Judgment No. HB 135/05
Case No. HC 2139/05
CRB TFC 87/05

THE STATE

Versus

MALOTHY NDLOVU

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

Criminal Review

NDOU J: The accused was convicted by a Gweru Magistrate of contravening section 56(2)(e) of the Road Traffic Act [Chapter 13:11] as read with section 25 Part LXXXIV of the Criminal Penalties Act [No. 22 of 2001].

The learned scrutinising Senior Regional Magistrate Central Division, is not satisfied with the propriety of the conviction resulting in him addressing the following minute to this court.

> "The accused was convicted on his own plea of guilty of contravening section 56(2)(e) of the Road Traffic Act which provides that:
>
> "Any person who … acts upon, produces or uses an invalid licence with intent that it shall be regarded as valid … shall be guilty of an offence" (emphasis is mine).
>
> The facts of the case as per state outline are very shallow and the inquiry into mitigation by the trial magistrate is perfunctory. As shown above section 56(2)(e) of the Act … requires proof of requisite *mens rea* on the part of the accused before he is convicted as this is not a strict liability offence. An unrepresented accused may not appreciate this. *In casu*, the facts do not disclose how the accused obtained an invalid certificate of competence in his possession. This is so because it is inexplicable that accused would take an invalid certificate of competence to Vehicle Inspection Department

> (VID) inspectors to obtain a drivers' licence disc well knowing that the certificate accused had was invalid. Further, it is

> not even explained how or in what way the certificate of competence was invalid. All these issues in my view, have a bearing on whether the accused had requisite intention to commit the offence and/or sentence to be imposed. All these issues were not canvassed by the trial magistrate and puts into issue the propriety of the conviction and/or sentence."

I agree with the learned scrutinising Senior Regional Magistrate's observations. The conviction cannot stand. The essential elements of the charge were not fully canvassed with the accused. He was not placed in a position where he would make an informed decision on his plea of guilty. As the accused was undefended, the trial magistrate was under obligation to assist him as far as is necessary to ensure that justice is done. The above pertinent points raised by the scrutinising Regional Magistrate should have been canvassed – *S* v *Kefasi & Ors* 1975(1) RLR 357; *R* v *Cowan* 1969(2) RLR 18; *S* v *Tshuma* 1979 RLR 366; *S* v *Mutadza* 1983(1) ZLR 123 and *S* v *Chuma* 1990(2) ZLR 33 (H). It is trite that the trial magistrate, when resorting to the use of the procedure set out in section 271(2)(b) of the Criminal Procedure and Evidence Act [Chapter 9:07] he/she is required to ensure that the accused fully understands the nature of the charge. All essential elements of the offence must be explained to the accused and be understood and admitted by the said accused. The element of the intention *in casu*, which emanates from the statutory definition should have been explained to the accused – *S* v *Matimba* 1989(3) ZLR 173(S); *S* v

Dube & Anor 1988(2) ZLR 285(S) and *S* v *Ncube* (2) 1989(2) ZLR 232(H). This was not done in this case.

Accordingly, the conviction be and is hereby set aside and a trial *de novo* is ordered before a different magistrate.

Bere J ………………………………. I agree