

THE STATE
versus
KILLIAN ZEMBE

HIGH COURT OF ZIMBABWE
CHIGUMBA & MWAYERA JJ
HARARE, 25 March 2015

Criminal Review

CHIGUMBA J: The accused was convicted on his own plea of guilt on a charge of negligent driving as defined in s 52(2) of the **Road Traffic Act [Chapter 13:11]**. It was alleged that he drove a motor vehicle negligently, and that he unlawfully caused an accident in which twelve people were injured. The particulars of negligence formed part of the state outline. In mitigation, the accused submitted that he was twenty five years old, married with one child, gainfully employed as a driver of a pickup truck realizing USD\$280-300 a month. He had USD\$80-00 on his person, no savings and no assets of value. He was sentenced to pay a fine of USD\$300-00 or in default of payment to serve four months in prison. In addition, six months imprisonment was suspended for five years on condition that the accused did not commit an offence involving negligence for five years. The trial court directed that the accused's licence be submitted for endorsement.

The record was placed before us by the scrutinizing regional magistrate who was of the view that the trial court erred by not canvassing special circumstances as part of the sentencing procedure, and consequently, imposing an incompetent sentence by failing to consider whether the accused person ought to have been prohibited from driving, as opposed to merely having his licence endorsed. Accused was operating the vehicle in question to ferry passengers for a fee.

Section 52 (2) (a) of the RTA provides that:

“52 Negligent or dangerous driving

(1)...

(2) A person who drives a vehicle on a road—

- (a) negligently; or
- (b)..."

The penalties for contravening the provisions of section 52(2) (a) are as follows:

1. Where the vehicle was a commuter omnibus or a heavy vehicle
 - (a) a fine not exceeding level ten.
 - (b) Imprisonment for a period not exceeding one year.
 - (c) Both such fine and imprisonment
2. Where the vehicle is not a commuter omnibus or a heavy vehicle
 - (a) A fine not exceeding level seven
 - (b) Imprisonment for a period not exceeding six months
 - (c) Both such fine and imprisonment
3. Where the accused has no previous conviction for dangerous, negligent or reckless driving in the five year period preceding the conviction, the court may prohibit him from driving for such period as it thinks fit.
4. Where the accused has a previous conviction for dangerous, negligent or reckless driving in the five year period preceding the conviction, the court may
 - (a) prohibit him from driving for such period as it thinks fit, unless the vehicle is a commuter omnibus or a heavy vehicle in which case the accused shall be prohibited from driving for a mandatory two year period.
 - (b) Cancel his licence in respect of the classes that he has been prohibited from driving.

It is important to take note of the proviso:

“Provided that the court may decline to prohibit the person from driving if it—

- (a) considers that there are special circumstances in the case which justify the court in so declining; and
- (b) endorses the special circumstances referred to in paragraph (a) on the record of the case when passing sentence.”

For purposes of s 52 (2) (a) of the Road Traffic Act the meaning of special circumstances for purposes of consideration of prohibition from driving, is that, they are special circumstances surrounding the commission of the offence concerned, not special circumstances peculiar to the offender.

In *S v Chaita & Ors* 1998 (1) ZLR 213(H) it was held that:

“When deciding upon the appropriate sentence in cases of culpable homicide arising out of traffic accidents, judicial officers should always have regard to the provisions of s 64(3) of the Road Traffic Act [Chapter 13:11]. In every case of culpable homicide arising out of a traffic accident, the court is required by s 64(3) to make a finding on the degree of negligence involved. The failure to make such a finding amounts to misdirection. A finding on the degree of negligence must always be made, because s 64(3) of the Road

Traffic Act provides that if the offence that the accused would have committed had he been charged under the Road Traffic Act would have required the court to prohibit the accused from driving and/or to cancel his licence, then the court convicting the accused of culpable homicide must also prohibit him from driving and/or cancel his licence”.

The court went further at p 218 and p 220 to find that:

“Section 64(3) of the Act presupposes that the magistrate will make precise findings on the degree of negligence involved...The question which necessarily and crisply arises here is whether it is a requirement under s 64(3) of the Act that the court, on convicting a person of culpable homicide, should expressly apply its mind to the question of which of the statutory motoring offences the circumstances of the common law offence disclose”.

The court answered that question in the affirmative and continued:

“...on a charge of culpable homicide arising out of a motor vehicle accident the court is required to make a finding of the precise degree of negligence of the accused and is enjoined to approach the matter in terms of s 64 (3) of the Act. A failure to do so is clearly misdirection”.

