFERENCE TO *THE PEOPLE v EMMANUEL MBITA AND RABI CHILUFYA*

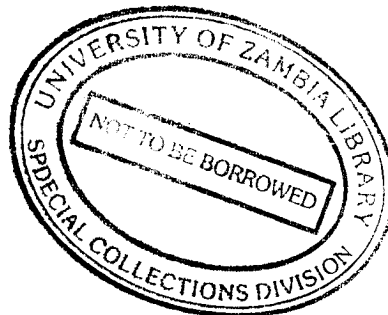
By

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for the Award of the Bachelor of Laws (LLB) Degree



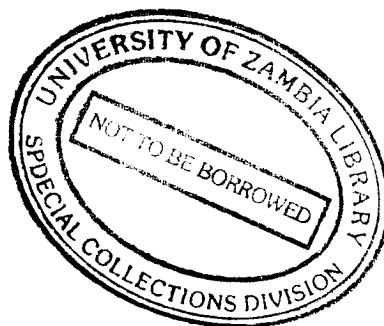
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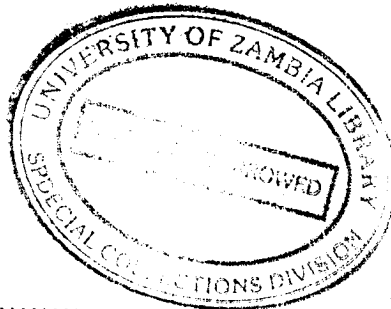
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ABSTRACT

This research examined the reality and efficacy of anti-vandalism laws in Zambia, before the amendment by Act No. 17 of 2007 and, as amended by the said Act. An evaluation was made as to whether the lacuna that was in the law before the amendment was actually filled by the amendment. The study was based on both desk research and interviews with learned counsel and officers of the Zambia Police Service at the Force Headquarters.

It was found that before the amendment to the Penal code by Act No. 17 of 2007, the State Security Act, the Railways Act, the Telecommunications Act, the Electricity Act and the Aviation Act *inter alia* criminalised and still criminalise the destruction of various forms of property such as roads, dams, bridges, railways, telecommunications and aerodromes. The Penal Code did so too. The major weakness observed in the Acts above is that they did not comprehensively protect private and public property essential or incidental to the provisions of a necessary service. It was also observed that one of the motives underlying the destruction or vandalism of public and private property was economic gain or other personal gain which were not envisaged under the old laws. The penalties maintained for the offence were also not deterrent.

Act No. 17 of 2007 has made the law more comprehensive, certain and stiffer with regard to the offence of vandalism. The amendment, by criminalizing destruction or vandalism, for any purpose, to public and private property, strengthened the law by encompassing such purposes as individual economic gain or other personal benefit. Through sentences of between ten and twenty-five years imprisonment, the law now seeks to deter would-be offenders.

Act No. 17 embraces some weaknesses. For example, the Act limits the mens rea elements in the determination of culpability as against the accused to only intent and malice, leaving out recklessness. The Act also does not provide any opportunity for the accused to raise a lawful excuse for their commission of acts of vandalism. It was also observed that the Act has created the offence of vandalism which is different from malicious damage to property in general. This overlap and duplication in nomenclature is awkward, and could be attributed to poor drafting.

It is recommended that the whole Division VI in the Penal Code, be renamed from "MALICIOUS INJURIES TO PROPERTY" to 'VANDALISM TO PROPERTY' so as to make the law simple. It is also recommended that the other statutes' viz Electricity Act, Railways Act, the Communications Act among others be amended so as to make them responsive to and identical with Act No. 17 of 2007. Since the Penal Code defines property to include real and personal property, it is recommended that the courts interpret destruction of or damage to property to include 'damage to land' in terms of unlawful dumping of refuse on another's land.

ACKNOWLEDGEMENTS

First and foremost, I would like to thank my supervisor Ms Lwatula for her constant supervision and assistance towards the realisation of this report. In the same vein, I would like to thank Mr Mumba Malila for highly inspiring me, Mr Lutangu Wakumelo for helping me access National Assembly Library facilities, and my 'brother' Bright Muteti, for being there whenever I needed anything, whether for personal or educational purposes.

To Shimutwa Shiyenge, I am highly indebted to you for your help in the determination of my research topic and for the typing facilities. Busy though you are, you always have time for a friend. Thank you.

I wish to express my gratitude to Mutinta Mbala, for her friendship and encouragement throughout the research. Thank you for helping me to ease up each time I was overwhelmed by stress.

Many thanks go to Mateyo Nyirenda for the learned discourse, Mukwau 'MK' Sinkonde and Jane Sayela for their invaluable assistance in the provision of typing facilities.

To my most beloved mother, Catherine C. Mulenga, thank you for your love, prayers, constant rebukes whenever I slackened, and for believing in, and being patient with me. You are the best mum I'd ever dream of having.

Finally, to my unfailing God, I praise, glorify, and honour your name. You had it all figured out. I will thus proclaim to all that you never ever fail your own.

DEDICATION

This dissertation is dedicated to my mother, Catherine C. Mulenga, my brother, Lovemore Mulenga and my sisters, Sandra, Consildah, Save, Omega, Nchimunya and Melody Mulenga.

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- R v Woollin* [1998] 3 WLR 382
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- R v. Whiteley* [1991] 93 Cr. App. R. 25 at 29
- Hardman v. Chief Constable of Avon and Somerset Constabular* [1986] Crim. L.R. 330
- Henderson v Battley* 29 November 1984, unreported
- Cox v. Riley* [1986] 83 Cr. App. R. 54
- R v Smith (David)* [1974] QB 354
- Chamberlain v Lindon* The Times, 6 April 1998
- Parker* [1993] Crim LR 856
- Steer* [1987] All ER 833
- R. v Aves* [1950] 2 All ER 330
- Abramovich* [1914] 11 Cr App R 45
- Fanwell v R* (1954) 1R and N 81
- Danny Zyambo v The People* (1977) ZR 53
- Kunda v The People* (1980) ZR 100 SC (29 November 1979)
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- The Penal Code Chapter 87 of the Laws of Zambia (as amended by Act No. 17 of 2007)
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CHAPTER ONE

VANDALISM: DEFINITION; NATURE; PREVALENCE IN ZAMBIA; PROBLEM STATEMENT; OBJECTIVES; RATIONALE; JUSTIFICATION; AND METHOD OF THE RESEARCH

1.1 INTRODUCTION

In 2007, the Parliament of the Republic of Zambia through Act No.17 of the said year, made an amendment of and to salient provisions of the Penal code, which provisions criminalise vandalism in Zambia. The amendment has attempted to strengthen the law in order to deter the commission of acts of vandalism to public and private property for any purpose.

In this chapter, the researcher intends to discuss in general terms the offence of vandalism. The chapter attempts to define what amounts to vandalism, detailing the constituents of the offence, and the prevalence of the offence in Zambia. The researcher further states the problem the research as a whole intended to address, the research objectives, the rationale behind the study, and the justification for and the method of the research.

1.2 DEFINITION AND NATURE OF VANDALISM

According to TheFreeDictionary,¹ vandalism is the intentional and malicious destruction of or damage to the property of another. It includes *inter alia* behaviour such as breaking windows, slashing tyres, spray painting a wall with graffiti, and destroying a computer system through the use of a computer virus.

The Penal Code² defines the term 'vandalise' in section 341A (a), to mean:

wilfully or maliciously destroying, damaging, defacing, disabling or in any way disrupting the function of or impairing public or private property and in the case of a

¹ 'Vandalism', Available at <http://legal-dictionary.www.thefreedictionary.com> accessed October 25, 2011.

² Chapter 87 of the Laws of Zambia

computer includes but is not limited to such acts as interference with, interruption or obstruction of the lawful use of a computer by means of a computer virus or otherwise and the causing of a direct or indirect degradation, failure or other impairment of function of a computerised system or any part thereof by means of a virus or otherwise.

From the above definitions, it follows that the main ingredients of the offence of vandalism are:

1. Willful or malicious act(s) of disabling or in any way disrupting the function or impairing of property; and
2. That the property in issue must either be public or private.

It should be concluded therefore that in Zambia, the *mens rea* element in the offence of vandalism will be satisfied if there is either intent or malice. The perpetrator must have (1) acted out of his or her will or intentionally; or (2) he must have acted out of malice. In both instances, a case would be proved as against the accused.

Intent was defined in *R v Mohan*³ as a decision to bring about, in so far as it lies within the accused's power, [the prohibited consequence], no matter whether the accused desired that consequence of his act or not. This definition was elucidated by the House of Lords in *R v Woollin*⁴ wherein they stated that a result foreseen is an intended result. Where a jury is satisfied beyond reasonable doubt on the evidence that the accused foresaw death or serious injury as virtually certain to result from his actions this amounts to an intention to bring about that consequence. Malice, on the other hand has been defined as a specific intent by the defendant to cause substantial... injury or harm to the claimant.⁵ To establish malice, a claimant must show not only that the defendant had some ill will towards her, but that he purposely acted on that will

³ [1976] QB 1

⁴ [1998] 3 WLR 382

⁵ Russel G. Thornton, 'Malice/Gross negligence,' Dallas, Texas, 2006, Available at <http://www.ncbi.nlm.nih.gov>, accessed April 04, 2012.

to cause her some serious injury.⁶ This definition pertains to vandalism of property *mutatis mutandis*.

In other jurisdictions, a person who damages or destroys property recklessly will be culpable of the offence of vandalism. Recklessness was defined in the case of *R v G*.⁷ The House of Lords in that case held that a person acts recklessly with respect to (a) a circumstance when he is aware of a risk that it exists or will exist; or (b) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk. The Penal Code (including the amendment by Act No. 17 of 2007) does not make any reference to recklessness in determining one's liability as regards acts of vandalism.

The *actus reus* is any act causing disabling or in any way disrupting the function or impairing of another's property.

It should be noted that criminal statutes employ different terms such as 'criminal mischief' or 'malicious trespass' *inter alia* for the offence of vandalism.⁸ Another point worth noting is that in the absence of damage, the defendant may be guilty of trespass.⁹ Further, if there is no proof that the defendant intentionally or maliciously damaged the property, he cannot be convicted of the crime but can be held liable for monetary damages in a civil action.¹⁰

1.3 THE PREVALENCE OF VANDALISM IN ZAMBIA

It has been stated in the introduction above that it is evident that vandalism was common in the first two Republics. According to government statistics of 1979, given by the then Inspector

⁶ Russel G. Thornton, 'Malice/Gross negligence,' Dallas, Texas, 2006, Available at <http://www.ncbi.nlm.nih.gov>, accessed April 04, 2012.

