

THE STATE
versus
JOSEPH NYAMVURA

HIGH COURT OF ZIMBABWE
TSANGA & CHITAPI J
HARARE, 3 October 2018

Review Judgment

CHITAPI J: The record of proceedings in this matter has been placed before me on review in terms of s 59 of the Magistrates Court Act [*Chapter 7:10*]. The accused a 32 years old first offender pleaded guilty to two charges. In count 1, it was alleged that on 2 January, 2018, along Chivhu –Nyazura road, he drove a commuter omnibus without being the holder of a licence in contravention of s 6 (1) of the Road Traffic Act. [*Chapter 13:11*]. The charge should for clarity be framed as “contravening s 6 (1) as read with the proviso to s 6 (5) in that the accused unlawfully drove a commuter omnibus (*details of the vehicle and where he was arrested whilst driving*) without being a holder of a valid licence issued in respect of the said motor vehicle.” In *casu* the charge alleged a contravention of s 6 (1) which only prohibits the driving of a vehicle without a valid licence. It did not refer to s 6 (5) which then makes it an offence to so drive. The proviso is important to refer to because it distinguishes punishment which may be imposed depending on the type of motor vehicle concerned. If the vehicle involved is a commuter omnibus, a minimum sentence of 6 months must be imposed unless the convict satisfies the court of the existence of factors set out in the said section which I shall deal with later in this judgment.

In count 2, the accused was charged with negligent driving as defined in s 52 (2) of the Road Traffic Act, [*Chapter 13:11*]. The charge arose from the same incident in that, whilst driving the same commuter omnibus without a valid licence as charged in count 1, the accused was negligent in failing to keep a proper look out, failing to keep the vehicle under proper control and failing to stop or act reasonably when an accident seemed imminent. Due to his negligent driving the commuter omnibus overturned once and landed in a ditch facing the opposite direction of the accused’s line of travel. Fortunately, it landed on its wheels. There were 11 passengers on board. Ten of the passengers sustained minor injuries and were

treated at Rusape General Hospital and discharged. One passenger sustained a fracture of the right shoulder and had to be further managed at Parirenyatwa Hospital. He was treated and has recovered.

As with the 1st count, the charge should have specified that the accused was being charged with contravening s 52 (2) (a) as read with s 52 (2) (a) (i) of the Road Traffic Act, [*Chapter 13:11*]. Section 52 (2) (a) creates the offence of negligent driving whilst s 52 (2) (a) (i) is the penalty section applicable if the vehicle involved in the negligent driving is a commuter omnibus . The penalty which may be imposed is a fine not exceeding level ten or imprisonment not exceeding one year or both a fine and a term of imprisonment.

The purpose of composing or framing a charge is to advise the accused in a precise, unambiguous wording of the nature of the offence or charge that the accused is facing on trial. Section 146 (1) of the Criminal Procedure & Evidence Act, [*Chapter 9:07*] provides that a charge should set out the offence charged in such a manner and giving particulars as to the time, manner and place of commission as well as the particulars of the person as may be reasonably sufficient to inform the accused of the nature of the charge. Section 146 aforesaid purports to distinguish between Statutory and non- statutory offences with statutory offences being covered under s 146 (2) which provides that with statutory offences, the charge should describe the offence in the words of the enactment or in similar wording. *Provisos*, exemptions, exceptions, excuses or other qualifications include presumptions and onuses are not required to be included. Following on the codification of crimes under the Criminal Law Codification and Reform Act, [*Chapter 9:23*], it can be argued that all crimes cognizable in Zimbabwe have been codified either under the Criminal Law Codification and Reform Act or as provided for in other statutes creating the other crimes. Section 146 (4) provides that, where particulars which must be included in relation to offences listed in the first column of the second schedule to the Criminal Law codification and Reform Act, are not known to the Prosecutor, it is deemed sufficient to indicate in the charge that the unknown fact is so unknown. Section 146 (5) provides that an indictment summons or charge “alleging the commission of a crime mentioned in subsection (4) shall not be held to be defective on account of the failure or omission to mention the section of the Criminal Law Code in which the crime is set forth. The application of s 146 relating to the essential averments which a charge should contain however is subject to the Criminal Procedure and Evidence Act and any other enactment. In other words, unless the Criminal Procedure and Evidence Act or

other enactment under which an accused is charged provides otherwise, the provisions of s 146 are all embracing when it comes to the framing of a charge.

