

THE STATE

Versus

JOSEPH CHIRWA

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 21 OCTOBER 2004

Criminal Review

NDOU J: The accused was convicted by a Gweru Magistrate of two charges, namely count 1 contravening section 6(1)(a) as read with 6(5) of the Road Traffic Act [Chapter 13:11], and count 2 culpable homicide. He pleaded guilty to count 1 and not guilty to count 2. In count 1 the learned scrutinising Regional Magistrate for the Central Division, queried the propriety of the conviction because the record shows that the proceedings were conducted pursuant to the provisions of section 271(2)(b) of the Criminal Procedure and Evidence Act [Chapter 9:07] yet no essential elements of the charge were put to the accused. In her response to the said query the trial magistrate purports to have proceeded in terms of section 271(2)(a) of the Act. I do not think it was advisable to do so bearing in mind the possibility of prohibition from driving.

Documentary evidence of the Traffic Accident Book, post mortem report and the sketch plan were not submitted with the record on scrutiny. They should have been part of the record. Even on request by the Regional Magistrate they were not submitted. The trial magistrate made a brief comment on why they were not initially submitted but still did not submit them. This is highly unsatisfactory.

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In count 2 the trial magistrate was enjoined to proceed in respect of sentence in terms of section 64(3) of the Act and prohibit the accused from driving for not less than 6 months as was done in *casu – S v Chaita & Ors* 1998(1) ZLR 213 and *S v Mapeka & Anor* 2001(2) ZLR 90. The trial, however, did not carry out the mandatory inquiry into special circumstances before prohibiting the accused from driving for 6 months. It was improper for the trial magistrate to do so. The fines of \$30 000 and \$60 000 are very lenient. The trial magistrate, in her own response, relied on repealed penalty provisions.

There is need for remedial action in this matter. From the evidence in the record and the facts found by the trial magistrate and what is common cause the guilt of the accused has been established on both counts. I say so even without the benefit of the documents requested by the learned scrutinising Regional Magistrate. I accordingly confirm both convictions and sentences imposed. I however, set aside the part of the sentence imposed prohibiting the accused from driving for 6 months and refer the matter to the trial magistrate for a proper inquiry in compliance with the mandatory provisions of section 64(3) of the Road Traffic Act.

Cheda J I agree