⁷ [2003] UKHL 50

⁸ 'Vandalism', Available at <http://legal-dictionary.www.thefreedictionary.com> accessed October 25, 2011.

⁹ 'Vandalism', Available at <http://legal-dictionary.www.thefreedictionary.com> accessed October 25, 2011.

¹⁰ 'Vandalism', Available at <http://legal-dictionary.www.thefreedictionary.com> accessed October 25, 2011.

General of Police, Fabiano Chela, there were about 500 convictions in the year 1974, of which a few more defendants received prison sentences than fines. Forty juveniles were caned after being found guilty of malicious damage.¹¹

Over forty-five years after independence, the crime has continued to blight Zambia, despite calls by important political figures to the public to guard against the offence. In the year 2010, the then president of the Republic of Zambia, Rupiah Banda, said the vandalism of road signs not only endangers the lives of road users but results in wastage of resources as funds have to be ploughed into the same roads to replace vandalised road infrastructure. He said the act was inimical to the economic development of the country.¹²

In an attempt to deal with the scourge some corporations have resorted to signing Anti-vandalism Pacts with the police.¹³ For example, Zambia Telecommunications Corporation and the Zambia Police signed a memorandum of understanding to jointly fight vandalism against telecommunication infrastructure in the country.¹⁴ The Corporation also introduced an anti-vandalism toll free line, 5365, to enable the public to report all culprits.¹⁵

It is also evident that the judiciary has had its share of vandalism cases. For example, in March of 2010, the Kitwe High Court sentenced two men to 10 years imprisonment with hard labour each for vandalising ZESCO property valued at K2.5 million and K2.8 million, respectively.¹⁶ In another instance, in August of 2010, three Livingstone juveniles were ordered to serve one year

¹¹ Eugene K. Keefe, 'Corporal Punishment' under "settings," Available at <http://www.corpun.com>, accessed November 07, 2011.

¹² 'Guard Against Vandalism' Sunday Times of Zambia of November 07, 2010.

¹³ 'Police, Zamtel sign Anti-vandalism Pact; warns vandals' Zambia Daily Mail of May 06, 2011.

¹⁴ 'Police, Zamtel sign Anti-vandalism Pact; warns vandals'

¹⁵ 'Police, Zamtel sign Anti-vandalism Pact; warns vandals'

¹⁶ 'Two men jailed 10 years each for vandalism' Times of Zambia of March 28, 2011.

probation for vandalising ZESCO installations while their parents were ordered to pay ZESCO K1, 142, 000 each within 30 days by the Livingstone Magistrate court.¹⁷

It is important to note that despite the legislature's attempts at criminalising vandalism in Zambia, and the judiciary's proactive department in punishing offenders, the situation on the ground leaves much to be desired. The question that requires an urgent answer is: is the law adequate; if not, which areas need immediate attention so as to make it effective in addressing the offence.

1.4 STATEMENT OF THE PROBLEM

In Zambia, offences against property are dealt with under the penal Code Cap 87 of the laws of Zambia, and the provisions of other Acts of Parliament.¹⁸ The Penal code has undergone numerous amendments in the past years as a response to the many inadequacies it has exhibited with regard to crimes it purports to penalise. In 2007, the part of the Act that criminalises malicious injuries to property, DIVISION VI, was amended by Act No. 17 of 2007. The amended part criminalises the vandalism of public property essential or incidental to the provisions of a necessary service.¹⁹

This research assessed whether the law adequately criminalises the offence of vandalism in Zambia. The study examined the provisions of the Penal Code and other statutes on vandalism before the enactment of Act No. 17 of 2007; and the Penal Code provisions after the amendment, focusing on whether Act No. 17 was able to cure the mischief that was being perpetuated by the law before the amendment, ultimately bringing out the strengths and weaknesses of the law. The

¹⁷ '3 Livingstone juveniles get Probation for vandalism' The Post Newspapers Zambia of August 03, 2011.

¹⁸ S. E. Kulusika, *Text, Cases and Materials on Criminal Law in Zambia*, (Lusaka: UNZA Press, 2006), 578

¹⁹ The Penal Code Chapter 87 of the Laws of Zambia as amended by Act No. 17 of 2007, s 341 (d).

research further analysed the difficulties law enforcers face in implementing the provisions of the law. The research also assessed how other jurisdictions have addressed the offence of vandalism, these jurisdictions being Australia and the United Kingdom. The study makes a commentary on how the courts have interpreted the provisions that criminalise vandalism in Zambia. This has been done, through an examination of the application of section 341D (d) (2) of the Penal Code Cap 87 of the laws of Zambia as amended by Act No. 17 of 2007 in the case of *The People v Emmanuel Mbita and Rabi Chilufya*, to try and elucidate some of the salient tenets relied on when ascertaining one's culpability vis-a-vis vandalism.

1.5 OBJECTIVES OF THE STUDY

The definitive objective of this research was to critique the laws that criminalise vandalism in Zambia. The research assessed whether these laws are adequate and effective in addressing the offence. In outline form, the objectives of the research were:

- i. To evaluate Zambian laws that criminalise acts of vandalism;
- ii. To give an analysis of the way law enforcers have enforced Penal provisions on vandalism;
- iii. To investigate whether the amendment to the law on vandalism in Zambia has addressed the lacuna, or mischief, that was prevalent in the penal legislation before the amendment;
- iv. To explore the criminalisation of vandalism in Australia and the United Kingdom so as to identify how other jurisdictions have sought to curb this vice; and
- v. To determine how the High court for Zambia came to the determination that the accused in the case of *The People v Emmanuel Mbita and Rabi Chilufya* were liable for vandalism.

1.6 RATIONALE/JUSTIFICATION OF THE RESEARCH

Very little has been written on the subject of vandalism in Zambia. This is ironic in that the crime is so prevalent in the country, offenders ranging from juveniles to adults. This research provides very important legal information with regards to understanding the nature of the offence of vandalism. The study further highlights how the amendments to Penal Code provisions that have further elucidated the criminalisation of vandalism in Zambia are impacting society. The paper is a very important contribution to the legal fraternity, as it provides information meant to cover the lacuna in the law on vandalism. Through the analysis of the treatment of vandalism in Australia and the United Kingdom, the paper is meant to rouse the Zambian legal system towards legal reform in Zambia.

1.7 SPECIFIC RESEARCH QUESTIONS

Precisely, the specific research questions this paper has addressed are:

- i. The criminalisation of vandalism in Zambia, is the law adequate?
- ii. What are some of the enforcement measures of penal provisions criminalising vandalism in Zambia?
- iii. Has the amendment to the law on vandalism in Zambia addressed the lacuna, or mischief, that was prevalent in the penal legislation before the amendment?
- iv. What is the law on vandalism in Australia and the United Kingdom?
- v. How did the High Court for Zambia determine the culpability of the accused in *The People v Emmanuel Mbita and Rabi Chilufya*?

1.8 RESEARCH METHODOLOGY

This research was based on both desk research being research through textbooks by learned authors, judicial decisions, statutes, newspaper articles, and internet sources; and field research,

done at the National Assembly through access to Parliamentary publications, and interviews with learned counsel and officers of the Zambia Police Service at the Force Headquarters.

Chapter one is a general introduction, and therefore gives the definition and describes the nature of the concept of vandalism, stating its constituent elements, these being the blameworthy state of mind of the accused or *mens rea* and the act or *actus reus*. This is followed by a brief discussion of the prevalence of vandalism in Zambia. The chapter then states the problem of the research, its objectives, rationale, justification and the research methodology.

Chapter two examines the reality and efficacy of anti-vandalism laws in Zambia. The chapter outlines the law on vandalism, before the amendment by Act No. 17 of 2007 and, as amended by the said Act. An evaluation is made as to whether the lacuna that was in the law before the amendment was actually filled by the amendment. The chapter also discusses the enforcement measures of the penal provisions criminalising vandalism in Zambia. The chapter finally assesses the adequacies and inadequacies of the law and enforcement hurdles.

The third chapter assesses how vandalism is being addressed in other jurisdictions. The chapter investigates the Criminalisation of vandalism in Australia and the United Kingdom. A comparative analysis of these jurisdictions' anti-vandalism laws is made vis-a-vis the Zambia criminal justice system's treatment of the crime.

Chapter four is a commentary on the case of *The People v Emmanuel Mbita and Rabi Chilufya*. The chapter discusses how the High Court determined the accused's culpability with regard to the offence of vandalism. The chapter discusses the doctrine of recent possession, stating how it was relied on in the case, and concludes with a critical comment on the decision.

A summary of the research, conclusions and recommendations are given in chapter five.

CHAPTER TWO

THE REALITY AND EFFICACY OF VANDALISM LAWS IN ZAMBIA

2.1 INTRODUCTION

It has been stated in the preceding chapter that the Penal Code, one of the laws that criminalise vandalism in Zambia, has undergone numerous amendments in the past years. It is therefore at the core of this research to determine the reasons for the amendment so as to help understand whether the amendment to the law had any impact with regard to the intended or targeted lacuna or mischief. It is also of paramount importance to investigate whether there are any measures put in place by law enforcers to enforce these laws, apart from the traditional channel whereby victims report to the police after they have fallen victim to the commission of a crime.

This chapter investigates whether there was any law that criminalised vandalism in Zambia before the Penal Code amendment by Act No. 17 of 2007. In doing this, the research undertakes to find out why there was an amendment to DIVISION VI of the Penal Code which criminalises malicious injuries to property. An evaluation is made as to whether the lacuna that was in the law before the amendment was actually filled by the amendment. The chapter also discusses the enforcement measures of the penal provisions criminalising vandalism in Zambia. The chapter finally assesses the adequacies and inadequacies of the law and enforcement hurdles.

2.2 THE LAW BEFORE THE AMENDMENT BY ACT NO. 17 OF 2007

Before the amendment to the Penal code by Act No. 17 of 2007, the State Security Act, the Railways Act, the Telecommunications Act, the Electricity Act and the Aviation Act *inter alia* criminalised and still criminalise the destruction of various forms of property such as roads,

dams, bridges, railways, telecommunications and aerodromes.²⁰ The Penal Code did so too. Most of these pieces of legislation, including the Penal Code, were enacted at a time when the persons who destroyed or vandalised such property did so with intent to damage property or to endanger the safety of the persons using the property.²¹ This is clearly discernible from the provisions of most of these statutes in which destruction to property is tied with the intent to damage property or to endanger the safety of the persons using the property. An analysis of the provisions of the Penal Code and other statutes will aid in elucidating this discourse.

2.2.1 Penal Code Provisions

Section 335 (1) of the Penal code²² before the amendment by Act No.17 provided:

Any person who wilfully or unlawfully destroys or damages any property is guilty of an offence, which unless otherwise stated is a misdemeanour and is liable, if no other punishment is provided, to imprisonment for two years.

