

THE STATE  
versus  
GABRIEL KAMUCHEPA

HIGH COURT OF ZIMBABWE  
MAFUSIRE J  
MASVINGO: 15 March 2018

### **Criminal Review**

MAFUSIRE J

- [1] The trial court has conceded that it misdirected itself in the manner it handled the charge that was preferred against the accused person in count one, and the manner it approached sentencing in both counts one and two. This case is almost on all fours with *S v Chitepo* HMA 3-17 in which some guidelines in matters involving driving offences were proffered.
- [2] As in the *Chitepo* case, the accused, who was not represented, pleaded guilty to two counts that arose out of a single driving infraction involving a tractor. The first count was framed as contravening s 6[1] of the Road Traffic Act, *Cap 13:11* [No driver's licence]. The second count was **culpable homicide** as defined in s 49 of the Criminal Law [Codification and Reform] Act, *Cap 9:23* [*“the Code”*].
- [3] The facts were these. The accused drove a tractor along some road in some gum tree plantation. Hooked to the tractor was a trailer loaded with some gum poles. Some eight passengers sat on the front wing of the trailer, in front of the load of gums. As he drove, one passenger fell from the trailer. His skull was crushed by the rear left wheel of the loaded trailer, exposing the brain matter. He died on the spot.
- [4] In count one the narration was as follows:

“In that on the 2<sup>nd</sup> day of October and at Mtao forest Plantation, Gabriel Kamuchepa unlawfully drove an unregistered Messy ferguson tractor without a driver’s licence knowing that he is not the holder of a valid driver’s licence.”

- [5] Apart from the obvious typos [e.g. the year not given, and the “f” in “forest” and “ferguson” being small case], there were several and more fundamental omissions in the charge.
- [6] The first omission was that the charge of driving a motor vehicle by someone who is not the holder of a valid licence in respect of the motor vehicle of the class concerned is not complete by the citing only of s 6[1] of the Road Traffic Act [*“the Act”*]. This sub-section merely carries the prohibition. It simply says ‘thou shall not do this unless thou is this, and thou does that.’ It is sub-section [5] that creates the offence. It says if someone does what is prohibited by sub-section [1], then they are guilty of an offence. It is also sub-section [5] that spells out the penalty for the offence created. Therefore, a charge of driving without a driver’s licence should cite s 6[1] together with s 6[5] for it to be complete. An accused person ought to appreciate what offence he is being accused of, and what penalty, if prescribed, he is liable for.
- [7] The second omission was the failure to specify where the accused drove the tractor. The offence is created where the impugned driving is ‘on a road’. *In casu*, the charge simply said the accused drove an unregistered ... tractor without a driver’s licence. That is not an offence. As I said in the *Chitepo* judgment, an unlicensed driver does not commit the offence prescribed by s 6 of the Act if his driving is not on a road, as defined.
- [8] The State Outline purported to cure the second defect above. But it did not. It said the accused drove the unregistered tractor “... along Matende road in Mao plantation ...” That was not enough. “Road” for the purposes of the offence in s 6 of Act, as read with s 2, is any highway, street or other road to which the public, or any section thereof, has access. *In casu*, the charge did not specify what type of ‘road’ it was.

- [9] The trial magistrate, in answer to my query on the above point, said the road in question was a private road. That seems obvious. The charge said the driving was along Matende Road in Mao Forest Plantation. This appears to be private premises. If that was the case – and the accused gets the benefit of the doubt – then there was no offence committed. Section 2 of the Act defines a “private road” as any road the maintenance of which neither the State nor a local authority has assumed responsibility, and which is not commonly used by the public or any section thereof.
- [10] The third omission was the failure to refer to the special permits prescribed by s 8 of the Act for, among others, tractor drivers. The driver’s licence for a tractor is class 5. But in terms of the Act, a tractor driver does not always have to have a licence. In terms of s 8 all that an employee of a farmer or of a miner, or a self-employed farmer or miner, as defined, needs in order to legally drive a tractor belonging to, or possessed by them, on any road for farming purposes, up to a belt of ten kilometres of the farm or the mine boundary, is a tractor driver’s permit issued in accordance with that section.
- [11] In the present case, both the charge sheet and the State Outline said nothing about the capacity in which the accused drove the tractor. Was he the owner of the plantation and/or of the tractor? Was he a mere employee? If he was the owner of that plantation, and thus was self-employed, and if he was also the owner of that tractor, he could legitimately have driven it, if he met the criteria laid out in s 8 of the Act. If he was an employee and had the authority to drive the tractor as prescribed by s 8 of the Act, then he did not commit the offence preferred against him in count one.
- [12] In this case, the omission relating to s 8 permits was all the more glaring given what the accused said when the court canvassed the essential elements:
- “Q Why did you drive without a licence?
- A I have *a reference* to drive without a licence.”[*my emphasis*]

