

THE STATE

Versus

LOVEMORE MUSHUNJE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 21 AUGUST 2003

Criminal Review

NDOU J: The accused pleaded guilty to negligent driving i.e contravention of section 52(2)(a) of the Road Traffic Act [Chapter 13:11]. He was properly convicted by a Hwange Magistrate and nothing turns on the conviction. He was sentenced as follows:

“\$2 000/1 month imprisonment. Accused is prohibited from driving all classes of motor vehicle for 6 months. Licence shall cancel.”

A certificate of previous convictions produced in terms of section 90 of the Act showed that the accused is a holder of classes 4 and 5 driver’s licences and that he had no previous convictions. In the circumstances prohibition from driving and cancellation of the accused’s licence was not mandatory. In exercising her discretion the learned trial magistrate imposed a prohibition from driving and cancelled the accused’s licence as reflected above. The learned scrutinising Regional Magistrate, Hwange, queried, *inter alia*, the exercise of such discretion “without the trial court exploring whether accused had special reasons or not and no finding pertaining thereto ever made.” In her wisdom the learned trial magistrate did not respond to this particular query.

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The accused was not legally represented during the truncated trial and the learned trial magistrate a duty to fully canvass the question of special circumstances with him because the accused himself will often be unaware of the provisions subsection (4)(a) of section 52. The court must offer some guidance to the accused in this regard. In trials conducted pursuant to the provisions of section 271(2)(b) of the Criminal Procedure and Evidence Act [Chapter 9:07] the possibility of error is so great that trial magistrates should be at particular pains and should exercise every caution to avoid injustices occurring – see *Mavis Zindonda* AD 15-79; *Amon Maponga v S* HH-276-84 at page 6 and *S v Siomn Ngulube* HH-48-00 at pages 3-4.

In casu, it does not seem to me that the learned trial magistrate was aware of the provisions of section 52(4) as there is simply no reference made at all to the question of special circumstances in the entire record of proceedings. This constituted a gross irregularity. This irregularity should, however, be contextualised because no conviction or sentence may be quashed or set aside by mere reason of irregularity or defect in the proceedings unless the reviewing judge considers that a substantial miscarriage of justice has actually occurred – section 29(3) of the High Court Act [Chapter 7:06]. The object of this provision is to prevent proceedings being set aside on technical grounds. The test is whether there has been substantial prejudice to the accused – *Criminal Procedure in Zimbabwe* by John Reid Rowland at 26 – 10(h). In this matter if the sentence is not altered there is bound to be substantial prejudice to the accused.

The other question is whether it is in the interest of justice to remit the case to the learned trial magistrate for the question of the existence or otherwise of special circumstances. In this regard I believe that the interests of justice are generally not

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served by lightly requiring the re-opening of a case that has already adjudicated upon – *R v Boschhoff* 1956 R & N 61 (SR); *R v Haya* 1957 R & N 645; *R v Mokwena* 1948(2) PH H 203; *Bekhem v Jarvis N.O. v Garnett N.O.* 1952 S R 140; *S v Ngombe* 1964 (3) RSA 816 (RA) and *S v de Jager* 1965(2) SA 612.

I hold the view that this is a case where remittal is not in accordance with the interests of justice. The accused was sentenced on 12 November 2002. The period of prohibition of six months has lapsed in any event. The only option left would be that of the cancellation of his driver's licence.

In light of the above, I accordingly, make the following order –

The convictions of both counts be and are hereby confirmed. The prohibition of the accused from driving for six months and the cancellation of his drivers' licences be and are hereby set aside. The rest of the sentence is otherwise confirmed. The accused and the Registrar of Road Traffic Licences are to be informed of the purport of this judgment.

Chiweshe J I agree