Though the words vandalise and vandalism are not used in the section above, this section actually criminalises the vandalism of any property (see definition of ‘vandalise’ in chapter one). Another thing worth noting is that the sentence of two years only applies where no other punishment is provided. This means that if one willfully or unlawfully destroys or damages any property and in the process of doing this endangers the life of any person, the offender will be guilty of a felony and is liable to imprisonment for life.²³ Note that the offence here is destroying or damaging property with intent to damage the property or endanger the life of a person. This is the case with all other provisions delineated below.

²⁰ REPORT OF THE COMMITTEE ON LEGAL AFFAIRS, GOVERNANCE, HUMAN RIGHTS AND GENDER MATTERS ON THE PENAL CODE (AMENDMENT) BILL NO. 19 OF 2007, FOR THE FIRST SESSION OF THE TENTH NATIONAL ASSEMBLY, APPOINTED ON 8TH NOVEMBER 2006

²¹ REPORT OF THE COMMITTEE ON LEGAL AFFAIRS, GOVERNANCE, HUMAN RIGHTS AND GENDER MATTERS ON THE PENAL CODE (AMENDMENT) BILL NO. 19 OF 2007

²² Chapter 87 of the Laws of Zambia

²³ Penal Code Act, Chapter 87 s 335 (2) before the amendment in issue

Subsection (3) of section 335 of the Penal Code²⁴ provided that if the property in question is a bank or wall of a river, or navigation works, or bridges, the offender is guilty of a felony and is liable to imprisonment for life. If the property in question is a testamentary instrument, whether the testator is living or dead, or a register which is authorised or required by law to be kept for authenticating or recording the title to any property or for recording births, baptisms, marriages, deaths, or burials, or a copy of any part of such register which is required by law to be sent to any public officer, the offender is guilty of a felony and is liable to imprisonment for fourteen years.²⁵ The offender is guilty of a felony and is liable to imprisonment for seven years, if the property in question is a vessel in distress or wrecked, or stranded, or anything which belongs to such vessel. ²⁶If the property in question is any part of a railway, or any work connected with a railway, the offender is guilty of a felony and is liable to imprisonment for fourteen years.²⁷

Section 335 (7) (a)-(l) of the Penal Code²⁸ provides for the liability and sentence for offenders who willfully or unlawfully destroy or damage other things of special value. The said subsection provides that if the property is a vessel, whether completed or not, a light, beacon, buoy, mark, or signal, used for the purposes of navigation, or for the guidance of persons engaged in navigation; a bank or wall of a river, canal aqueduct, reservoir, or inland water, or a work which appertains to a dock, canal, aqueduct, reservoir, or inland water, or which is used for the purposes of lading or unlading goods; a railway or bridge, viaduct, or aqueduct which is constructed over a highway, railway, or canal, or over which a highway, railway, or canal passes; anything in process of manufacture, or an agricultural or manufacturing machine, or a manufacturing

²⁴ Chapter 87

²⁵ Penal Code Act, Chapter 87 s 335 (4)

²⁶ Penal Code Act, Chapter 87 s 335 (5)

²⁷ Penal Code Act, Chapter 87 s 335 (6)

²⁸ Chapter 87

implement, or a machine or appliance used or intended to be used for performing any process connected with the preparation of any agricultural or pastoral produce; a shaft or a passage of a mine; a machine, appliance, apparatus, building, erection, bridge, or road, appertaining to or used with a mine, whether the thing in question is completed or not; a rope, chain, or tackle, of whatever material which is used in a mine, or upon any work appertaining to or used with a mine; or a well, bore for water, or the dam, bank, wall, or floodgate of a millpond or pool; the offender is guilty of a felony and is liable to imprisonment for seven years.

If the property in question is a document which is deposited or kept in a public office, or which is evidence of title to any land or estate in land, the offender is guilty of a felony and is liable to imprisonment for seven years.²⁹

It should be noted that although these provisions above endeavoured to punish offenders who willfully and unlawfully destroyed or damaged property, there is no uniformity in terms of sentencing upon conviction. For example, if one willfully and unlawfully destroyed or damaged a bridge, navigation works, or wall of a river, he would be liable to imprisonment for life whereas if the property in issue is any part of a railway or work connected with a railway, the offender is guilty of a felony and liable to imprisonment for fourteen years. The researcher is of the view that these offences should have been treated the same, since the consequences of their commissioning would be more or less the same: loss of human life.

²⁹ Chapter 87, section 335 (8)

2.2.2 Other Statutory Provisions

Section 21 (2) of the Electricity Act³⁰ provides that

any person who, without legal right, cuts, injures or interferes with any apparatus for generation, transmitting or distributing or supplying electricity, or maliciously extinguishes or damages any lamp or other electric apparatus provided for the convenience of the public, shall be guilty of an offence.

Section 24 of the Act states that

Any person who is guilty of an offence under this Act shall be liable in respect of each offence to a fine not exceeding one hundred thousand penalty units, or to imprisonment for a period not exceeding five years, or to both.

Section 18 of the Radio Communications Act³¹ provides:

a person who without lawful excuse, by any means interferes with or obstructs the carrying on of a radio communications service shall be guilty of an offence and shall be liable to a fine not exceeding twenty thousand penalty units or to imprisonment for a term not exceeding two years, or to both.

Section 21 of the Telecommunications Act³² provides

a person who wilfully interferes with, hinders or impedes in any way the carrying on of a telecommunications service; without lawful cause, by any means interferes with or obstructs the carrying on of a telecommunications service, shall be guilty of an offence and shall be liable to a penalty not exceeding twenty thousand penalty units or to imprisonment for a term not exceeding two years or to both.

It is important to note that the offences listed under section 335 (7) of the Penal Code and the other statutes cited above should have been given heavier punishments as opposed to the imprisonment sentences provided. This should have been the case because the property in issue is private and public property essential or incidental to the provisions of a necessary service.

³⁰ Chapter 433 of the laws of Zambia

³¹ Chapter 169 of the laws of Zambia

³² Chapter 469 of the laws of Zambia

The major weakness, therefore, observed in the above law is that it did not comprehensively protect private and public property essential or incidental to the provisions of a necessary service. Whereas it criminalised the destruction or damage to railways, navigation works, electricity supply apparatus, communications and telecommunications equipment and other property, it did not provide adequate protection of property used in any service relating to the generation, supply or distribution of electricity, any fire brigade or fire service, any sewerage, rubbish disposal or other sanitation service, any health, hospital or ambulance service, any service relating to the supply or distribution of water, any service relating to the production, supply, delivery or distribution of food or fuel, and any communications service. This is part of the lacuna that was present in the law before the amendment by Act No. 17 of 2007. The law did not also adequately provide for the protection of computers and computerised systems.

It should be pointed out that one of the motives underlying the destruction or vandalism of public and private property was economic gain or other personal gain which were not envisaged under the old laws.³³ This is the other part of the lacuna that was in the law before the amendment. Only intent to damage property or to endanger life was foreseen.

Evidently, the law, as regards acts of vandalism of property essential or incidental to the provisions of a necessary service, was inadequate. The penalties maintained for the offence were clearly not deterrent. This was the mischief that the amendment by Act No. 17 of 2007 sought to curb. The incidence of destruction of or vandalism to public and private property was observed to be high hence the need for stiff penal sanctions to deter would-be offenders.³⁴ The amendment

³³ REPORT OF THE COMMITTEE ON LEGAL AFFAIRS, GOVERNANCE, HUMAN RIGHTS AND GENDER MATTERS ON THE PENAL CODE (AMENDMENT) BILL NO. 19 OF 2007

³⁴ REPORT OF THE COMMITTEE ON LEGAL AFFAIRS, GOVERNANCE, HUMAN RIGHTS AND GENDER MATTERS ON THE PENAL CODE (AMENDMENT) BILL NO. 19 OF 2007

also sought to widen culpability as against offenders by criminalizing destruction or vandalism 'for any purpose,' as opposed to 'with intent to damage property' or 'endanger life' under the old law. After the amendment to the Penal Code by Act No. 17 of 2007, the prosecution has only got to prove intent or malice as against the accused in order to have a conviction. Any defence, whether lawful or not will not have any effect on the accused's culpability. As long as he has willfully or maliciously destroyed or damaged property for 'any purpose,' he will be liable for the offence. This means that even if the accused was trying to protect his property when he destroyed or damaged another's property, he will be liable. This state of affairs seems to be unjust.

2.2.3 Ensuing State of Affairs

It should be noted that since the law was inadequate with regard to the protection of property essential or incidental to the provisions of a necessary service before the amendment, the offence of espionage was sometimes relied on.³⁵ This is found in the State Security Act.³⁶ Section 3 (d) of the State Security Act provides for the offence of espionage and states that any person who, for any purpose prejudicial to the safety or interests of the Republic:

without lawful excuse damages, hinders or interferes with, or does any act which is likely to damage, hinder or interfere with, any necessary service or the carrying on thereof; shall be guilty of an offence and liable on conviction to imprisonment for a period of not less than twenty years but not exceeding thirty years.

Section 2 (a) to (k) of the Act provides that "necessary service" includes any service relating to the generation, supply or distribution of electricity; any fire brigade or fire service; any sewerage, rubbish disposal or other sanitation service; any health, hospital or ambulance service; any

³⁵ Interview: J. Masiye, Assistant Director- Legal and Professional Standards Unit, Zambia Police Force Headquarters, December 28, 2011

³⁶ Chapter 111 of the laws of Zambia

service relating to the supply or distribution of water; any service relating to the production, supply, delivery or distribution of food or fuel; mining; any communications service; any transport service; any road, railway, bridge, ferry, pontoon, airfield, harbour or dock; or any other service or facility, whether or not of a kind similar to the foregoing, declared by the President to be a necessary service for the purposes of this Act.

The State Security Act criminalises the destruction or damaging of property for any purpose prejudicial to the safety or interests of the Republic, without lawful excuse. This offence, espionage, attracts a minimum sentence of twenty years upon conviction. Slapping the sentence for the offence of espionage in a case where someone vandalized property for individual economic gain or other personal benefit would be unjust. However, this is what happens when important legislation such as the Penal Code is inadequate.

It also came to the attention of the researcher that in certain instances, offenders were charged with the offence of sabotage.³⁷ This offence is provided for by the Zambia Security Intelligence Act.³⁸ According to the Zambia Security Intelligence Act “Sabotage” means

an act intended to cause damage or injury to plant, machinery, or vital installations used for the purposes of communications, transport, water, energy and electricity supply; buildings; and any other property; with a view to assisting any person, State or organization that is hostile to the Republic or for purposes of furthering a subversive act.