[13] Immediately, the court should have stopped to enter a plea of not guilty in terms of s 272 of the Criminal Procedure and Evidence Act, *Cap 9:07* so that the issue could be properly investigated. What was that 'reference' the accused mentioned? Could it be the s 8 permit? It was more likely it was. But the court just went straight ahead:

“Q Any right?

A No

Q Any defence?

A No.”

[14] Since the accused was not represented, the court should have doubted the genuineness of his plea of guilt. It was not informed. Section 272 of the Criminal Procedure and Evidence Act says:

**“272 Procedure where there is doubt in relation to plea of guilty**

If the court, at any stage of the proceedings in terms of section *two hundred and seventy-one* and before sentence is passed—

[a] is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty; or

[b] is not satisfied that the accused has admitted or correctly admitted all the essential elements of the offence or all the acts or omissions on which the charge is based; or

[c] is not satisfied that the accused has no valid defence to the charge; the court shall record a plea of not guilty and require the prosecution to proceed with the trial:

Provided that ...”

[15] In count one the accused was sentenced to a fine of two hundred dollars [\$200], or in default thereof, sixty [60] days imprisonment. However, in the light of the above misdirection the conviction is hereby set aside and the sentence quashed.

[16] The charge of culpable homicide in count two arose because of the death of the deceased. The particulars of negligence were framed thus:

“i] Drive [*sic*] motor vehicle without a driver’s licence;

- ii) Fail [*sic*] to observe some statutory provisions, that is to say, allowing passers [*sic*] to ride on wings.”

[17] In *S v Chitepo* above, such carelessness in the framing of criminal charges in criminal matters drove me to remark as follows:

“I caution in passing that great care and precision should always be taken and exhibited in the drafting of criminal charges and the handling of criminal matters. Criminal proceedings affect some of the fundamental human rights and freedoms enshrined in the Constitution, namely the right to liberty, and even the right to life.”

[18] Driving a motor vehicle without a valid driver’s licence, whilst criminal, is not negligence *per se*. Some unlicensed persons are quite competent as drivers. Prosecutors should be careful not to conflate the crime of driving a vehicle without a valid driver’s licence with the crime of culpable homicide, the bedrock of which is negligence.

[19] The one defect in the charge in count two was that the particulars of negligence did not specify the statutory provisions the accused allegedly failed to observe when he allegedly allowed passengers [not ‘passers’] “... *to ride on wings*.” Undoubtedly it was negligence for the accused to permit, as the driver and therefore, the person in charge of the vehicle, persons to sit on the wings of the loaded trailer as he drove the tractor. The danger was obvious. This was a factor of negligence that should have been framed with precision. As it was, the numerous mistakes almost made nonsense of the charge, thereby casting considerable doubt as to whether the accused did appreciate what he was pleading guilty to.

[20] The sentence of the court *a quo* in count two was also a fine of \$200, or in default, sixty days. To his credit, and in line with the direction in cases such as *S v Dzvatu*<sup>1</sup>; *S v Mtizwa*<sup>2</sup>; *S v Chaita & Ors*<sup>3</sup>; *S v Mapeka & Ors*<sup>4</sup>; *S v Muchairi*<sup>5</sup>

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<sup>1</sup> 1984 [1] ZLR 136 [H]

<sup>2</sup> 1984 [1] ZLR 230 [H]

<sup>3</sup> 1998 [1] ZLR 213 [H]

<sup>4</sup> 2001 [2] ZLR 90 [H]

<sup>5</sup> HB 41-06

and *S v Wankie*<sup>6</sup>, to mention just but a few, the trial magistrate did assess the degree of negligence. He set it at ordinary negligence. I agree with that assessment, given the known circumstances.

