

GUIDE GWAMA**Versus****THE STATE**

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA & MOYO J J
BULAWAYO 22 JUNE & 30 JULY 2015

Criminal Appeal

Z. Tapera for appellant
N. Ngwenya for respondent

KAMOCHA J: The appellant appeared before a provincial magistrate at Kwekwe facing firstly a charge of contravening section 6 (1) of the Road Traffic Act, Chapter 13:11 “No driver’s licence”. He, on 16 October 2012 at about 20:48 hours, drove a Nissan UD lorry registration number ACB 1614 along Mvuma Road, opposite Msasa suburb, Kwekwe when he knew that he was not a holder of a driver’s licence to drive that class of a motor vehicle.

Secondly he was charged with negligent driving in contravention of section 52 (2) of the Road Traffic Act [Chapter 13:11] – “the Act”. He negligently drove the said motor vehicle on the date, time and along the road mentioned in the first count and hit a vehicle driven by Macdonald Muchochonyi which was stationery at a give way as it gave way to him.

The driver of the stationery vehicle sustained fractures on the left humerus, radius and ulnar. His vehicle was damaged and its panel beating cost \$460,00. His medical bill cost \$360,00. The bills were paid by the appellant.

The appellant pleaded guilty to both counts and was found guilty as pleaded. The convictions were proper and nothing turns on them.

The appellant was sentenced as follows:

Count 1: 6 months imprisonment

Count 2: 6 months imprisonment of which 3 months imprisonment was suspended for 5 years on the customary conditions of future good behaviour. His effective sentence for both counts was 9 months imprisonment. In addition appellant was prohibited from driving for a period of 2 years from the date of sentence.

The appellant noted this appeal against sentence complaining that:-

- (1) The trial magistrate did not wholesomely engage in an inquiry in order to gather as much information as possible to be able to assess the adequate sentence especially with the issue of special circumstances which appellant failed to appreciate to justify the non-imposition of a minimum mandatory prison sentence. It was alleged that that was prejudicial to the unrepresented appellant.
- (2) The second complaint was that the trial magistrate should have first considered and discarded the option of a fine or community service as the appropriate sentence since the appellant was a first offender and also considering that he was given a sentence of 9 months, less than a year.
- (3) Appellant attacked the sentence as being manifestly excessive as the injured party who did not sustain permanent injuries also contributed to the accident and there were no fatalities, notwithstanding the fact that the negligence did not constitute gross negligence and that the appellant pleaded guilty and is a first offender aged 25 years old family man with 3 children. He submitted that a fine coupled with a suspended prison term and or community service sufficed.
- (4) He concluded that the sentence imposed was disproportionate to the harm committed. Another court faced with the same facts may not have imposed an effective custodial sentence or prohibited the appellant from driving for 2 years especially considering that appellant was sober at the time.

He then prayed that the sentence be set aside and be substituted by either a fine, a wholly suspended prison term on condition of good behaviour and to community service.

In terms of section 6 (1) of the Act no person shall drive a motor vehicle on a road unless he/she is the holder of a valid licence issued to him/her in respect of motor vehicles of the class concerned.

Subsection (5) of section 6 provides that a person who contravenes subsection (1) shall be guilty of an offence ... if the motor vehicle he/she was driving in contravention of that subsection was a commuter omnibus or a heavy vehicle, he/she shall be liable to imprisonment for a period no exceeding five years and not less than six months, unless he satisfies the court that –

- “(a) he possessed a licence issued to him in respect of commuter omnibuses or heavy vehicles, as the case may be; and
 - (b) the licence referred to in paragraph (a) ceased to be valid on the expiry of the period referred to in subsection (1) of section fourteen A; and
 - (c) he could have lawfully have renewed the licence referred to in paragraph (a) and, had he done so, he would have been entitled to drive the commuter omnibus or heavy vehicle concerned.
- Or unless he satisfies the court, in terms of section eighty-eight A, that there are special reasons in the case why that penalty should not be imposed upon him.”

The appellant was driving a lorry which is a heavy vehicle when he was not a holder of a licence of such class of vehicle. It is not clear from the record whether or not he was a holder of an expired licence for that class of motor vehicle which if he had lawfully renewed he would have been entitled to drive the heavy vehicle concerned.

The record of proceedings does not show that the court *a quo* addressed that issue at all. It should have carried out an inquiry in order to satisfy itself whether or not the appellant possessed a licence issued to him in respect of heavy motor vehicles which had expired and which if he had lawfully renewed would have entitled him to drive the said heavy motor vehicle.

Failure by the court *a quo* to conduct that inquiry is a serious misdirection. It is like a failure to conduct an inquiry by a trial court in terms of section 88A of the Act in order to satisfy itself whether or not there are special reasons in the case. The requirement to conduct an inquiry ought to be complied with in every case for an accused to satisfy the court whether or not he possessed a learner's licence for that class of motor vehicle, which had expired.