The purpose of the act (a view to assisting any person, State or organization that is hostile to the Republic or for purposes of furthering a subversive act) as the case may be is difficult to prove.

³⁷ Interview: Research and planning Unit, police Force Headquarters, December 29, 2011

³⁸ No. 14 of 1998

2.3 THE LAW AS AMENDED BY ACT NO. 17 OF 2007

Act No. 17 of 2007 made a number of changes to the law and for the first time introduced the words ‘vandalize’ and ‘vandalism’ in the Penal Code. The Act was meant to strengthen the law and enforcement against vandalism by *inter alia* giving stiff penal sanctions to deter would-be offenders.³⁹ Its object was to revise provisions relating to the offence of vandalism to public and private property; provide a minimum sentence for the offence of arson; and provide for matters connected with or incidental to the foregoing.⁴⁰ The Act repeals and replaces section 335 by a new section 335. Under Act No. 17 of 2007, section 335 (1) provides:

Any person who willfully and unlawfully destroys or damages any property commits an offence, which, unless otherwise stated, is a misdemeanor and is liable, on conviction, if no other punishment is provided, to imprisonment for two years.

Where the destruction or damage caused to property is in excess of five million Kwacha, the offender commits a felony and is liable, on conviction, to imprisonment for a term of not less than five years and not exceeding twelve years; and where it is in excess of fifteen million Kwacha, the offender commits a felony and is liable, on conviction, to imprisonment for a term of not less than seven years and not exceeding twelve years.⁴¹

It should be noted that this measure is intended to provide penalties whose gravity corresponds to the extent of the malicious damage.⁴²

Subsection (2) of section 335⁴³ criminalises the willful and unlawful destruction: of a dwelling-house or a vessel using any explosive substance; a testamentary instrument, whether the testator is living or dead, or a register which is authorized or required by law to be kept for authenticating

³⁹ Chapter 87 proviso to section 335 (1)

⁴⁰ REPORT OF THE COMMITTEE ON LEGAL AFFAIRS, GOVERNANCE, HUMAN RIGHTS AND GENDER MATTERS ON THE PENAL CODE (AMENDMENT) BILL NO. 19 OF 2007

⁴¹ Act NO. 17 of 2007 s 335 (1) (a) and (b)

⁴² REPORT OF THE COMMITTEE ON LEGAL AFFAIRS, GOVERNANCE, HUMAN RIGHTS AND GENDER MATTERS ON THE PENAL CODE (AMENDMENT) BILL NO. 19 OF 2007

⁴³ Of Act No. 17 of 2007

or recording the title to any property or for recording births, baptisms, marriages, deaths, or burials, or a part of any such register which is required by law to be sent to any public officer; a vessel in distress or wrecked, or stranded or anything which belongs to such a vessel; and a document which is deposited or kept in a public office, or which is evidence of title to any land or estate in land, as before the amendment. It should be noted that the new section 335 ends with what has been outlined above. The other provisions that were in the Penal Code before the amendment have been removed.

Act No. 17 of 2007 also repealed section 340 by substituting it with penalties for nuisance or trespass on railway works.

The Penal Code is amended by the insertion immediately after section three hundred and forty-one of a new DIVISION VIA: VANDALISM TO PRIVATE AND PUBLIC PROPERTY; PUNISHMENT FOR VANDALISM. Section 341 D (1) provides: "Any person who for any purpose vandalises any public or private property essential for or incidental to the provision of a necessary service commits a felony."

Subsection (2) outlines the property subsection (1) refers to and this includes property essential for or incidental to the connection, installation, generation, supply or distribution or other use of electricity; property essential for or incidental to the provision of a fire service; any machinery, equipment, plan or other structure essential for or incidental to the collection, conveyance, storage purification, or disposal of sewage, or disposal of rubbish, or the provision of any other sanitation service; property essential for or incidental to the protection of public health or the provision of health services; structure essential for or incidental to the purification, filtration, distillation, storage, distribution or supply of water; structure essential for or incidental to the storage, refinery, conveyance, distribution, or supply of fuel; any work or way pertaining to or used with a mine; communications apparatus or communications installations installed or erected

or operated by a telecommunications or communications service provider for the purpose of operating or sustaining a telecommunications or communications system or providing a telecommunications service; a railway, or any work connected with a railway; a road, bridge, ferry, pontoon, harbor, dock, or canal; an aircraft, aerodrome, navigation facility or any other instrument, apparatus, equipment, machinery or other property essential for or incidental to safe aviation. The vandalism of the above stated property amounts to a felony and is punishable by imprisonment for a term not less than ten years and not more than twenty-five years; where the vandalism causes the death of any person, to imprisonment for life.

This measure is intended to provide a more deterrent penalty which overrides any other written law.⁴⁴ The individual Acts whose provisions have been overridden by this measure include *inter alia* section 24 of the Electricity Act,⁴⁵ which provides a punishment in form of a fine not exceeding one hundred thousand penalty units or to imprisonment for a term not exceeding five years or to both; section 31 of the Water Supply and Sanitation Act⁴⁶ in which the maximum sentence prescribed is a fine of up to one hundred thousand penalty units or imprisonment of up to five years or both; section 1.5 (1) of the Telecommunications Act⁴⁷ and section 16 of the Radio Communications Act⁴⁸ in which the maximum penalties are a fine not exceeding twenty thousand penalty units or imprisonment to a term not exceeding twelve months, or to both, respectively; and sections 73 and 74 of the Railways Act⁴⁹ in which no minimum sentences are prescribed and the maximum sentence is up to twenty-one years. These penalties, apart from the latter, are clearly not deterrent.

⁴⁴ REPORT OF THE COMMITTEE ON LEGAL AFFAIRS, GOVERNANCE, HUMAN RIGHTS AND GENDER MATTERS ON THE PENAL CODE (AMENDMENT) BILL NO. 19 OF 2007

⁴⁵ Chapter 433 of the Laws of Zambia

⁴⁶ No. 28 of 1997

⁴⁷ Chapter 469 of the laws of Zambia

⁴⁸ Chapter 169 of the Laws of Zambia

⁴⁹ Chapter 453 of the Laws of Zambia

Section 341A (a) to (j) defines the phrase " necessary service" to include (as under the State Security Act) any service relating to the generation, supply or distribution of electricity; any fire brigade or fire service; any sewage, rubbish disposal or other sanitation service; any health, hospital or ambulance service; any service relating to the supply or distribution of water; any service relating to the production, supply, delivery or distribution of fuel; mining; any communications service; any road, railway, bridge, dam, ferry, pontoon, harbour, dock or canal; and any service relating to the aviation of aircraft.

It is important to note that what has now been termed vandalism of property essential or incidental to the provision of a necessary service by Act No. 17 of 2007 is actually espionage under the State Security Act. The sentence for the offence under the State Security Act is between twenty and thirty years imprisonment whereas under Act No. 17 of 2007, it is now between ten and twenty five years. This is perhaps so because under the State Security Act, the offence is done for purposes prejudicial to the safety or interests of the Republic whereas under the Penal Code, the offence is done willfully or maliciously and for any purpose. The two Acts seem to foresee two different would-be offenders: a rebel who destroys or damages property in a manner that may be treasonable on the one hand, and a person who destroys or damages property for any other purpose than that which is prejudicial to the safety or interests of the Republic on the other.

Section 341E criminalises the vandalism of public buildings and infrastructure which include *inter alia* churches, mosques, schools, community centres and any personal property contained in any infrastructure. The sentence for the offence is between ten and twenty-five years.

Section 341F criminalises the vandalism for any purpose of a computer or a computerised system. Upon conviction, an offender would be sentenced to between ten and twenty-five years in prison. This measure overrides sections 8 and 12 of the Computer Misuse and Crimes Act,⁵⁰ which provide a penalty of between five and ten years imprisonment.

Sections 341G and 341H make it criminal to vandalise traffic signs and traffic signals; and the vandalism of navigational signs and signals on waterway, respectively. Offenders, on conviction, are liable to imprisonment for between ten and twenty-five years. This measure is stiffer and more deterrent than and overrides section 33 (10) of the Public Roads Act,⁵¹ which provides a penalty in the form of a fine not exceeding seven thousand penalty units or imprisonment for a term not exceeding three months, or both.

Any person who attempts to commit an offence under DIVISION VIA commits an offence, and is liable, on conviction, to imprisonment for eight years.⁵² Further, any person who aids, abets, counsels, procures, incites or solicits the commission of an offence under this Division, commits a felony and is liable, on conviction, to the same penalties as if that person had been convicted of the offence.⁵³ An institution may also be held liable for the commission of vandalism.⁵⁴

2.4 ENFORCEMENT MEASURES

There are basically two enforcement measures of Penal Code provisions by the police. These are the Traditional Method; and community services; and assigning investigations and prosecution

⁵⁰ No. 13 of 2004

⁵¹ No. 12 of 2002

⁵² Act No.17, s 341

⁵³ Act No. 17, s 341K

⁵⁴ Act No. 17, s 341I

groups to firms most affected by vandalism.⁵⁵ It should be noted that the third measure is basically a limb of the Traditional method.

2.4.1 The Traditional Method⁵⁶

The traditional method is a measure or situation whereby victims or eye-witness report to the police of being victims or having sighted the commission of the offence of vandalism. It should be noted that this caters for more than 95 percent of the enforcement measures of the Penal Code provisions, not just anti-vandalism laws.⁵⁷ In other words, it is difficult under the current circumstances in Zambia, for the police to work on better means of executing their duties as law enforcers.

2.4.2 Community Services

Community services fall under the Community Services Division of the Police Service.⁵⁸ These services were initially an initiative by members of communities to help the police curb crime in the respective communities, but have now grown to include victim support which helps vulnerable groups in society such as victims of gender-based violence access the law and have their abusers prosecuted.⁵⁹ Other aspects of community services include child protection, school liaisons which deal with sensitization and awareness programmes in schools, community policing, where people come up with structures such as police Posts and neighbourhood watches to assist the police deal with crime.⁶⁰

⁵⁵ Interview: J. Masiye, December 28, 2011

⁵⁶ Interview: J. Masiye, December 28, 2011

⁵⁷ Interview: J. Masiye, December 28, 2011

⁵⁸ Interview: Research and planning Unit, police Force Headquarters, December 29, 2011

⁵⁹ Interview: Research and planning Unit, December 29, 2011

⁶⁰ Interview: Research and planning Unit, December 29, 2011

2.4.3 Investigations and Prosecution officers attached to Firms

This measure is still in its pilot phase and involves a situation where corporations most victimized by vandals are given police officers to investigate and prosecute cases of vandalism.⁶¹

It should be noted that so far, only the Zambia Electricity Supply Corporation (ZESCO) has such officers.⁶² It was observed, during the course of the research that very few police officers are aware of the changes in the law. There is need to reorient police officers on changes in the law, as and when they take place.

