THE STATE
versus
ISAAC CHINODA

HIGH COURT OF ZIMBABWE
MAWADZE J.
MASVINGO, 28 July, 2023

Criminal Review

MAWADZE J: The penalty provisions in some statutes like the Road Traffic Act [*Chapter13:11*] have created immense challenges to some judicial officers. This relates to the additional sanctions so provided in the related provisions of the Road Traffic Act [*Chapter 13:11*].

The exhortation is that Magistrates should endeavour to carefully read these provisions in the said Road Traffic Act [*Chapter 13:11*[the Act] under which an accused is being charged before plunging in to the dark as it were.

I also mention in passing that where queries are raised on review it is prudent to apply one's mind to such queries before making a perfunctory response. This would prevent an unnecessary flurry of correspondence between the reviewing Judge and the trial Magistrate which is time consuming and unnecessary. It can be rather discouraging for a judge to write minute after minute on the same issue.

I now turn to this matter at hand.

This matter was concluded on 20 June 2023 when the accused was convicted and sentenced on his own plea of guilty of Contravening Section 52 (2) of the Road Traffic Act [*Chapter 13:11]* which relates to negligent driving.

The record of proceedings was placed before me on automatic review on 26 June 2023. The proceedings had been conducted by the Magistrate sitting at Masvingo. After perusing the record of proceedings I raised the following straightforward queries:

"1. *In terms of what provision was the accused's licence cancelled?*

2. Why was the accused prohibited from driving for less than 2 years if he was driving an omnibus?

3. Why does the prohibition relates to class 2 only?"

In the response the trial Magistrate simply addressed the second query and failed to deal with the other two issues in any meaningful manner. A concession was made that the prohibition period from driving of 6 months which has been imposed was improper.

On 14 July 2023 I again wrote to the trial Magistrate and raised the following,

"1. My minute dated 26 June 2023 and the response thereto by the trial Magistrate as per the dated 11 July 2023 refer

2. As per my query dated 26 June 2023 item (1) I asked why the accused's driver's licence was cancelled. This was not responded to.

3. In regards to issue (3) I simply wanted the trial Magistrate to explain why he or she exercised the discretion in prohibiting accused from driving class 2 motor vehicles and not other classes. The reasons for sentence are silent on this."

The Provincial Magistrate in charge of Masvingo Province on 19 July 2023 implored the trial Magistrate to respond all the issues I had raised.

The trial Magistrate, in a very brief response on, on 20 July 2023 simply conceded that the reasons for sentence do not disclose why the discretion was exercised to prohibit the accused from driving class 2 motor vehicles only.

I realised that we were in a merry go round so to say. If the trial Magistrate had simply responded to the queries in the order they had been numbered all this omissions could have been avoided.

The facts of this matter are simple and straight forward despite minor inconsistences I observed between the charge sheet and the state outline in the registration number of the said motor vehicle involved and its proper description.

The agreed facts are as follows;

The 41 year old accused is a resident on No 314, Runyararo West Masvingo. He is a holder of a valid Zimbabwean driver's licence in respect of classes 2, 4, and 5. On 25 April 2023 at about 14:30hrs he was driving a white Toyota Hiace omnibus with no passengers along Charumbira Street due east towards Masvingo town. A 4 year old juvenile Pasca John Chikati was crossing the same road near Vision Academy from the left to the right. The accused hit the same juvenile and immediately stopped.

The said juvenile sustained soft tissue injury on the left ankle (8x6cm deep bruise), bruises on left elbow, left parietal region swelling and other unspecified minor bruises. The injuries are described as moderate and there is no possibility of any permanent injury. Lastly the impact is said to have been moderate.

The accused fully admitted that his negligent driving conduct was the proximate cause of this accident. It was during day light but apparently he did not keep a proper look out. His speed was excessive in the circumstances as he failed to stop before impact or to act reasonably when the accident or collision was imminent. Indeed the duty of care towards children is always of a higher threshold. In the result the conviction, albeit on a plea of guilty, is in order.

