

ENOCK MUSABA EKA v THE STATE

SUPREME COURT OF ZIMBABWE,
BECK JA & GUBBAY, JA,
HARARE, SEPTEMBER 27, 1983.

B.S. Dodd, for the appellant

M. Werrett, for the respondent

BECK, A.C.J.: The appellant was convicted of having contravened s 47, as read with s 80, of the Road Motor Transportation Act [Cap 262] in that he unlawfully failed to observe a condition imposed in respect of the road service permit under which he operated one of his buses by causing it, on 20 November 1982, to be operated without a timetable.

The bus in question was stopped by the Police at the foot of Christmas Pass on the outskirts of Mutare, towards which city it was travelling according to a destination indication displayed on the front of the vehicle. There were passengers on board. It is common cause that it was without a timetable. It is also common cause that the road service permit that was seen by the Policemen, and produced before the magistrate, but which has since been mislaid and has not been seen by us, authorised the bus to be used for private hire as well as for stage carriage along the route that it was travelling. It is accepted by the State that, if the bus was in fact being used at the time for private hire only, the absence of a timetable was no offence.

The only witnesses called by the prosecutor were the two Policemen who stopped the bus. One of them conceded, although the other denied, that the driver of the bus said to them that the bus was on a private hire journey at the time. In conformity with that immediate assertion on the part of the driver, the appellant said in the outline of his defence that "The bus was on private hire and there was no need to carry a timetable". In the course of testifying on his own behalf the appellant adhered to this assertion adding, in answer to a question put by the prosecutor, that the bus had started the journey in Seke. No other details of the alleged private hire contract were sought by the prosecutor.

The only evidence on which the State relied to refute the defence raised by the contention that the bus was on private hire at the time was a scant assertion by each of the two Policemen that people in the bus had tickets. P.O. Chasarira's evidence on the point was:

"People in the bus had tickets. I got onto the bus and demanded to see some tickets". Asked by the appellant in cross-examination "Do you have any of those tickets?", he answered: "I have no tickets." Constable Kazimbi's evidence was: "Patrol Officer and I checked for tickets on the bus. I asked two passengers in front and they produced tickets. Don't know where they came from.

Driver told me he was on private hire, but there were tickets issued to passengers." Under cross-examination by the appellant the following exchange took place

"Q. Driver told you they were on private hire?

A. Yes he told me, but there were tickets issued.

Q. You knew case would come to court and you have to produce evidence?

A. I did not take any tickets."

3. S.C. 101/83

In a brief judgment the magistrate found, solely on the strength of this evidence by the Policemen, that "passengers did carry tickets" and that the State case had therefore "been proved beyond doubt that the bus was not for private hire and it did not carry a timetable".

There is absolutely nothing in the evidence, other than the matter

of the tickets shown to the Policemen, to refute the defence raised and to prove that the bus was on a stage carriage journey for which a timetable had to be exhibited. It was tenuously suggested, that the indication of the destination on the front of the bus, and the absence of an indication that it was on private hire, assisted the State case. This was not something that was canvassed with the appellant however, and in any event it was conceded that there is no statutory obligation not to display the vehicle's destination without also indicating that it is on private hire, so that this was an entirely equivocal feature of the evidence that assisted neither side.

The conviction can only be supported if the Policemen's evidence concerning the tickets that they saw properly served to prove that those tickets were sold on the appellant's behalf for that very journey as if it were a stage carriage journey. Tickets can, of course, take a variety of forms and can be issued for a variety of purposes, and clearly the content of the tickets seen by the Policemen was crucially relevant to the issue that the State had to prove. The Policemen did not in fact give evidence concerning the content of the tickets they saw, and if they had done so it would have been secondary evidence of the content for the reception of which, instead of the best evidence afforded by the tickets themselves, no justification existed, (R v Pelunsky 1914 AD 360; S v van Pittius and Another

1973 (3) SA 814 (C) at 817/8). If, on the other hand, the evidence of the Policemen was understood to imply that they were told by the passengers they approached that the tickets they produced had been sold to them as if it were a stage carriage journey, then such evidence was necessarily hearsay and inadmissible.

In short there was no basis on which the magistrate could properly treat the evidence of the Policemen as sufficient to refute the appellant's defence and to prove the State case. The State could, and should, in the circumstances known to the Police from the outset, have called one or more of the passengers whom they know to have tickets to have given direct testimony concerning the circumstances, in which, and the purposes for which, the tickets were purchased. Indeed, counsel for the State conceded on reflection that this was the position and that the evidence that was led did not suffice to prove the appellant's guilt.

For these reasons we allowed the appeal at the conclusion of argument and ordered the conviction and sentence to be set aside.

GUBBAY JA: I agree

J.H.E. Rogers & Coghlan, Welsh & Guest, appellant's legal representatives.