**DAVID TEMBO**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA AND MATHONSI JJ
BULAWAYO 7 AND 10 NOVEMBER 2011

*M Ndlovu* for appellant
*Miss Munyeriwa* for respondent

Criminal Appeal

**KAMOCHA J:** The 38 years old appellant was convicted of driving a class two motor vehicle without a licence in respect of such class of motor vehicle. The vehicle was a T35000 whose net mass was 260kg. It was a heavy vehicle as defined in section 2 of the Road Traffic Act [Chapter 13:11].

The appellant was carrying mining machinery and 3 passengers. After conviction the trial court sentenced him to the minimum mandatory sentence of 6 months imprisonment as it held that there were no special reasons why the mandatory minimum sentence should not be imposed.

The appellant appealed against the sentence on two grounds. Firstly, the appellant complained that the court *a quo* had erred by not making a full inquiry with regard to his special circumstances and as a result of the superficial inquiry the court was unable to find special reasons to save the appellant from the prescribed minimum mandatory sentence.

Secondly, the appellant alleged that the trial court had erred by imposing the mandatory sentence when there were special reasons.

In the result, the appellant prayed that the trial court's sentence be set aside and substituted with a fine.

In the alternative appellant prayed that the matter be remitted to the trial court for it to conduct a full inquiry on the special circumstances or that this court grants the appellant such further and/or alternative relief as may, to it, seem meet.

The main thrust of the appellant's complaint was that the trial court had erred in restricting the inquiry on special circumstances to those peculiar to the commission of the offence. Hence the inquiry was incomplete as there was no justification for limiting the special reasons to those peculiar to the commission of the offence only. The special reasons should have also related to the offender as was held in the case of *R* v *Da Costa Silva* 1956(2) SA 173 (SR). The respondent's counsel conceded that point and the concession was proper, in my view.

The appellant also complained that the trial court should have fully explained the question of special reasons at an earlier stage before the sentencing stage as it was very inadequate to do so at the sentencing stage as stated in *S* v *Dube and another* 1988(2) ZLR 385 (SC).

The appropriate stage to canvass special circumstances/special reasons is immediately after the court has pronounced the verdict of guilty before hearing the accused in mitigation. *In casu*, the trial court canvassed the special reasons with the appellant after hearing him in mitigation. That was undesirable.

Having said that I would not go so far as to hold that the explanation given by the trial court was inadequate. The trial court recorded the summary explanation which the appellant appeared to understand and he told the court what he believed amounted to special reasons albeit he was restricted to those relating to the commission of the offence only.

Having held that the trial court had misdirected itself in restricting the special circumstances only to those peculiar to the commission of the offence this court is at liberty to examine whether or not there are any special reasons peculiar to both the commission of the offence and the appellant himself. As stated in *S* v *Chisiwa* 1981 ZLR 666 at 671 "special" connotes that reasons have to be out of the ordinary either in their extent or their nature. A clear distinction must be drawn between special reasons and mitigatory features like good character or a particular hardship which factors do not amount to special circumstances.

The appellant in this case submitted that the trial court would have found the following factors to amount to special circumstances had it not restricted the horizon of special circumstances:-

(a) That he was driving the heavy vehicle as part of the test driving it after he had repaired it;
(b) That he was on his way to mend the wheel of a tractor which had had a break down in the mine;
(c) That he was not involved in an accident;

(d) That he was not in the business of ferrying passengers;
(e) That he was driving the vehicle under instructions from his employer; and
(f) That there was no other driver at the said time.

I now turn to deal with the above factors seriatim. A person test-drives a vehicle in order to ascertain whether the defect that was being corrected has been rectified. The test-driving is not prolonged and should not be combined with the execution of one's normal duties. *In casu* test-driving was combined with going to mend a wheel of the tractor which had a puncture. The appellant was also carrying mining machinery and 3 passengers according to the facts that he admitted. So his suggestion that he was test driving the vehicle is misleading and false. The correct position is as he stated when addressing the court in mitigation that he was driving the vehicle as he went about the performance of his business. He drove the vehicle to go and mend the punctured wheel of a tractor at the mine. There is nothing out of the ordinary about that. Similarly there is nothing out of the ordinary about the fact that he was not involved in an accident and was not in the business of carrying passengers.

The appellant's submission that he was driving the vehicle under instructions from his employer is also untenable as that seems to suggest that the employer employed a class four driver to drive class two vehicles. He agreed to do so well knowing that he was only a holder of a class four licence. That cannot be regarded as a special reason. It is in fact a factor in aggravation instead.

The appellant finally submitted that he had to drive the vehicle as there was no other driver at that particular time. The appellant has given conflicting reasons for driving the vehicle. He was obviously trying to pull wool over the court's eyes.

He further alleged he had made a mistake of law in that he was not sure that as a holder of a class four driver's licence he was not sure that the vehicle he was driving was a heavy vehicle. The appellant was employed as a driver who ought to have known that a T35000 was a heavy vehicle. One needed a class two licence to drive such vehicle. His belief was clearly unreasonable and so was his mistake of law that a holder of a class four licence is permitted in law to drive a class two motor vehicle. It is simply not true that he was not sure that he was committing an offence.

It was also submitted on behalf of the appellant that one of the three passengers he was carrying in the vehicle was going to end up at the hospital. The appellant was being dishonest about why he was driving the vehicle. The fact that the vehicle was going to end up at the hospital does not make it an emergency because he was firstly going to mend a puncture of a tractor. It is difficult to understand the relevance of the submission that the appellant was the

only driver at that particular time when there was no emergency. The appellant was desperately clutching at straws. Quite clearly special reasons are non-existent in this matter.

In the result the minimum mandatory sentence imposed by the trial court shall stand.

The order of this court is that the appeal be and is hereby dismissed.

Mathonsi J ……. I agree

*Mlweli Ndlovu & Associates*, appellant's legal practitioners
*Civil Division of the Attorney-General's Office*, respondent's legal practitioners