The trial court therefore misdirected itself by failing to make a finding on the precise degree of negligence as required by section 64 (3) of the Road Traffic Act.

See *S v Mtizwa* 1984 (1) ZLR 230 at 232A-B for guidance on how to assess the degrees of negligence at 233G-234A:

“‘Gross negligence’ is simply a very serious or aggravated form of ordinary negligence - negligence of a high degree (*see S v Smith & Ors 1973 (3) SA 21 (T)*). In *Drake v Power (1961) 46 MPR 91*, a Canadian case cited by Saunders Words and Phrases Legally Defined vol 3 p 332, the expression ‘gross negligence’ is usefully defined as implying ‘conduct in which there is a marked departure from the standards by which responsible and competent drivers habitually govern themselves.’

‘Recklessness’, on the other hand, connotes not only a willful disregard for the safety and rights of other road users but also ‘cases of indifference or rashness or inadvertence in which consciousness of consequences plays no part. Recklessness may be shown by proof of gross negligence but proof of gross negligence does not necessarily show recklessness.’”

There is a difference between special circumstances and mitigatory factors. Special circumstances can be peculiar to the offender or dependant on the circumstances surrounding the commission of the offence. There are a number of decided cases where the meaning of special circumstances, have been explained.

In *S v Mbewe & Ors* 1988 (1) ZLR (7) (H) in which the accused was convicted of contravening the Parks and Wildlife Act, it was held that:

“‘Special circumstances’, means any extraordinary factor arising out of the commission of the offence or which is peculiar to the offender. A clear distinction must be drawn between special circumstances and mitigating features which are of general application, such as good character or particular hardship. The latter do not constitute special circumstances, nor does contrition or co-operation on the part of the accused. However, where, for example, the accused was forced by circumstances to commit an offence or was bona fide ignorant of some statutory provision of the law, such factors could constitute not only mitigating factors but special circumstances”.

The court went further, and stated that;

“From a procedural point of view, a magistrate, having convicted a person ... is obliged to record the special circumstances of the particular case before him. If this is not done this amounts to a misdirection rendering the sentence incompetent. See *Attorney-General v Jasi and Nharingo* S-2-87.

In *S v Chaerera* 1988(2) ZLR 226, on the meaning of special circumstances, the court said, at 229, that a trial court must always explain to the accused person what the meaning of special circumstances was. See *S v Mugadza* 1983(2) ZLR 67 (H), *S v Kudavaranda* 1988 (2) ZLR 367(H), *S v Bain* 1977 (3) SA 494 (R).

It is my considered view that, the trial court misdirected itself by:

1. Failing to assess the degree of negligence involved and to take that into consideration in assessing sentence.
2. Failing to explain the meaning of special circumstances to the accused.
3. Failing to endorse whether special circumstances had been considered and found or rejected, in the record of proceedings, as part of the court’s reasons for sentence.
4. Failing to consider cancellation of licence and or prohibition from driving as part of the sentences imposed.

A perusal of the record of proceedings, statements in mitigation, and the reasons for sentence in a will show that: the meaning of special circumstances was not explained to the accused person prior to mitigation being recorded. Special circumstances were not recorded or taken into consideration prior to sentencing. This is contrary to the provisions of s and 52 (2), of the Road

Traffic Act. The trial court was apparently unaware of the mandatory sentencing provisions, and mandatory prohibition from driving, sentencing possibilities. On the purpose of prohibiting a person from driving, see *S v Masendeke* 1999 (1) ZLR 352 (H) where the court held that:

“...the purpose of prohibiting a person from driving and cancelling his licence is both to punish the convicted person and to protect the public from his undesirable manner of driving and the prohibition from driving and cancellation of the licence is part of the sentence”.

Magistrates should be aware of their duty to ordinary members of the public, to prohibit negligent drivers from driving for specified periods, during which it is hoped that the drivers will be rehabilitated in some way or suitably chastised by the resultant loss of income. The pursuit of money on the roads, by way of providing transport, must be tempered by the use of the relevant provisions of the law to protect the public from unscrupulous transport operators. There is need to deter drivers who ferry members of the public from being careless on the roads, in order to reduce or obliterate the carnage on our roads. The best method to achieve this goal is for magistrates to acquaint themselves fully with the nitty-gritties of the sentencing regime that governs road traffic offences.

Regrettably, the only remedy available is to decline to certify these proceedings as being in accordance with real and substantial justice. The accused was not legally represented, and he pleaded guilty. Prohibition from driving is a more serious penalty than endorsement of the driver's licence. The accused may therefore not be sentenced afresh. Accordingly, I withhold my certificate.

MWAYERA J Agrees.....