Reverting to s 146 (5), its application is limited to the Criminal Law Codification and reform Act. In other words a failure to mention the section of that Act which creates an offence under the enactment does not render the charge defective. The subsection does not provide that it is not essential to cite the section. It also does not bar the taking of an objection to a charge as being defective where the statutory offence charged does not fall within the band of offences listed in column 1 of the second schedule to the Criminal Law Codification and Reform Act.

In *casu*, I have made corrections to the charge in the first count to reflect the correct sections of the Road Traffic Act as they should have been cited. The omission to cite the correct sections does not invalidate the charge because a mere defect in a charge does not invalidate the charge unless prejudice resulted or to use the wording used in criminal reviews, a substantial miscarriage of justice has occurred. The reason why mere defects in a charge do not invalidate the charge or subsequent proceeding is that procedural laws are intended to promote or serve the ends of justice and not to subvert or frustrate them. However, notwithstanding that an imprecisely drafted charge will not defeat the charge, it must be stressed that the charge forms the foundation of the accusation and as such, meticulous care should be taken in drafting or framing the charge. Good practice dictates that sections in an enactment relied upon for founding a charge should not only be cited but should be correctly cited.

In *David Karombe* HH 264/15 HUNGWE J with the concurrence of BERE J (as he then was) relied on the judgment in *S v Carbon* 1973 (4) SA 615 and held that “a failure to refer to the section at all or reference to the wrong section of a statute does not affect the validity of a charge provided that it is clear that the accused because of the factual description of the alleged offence, was aware of the nature of the charge and was not prejudiced”. I agree. Following on this therefore, the convictions in this case will stand because the defect in citing the wrong sections of the Road Traffic did not cause any prejudice to the accused person.

The accused was sentenced as follows in respect of the convictions. On count 1, 3 years imprisonment with 1 year suspended on condition that the accused is not convicted of any offence involving the driving of a motor vehicle without a valid driver’s licence for which upon conviction he is sentenced to imprisonment without the option of a fine. In addition the accused was prohibited from driving “motor vehicles” for life. In regard to the

prohibition order, the court is required in the absence of the accused showing the existence of factors stated in the provision to s 6 (6) of the Road Traffic Act, to impose a driving life ban or prohibition in relation to the class of vehicles to which commuter omnibuses or heavy vehicle are classed. Section 6 (6) aforesaid provides as follows

“(6) Subject to Part IX, a court convicting a person of an offence in terms of subs (5) may prohibit him from driving for such period as the court thinks fit;
Provided that, if the motor vehicle he was driving in contravention of subs (1) was a commuter omnibus or a 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 para (a) ceased to be valid on the expiry of the period referred to in subs (1) of s fourteen A; and
(c) he could lawfully have renewed the licence referred to in para (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 s eighty-eight A, that there are special reasons in the case why such a prohibition should not be imposed upon him.”

In determining sentence, the magistrate simply advised the accused that the offence of driving without a licence carried a mandatory custodial sentence of not less than 6 months and not more than 5 years and further that the court was obliged to prohibit the accused from driving for life unless the accused had “special circumstances peculiar to the offence.” The accused responded that he had been sent by his employer to carry stones and quarry from the mountain. He then collected hired hands to assist in the process after having been given money to pay them by his employer. The magistrate ruled that there were no special circumstances, hence the sentence imposed in count 1 as well as the order of prohibition or ban from driving for life. In my view, the magistrate misdirected himself in the determination of sentence in count 1.

Firstly, the magistrate did not explain the concept of special circumstances nor did he enquire into whether or not the circumstances set out in s 6 (6) (a) – (c) of the Road Traffic Act existed. This court dealt with and gave directions on how the issue of special circumstances should be handled in *S v Manase* HH 110/15. This is a must read and understand case for all magistrates. In summary, MUREMBA J explained the procedure which must be followed. The court is required to fully explain clearly what special circumstances entail. The explanation given should be recorded and so should the accused’s explanation or answers. The accused may lead evidence in this regard and this should be explained to the accused. In *casu*, the explanation of special circumstances given to the accused was not recorded. The court simply invited the accused to address on special circumstances peculiar

to the offence. For an unrepresented accused this was wholly inadequate because it cannot be said that the accused understood any explanation given. In fact, no explanation was given and it is not recorded that the accused understood the explanation assuming that any was given by the court. The accused was not advised of his rights to lead evidence on the issue.

