

HENRY MUNDOKA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU & BERE JJ
BULAWAYO 3 AND 27 MARCH 2008

G Nyoni, for the appellant
W Nyabadza, for the respondent

Criminal Appeal

NDOU J: The appellant was convicted by a Beitbridge Magistrate of driving an omnibus on a road not being the holder of a licence issued to him in respect of motor vehicles of the class concerned. He was sentenced to six months imprisonment and prohibited from driving heavy motor vehicles for life. The appellant protested the conviction and the sentence as evinced by this appeal. The salient facts are that the appellant was a holder of a learner's licence i.e. a provisional driver's licence. This is beyond dispute. On 17 June 2005 at about 0720hrs, at Total Garage, Beitbridge, the appellant was found driving the omnibus. He was employed by the owners of the omnibus as a mechanic. In fact he had just repaired the said omnibus and he was test-driving it. He told the trial magistrate all these facts and the public prosecutor did not dispute. The state does not support the conviction and sentence. Mr *Nyabadza*, has rightly conceded that as the appellant was a holder of learner's licence, a charge of contravening section 6(1) (a) of the Road Traffic Act [Chapter 13:11] was inappropriate. Section 6(1)(a) provides:

“Subject to this Act, no person shall drive a motor vehicle on a road unless he is a holder of a valid licence issued to him in respect of motor vehicles of the class concerned.”

The appellant, as a holder of a learner's licence [issued in terms of section 9 of the Act] was entitled to drive on the road subject to condition set out in section 9. *In casu*, he should have been under supervision in terms of section 9(6) and was not allowed to carry passengers in terms of section 9(7).

[There is no evidence on whether or not the bus had passengers at the time that it was test driven by the appellant]. Further, it is not clear whether the vehicle had “L” plates affixed as required by section 9(8)(b). These issues were not canvassed by the trial magistrate obviously due to the above-mentioned misdirection.

The appellant should have been charged for contravening section 9(10) of Act which provides:

- “(10) A person who-
- (a) fails to comply with the condition, if any, subject to which a learner’s licence is issued to him; or
 - (b) contravenes subsection (2), (6), (7), (8) or (9);
- shall be guilty of an offence.”

The problem here is that the trial magistrate did not canvass whether or not the learner’s licence was in respect of the class of vehicle concerned i.e. a bus. The trial court did not deal with the issue of whether the bus had passengers. Neither did it deal with the issue of affixing “L” plates. One can only speculate. These material issues should have been outlined by the state and canvassed by the learned trial magistrate during the summary trial. In view of these glaring procedural irregularities, I agree with both counsel that we exercise our wide powers of review.

Accordingly, the conviction is quashed and the sentence set aside and it is hereby ordered that the appellant be tried de novo before a difference magistrate.

Bere J I agree

W Tshakalisa Legal Practitioners c/o Majoko & Majoko Legal Practitioners,
appellant’s legal practitioners
Criminal Division, Attorney General’s Office, respondent’s legal practitioners