2.5 ADEQUACIES AND INADEQUACIES OF THE LAW AND ENFORCEMENT HURDLES

Act No. 17 of 2007 has made the law more comprehensive and certain with regard to the offence of vandalism. In fact, as has been stated earlier, the amendment did introduce the terms vandalism and vandalise in the Penal Legislation for the first time. What this means is that there is now the offence of malicious damage to property on the one hand; and the offence of vandalism of private and public property. The offence of malicious damage is generally a misdemeanour whereas the offence of vandalism is a felony. The amendment by Act No. 17 has been able to address the lacuna that was in the law which was that the Penal Code or any other law did not adequately address the offence of destruction of or damage, for any purpose, to property essential or incidental to the provision of a necessary service and other property such as churches, mosques, computers and computerised systems, and traffic signs or signals. As was submitted by the Committee on Legal Affairs, Governance, Human Rights and Gender Matters,⁶³

⁶¹ Interview: J. Masiye, December 28, 2011

⁶² Interview: Research and planning Unit, December 29, 2011

⁶³ ON THE PENAL CODE AMENDMENT BILL NO. 19 OF 2007 FOR THE FIRST SESSION OF THE TENTH NATIONAL ASSEMBLY, 2006

the pieces of legislation which criminalise the destruction of various forms of property such as the State Security Act, the Railways Act, the Telecommunications Act, the Electricity Act, the Aviation Act, including the Penal Code (before the amendment) could not effectively be used for the prosecution of destruction of property for economic gain, other personal benefit or indeed any other purpose, save the purpose stipulated in the statutes. The amendment, therefore, by criminalizing the destruction or vandalism, for any purpose, to public and private property, strengthened the law by encompassing such purposes as individual economic gain or other personal benefit. It has already been stated above that 'any purpose' may include any lawful defence. for example, if the accused destroyed property in order to protect his person, he would not be able to raise this as a defence. This would inevitably lead to serious injustice.

Whereas the law has been made more comprehensive and certain, the fact that there is a separation between malicious damage on the one hand, and vandalism on the other seems problematic. To vandalise is to willfully or maliciously destroy, damage and so on. Malice is ill motive or mischievous intent. It could be argued that this means more or less the same as unlawful intent. The point is that what is termed malicious damage which comprises will and unlawfulness might as well be termed vandalism. There is need to make the law simpler by having a uniform term for willful and unlawful or malicious destruction of property whether private or public so that the Penal Code provisions on destruction or damage to property should all address the offence as vandalism, unlike is the present situation.

It is important to note that the legislature is quite inadequate with regard to knowledge about salient principles of criminal law.⁶⁴ This is seen in their inability to realize the need to apportion an opportunity for the accused to raise defences when charged with the offence of vandalism in

⁶⁴ See CHAPTER IV of the Penal Code Chapter 87 of the Laws of Zambia on General Defences

the amendment by Act No.17 of 2007. Instead of criminalizing acts of vandalism for 'any purpose,' they should have indicated 'without lawful excuse' as is the case under the State Security Act. The writer is of the opinion that this aspect of the legislation must be questioned by the courts.

On the point of enforcement, it is important to note that although many offenders are getting prosecuted and sentenced accordingly, more could be done in this area. This is because it is difficult for law enforcers to have any systematic execution of the law. All they do is lie in wait for victims to report the commission of the crime. Even the police officers attached to ZESCO have no more work than to wait until there is a report of vandalism at which point they begin their investigations.

It should be noted in conclusion that the amendment to the Penal Code by Act No. 17 of 2007, has made the law much more practical to the demands of society. The fact that the Penal Code and the other statutes adumbrated above could not be relied on by firms such as ZESCO, ZAMTEL and others when their property was destroyed or damaged because the penalty that the court would grant to offenders was not proportionate to the value of the property destroyed or damaged was a serious mischief the law was perpetrating, before the amendment. With the amendment in place, it is now not only possible to have offenders sentenced according to the offence committed but to also have a court order for the forfeiture of any property or sum of money. It is also possible, after the amendment to fine an institution upon conviction, for vandalizing property. It is also possible to deter would-be offenders since the law is now very stiff. Despite the few weaknesses present in the law that have been stated above, the amendment by Act No. 17 has made the law more definite.

CHAPTER THREE

THE CRIMINALISATION OF VANDALISM IN AUSTRALIA AND THE UNITED KINGDOM

3.1 INTRODUCTION

Zambia like many other countries in the World is a common law state. It is therefore imperative that as the law endeavors to develop here, orientation is made of other common law jurisdictions so as to assess how their laws have developed. This is necessary because the common law is a very predictable system that is relatively uniform all over the World with a few deviations in a few areas. It is the task of this chapter to assess how vandalism is being addressed in other jurisdictions. The chapter investigates the Criminalisation of vandalism in Australia and the United Kingdom. A comparative analysis of these jurisdictions' anti-vandalism laws is made vis-a-vis the Zambia criminal justice system's treatment of the crime.

3.2 THE CRIMINALISATION OF VANDALISM IN NEW SOUTH WALES, AUSTRALIA

It should be pointed out at the onset that as regards laws, Australia is divided into common law jurisdictions and code jurisdictions.⁶⁵ Common law jurisdictions have crimes Acts which list the most common offences and fix their penalties, but do not always exhaustively define the elements of the offence. These include New South Wales, South Australia and Victoria.⁶⁶ On the other hand, in code jurisdictions, which comprise the Commonwealth, the Australian Capital Territory, the Northern Territory, Queensland, Tasmania, and Western Australia, statutory codes

⁶⁵ 'Australian criminal Law' article available at <http://www.nationmaster.com>, accessed February 12, 2012

⁶⁶ 'Australian Criminal Laws in the Common Law Jurisdictions' Information available at <http://www.oup.com.au>, accessed February 12, 2012

have been introduced to be a comprehensive statement of criminal law, and are interpreted to replace the common law except in cases of ambiguity.⁶⁷ Since Zambia is a common law jurisdiction, it is indubitable that any attempt at assessing the laws of Australia be addressed at a common law jurisdiction. This chapter therefore assesses the law that criminalises vandalism in New South Wales, an Australian common law jurisdiction.

The major statute that codifies the common law crimes for the state of New South Wales in Australia is the Crimes Act of 1900.⁶⁸ It is an extensive legal document which defines an extensive list of offences under New South Wales Law. Vandalism of public and private property is covered between sections 194 and 308I of the Act. A synopsis of these sections is perhaps important at this juncture.

Section 194 of the Act provides that a reference to property does not include a reference to property that is not of a tangible nature,⁶⁹ and includes a reference to wild creatures that have been tamed or are ordinarily kept in captivity and also includes any other wild creatures or their carcasses but only if they have been reduced into possession that has not been lost or abandoned, or are in the course of being reduced into possession. The section further provides that an act done by a person under a reasonable belief that the person had a right to do the act does not constitute an element of any offence under that part of the Act. The section then defines what amounts to damaging property. This includes removing, obliterating, defacing or altering the unique identifier of the property. The unique identifier is any numbers, letters or symbols that are

⁶⁷ Australian Law Reform Commission, information available at <http://www.alrc.gov.au>, accessed February 10, 2012

⁶⁸ The Act can be downloaded at ACT Government website at <http://www.legislation.nsw.gov.au>, accessed February 12, 2012

⁶⁹ Crimes Act 1900 section 194 (1)

marked on or attached to the property as a permanent record so as to enable the property to be distinguished from similar property.

Of great importance to this research are the provisions between section 201 and section 308E of the Act. These provisions criminalise the destruction or damage to private or public property necessary or incidental to the provision of a necessary service, public buildings, computer or computerized systems, traffic signs and signals and navigational signals and signs. It should be noted that the terms listed above are not actually used, but the provisions refer to identical property.

To begin with, the Act provides that a person who intentionally or recklessly interferes with a mine by destroying, damaging, obstructing or rendering useless its property is liable to imprisonment for seven years.⁷⁰ Further, a person who intentionally or recklessly destroys, damages, removes, or interferes with piles or other materials that form part of, or have been fixed or placed in position in order to in order to secure sea wall, river bank, canal and other works, is liable to imprisonment for seven years.⁷¹ It should be noted from the above provisions that intent or recklessness has to be present in the determination of culpability for the commission of the offences above. It is further interesting to note that the sentence for the offences is seven years, which is more or less not a deterrent penalty.⁷²

Section 203B of the Act introduces an offence called sabotage. The section provides that a person whose conduct causes damage to a public facility, and who intends to cause that damage, and who intended by that conduct to cause extensive destruction of property, or major economic loss, is guilty of the offence of sabotage whose maximum penalty is imprisonment for 25 years.

⁷⁰ Crimes Act 1900 section 201

⁷¹ Crimes Act section 202

⁷² Compare this to the sentence under Zambian legislation discussed in the preceding chapter

Section 203A defines 'economic loss' to include the disruption of government functions or the disruption of the use of public facilities. 'Public facility' means any of the following (whether publicly or privately owned): a government facility, including premises used by government employees in connection with official duties; a public infrastructure facility, including a facility providing water, sewerage, energy or other services to the public; a public transport facility, including a conveyance used to transport people or goods; a public place including any premises, land or water open to the public; and a public computer system, including a computer system used for the operation of a public facility, for the provision of banking services or for other services to the public. A person who threatens sabotage is guilty of an offence and liable to a maximum imprisonment for 14 years. In determining one's culpability under section 203B, the court need only prove intent.

The offence of sabotage under the Crimes Act 1900 seems to be on all fours with the new offence of vandalism under the Penal Code Cap 87 of the laws of Zambia as amended by Act No. 17 of 2007. It is perhaps how come the maximum sentence for the two crimes is identical: 25 years imprisonment. Another point worth noting is that the Penal Code Act provides that the act should be committed intentionally or maliciously and for any purpose whereas under the Crimes Act 1900; intent to destroy is all that is required.

According to section 204, any person who with intent to cause the death of a person, or with reckless indifference for the safety of the life of a person, destroys or damages an aircraft or vessel is liable to imprisonment for 25 years. Section 210 provides that a person who intentionally or recklessly destroys, damages, removes, conceals or interferes with a mark, device, or equipment used or designed to be used to assist the navigation of aircraft or vessels, or does any act with the intention of causing any such destruction, damage, concealment or

interference, is liable to imprisonment for seven years. The offence in section 204 requires either intent or recklessness unlike the offence of sabotage above but the sentence for its commission is the same as that for sabotage. The offence of destruction or damage to navigation marks is punishable by seven years imprisonment.