An inquiry into special circumstances was made properly before sentence. All the accused said was that after the accident he ferried the injured child to hospital, advised the police of the accident and paid all the medical bills of the child until the child was discharged from hospital. The accused said he survives by driving and that is how he is able to provide for his family.

The trial court rightly found that there are no special circumstances in this matter. At most all what the accused said is simply mitigatory.

The accused is a first offender. He has 4 children and is unemployed.

The sentence imposed by the court *a quo* is as follows;

> *"$400 USD fine in default of payment 160 days imprisonment payable in ZWD at the prevailing Bank rate on or before 30/06/23. In addition accused is prohibited from driving motor vehicles class 2 for 6 months and accordingly driver's licence hereby cancelled."(sic)*

The penalty provision for Contravening Section 52 (2) of the Act [*Chapter 13:11*]is a fine not exceeding level ten (which currently is US $700) or imprisonment not exceeding one year or

both if the accused was driving an omnibus or a heavy vehicle. Again the fine imposed strikes a proper balance of the mitigating and aggravating factors. It is in order.

What exercised my mind are the additional sanctions imposed of prohibition from driving and the cancellation of driver's licence.

Prohibition from driving *in casu* is provided for in Section 52 (4) of the Act [*Chapter 13:11*], specifically Section52 (4) (2) as it relates to an omnibus. In the absence of special circumstances the mandatory prohibition from driving is for a period not less than 2 years if the accused was driving a heavy vehicle or an omnibus.

What is important is that the provisions of Section 52 of the Act [*Chapter 13:11*] are subject to Part IX of the Act [*Chapter 13:11]*. Part IX referred to deals with prohibition from driving and the endorsement of the licence [See Sections 62 to Section 67)

In the case of *State v Mujati* 1997 (1) ZLR 508 (H) *Gillespie J* extensively dealt with the issues of prohibition from driving and cancellation of the driver's licence as is provided in the various sections of the Act [*Chapter 13:11*]especially those creating the driving offences and Part IX of the Act [*Chapter 13:11*]

Generally as is provided for on section 65 (1) of the Act [*Chapter 13:11*] prohibition from driving should extent to all classes of motor vehicles.

The first misdirection in this matter is that the accused was prohibited from driving for a period of 6 months which is much less than the minimum provided for in the Act [*Chapter 13 :11*] of 2 years as he was driving an omnibus. This is clearly provided for in Section 52 (4) (2) of the Act [*Chapter 13:11*]. Corrective measures should therefore be taken.

The second issue is whether it was proper for the prohibition order from driving to be in relation to class 2 motor vehicles only? Section 52 of the Act [Chapter 13:11] does not provide an answer to this. However it should be noted that Section 52 of the Act [*Chapter 13:11*] is to be read together with part IX *[Chapter 13:11]* of the Act specifically Section 65 (3) of the Act [*Chapter 13:11*].

Section 65 (3) of the Act [*Chapter 13:11*] provides as follows,

> *"(3) Where a court having convicted a person of an offence in terms of this Act or any other law, prohibits that person from driving, <u>it may</u> order that such prohibition shall extend to such classes of motor vehicle, other than the class to which the motor vehicle driven or attempted to be driven by the person at the time of commission of the offence belongs, as it thinks fit.*

Provided that this subsection shall not apply to prohibition from driving imposed in terms of Subsection (2) of Section sixty-four A" (my emphasis)

The interpretation of Section 65 (3) of the Act [*Chapter 13:11*] is again simple. Once the court decides to prohibit an accused from driving as is provided by the relevant section of the Act [*Chapter 13:11*] or any other law the court has the discretion to specify if such prohibition would only relate to the class of the motor vehicle the accused was driving at the material time or to other classes of motor vehicles. This clearly entails an exercise of discretion. The discretion to limit the prohibition order from driving to the class of motor vehicle the accused was driving and not to all other classes of motor vehicles should be exercised judiciously. In practical terms cogent reasons should be given for the decision taken. It cannot be done capriciously. Thus the reasons for sentence of the court *a quo* should address this issue in specific terms.