[21] However, it is on sentencing, in both counts, that the court *a quo* seriously misdirected itself in a number of respects. Going back to count one: in terms of s 6[5] of the Act, a person convicted of driving a motor vehicle without a driver's licence, in contravention of sub-section [1], is liable to a fine not exceeding level six [\$300], or to imprisonment for a period not exceeding one year, or to both such fine and such imprisonment. However, if the motor vehicle the accused was driving was a commuter omnibus or a heavy vehicle, he ***shall*** be liable to imprisonment for a period not exceeding five years and not less than six months, unless he comes within one or other of the two exceptions specified.

[22] In the present case, the accused did not come within the first set of exceptions, because they relate to a licensed driver, which he was not. The second exception that enables the unlicensed driver of a commuter omnibus, or of a heavy vehicle, to escape the mandatory jail term of sub-section [5] is if they manage to show that there were special reasons why the special penalty should not be imposed.

[23] What determines whether or not the mandatory jail term should be imposed is whether or not the motor vehicle in question was a commuter omnibus, or a heavy vehicle. What determines whether a motor vehicle is a heavy vehicle or not is its weight, and, in the case of a passenger motor vehicle, its passenger carrying capacity – an aspect not relevant in this case, because a tractor is not a passenger-carrying vehicle.

[24] But in terms of the definition of “*motor vehicle*” in s 2 of the Act, a tractor is a motor vehicle. Whether or not it is a heavy vehicle depends on whether or not its net mass exceeds two thousand three hundred kilogrammes [2 300 kg]. The Act says a “*heavy vehicle*” means a motor vehicle exceeding 2 300 kilogrammes

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<sup>6</sup> HH 831-15

net mass, but does not include a passenger motor vehicle having seating accommodation for less than 8 passengers.

[25] The above aspect was not considered at all in the court *a quo*. It is not clear what then informed the sentence of \$200 fine or sixty days imprisonment in count one. Having convicted him in count one, it was mandatory for the court to have established whether the accused was liable for the s 6[5] special penalty or not. Among other things, it was necessary to establish the weight of the tractor because if it was a heavy vehicle, the penalty would have had to be the mandatory period of imprisonment of not more than five years, but not less than six months as prescribed by the proviso to sub-section [5], unless he satisfied the court of the three circumstances specified therein, or of the existence of special circumstances as contemplated by s 88A of the Act.

[26] The court's misdirection in regards to sentencing becomes even more pronounced in relation to count two. Section 64 of the Act says:

“(1) Subject to this Part, a court convicting a person of an offence in terms of any law other than this Act by or in connection with the driving of a motor vehicle on a road may, in addition to any penalty which it may lawfully impose, prohibit the person from driving for such period as it thinks fit.

(2) ..... [not relevant] .....

(3) If, on convicting a person of murder, attempted murder, culpable homicide, assault or any similar offence by or in connection with the driving of a motor vehicle, the court considers –

(a) that the convicted person would have been convicted of an offence in terms of this Act involving the driving or attempted driving of a motor vehicle if he had been charged with such an offence instead of the offence at common law; and

(b) that, if the convicted person had been convicted of the offence in terms of this Act referred to in paragraph (a), the court would have been required to prohibit him from driving and additionally, or alternatively, would have been required to cancel his licence;

the court shall, when sentencing him for the offence at common law –

(i) prohibit him from driving for a period that is no shorter than the period of prohibition that would have been ordered had he

been convicted of the offence in terms of this Act referred to in paragraph (a); and

- (ii) cancel his licence, if the court would have cancelled his licence on convicting him of the offence in terms of this Act referred to in paragraph (a).”

[27] To unpack the above provisions: a conviction of culpable homicide, as defined by s 49 of the Code, that involves the driving of a motor vehicle, should, among other things, automatically compel the court to pay regard to the prescribed driving offences in the Road Traffic Act, such as:

- S 50 [exceeding speed limits];
- S 51 [driving without due care and attention ...];
- s 52 [negligent or dangerous driving];
- s 53 [reckless driving];
- s 54 [driving with prohibited concentration of alcohol in blood]; and
- s 55 [driving whilst under the influence of alcohol or drugs or both].

