

ELVIS MUTAMBARA
and
TAKASIYIWA NHENDO
versus
THE STATE

HIGHCOURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE; 27 February & 2 March 2023

Criminal Appeal

J Ndomene, for the appellants
K H Kunaka, for the respondents

CHIKOWERO J:

1. This is an appeal against sentence only.
2. The appellants separately appeared before the Magistrates Court sitting at Harare and were convicted pursuant to pleading guilty to one count each of reckless driving as defined in s 53(2) of the Road Traffic Act [*Chapter 13:11*] (the Act).
3. Both were sentenced to 18 months imprisonment of which 8 months were suspended for 3 years on condition the appellants do not within that period commit any offence involving reckless or negligent driving for which they would be sentenced to imprisonment without the option of a fine. The effective custodial term in respect of each appellant was thus 10 months imprisonment. In addition, both appellants were prohibited from driving all classes of motor vehicles for 12 months as well as heavy vehicles and commuter omnibuses for life. Their drivers' licences were cancelled.
4. Each appellant, being a bus driver, had driven recklessly by wantonly driving on the wrong side of the road. They had thus obstructed the flow of traffic. Their actions resulted in the creation of a traffic jam. The appellants were behind the steering wheels of public service vehicles namely Zhong Tong buses along Remembrance Drive due west. They had then

driven on the wrong side of the road as they neared the premises housing the Zimbabwe Broadcasting Corporation's Mbare Studios. This was around 8.00am.

5. The court meticulously took each appellant through the procedure on a plea of guilty as provided for in s 271 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. It convicted them on being satisfied that the pleas of guilty were genuinely and unequivocally made. Neither appellant has appealed the conviction.
6. Section 53(2)(a) of the Act provides for a minimum mandatory sentence of twenty-four months imprisonment to be imposed on anyone convicted on a charge of reckless driving in the absence of a finding that special circumstances exist.
7. We are satisfied that the court adequately explained the meaning of special circumstances and the significance of such circumstances. The existence or otherwise of such circumstances would inform the appropriate sentence to be imposed. The court went as far as giving an example to each appellant on what would constitute special circumstances. That the explanation was adequate and understood by the appellants is beyond contestation. Both gave reasons which were correctly found not to be special circumstances. Accordingly, there is no merit in the contention that the court did not adequately explain the meaning of special circumstances.
8. The first, second, third, sixth and seventh grounds of appeal are all misplaced. They raise one issue, namely that the sentence passed, being custodial, was manifestly harsh and excessive as to induce a sense of shock. Since the law maker has provided for imposition of a minimum mandatory sentence where there are no special circumstances, it is not open to the appellants to suggest that a non custodial sentence should have been passed.
9. The appellants complain that the sentence is shocking also to the extent that both were prohibited from driving all heavy vehicles and commuter omnibuses for life. They contend that, being first offenders, they should have been spared such prohibition. Section 53(4)(a)(ii)B of the Act makes prohibition from driving heavy vehicles and commuter omnibuses for life mandatory where there are no special circumstances. This is so even for first offenders as long as the conviction is for reckless driving. If the lawmaker intended to spare first offenders from the rigours of prohibition from driving heavy vehicles and commuter omnibuses for life upon conviction for reckless driving our view is that the

appropriate wording would have been employed. As the law currently stands, there is no ambiguity in the relevant penalty provisions.

10. Both counsel conceded that the custodial sentence imposed was irregular in that it falls below the minimum mandatory sentence provided for by statute. Since the respondent did not cross-appeal, we cannot exercise appellate jurisdiction in quashing the sentence and substituting it with the more severe sentence provided for by the statute. In other words, we cannot employ the provisions of s 38(4)(a) of the High Court Act [*Chapter 7:06*] to set aside the custodial sentence and substitute it with the sentence that ought to have been passed by the trial court.
11. Mr Muchemwa asked us to exercise our powers of review to correct the sentence. Mr Ndomene conceded that in the event that we agree that there were no special circumstances there would be nothing precluding us from setting aside the sentence and substituting the same with that statutorily provided for. We note too that subsequent to passing of sentence the trial magistrate observed that he had passed an incompetent custodial sentence. He wrote to the Registrar of this court requesting that the record be placed before judges of this court for review so that the error could be attended to. As at the date of hearing of the appeal the proceedings had not been reviewed as the copies of the record of proceedings had been availed to us for purposes of preparing for the hearing of the appeal. The task thus falls upon our shoulders to invoke our powers of review to correct the custodial portion of the sentence imposed on each appellant. This we now do.
12. In the result the following order shall issue:
 - 1) On review, the sentence of 18 months imprisonment of which 8 months were suspended for 3 years on condition each appellant does not within that period commit any offence involving reckless or negligent driving for which he would be sentenced to imprisonment without the option of a fine be and is set aside. The following is substituted:

“In CRB MBR 7107/22 the accused, Elvis Mutambara, is sentenced to 24 months imprisonment. In CRB MBR 7108/22 the accused, Takasiya Nhendo, is sentenced to 24 months imprisonment.”

- 2) As regards the remaining parts of the sentence passed on the appellants under CRB MBR 7107/22 and CRB MBR 7108/22, the appeal be and is dismissed.

CHIKOWERO J:.....

ZHOU J:.....

I agree

Maposa and Ndomene, appellants' legal practitioners
The National Prosecuting Authority, respondent's legal practitioners