

BEPURA THOMPSON
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA & TAGU JJ
HARARE, 21 May 2014

Criminal Appeal

F. Musina, for the appellant
E. Makoto, for the respondent

CHATUKUTA J: On 21 May 2014, we heard and dismissed an appeal by the appellant. We gave *ex tempore* reasons for the dismissal. The applicant has requested written reasons for our decision. The following are our reasons.

The appellant pleaded guilty and was convicted on 8 March 2013 of contravening s 6 (1) of the Road Traffic Act [*Chapter 13:11*], s 39 of the Road Motor Transport Act and s 18 as read with s 39 of the Road Motor Transport Act [*Chapter 13:15*]. He was sentenced in count 1 to 2 years imprisonment. In counts 2 and 3, he was sentenced to \$20 in default of payment 4 days imprisonment respectively.

The established facts are that the appellant was an owner of a Toyota Hiace commuter omnibus. On 4 March 2013 he was driving the omnibus from Mutorashanga to Mvurwi with 15 passengers on board. He was stopped by police. He was arrested by the police upon it being discovered that he was not a holder of a driver's licence. The police also observed that he was not in possession of a valid authority to ply the Mvurwi-Mutorashanga route. He also did not have a valid certificate of fitness for the omnibus issued by the Vehicle Inspection Department.

The appellant was dissatisfied with the sentence, hence the appeal to this court.

In his grounds of appeal, the appellant attacked the decision of the trial court on the basis that the court should have treated the offences as one for sentence. It was contended

that the offences were created in one act of driving. It was further submitted that the trial magistrate erred in holding that no special circumstances existed when he sentenced the appellant to the first count. The appellant had submitted that he drove the omnibus because his driver was sick. He was driving the omnibus to Mvurwi to give the omnibus to another licenced driver. He was the only public transport service provider along that route. It was further contented that the sentence of 2 year imprisonment induced a sense of shock in light of the fact that the appellant had not been negligent in any manner and hence should have been sentenced to the minimum mandatory sentence of 6 months.

During oral submissions, the appellant abandoned the first ground that all counts should have been taken as one for sentence. It is our view that the abandonment was proper. The offences are not kindred offences. In fact, a contravention of s 6 (1) attracts a minimum mandatory sentence whilst the offences under the Road Motor Transportation Act attract fines.

The respondent opposed the appeal. It was submitted that the explanation proffered by the appellant did not amount to a special circumstance. The sentence imposed was within the sentencing discretion of the magistrate.

The two issues for determination are therefore, in our view, whether or not the court *a quo* erred in holding that the explanation by the appellant did not amount to special reasons so as to protect the appellant from the imposition of the minimum mandatory sentence. The second issue is whether or not the sentence of 2 years is so excessive so as to induce a sense of shock.

Section 6 (5) of the Road Traffic Act provides for a minimum mandatory sentence of 6 months where one is convicted of driving without a licence, unless an accused proffers special reasons why the minimum sentence should not be imposed on him. It is trite that special reasons are reasons that are out of the ordinary which are peculiar to the offence and the offender.

We are of the view that the first reason advanced by the appellant does not constitute a special reason. The fact that the appellant's bus driver had taken ill does not in our view constitute a special reason. It appears from the record that the driver was not even on the omnibus. As submitted by the respondent, it would have been debatable had the appellant been driving the sick driver to hospital.

The appellant did not have an obligation to carry members of the public. There were no attending consequences for failing to do so. The appellant drove the omnibus out of economic expediency. Economic expedience cannot be said to be a special reason. In any event, although he said that he was the only one plying that route, he did not have lawful authority to do so hence the conviction for not having the requisite permit.

Regarding the propriety of the sentence, s 6 (5) provides a minimum mandatory sentence of 6 months imprisonment and a maximum sentence of five years imprisonment. As rightly observed by the respondent, a sentence of two years imprisonment falls within the sentencing discretion of the magistrate. We can only interfere with the sentence where the magistrate exercised that discretion injudiciously.

In arriving at the sentence, the trial magistrate considered that the appellant's moral blameworthiness was very high. He considered that the appellant was ferrying 15 passengers. He therefore put the lives of those passengers at risk by driving when he did not have the requisite license. The magistrate also took into account the ever increasing carnage on our roads.

The magistrate cannot be faulted for considering these factors to be aggravating and outweighing the mitigating factors. The appellant submitted that he was not negligent because he was not involved in an accident. However, the fact that he drove a public vehicle carrying 15 passengers and without a licence is in itself a form of negligence. The appellant was willing to put the lives of 15 people at risk. The negligence is compounded by the fact that he did not have the requisite certificate of fitness for the omnibus that he was driving. The appellant was the owner of the omnibus. He was enjoined to ensure that the omnibus was fit and safe to carry members of the public. He was however willingly to drive the omnibus without proof that it was fit and safe.

Under the circumstances, it is our view that the trial magistrate did not misdirect himself.

It would be remiss for us not to comment on the charges preferred against the appellant in counts 2 and 3 although the issue was not addressed by any of the parties in their heads of argument. The appropriate charges should have been a contravention of s 7(1) (b) (iv) and s 12 (1) as read with s 39 of the Road Motor Transportation Act [*Chapter 13:15*] respectively. The chapter number was assigned to Act 1 of 1997 by Statute Law Compilation and Revision (Assignment of Chapter Numbers) Notice 2006, SI 262 of 2006. However,

there was no prejudice occasioned as a result of the wrong citation of the charges. The charges are accordingly amended. The conviction and sentence are hereby confirmed.

The appeal is accordingly dismissed.

TAGU J concurs.....

Mushonga Mutsvairo & Associates, appellant's legal practitioners
Attorney General's Office, respondent's legal practitioners