

THE STATE
versus
GIBSON MURINDA

HIGH COURT OF ZIMBABWE
MUSAKWA, DUBE JJ
HARARE, 2 February 2015

Review Judgement

DUBE J: This record was referred to me from the Acting Regional Magistrate for Harare who scrutinised the record. He has raised the following concerns,

“The trial court as part of its sentence , prohibited the accused from driving for two years on the basis that accused had driven a public service vehicle .This is in spite of the fact that the charge does not allege that the vehicle accused drove was a public service vehicle. The court appears to have inferred that it was a public service vehicle from the averment in the charge that the vehicle was a Toyota Hiace, an inference I am unable to support since not all Toyota Hiaces are public service vehicle.”

In its response the trial court accepted that the oversight was not justified but still contended that it had been brought to the attention of the accused during the explanation of special circumstances. The trial court contended that the accused had been convicted of negligent driving of a public service namely a commuter omnibus vehicle and that he did not dispute this fact. The court has undertaken to guard against such errors in the future.

The brief facts surrounding the commission of this offence may be summarised as follows. The accused appeared before a Harare magistrate facing charges of contravening s 52 (2) of the Road Traffic Act [*Chapter 13:11*], thus Negligent Driving. He pleaded guilty to the offence and was sentenced to 6 months imprisonment of which 3 months were suspended for 5 years on condition that the accused performs community service. In addition he was prohibited from driving classes of motor vehicle to which commuter omnibus or heavy motor vehicles belong for 2 years. His licence was cancelled.

The allegations in the state outline are as follows. On the 27th of May 2012, the accused was driving Toyota Hiace along Robert Mugabe Rd.At the intersection of Robert Mugabe Rd and Wheeler Ave, Harare, the accused who was driving and following behind the

complainant's vehicle failed to observe that the complainant was indicating to turn, resulting in him colliding with the rear of the complainant's vehicle.

The charge of negligent driving reads as follows,

“In that on the 27th of May 2012 and at the intersection of Robert Mugabe and Wheeler Rd, Eastlea, Harare, Gibson Murinda drove a motor vehicle namely a Toyota Hiace registration number ABQ negligently”

There is no allegation in the state papers that the accused drove a commuter omnibus or a public service vehicle but simply a Toyota Hiace vehicle. The trial court fell into the error of supposing that the vehicle in issue was a commuter omnibus and a public service vehicle. After convicting the accused person, the court proceeded to enquire into special circumstances. When the court was explaining what special circumstances are to the accused, it remarked as follows,

“Accused person you have been convicted of negligent driving of a public service vehicle namely a commuter Omnibus.”

The record does not indicate that a response was elicited from the accused. The suggestion that the accused had been involved in an accident whilst driving a public service vehicle was both misleading and erroneous as the state was not alleging that the accused drove a public service vehicle or an omnibus. The record does not indicate that the accused was appraised of what special circumstances are. It is incumbent upon a court making an inquiry into special circumstances to explain fully to the accused the import of special circumstances. This requirement serves to equip the offender to understand the nature of the enquiry being conducted and its purpose. A suggestion to an offender that he has been convicted of negligent driving of a public service vehicle namely a commuter omnibus is not an explanation of what special circumstances are. The court tried to elicit essential elements of the offence from the accused after it had convicted him of the offence charged. There is a growing tendency on the part of magistrates dealing with driving offences where this type of vehicle is involved, to assume that a Toyota Hiace is a public service vehicle and a commuter omnibus. This correlation is misplaced. The definition section of the road Traffic Act defines a public service vehicle as follows,

“public service vehicle” means a motor vehicle in respect of whose operation an operator's licence is required in terms of the Road Motor Transportation Act [*Chapter 13:15*];”

A Toyota Hiace is not as a matter of course a commuter omnibus nor a public service vehicle. A vehicle which is a commuter omnibus only becomes a public service vehicle when it is used for the purposes of ferrying passengers for profit in terms of the legal definition of a

public service vehicle. The vehicle may be an omnibus, but it can only become a commuter omnibus when it is used for the purpose of ferrying passengers. It is not the class of vehicle, type or description of a vehicle that determines whether it is a public service vehicle, but rather the use to which the vehicle is being put. The fact that it was later suggested to the accused that he was driving a public service vehicle does not validate a failure by the prosecution to state and fully outline the nature of the allegations against the accused in its papers. The trial court failed to pick the anomaly in the state papers. Unless a charge sheet contains a specific allegation to the effect that an offender drove a public service vehicle or commuter omnibus, it is inappropriate to treat an offender as if he drove such class of vehicle for purposes of sentence in terms of s 52 (2). An admission by an accused to essential averments not linked to the offence charged cannot be not an admission of guilt to the offence charged. Such an admission does not cure the defect in the charge. An offender cannot be convicted of a crime in circumstances where he is unaware of the full allegations that make the conduct complained against criminal. In this case the accused did not admit that he drove a public service vehicle or a commuter omnibus. The information was just thrust down his throat. He was not afforded an opportunity to respond to the suggestion. I am not satisfied that accused was properly advised of the nature of charges he was facing and that his admission of guilt is a genuine and unequivocal plea of guilt to the offence of driving a public service vehicle negligently.

The facts disclose that the accused drove a Toyota Hiace. The accused admitted that he drove the vehicle negligently. The allegations as they stand are supportive of no more than a case of negligent driving involving an ordinary vehicle in terms of s 52 of the Road Traffic Act. The conviction is proper.

It is with the sentencing approach that I am concerned. The trial court approached the question of sentence from a wrong angle. The court went on to enquire into the question of special circumstances and sentenced the accused from the premise that he drove a commuter omnibus and a public service vehicle negligently. This procedure was not necessary in the circumstances of this case. The sentence cannot stand. The sentence imposed is hereby set aside and substituted with the following.

The accused is sentenced to pay a fine of \$ 400-00. In addition, the accused is prohibited from driving all classes of motor vehicles for one year. His licence is accordingly cancelled.

MUSAKWA J agrees