Section 308E provides that a person who causes any unauthorized impairment of electronic communication to or from a computer, and knows that the impairment is unauthorized, and intends to impair electronic communication to or from a computer, or who is reckless as to any such impairment, is guilty of an offence whose maximum penalty is imprisonment for ten years. Destroying, damaging or impairing of electronic communication to or from a computer is punishable by a maximum sentence of ten years.⁷³

It should be concluded that different criteria were used in determining the penalties for destruction or damage to property under the Crimes Act 1900. This is unlike under the Penal Code which treated all cases of vandalism similarly. The Penal Code seems to be more uniform in its address of cases of vandalism, and this makes it very difficult to fathom whether much could be learnt from the New South Wales jurisdiction's treatment of the crime. It is important that an assessment be had of the British system, which is essentially the 'parent' of all common law jurisdictions.

3.3 THE CRIMINALISATION OF VANDALISM IN THE UNITED KINGDOM

The primary piece of legislation that contains offences concerning damage to property in the United Kingdom is the Criminal Damage Act 1971.⁷⁴ A few offences are still contained within

⁷³ Crimes Act section 308E

⁷⁴ Available for downloading at The National Archives website at <http://www.legislation.gov.uk>, accessed February 13, 2012. For further information on the Act, see also Michael J. Allen, (ed) *Elliot and Wood's Cases and Materials*

the Malicious Damage Act 1861 but the main body of legislation is contained within the Criminal Damage Act 1971 which is 'an act to revise the law of England and Wales as to offences of damage to property, and to repeal or amend as respects the United Kingdom certain enactments relating to such offences; and for connected purposes.'⁷⁵ Two types of criminal damage are envisaged by the Act: destroying or damaging property belonging to another; and destroying or damaging Property with Intent to Endanger Life.

3.3.1 Destroying or damaging property belonging to another

The Criminal Damage Act 1971 in section 1 (1) provides that

a person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.

According to section 4 of the Act, where the offence under section 1 is committed by fire it is charged as arson and the accused shall on conviction on indictment be liable to imprisonment for life. A person guilty of any other offence under the Act shall on conviction on indictment be liable to imprisonment for a period not exceeding ten years.⁷⁶ It should be noted that where the damage is less than five thousand pounds, the maximum sentence usually handed down will not be greater than six months.⁷⁷ The maximum ten years sentences are slapped where the damage caused is over five thousand pounds.⁷⁸

on *Criminal Law 8th Ed.* (London: Sweet and Maxwell, 2001), Richard H. Bruce, *Success in Law 5th Ed.* (London: John Murray, 2001), Jonathan Herring, *Criminal Law 3rd Ed.* (New York: Palgrave Macmillan, 2002), and Michael Jefferson, *Criminal Law 6th Ed.* (Edinburgh: Pearson Education Ltd, 2003)

⁷⁵ See Criminal Damage Act 1971 preamble

⁷⁶ Criminal Damage Act 1971 section 4

⁷⁷ 'Criminal Damage', Available at <http://www.inbrief.co.uk>, accessed December 26, 2011

⁷⁸ 'Criminal Damage', Available at <http://www.inbrief.co.uk>, accessed December 26, 2011

It is significant to have a detailed analysis of the elements of the crime of Criminal Damage under this Act.

3.3.1.1 Destruction/Damage

The Criminal Damage Act does not provide any definition of what amounts to destruction or damage. Therefore caselaw has demonstrated that it is up to the court on a case by case basis to establish whether there has in fact been damage taking into account matters of fact and degree. In the case of *R v. Whiteley*⁷⁹ it was held that the term "damage" for the purpose of this provision, should be widely interpreted so as to include not only permanent or temporary physical harm, but also permanent or temporary impairment of value or usefulness. In *Hardman v. Chief Constable of Avon and Somerset Constabular*,⁸⁰ therefore, graffiti, although eventually removable by action of rainfall, was actually washed away by the local authority, incurring expense. The graffiti was held to be criminal damage. In *Henderson v Battley*,⁸¹ it was held that dumping rubbish on land may amount to damage where the owner of the land is put to expense in removing it, even though the land underneath is not damaged. The requirement appears to be that if expense on the part of the owner of the property is incurred to restore it to its previous condition, a court may conclude that damage has been caused.⁸²

The nature of the property involved may also be relevant in addition to the degree of harm caused.⁸³ For example a scratch to the bonnet of a car would constitute damage as this would

⁷⁹ [1991] 93 Cr. App. R. 25 at 29

⁸⁰ [1986] Crim. L.R. 330

⁸¹ 29 November 1984, unreported

⁸² Micheal J. Allen *Textbook on Criminal Law 6th Ed* (London: Blackstone Press Ltd, 2001), 490

⁸³ Micheal J. Allen *Textbook on Criminal Law 6th Ed*, 490

involve expense on the part of the owner in remedial work, despite the secondhand value of the car not being affected.⁸⁴

Further, the damage does not have to be visible.⁸⁵ In this case if the damage affects the proper functioning of the property then that will be taken to be damage regardless of the fact that it cannot be seen. In the case of *Cox v. Riley*⁸⁶ the deletion of the program from a computer-controlled machine, rendering it unusable, was held to constitute damage.

This decision was followed in *R v Whiteley*,⁸⁷ where the accused had hacked into a computer network and altered data stored on disks. This was held to be damage even though the physical nature of the disks had not been altered or impaired; their usefulness, however, was impaired. This position as regards computers has been reversed by the Computer Misuse Act 1990 which provides:

For the purposes of the Criminal Damage Act 1971 a modification of the contents of a computer shall not be regarded as damaging any computer or computer storage medium unless its effect on that computer or computer storage medium impairs its physical condition.

Criminal damage is also committed where the accused destroys property, for example, by demolishing a building, breaking up a machine, killing an animal, laying waste crops, incinerating books and so on.⁸⁸

⁸⁴ Micheal J. Allen *Textbook on Criminal Law 6th Ed*, 490

⁸⁵ 'Criminal Damage', Available at <http://www.inbrief.co.uk>, accessed December 26, 2011

⁸⁶ [1986] 83 Cr. App. R. 54

⁸⁷ [1991] 93 Cr. App. R. 25 at 29

⁸⁸ Micheal J. Allen *Textbook on Criminal Law 6th Ed*, 491

3.3.1.2 Property

Section 10 of the Criminal Damage Act 1971 defines property to mean property of a tangible nature, whether real or personal, including money and including wild creatures which have been tamed or are ordinarily kept in captivity, and any other wild creatures or their carcasses if, but only if, they have been reduced into possession which has not been lost or abandoned or are in the course of being reduced into possession. Land is included in this definition. As was held in *Henderson v Battle*,⁸⁹ where the defendants had dumped rubble on a development site which cost a substantial sum to clear; the act constituted damage to the land.

3.3.1.3 Belonging to Another

According to section 10 of the Criminal Damage Act 1971, property shall be deemed to belong to someone having the custody or control of it; having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest); or having a charge on it. This means that an owner can damage his or her own property if at the same time it belongs to someone else falling within the definition contained in Section 10. An example of this is the property being owned not only by the individual but also the mortgage company if the property is the subject of a mortgage.⁹⁰

3.3.1.4 Intent, Recklessness and lack of lawful excuse

Intention, recklessness and lack of lawful excuse are the requisite mental elements required for the destruction or damage to property belonging to another to amount to an offence.

⁸⁹ 29 November 1984, unreported

⁹⁰ 'Criminal Damage', Available at <http://www.inbrief.co.uk>, accessed December 26, 2011

3.3.1.4.1 Intent and recklessness

If the accused mistakenly believes that the property he is damaging or destroying is his own, he will lack the requisite intention. In the case of *R v Smith (David)*⁹¹ the accused not knowing property law, damaged fixtures he had installed in the flat of which he was a tenant when removing wiring for his stereo equipment. He believed that the fixtures belonged to him when, in law, they belonged to the landlord. Quashing his conviction of criminal damage, the House of Lords stated:

Applying the ordinary principles of mens rea, the intention and recklessness and the absence of lawful excuse required to constitute the offence have reference to property belonging to another. It follows that in our judgment no offence is committed under this section if a person destroys or causes damage to property belonging to another if he does so in the honest though mistaken belief that the property belonging to another is his own, and provided that belief is his honestly held it is irrelevant to consider whether or not it is a justifiable belief.

3.3.1.4.2 Lawful Excuse

According to section 5 of the Criminal Damage Act 1971, a person charged with criminal damage shall be treated as having a lawful excuse if at the time of the act or acts alleged to constitute the offence, he believed that consent was given; if the damage was caused during the protection of that person's own property if that property was in immediate need of protection and that the means taken to protect that property were in fact reasonable. In *Chamberlain v Lindon*,⁹² the Queen's Bench Division upheld the decision of Nuneaton Justices to acquit the accused of criminal damage where he had demolished a wall built by the complainant on the complainant's land as the accused honestly believed such action was necessary to protect his right of vehicular

⁹¹ [1974] QB 354

⁹² The Times, 6 April 1998

access across the claimant's land and that delay would prejudice his rights. If the damage does not fall within the ambit of section 5, then it will be taken to have been without lawful excuse.

3.3.2 Destroying or Damaging Property with Intent to Endanger Life

Subsection (2) of section 1 of the Criminal Damage Act 1971 provides

a person who without lawful excuse destroys or damages any property, whether belonging to himself or another (a) intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged; and (b) intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered; shall be guilty of an offence.

Under section 4 (1) of the Criminal Damage Act 1971, the maximum punishment for the offence is life imprisonment. This is because a person who commits this crime will usually do so with the requisite intent to cause death.

3.3.2.1 Destruction/Damage

The meaning of 'damage', 'destroy' or 'property' is the same as under section 1 (1).⁹³ However, a person may commit this offence on his own property.⁹⁴ For example, in *Parker*,⁹⁵ it was held that if a landlord wishing to evict a squatter who is refusing to leave, throws a petrol bomb into the house thereby damaging the property, he is liable to conviction of the section 1 (2) offence if he had the requisite *mens rea* specified in section 1 (2) (b).

⁹³ Micheal J. Allen *Textbook on Criminal Law 6th Ed*, 497

⁹⁴ Micheal J. Allen *Textbook on Criminal Law 6th Ed*, 497

⁹⁵ [1993] Crim LR 856

3.3.2.2 Intent and recklessness

The accused must intend to damage or destroy property or be reckless thereto. In addition, the accused must intend by that damage to endanger life or be reckless thereto.⁹⁶ In *Steer*,⁹⁷ the accused fired a shot through a window pane behind which two people were standing. It was accepted that he did not intend to endanger their lives. The question remained, however, whether he damaged property being reckless whether the life of another would be endangered. He was convicted and appealed submitting that it had to be proved that the endangering arose from the damage to the window and not the act which caused the damage to the window. The House of Lords affirmed the decision of the Court of Appeal allowing his appeal as it was the shooting which endangered the lives and not the breaking of the window. Though recklessness was not proved in the case above, it should be noted that under the 1971 Act, it is only sufficient to prove recklessness for the offence to exist.