In regard to the ban from driving, the record does not clearly show that vehicle in question was a commuter omnibus. The charge sheet and state outline referred to the vehicle as a “Toyota Hiace.” When plea recording, the magistrate did not ever use the word a commuter omnibus save when writing reasons for sentence. The fact that the vehicle was a Toyota Hiace did not make it a commuter omnibus without such fact being established or proved. In terms of the Road Traffic Act, a commuter omnibus is defined as:

- “Commuter omnibus” means passenger public service vehicle which—
- (a) has a seating accommodation for more than seven passengers; and
 - (b) is used to provide a passenger transport service in accordance with a permit issued under
 - (i) regulations made in terms of s 193 of the Urban Council Act [*Chapter 29:15*]; or
 - (ii) Part V of the Road Motor Transportation Act [*Chapter 12:10*]

The Road Traffic Act also defines as omnibus as “omnibus” means a heavy vehicle having—

- (a) a net mass exceeding two thousand three hundred kilograms; and
- (b) seating accommodation for seven or more passengers.

There is therefore a distinction between an omnibus and a commuter omnibus. The latter operates under a permit issued in terms of s 193 of the Urban Councils Act or Part V of the Road Motor Transportation Act. Thus, whilst the Toyota Hiace by design could have had a seating capacity of more than 7 passengers since it was loaded with 11 passengers as *per* the agreed facts, it did not follow that it qualified by definition as a commuter omnibus. Neither the charge sheet nor state outline described the vehicle as such and there was no other evidence to show or prove that the vehicle was a commuter omnibus. The magistrate was misdirected not to ascertain that indeed the Toyota Hiace qualified as a commuter omnibus in terms of the Act. For this reason, sentencing the accused on the basis that he drove a commuter omnibus without such material fact being proved was a misdirection. The irregularity committed in this respect was gross and resulted in a substantial miscarriage of justice.

To cure the irregularities, I can either set aside the conviction and sentence and order that the proceedings be commenced afresh before a different magistrate. I can also confirm the conviction, set aside the sentence and remit the case to the magistrate concerned to

properly canvass the issues of special circumstances and the nature of the vehicle in issue, whether it was commuter omnibus or just an omnibus. I can also confirm the conviction, set aside the sentence and impose a different sentence which is informed by the facts and evidence.

When the accused was asked to explain how he came to drive the vehicle, he indicated that he was about his employers business having been tasked to go and collect quarry from the mountains. The passengers were not fee paying but “guys” whom the accused was to pay for helping with collection of the quarry. The Toyota Hiace was therefore in use to carry quarry and the passengers were not commuters or commuting. This vital piece of evidence was not challenged by the State. The accused both in addressing special circumstances and in mitigation stated that he was going about his assignment as given by his employer. It was not disputed that he was so employed. Considering the definition of an omnibus in the Road Traffic Act, the accused had 11 passengers in the Toyota Hiace. I can safely therefore hold that the Toyota Hiace qualified as an omnibus but was not proven to be a commuter omnibus. The accused should have been sentenced on the basis that he drove an omnibus without being a holder of a valid driver’s licence and that he drove the omnibus negligently and overturned injuring the passengers in the omnibus. The accused addressed the court in mitigation of sentence and the prosecutor addressed the court and submitted that there are no special circumstances without elaboration. I am therefore in a position to assess the evidence and sentence the accused afresh. The following order is therefore made:

1. The convictions of the accused on both the 1st and 2nd counts are confirmed save that in count 1, the record should reflect that the accused is guilty of contravening s 6 (1) as read with s 6 (5) of the Road Traffic Act, [*Chapter 13:11*].
2. The sentences on both counts are set aside and substituted as follows:
Count 1: 8 months imprisonment of which 2 months imprisonment is suspended for 3 years on condition that the accused is not within that period convicted of any offence involving the driving of any motor vehicle without a valid driver’s licence and for which upon conviction, he is sentenced to serve a term of imprisonment without the option of a fine.
Count 2- 6 months imprisonment.
3. The sentences in counts 1 and 2 shall run concurrently.
4. As the accused has served the effective term, he shall forthwith be liberated from custody.

TSANGA J: agrees