The complaint by appellant about special reasons is completely without merit. The record of proceedings clearly shows that the special reasons were explained to the appellant and he understood them. He then told the court what he believed to be special reasons and stated thus:-

“I was learning how to drive and the person who was teaching me to drive was not around. I also want the court to take into account that I have pleaded guilty and that I assisted the victim of the accident with his medical expenses. That is all.”

The court correctly held that there were no special circumstances in this case, in my view.

The appellant grasped the meaning of special reasons as explained by the trial court and even appreciated the difference between mitigating factors and special reasons. That is apparent from what he said when addressing the court in mitigation.

The appellant's legal practitioner did not apply his mind to what he was doing when he drafted the grounds of appeal. He submitted that the court should have considered a non custodial sentence of either a fine or community service in view of the fact appellant was sentenced to an effective sentence of 9 months imprisonment. He was oblivious of the fact that the court held that there were no special reasons in the case and had to impose the mandatory minimum sentence. The trial court had no discretion in the matter.

In the third ground of appeal he submitted that the sentence was manifestly excessive as the injured party who did not sustain permanent injuries also contributed to the accident and there were no fatalities. It is difficult to understand the reasoning behind the above submission.

The sentence is not excessive at all as the Act provides for a sentence of a maximum of 5 years imprisonment and a minimum of 6 months imprisonment. The submission also ignored the fact the injured party sustained three fractures to his left arm even if permanent disability had not yet been ascertained at the time of examination.

The suggestion that the injured party contributed to the accident is patently false and misleading. The admitted facts are that the appellant was driving along Mvuma Road, when he got to the Railway Avenue turn off he intended to turn left into Railway Avenue and indicated his intention to turn. The injured party was stationary at the turn off giving way to the appellant who was driving along Mvuma Road. As the appellant was negotiating his left turn into Railway Avenue he made a wide turn and hit the stationary car. It is difficult to understand why the submission was ever made at all.

In the fourth ground of appeal it was submitted that the sentence imposed was disproportionate to the harm committed. In the result an effective custodial sentence and prohibition from driving for 2 years were in appropriate since the appellant was sober at the time of the offence. This displays complete lack of attention and diligence on the part of the drafting legal practitioner. Both the sentence and prohibition order are mandatory in terms of the Act. The sobriety of the appellant was not an issue at all in casu as he was not charge with contravening section 54 (2) or 55 (2) of the Act.

Prohibition from driving

The proviso to subsection (6) of section 6 of the Act recites that:-

“...if the motor vehicle he was driving in contravention of subsection (1) was a commuter omnibus or a heavy vehicle, the court shall prohibit him for life from driving motor vehicles of the class to which commuter omnibuses or heavy vehicles, as the case may be, belong, unless he satisfies the court that –

- (a) he possessed a licence issued to him in respect of commuter omnibuses or heavy vehicles, as the case may be; and

- (b) the licence referred to in paragraph (a) ceased to be valid on the expiry of the period referred to in subsection (1) of section fourteen A; and
- (c) he could lawfully have renewed the licence referred to in paragraph (a) and, had he done so, he would have been entitled to drive the commuter omnibus or heavy vehicle concerned;

Or unless he satisfies the court, in terms of section eighty-eight A, of the Act that there are special reasons in the case why such prohibition should not be imposed upon him.”
Emphasis added.

In terms of section 52 (4) (a) of the Act a person convicted of driving a heavy vehicle negligently shall be prohibited from driving for a period of not less than two years, provided were the court considers that there are special circumstances it may decline to prohibit the person from driving. What the court considers to be special circumstances should appear on the record of the case.

The trial court was alive to the above provisions of the Act and the prohibition in respect of each section. It then prohibited the appellant from driving for a period of two years in respect of the negligent driving charge and declined to prohibit him from driving commuter omnibuses or heavy vehicles for life despite the fact that it had found that there were no special reasons in the case.

The court purported to excise a discretion which it did not have. The provisions of the Act are mandatory and the court had no choice in the matter where it holds that there are no special reasons. The court misdirected itself by failing to act as mandated by law. The appellant was facing two different counts each of which attracted a prohibition from driving where no special reasons exist.

In the light of the foregoing the appeal against the sentence of 9 months imprisonment fails and the sentence is hereby confirmed.

The prohibition from driving for a period of two years relating only to count 2 – negligent driving is also confirmed.

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The record of proceedings is returned to the trial court for it to recall the appellant and conduct an inquiry as to whether or not he possessed an expired learner's licence which if he had lawfully renewed would have entitled him to drive a heavy vehicle. In the event that the court holds that he did not, it should proceed as mandated by law.

Moyo J I agree

Magodora & Partners appellant's legal practitioners
Prosecutor-General's Office respondent's legal practitioners