3.3.2.3 Without Lawful Excuse

Without lawful excuse in section 1 (2) does not have a similar meaning to that of section 1 (1).⁹⁸ This means that the provisions of section 5 do not apply to section 1 (2).⁹⁹ Therefore in a case where the accused is given consent to damage property, if he does so intending to endanger the life of another or being reckless thereto, he will be guilty of the section 1 (2) offence. The limited circumstances in which the accused would have a lawful excuse appear to be confined to

⁹⁶ Micheal J. Allen *Textbook on Criminal Law 6th Ed*, 497

⁹⁷ [1987] All ER 833

⁹⁸ Micheal J. Allen *Textbook on Criminal Law 6th Ed*, 500

⁹⁹ Micheal J. Allen *Textbook on Criminal Law 6th Ed*, 500

situations where he damages property to prevent crime or apprehend an offender and the reasonable force he uses endangers life.¹⁰⁰

3.3.3 Threats to Destroy or Damage Property

Section 2 of the Act makes it an offence to make a threat intending that the other would fear it being carried out, to destroy or damage any property belonging to that other or third person, or to destroy or damage his own property in a way which he knows is likely to endanger the life of that other or a third person.

3.4 A COMPARATIVE ANALYSIS: AUSTRALIAN/UNITED KINGDOM ANTI-VANDALISM LAWS VIS-À-VIS ZAMBIA'S

The discussion above has shown how different jurisdictions treat similar offences due to their having divergent legal orders. It has been observed that Australia is closer to Zambia in the manner it treats offences of destruction or damage to public or private property. This is not the case with the United Kingdom where all offences of destruction or damage to public or private property are punishable according to the cost incurred on the destroyed or damaged property. In Zambia, the law seeks to deter would-be offenders. This is more or less the case with Australia as well, though this is subject to debate.

Another point worth noting about the manner in which the three jurisdictions criminalise criminal damage or destruction is that in Australia and the United Kingdom, an offender may elude punishment if it is established that he has a lawful excuse for the commission of the

¹⁰⁰ Micheal J. Allen *Texbook on Criminal Law 6th Ed*, 501

offence. This is not the case in Zambia where the law emphasises that the damage or destruction may be for any purpose. In Australia and the UK, only intent or recklessness has to be proven. The law in Zambia is more stringent than in the other two jurisdictions. This is also seen in the immensity of the penalty Zambian laws provide for the offence.

It should also be noted that in the United Kingdom, land is also defined as property that may be destroyed or damaged. As the case of *Henderson v Battley*,¹⁰¹ clearly illustrated, rubble may damage land. Zambia has a problem of refuse being carelessly dumped anywhere at any time. Amending our laws in line with the decision above would help us deal with this scourge that is eating into the beauty and sanitation of the country. Also in line with the above submission, it has been observed that in the UK, courts are able to make interpretations of what amounts to damage on a case to case basis. This is because due to such factors as rampant technological development, having a close-ended definition of what amounts to damage may allow some offenders to elude the teeth of the law.

Finally, as has been said above, the sentences for the commission of the crimes that fall under criminal damage or vandalism are stiffer in Zambia as compared to Australia and the United Kingdom. Further, sentences are varied in Australia whereas in Zambia, they have been treated the same despite their being diverse both in terms of the value of the property which is the subject matter of the offence and the severity of the offence. There is therefore need for Zambian legislators to relook into the law so as to rectify the disparities that exist.

¹⁰¹ 29 November 1984, unreported

CHAPTER FOUR

A COMMENTARY ON THE CASE OF *THE PEOPLE V EMMANUEL MBITA AND RABI CHILUYA*

4.1 INTRODUCTION

Since the enactment of Act No. 17 of 2007, not many cases have been adjudicated by the courts on vandalism. It is of essence, in legal discourse, that an appraisal be had of how the courts have interpreted the amended and new provisions of the Penal Code. This chapter is a commentary on the case of *The People v Emmanuel Mbita and Rabi Chilufya*, a 2010 High Court for Zambia case adjudicated in the aftermath of the Penal Code (Amendment) Act No. 17 of 2007. The chapter discusses how the High Court determined the accused's culpability with regard to the offence of vandalism as amended by the said Act No. 17 of 2007. Since the court relied on the doctrine of recent possession in order to arrive at its decision, this chapter discusses this doctrine, stating how it was relied on in the case, and concludes with a critical comment on the decision.

4.2 FACTS OF THE CASE

The two accused were charged with the offence of vandalism contrary to section 341 D (1) and (2) (a) and (d) of the Penal Code Cap 87 of the Laws of Zambia as amended by Act No. 17 of 2007. The particulars of the offence are that the two accused persons on the night of 25th December, 2009 at Mansa District of the Luapula Province of the Republic of Zambia jointly and while acting together did vandalise public property namely one solar panel valued at K1.5m the property of the Ministry of Health namely Kundamfumu clinic which property is essential to the provision of a necessary service. The two accused persons pleaded not guilty to the charge.

It was testified that the two accused had removed the solar panel from Kundamfumu clinic, which removal interrupted communication between Kundamfumu clinic and Mansa General Hospital. It was also learnt at the prosecution that the accused kept the solar panel for two days after which they took it for sale in Mansa. None of the prosecution witnesses testified that they had seen the two accused persons removing the solar panel from the clinic. The accused on the other hand testified that they found and picked the solar in the bush, but under cross examination admitted that they did not report the matter to the police.

4.3 THE HOLDING

On the evidence before the High Court, the court came to the conclusion that the prosecution had proved beyond all reasonable doubt that the two accused persons had committed the offence of vandalism in terms of section 341 D (2) of Act No. 17 of 2007. The court convicted them accordingly.

4.4 THE *RATIO DECIDENDI*

The court relied on section 341 D (1) of Act No. 17 of 2007 which criminalises the vandalism, for any purpose, of public and private property essential or incidental to the provision of a necessary service. The definition of the term 'necessary service', the definition of the word 'vandalise' both under section 341A, and the detailed description of property protected under section 341 D (2) (d) (h) of the Act were followed by the court. The court reasoned that since the solar panel was used to provide power to the surrounding area and supplying electricity to the fridge at Kundamfumu clinic where medicines were kept; and that it was also used in the communication between the clinic and Mansa General Hospital and other centres, these are necessary services as defined in section 341A. The removal of the solar panel had disabled or

disrupted the provision of these two necessary services; therefore, the act of removing the solar panel amounted to vandalism as defined in section 341A of Act No. 17 of 2007.

On the question of whether it was the accused person who removed the solar panel from the clinic which act amounted to vandalism, none of the prosecution witnesses had testified that they saw the two accused persons removing the solar panel from the clinic. However, the prosecution had proved that the two accused persons were in recent possession of the solar panel, a fact which the accused admitted, even though they stated that they found the solar panel in the bush. In the circumstances, the court determined the question whether an inference could be drawn from the fact of possession that it was the accused persons who had removed the solar panel from the clinic. This principle (of drawing an inference) is derived from the doctrine of recent possession. The doctrine is discussed below.

4.4.1 The Doctrine of Recent possession

This is a common law doctrine that stipulates that if the accused is found in possession of recently stolen goods and offers no explanation for his possession, or the court is satisfied beyond reasonable doubt that any explanation offered is untrue, the judge may infer guilty knowledge from this fact.¹⁰² The court is not obliged to draw such an inference and should convict only where it is satisfied that the accused had such knowledge or belief.¹⁰³ The doctrine of recent possession has been considered in a number of cases. In the case of *R. v Aves*,¹⁰⁴ it was held that where an accused person is in possession of property recently stolen, the court may infer guilty knowledge if he gives no explanation to account for his possession or if the court is satisfied that the explanation offered is untrue.

¹⁰² Micheal J. Allen *Textbook on Criminal Law 6th Ed.* (London: Blackstone Press Ltd, 2001) 486.

¹⁰³ *Abramovich* [1914] 11 Cr App R 45

¹⁰⁴ [1950] 2 All ER 330

The doctrine was extensively considered in the case of *Fanwell v R*,¹⁰⁵ where it was held that:

“Inference may be drawn, and a matter of recent possession must be treated as any other matter in which guilt is found by inference. The inference must be the only reasonable inference. And if a person is in possession of property recently stolen and gives no explanation the proper inference from all the circumstances of the case may be that he was the thief, or broke in to steal and stole, or was a receiver. And if an explanation is given because guilt is a matter of inference, there cannot be conviction if the explanation might reasonably be true.”

In the *Zambian* case of *Danny Zyambo v The People*,¹⁰⁶ the Supreme Court of Zambia stated that inference of guilt cannot be drawn from possession of stolen property unless it is the only inference that can be reasonably drawn. Where an innocent explanation might reasonably be true *afotiori* the inference of guilt is not the only reasonable inference. The court further stated that if the accused gives an explanation which might reasonably be true he has as a matter of law satisfied the court that the case has not been proved beyond reasonable doubt and has discharged the obligation imposed on him.

Finally, in the case of *Kunda v The People*,¹⁰⁷ the appellant was convicted of the charge of office breaking involving theft of property worth K560.00. It was established by evidence that one of the stolen items, a typewriter, was in the appellant's house a day after the theft had occurred. The appellant explained in his sworn evidence before the trial court that the typewriter was brought to his house by the respondent. His only witness, Mr Mumba, said that he and the respondent had stolen and brought the typewriter to the appellant to sell.

The trial magistrate came to the conclusion that this appellant in conjunction with Mr Mumba and the respondent had been a party to the breaking and the theft.

¹⁰⁵ (1954) 1R and N 81

¹⁰⁶ (1977) ZR 53

¹⁰⁷ (1980) ZR 100 SC (29 November 1979)

On appeal it was argued that the learned trial magistrate had erred in finding the appellant guilty of the principal offence. Counsel for the appellant contended *inter alia* that the offence of recent possession had not been proved against the appellant.

The Supreme Court held that in cases where guilt is found by inference, as for instance, where the doctrine of recent possession is applied, there cannot be conviction if an explanation given by the accused, either at an earlier stage or during the trial, might reasonably be true. The court was also of the view that where an accused person is in possession of property recently stolen, the court may infer guilty knowledge if he gives no explanation to account for his possession or if the court is satisfied that the explanation offered is untrue. The court finally stated that mere custody of recently stolen property is enough to prove possession.

