

THE STATE  
versus  
FRADRECK MBASO

HIGH COURT OF ZIMBABWE  
KUDYA J  
HARARE, 6 March 2008

### **Criminal Review**

KUDYA J: This record of proceedings was referred for review by the scrutinizing regional magistrate who believed that the accused had been charged with and convicted of and sentenced for a non-existent offence.

The accused was charged with the offence of driving a commuter omnibus when he was under the age of 25 purportedly in contravention of s 7 (1) (a) of the Road Traffic Act [*Chapter 13:11*].

He drove a commuter omnibus with 12 passengers along the Harare- Nyamapanda road. He was arrested at a police road block in Murewa. His certificate of competence and his national identity document showed that he was 23 years old at the time. He was convicted on his own plea and sentenced to as follows:

“\$20 000.00 or in default of payment 10 days imprisonment. In addition 3 months imprisonment is wholly suspended for 5 years on condition accused does not within that period commit any offence involving the driving of motor vehicle for which no valid drivers licence is held for which upon conviction is sentenced to imprisonment without option of a fine. Invalid drivers licence “Certificate of Competency” No 800974B is hereby cancelled. (Clerk of Court to advise CVR accordingly)”.

It is necessary that I quote in full the contents of section 7 of the said Act. It reads:

#### **7 Minimum age limits for drivers of motor vehicles**

- (1) Notwithstanding anything contained in this Act, no person under the age of—
  - (a) sixteen years shall drive on a road any motor vehicle; or
  - (b) eighteen years shall drive on a road a construction vehicle, heavy vehicle or passenger public service vehicle other than an omnibus or a commuter omnibus; or  
[Paragraph amended by section 4 of Act 3 of 2000.]
  - (c) twenty-five years shall drive an omnibus or a commuter omnibus on a road.

- [Paragraph inserted by section 4 of Act 3 of 2000.]
- (2) A licence issued to a person under the age of—
- (a) sixteen years in respect of any motor vehicle; or
  - (b) eighteen years in respect of a construction vehicle, heavy vehicle or passenger public service vehicle other than an omnibus or a commuter omnibus; or  
[Paragraph amended by section 4 of Act 3 of 2000.]
  - (c) twenty-five years in respect of an omnibus or a commuter omnibus;  
[Paragraph inserted by section 4 of Act 3 of 2000.]  
shall be invalid.
- (3) ...  
[Subsection repealed by section 4 of Act 3 of 2000.]
- (4) A court convicting a person of an offence in terms of subsection (3) may, subject to Part IX, prohibit the person from driving for such period as the court thinks fit.  
[Subsection amended by section 4 of Act 3 of 2000.]

Paragraph (c) of subsection (1) of s 7, above cited, prohibits a person who is under the age of 25 from driving a commuter omnibus while paragraph (c) of subsection (2) of the same section invalidates any licence issued to a person under the age of 25 in respect of a commuter omnibus. The repealed subsection (3) made it a criminal offence for a person to act contrary to subsections (1) and (2) while the repealed section 88 of the Act was a general penalty section.

Subsection (1) of section 10 of the Act sets out the two categories for which certificates of competency may be issued. It reads:

### **10 Issue of certificates of competency and drivers licences**

- (1) The holder of a learners licence may apply on the prescribed form to an examiner for a certificate of competency to drive—
- (a) motor vehicles of any class, other than omnibuses; or
  - (b) omnibuses, if he has held for such continuous period as may be prescribed a licence, other than a learners licence, in respect of such class of motor vehicles as may be prescribed.

It does appear from the wording of subsection (1) as read with subsection (2) of s 10 of the Act that a specific licence to drive commuter omnibuses is issued to persons between the ages of 25 and 70 years. The trial magistrate was obliged to inquire whether or not the certificate of competency that the accused held covered commuter omnibuses or not in order to determine whether subsection (2) of s 7 of the Act would apply in the instant matter. If the certificate covered an omnibus then it would be invalid and *a fortiori*, if it did not then it remained valid.

In the absence of an offence creating provision in the Act, a person under the age of 25 who drives a commuter omnibus does not commit the offence that the accused was charged

with. This was an anomaly which was brought about by the repeal of subsection (3) of s 7 and s 88 of the Act. There may be need for the creation of both an offence creating and a penalty provision which specifically relates to infractions of s 7 of the Act. In the absence of such provisions it was remiss of the trial magistrate to convict let alone sentence the accused for a non-existent offence. The error can only be corrected by setting aside both the conviction and sentence.

It seems to me that the accused may have infringed the provisions of subsection (1) of s 6 of the Act which penalizes a person who drives a motor vehicle without the requisite driver's licence for that class of motor vehicle. It will be up to the Attorney-General to determine whether he should be charged with that offence. Once convicted of driving a commuter omnibus without the requisite licence the magistrate may in the absence of special circumstances impose the mandatory minimum sentence outlined in subsection (5) of s 6 of the Act. I will direct the Registrar to bring this judgment to the attention of the Minister of Justice, Legal and Parliamentary Affairs, the Attorney-General, the Law Reviser and the Chief Magistrate to move the appropriate amendment of s 7 of the Act and to alert both prosecutors and magistrates on the impropriety of charging drivers under it.

Accordingly it is ordered that:

1. Both the conviction and sentence be and are hereby are set aside
2. The Registrar brings this judgment to the attention of the Minister of Justice, Legal and Parliamentary Affairs, the Attorney-General, the Law Reviser and the Chief Magistrate.

GUVAVA J: agrees