[28] In terms of s 64[1] of the Act, the court has discretion to prohibit from driving where it has convicted a person of a motoring offence in terms of any law other than the Act. In terms of s 64[3] if it has convicted of, among others, culpable homicide arising out of a motoring offence, where it would have convicted of a motoring offence in terms of the Act [e.g. negligent or dangerous driving, in contravention of s 52], then the court shall prohibit from driving and cancel the licence.

[29] To compound the situation further, in addition to s 64 aforesaid, the court should also pay regard to s 65 if it has convicted. Section 65 [1] says a prohibition from driving *shall* extend to all classes of motor vehicles. But of course, this is subject to the exceptions set out in the rest of that section. For example, sub-section [3] gives the court the discretion to confine the prohibition to the class of motor vehicles to which the one being driven by the accused at the time of the commission of the offence belonged.



- [30] The sum total of all this is that where the driver of a commuter omnibus or a heavy vehicle has been convicted of culpable homicide, the court cannot just approach sentencing in the ordinary way. It has to pay regard to the relevant sections above in case a prohibition from driving is mandatory or discretionary, or in case the licence has to be cancelled. Prohibition from driving is mandatory, for example, in terms of s 52[4][c] [negligent or dangerous driving of a commuter omnibus or a heavy vehicle]; s 54 [driving with prohibited concentration of alcohol in blood], and s 55 [driving while under the influence of alcohol or drugs or both].
- [31] In the present case, if the tractor in question was a heavy vehicle, then given that the trial court assessed the accused's degree of negligence as ordinary, it would have been to s 52 of the Act [negligent or dangerous driving] that the court would have sought guidance from in deciding the question of prohibition from driving. In terms of s 52[4][c], a court convicting a person of negligent or dangerous driving, in the case of a commuter omnibus or a heavy vehicle, **shall** prohibit him from driving for a period of not less than two years, unless there are special circumstances justifying the court to decline to impose the prohibition.
- [32] However, in this particular case, as in the *Chitepo* judgment, this is a moot point, raised only for guidance. The issue of whether or not the tractor was a heavy vehicle was not canvassed at all. The accused is entitled to the benefit of the doubt. At any rate, by the type of sentence that it meted out, the court seems to have treated the tractor as a light motor vehicle. Therefore, the sentence of the court *a quo* in count two shall not be interfered with. However, with all due respect, the magistrate's courts are urged to treat these driving offences with some caution to avoid these frequent pitfalls.
- [33] There is yet another word of caution relating to yet another glaring omission by the trial court in this case. In terms of s 163A of the Criminal Procedure and Evidence, *Cap 9:07*, the magistrate is obliged to inform an accused person of

his right to legal representation, and to endorse on the record the fact that he or she did so inform the accused. The record in this matter has no such endorsement. There is no telling whether or not the accused was so informed. Chances are that he was not. Yet s 163A is couched in peremptory terms. It says:

“ [1] At the commencement of any trial in a magistrates court, before the accused is called upon to plead to the summons or charge, the accused shall be informed by the magistrate of his or her right in terms of section 191 to legal or other representation in terms of that section.

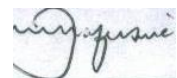
[2] The magistrate shall record the fact that the accused has been given the information referred to in subsection [1], and the accused’s response to it.”

[34] However, notwithstanding the above omission, and without having researched the full import of s 163A of the Criminal Procedure and Evidence Act, I shall not, in this judgment, go so far as to say the omission was fatal to the entire proceedings. I do not consider that the accused was prejudiced merely by that omission, but only in the respects identified already, and to which remedial action has been taken, or prescribed.

[35] In the final analysis therefore, the order of this court reads as follows:

- The conviction in count one be and is hereby set aside, and the sentence quashed.
- The conviction and sentence in count two be and are hereby confirmed.
- The court *a quo* is hereby directed to recall the accused and pronounce to him the above altered verdicts and sentence.

15 March 2018



MAWADZE J agrees: \_\_\_\_\_