The term "possession" is defined by s. 4 of the Penal Code as: 'possession', 'be in possession of' or 'have in possession' -

(a) includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to, or occupied by oneself or not) for the use or benefit of oneself or of any other person;

(b) If there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them.

4.4.2 Application of the Doctrine in *The People v Emmanuel Mbita and Rabi Chilufya*

Relying on the doctrine of recent possession discussed in the cases above, and the fact that the accused persons did not report their purported finding of the solar panel in the bush, the High court was at pains to find how the accused expected the lawful owner of the solar panel to know that his solar panel was in the possession of the accused persons. In the view of the court, the

failure by the accused persons to report the finding of the solar panel which in their own testimony they said was an unusual find in the bush, their conduct of selling the said panel within a period of two days, all showed that they had no reasonable grounds to believe that the owner of the said solar panel could not be found.

The court cited the case of *R v Chitema*,¹⁰⁸ in which the accused had picked up a five pound note near Luanshya Market and kept it. It was improbable that the money was abandoned and the accused had no reasonable ground of believing the owner could not be found, for example, by reporting to the police. It was held that the accused was guilty of theft.

Relying on the case cited above, the court was of the view that it was highly improbable that the two accused persons would have believed the owner of the solar panel had abandoned it in the bush or that they had any reasonable ground to believe that the owner of the solar panel could not be traced especially as the accused persons knew that it was a very valuable item. The court stated that the quick disposal of the solar panel clearly showed that the two accused persons had *animus furandi*. The court rejected the explanation given by the accused persons as to how they came in recent possession of the solar panel stating that it could not reasonably be true. The only inference the court could draw was that the two accused persons were the ones who actually removed the solar panel from Kundamumu clinic, which view was reinforced by the fact that the two accused persons led the arresting officer to the scene of the crime and showed him how they removed the solar panel from the roof using a ladder to climb to the top of the roof.

¹⁰⁸ 5 N R L R 385

4.5 A CRITICAL COMMENT

It should be pointed out that the case of *The People v Emmanuel Mbita and Rabi Chilufya*, ordinarily should have been adjudicated under section 318 (1) of the Penal which penalizes receiving or retaining property stolen or unlawfully obtained and like offences. The section provides a sentence of seven years on conviction. The law that was relied on, Act No. 17 of 2007 provides a stiffer punishment of between ten and twenty-five years imprisonment upon conviction. The case is a good illustration of the implementation of the intention of Act No. 17 of 2007: that of deterring would-be offenders. Through this judgment, the public was made aware of the amendment to the Penal Code, which amendment has tightened the protection of public and private property. The judgment is a warning to all would-be offenders that the teeth of the law as regards acts of vandalism are now sharper and more lethal.

However, as against the accused persons upon conviction, relying on the provisions of Act No. 17 may lead to injustice in certain circumstances. For example, a person who destroys or damages a ZESCO transformer worth billions of kwacha may upon conviction, be sentenced to imprisonment for between ten and twenty-five years, a sentence which was slapped on the accused in *The People v Emmanuel Mbita and Rabi Chilufya*. It seems apparently ridiculous to sentence a person who destroys or damages property worth K1.5m in the same manner as a person who destroys or damages property worth billions. In Zambia, since the Penal Code amendment by Act No. 17 of 2007, the purpose of dissuading would-be offenders outweighs this argument.

Another point worth noting from the case of *The People v Emmanuel Mbita and Rabi Chilufya*, is that an act of theft or any other criminal act that engrosses damage or destruction of property

may be tried under vandalism provisions. In fact, the doctrine of recent possession that was relied on in the case above is a doctrine under offences covered in Division V of the Penal Code which has provisions for offences relating to property such as theft and related offences. What this means is that acts of vandalism may take many forms including theft, public disorder, trespass and dangerous driving.

CHAPTER FIVE

SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1 SUMMARY

This essay has attempted to state the law as regards the offence of vandalism in Zambia. The essay has endeavoured to point out the weaknesses that were in the Penal Code¹⁰⁹ and other Acts of Parliament before the amendment by Act No. 17 of 2007, and how the amendment has remedied the lacunas that were present in the law before it was amended. It has further showed how effective the law has become after the amendment by Act No. 17 of 2007. It has been observed that the law as regards malicious damage to property was not adequate before the amendment by Act No. 17 of 2007 in that certain property, property essential for or incidental to the provisions of a necessary service and other public or private property were not protected.

It has, however, been observed that despite the fact that Act No. 17 has bettered the law criminalizing Acts of vandalism, it does inhere some weaknesses. For example, the Act limits the *mens rea* elements in the determination of culpability as against the accused to only intent and malice, leaving out recklessness. This means that if someone destroys or damages property for apparently no purpose, recklessly (see definition in chapter one), they will not be found wanting by the courts of law.

It has further been observed that the Act does not provide any opportunity for the accused to raise a lawful excuse for their commission of acts of vandalism. This is perhaps a drafting anomaly, on the part of the legislature, and is against salient principles of criminal law. An accused may commit acts of vandalism in order to protect their person or property in which case

¹⁰⁹ Chapter 87 of the Laws of Zambia

their action should be justified, and instead they may only be liable for monetary damages in a civil action. This does not seem to have been envisioned under Act No. 17 of 2007.

It was also observed that the Act has created the offence of vandalism which is different from malicious damage to property in general. This means that a person can now be charged either with malicious damage, or vandalism. It was stated in chapter two that acts of malicious damage are actually acts of vandalism. And as is already known, a good legal system must have laws that are simple and clear. This overlap and duplication in nomenclature is awkward, and could be attributed to poor drafting.

As regards enforcement, it was brought to the fore that law enforcers, police officers are very ill-equipped to enforce the law. In the first place, most police officers are oblivious of the fact that the law has changed as against acts of vandalism. The few officers that were interviewed indicated that the law they were abreast with as presently criminalizing the destruction of or damage to property is that which was provided in the repealed provisions criminalizing malicious damage to property. This state of affairs is embarrassing as law enforcers should be the first persons to know of any changes in the law as and when they take place.

Secondly, as regards police officers attached to corporations most affected by acts of vandalism, it was observed that only ZESCO has been availed such officers. This means that all the other institutions adversely affected by this criminal offence such as ZAMTEL, have to find other means of protecting their property from damage.

Another observation that was made by the researcher during field research is that police officers responsible for providing general statistical information, on for example the number of prosecutions, convictions, acquittals and so on, of persons accused of committing different

crimes in each year, are not confident with their statistics. They see little or no credibility at all in them. In the words of one of the officers interviewed:

“Here (at the Police Headquarters) what we have are fake statistics.”¹¹⁰

This remark demonstrates that the institutional framework for law enforcement in Zambia is very poor. As was stated by renowned learned lawyer Prof Patrick Mvunga in 1994 when contributing to Parliament on the importance of enforcing the law:

“We will have very good laws but good laws alone cannot create miracles. They need to be supported by corresponding facilities, and then the law will be as good as it was intended. No matter how good the law may be, the law can never change attitudes. Enforcement is extremely important.”¹¹¹

5.2 CONCLUSION

Other than the weaknesses stated above, it should be noted that the amendment by Act No. 17 of 2007 of the Penal Code has made the law more responsive to the current needs of society as against acts of vandalism. Since the amendment had among its objectives, the purpose of creating a situation whereby would-be offenders are deterred from engaging in acts of vandalism, it could be concluded that with good awareness campaigns, this objective will be achieved.

5.3 RECOMMENDATIONS

The following recommendations are hereby made:

- It is recommended that the whole Division in the Penal Code which provides for malicious injuries to property, Division VI, be renamed from “MALICIOUS INJURIES

¹¹⁰ Interview: December 29, 2011. For the sake of personal privacy the interviewee’s identity has been concealed

¹¹¹ Official Parliamentary Debates, Tuesday, 15th March 1994

TO PROPERTY’ to ‘VANDALISM TO PROPERTY’. This will mean that all acts of destruction of or damage to property, including arson, malicious damage and vandalism, will be generically called acts of vandalism. This will make the law much simpler for all Zambians even if they have not studied law because the term is used by and large to mean destruction of or damage to property.

- It is also recommended that the other statutes’ viz Electricity Act, Railways Act, the Communications Act among others be amended so as to make them responsive to and identical with Act No. 17 of 2007.
- It is further recommended that recklessness be added to intent and malice in the Penal Code, as part of the *mens rea* element in the determination of one’s culpability as against acts of vandalism, as is the case in both the UK and Australia. This will remove the limitation on the courts when determining the accused’s culpability to intent or malice only, so that where any of these two elements are not proved in a given case, the courts may still rely on recklessness.
- It is also recommended that the provisions on vandalism be amended so as to add ‘without lawful excuse’ to them, as is the case in UK and Australia. As was already observed above, it is ridiculous to have a provision that does not allow the accused to have recourse to a lawful excuse. This addition will make this law be in tandem with principles of criminal law and laws of other common law jurisdictions.
- Since the Penal Code defines property to include real and personal property (see s 4), it is recommended that the courts interpret destruction of or damage to property to include ‘damage to land’ in terms of unlawful dumping of refuse on another’s land. This will help

reduce cases of illegal dumping of refuse thereby creating good sanitation in the country. This is under the principle learnt from the UK that land can be damaged.

- In terms of enforcement, it is recommended that the institutional framework for law enforcement in Zambia be improved. This means that there must be retraining of police officers as and when the law changes. Further, the institutional framework employed in conveying statistical information from around the country about criminal cases generally should be improved. This will create confidence, first in the police officers themselves, and secondly in all other persons on the operations of the police force.
- It is also recommended that there be established a police unit specifically dealing with cases of vandalism. This unit can work together with the officers attached in the corporations and other places most adversely affected by acts of vandalism.
- Finally, it is recommended that general will against acts of vandalism be upheld. This includes political will, that is a resolve among politicians, especially those with influential positions, to speak against acts of vandalism as was demonstrated by Rupiah Banda;¹¹² improving educational and living standards so that people do not go about vandalizing property for purposes of endeavouring to make ends meet; and having awareness campaigns by both politicians and law enforcers on the effects of vandalism and the penalties provided by the law for those found wanting.

It should be concluded that some of these recommendations need immediate attention while others may be addressed as and when resources needed for their attainment avail themselves.

¹¹² Cited in Chapter one

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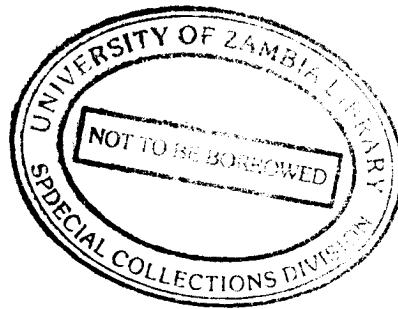
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