

**THE STATE**

**Versus**

**GILBERT NCUBE**

IN THE HIGH COURT OF ZIMBABWE  
NDOU J  
BULAWAYO 29 DECEMBER 2005

Criminal Review

**NDOU J:** The accused person was convicted on his own plea of guilty to a charge of culpable homicide by a Bulawayo Magistrate. Nothing turns on the conviction. However, as regards the sentence, the learned scrutinising Regional Magistrate, Western Division, was concerned by an apparent failure by the trial court to comply with statutory requirements imposed by the Road Traffic Act [Chapter 13:14]. This appears to be a very common error committed by traffic courts these days. In her memorandum to this court, the learned Regional Magistrate attacked the propriety of the sentence in the following terms:

“... He was sentenced to a fine and an additional suspended prison term on conditions given.

On scrutiny I noted that the trial magistrate had not complied with the applicable provisions of section 64(3) of the Road Traffic Act. That section provides:

“(3) If, on convicting a person of murder, attempted murder, culpable homicide, assault or any similar offence by or in connection with driving of a motor vehicle, the court considers-

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- (a) that the person would have been convicted of an offence in terms of this Act involving the driving or attempted driving of a motor vehicle if he had been charged with such an offence instead of the offence at common law; and
- (b) that if the convicted person had been convicted of the offence in terms of this Act referred to in paragraph (a), the court would have been required to prohibit him from driving ...;

The court shall, when sentencing him for the offence at common law-

- (i) prohibit him from driving for a period that is not shorter than the period of prohibiting that would have been ordered had he been convicted of the offence in terms of this Act ...”

In the present case the charge sheet states that the accused was negligent. In the plea recording process too the trial magistrate asked the accused thus:

- “Q By your negligence you caused the death of the now deceased ...  
A Yes”

It now follows that if no one had died as a result of this accident, the accused would have been charged with contravening section 52(1) i.e. negligent driving. In this case the [trial] court was obliged to turn to the provisions of section 52 of the Road Traffic Act and deal with the accused in the same way that the accused would have been dealt with had he been convicted of negligent driving in contravention of that section. She (the trial magistrate) did not comply with the provisions of section 52(4) of the Road Traffic Act [particularly] the proviso thereof. In terms of that [sub]section the court is empowered to decline to prohibit. However, this is only when the court considers that there are special circumstances which justify the court in so declining. Such special circumstances should be endorsed on the record when passing sentence as it provided in section 52(4) proviso (b). No inquiry was held into the existence or otherwise of the special circumstances. None were endorsed on the record. In response to the query I sent to her, the trial magistrate

conceded that she erred and [as is now very common] blamed pressure of work for it.”

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I associate myself with the observations by the scrutinising Regional Magistrate. For some inexplicable reason, it seems to me magistrates in traffic courts are not complying with provisions of proviso (b) of subsection (4) of section 52 both in culpable homicide cases arising out of negligent driving and in offences framed under section 52.

Accordingly, I am unable to certify these proceedings as being in accordance with real and substantial justice and I withhold my certificate.