In casu the accused was driving an omnibus and was prohibited from driving class 2 motor vehicles only. No specific reasons are given as to why the prohibition was not extended to other classes of motor vehicles. The reasons for sentence are silent on this. The trial Magistrate did not lay bare his or her reasoning process in the exercise of such discretion. The reason or reasons thereof remained safely stored in the mind of the trial Magistrate. The exercise of the discretion is unexplained.

The remedy for this in circumstances of this case is tied up with the last issue relating to the cancellation of the driver's licence. Simply put if the driver's licence is cancelled is it logical to then prohibit a holder of a licence from driving only a specific class of motor vehicle? The practicability of such an order is clearly untenable

The last issue to consider in this matter relates to the cancellation of the accused's driver's licence.

As has already been said Section 52 of the Act [*Chapter13:11*] does not provide for the cancellation of the driver's licence. Recourse should be made to part IX of the Act [*Chapter 13:11*] specifically Section 65 (5) which provides as follows;

"(5) If a person who has been prohibited from driving ———————

(a) For a period of twelve months or more or of consecutive periods which together amount to twelve months or more, is a holder of a licence the Magistrate or court prohibiting such a person from driving <u>shall</u> Subject to the provisions of Section fifty-

two, fifty-three, fifty -four, fifty- five and seventy-eight cancel the licence in respect of all classes of motor vehicle to which such prohibition extends (my emphasis).”

The provisions of Section 65 (5) of the Act [*Chapter 13:11*] are peremptory. Once the court has prohibited an accused from driving for a period of twelve months or more it shall cancel the driver’s licence of such an accused.

As already discussed *in casu* there is a mandatory prohibition of the accused from driving for a period of not less than 2 years, in the absence of special circumstances. The provision of Section 65 (5) kicks in as it were and the accused’s licence cannot be spared. It has to be cancelled.

In conclusion it is clear that the court *a quo* fell into error on the issues discussed. It failed to comply with the provisions of the law as provided for in the Act [*Chapter 13:11*]. The onus or burden to correct these anomalies does not lie with this court. Instead the solution is provided for in Section 65 (6) of the Act [*Chapter 13:11*] which states that if there is an omission from prohibiting an accused from driving as is required by law or failure to cancel an accused’s driver’s licence as is prescribed by law the trial court cannot be deemed to be *functus officio*. The same trial court is empowered to recall such an accused and correct the omissions. The procedure to do so is laid out in Section 65 (7) of the Act [*Chapter 13:11]*.

I should however emphasise that this can only be possible if it is done within six months from the date of the conviction of the accused as per section 65 (8) of the Act [*Chapter 13:11*] save for the prohibition or cancellation done in terms of Section 64 A of the Act [*Chapter 13:11*].

In casu the accused was convicted and sentenced on 20 June 2023. The six months period has not lapsed. The trial court should recall the accused and take corrective measures.

Accordingly the following order is made;

1. The conviction be and is hereby confirmed
2. The substantive sentence of ordering the accused to pay a fine of US$ 400 [or its equivalent in Zimbabwean dollars at the prevailing bank rate] or in default of such payment 160 days imprisonment be and is hereby confirmed

3. The accused's driver's licence be and is hereby cancelled.
4. The matter is remitted to the trial court for the trial Magistrate or in his or her absence any other Magistrate to comply with the mandatory provisions of Section 52 (4) of the Road Traffic Act [Chapter 13:15] as there are no special circumstances and to formally prohibit the accused from driving for a period of not less than 2 years.
5. The order of prohibiting the accused from driving only in relation of class 2 motor vehicles be and is hereby set aside. The matter is again remitted to the court *a quo* for the trial Magistrate or in his or her absence any other magistrate to grant an appropriate order prohibiting the accused from driving relevant classes of motor vehicles taking into account all factors already discussed.
6. The accused should be recalled timeously and without undue delay for purposes of compliance with paragraphs (4) and (5) above.

ZISENGWE J agrees .....