

THE STATE  
versus  
TADZAI KARIMAKWENDA

HIGH COURT OF ZIMBABWE  
CHITAPI AND MUSITHU JJ  
HARARE, 6 April 2022

### **Criminal Review**

CHITAPI J: The Regional Magistrate for Northern Division has referred the record of proceedings in the above matter for review by the Judge after determining on scrutiny that he could not certify the proceedings as according with real and substantial justice.

The background to the matter is that the accused appeared before the Provincial Magistrate at Chitungwiza on 3 February, 2022. He was upon his plea of guilty to a charge of negligent driving as defined in s 52 (2) of the Road Traffic Act, [*Chapter 13:11*] properly convicted as charged. The brief facts of the case were that the accused was on 30 November, 2021 around 7:30am driving a Toyota Noah motor vehicle along Seke road due north. Upon reaching the intersection of Seke road and Masotcha Ndlovu avenue the accused was negligently involved in an accident when he hit a female juvenile with the vehicle as she was crossing Seke road. The juvenile suffered soft tissue injury. It was found upon his admission that the accused was negligent in that he failed to act reasonably when an accident seemed imminent and further failed to keep a proper lookout of the road ahead of him. There is no issue with the conviction that arises from the Regional Magistrate's query nor upon the perusal of the record.

The accused was upon conviction sentenced as follows:

- “a) ZWL 15 000.00 or in default of payment, 60 days imprisonment.
- b) Clerk of court shall forward details pertaining to the conviction of the accused so that his licence will be endorsed appropriately in the event that he obtains a licence after this conviction.”

The Regional Magistrate queried the propriety of the second part of the sentence which required that the details of the conviction be forwarded for endorsement on a licence which the accused may in future obtain. I hasten to note that the Provincial Magistrate did not indicate to whom the clerk of court was supposed to forward the details of the conviction. It was common

cause that the accused held a military licence. Such a licence does not qualify to be a licence for purposes of the Road Traffic Act wherein a licence is in s 2 thereof defined as:

“licence means save in section sixty three, an internal licence or international driving permit referred to in subsection (1) of section eighteen or foreign drivers licence”

The same section defines an internal licence as:

“internal licence” means a driver’s licence, a learners licence, a tractor drivers permit or an international driver’s permit issued in terms of subsection(2) of section seventeen or referred to in subsection (1) of section eighteen.”

A military licence not being recognized under the Act, the simple position of the accused in relation to being qualified and permitted to drive a vehicle on the road as he did was that he was not a licence holder. The Regional Magistrate was of the view that the accused should additionally have been charged with the offence of driving a motor without being the holder of a licence as defined in s 6(1) as read with s 6(5) of the Road Traffic Act. The Regional Magistrate is correct in this respect. However, the position is that the accused was not so charged. The prerogative as to what charge(s) to prefer in any prosecution of the accused is reposed in the Prosecutor General who does not in that respect discharge his or her function under anyone’s direction. The suggestion by the Regional Magistrate that the trial Magistrate ought to have taken up the issue of preferring an additional charge with the prosecutor would amount to interference with the discretion of the Prosecutor General and may suggest an inclination towards malice or prejudice to the accused and possible impartiality. The State should be left to decide upon the charges to bring against the accused. However, the court is permitted to interrogate any particular charge preferred. It should not suggest that further charges should be added to the one placed before it. *In casu* the State is assumed to have had all facts to hand from which to decide on what charge to prefer. The court was required to determine only that charge preferred against the accused and it did so.

The above discussion aside the precise misdirection committed by the Provincial Magistrate in relation to sentence was the order that the record of the conviction be transmitted to an unnamed entity for endorsement of the accused’s licence should he obtain one in future. This part of sentence has no legal basis. The Provincial Magistrate stated as follows in part when queried to explain the basis of the order by the Regional Magistrate

“Since I did prohibit accused from driving but having noted that the accused had committed an offence which warrants the endorsement of his licence, I was of the view that the same way, the Registrar Central Vehicle Registry is notified in instance where a person who is not a holder of a licence is prohibited, was the same way the Registrar would be notified such that in the

event the offender acquires a licence, appropriate endorsements would be made on the licence. Page 3 of the reasons for sentence also specifically indicate where the clerk of court was supposed to forward the details of the conviction of the accused.”

Let me immediately observe that there is a distinction between reasons for judgment or order and the order itself. The order is the one which represents the decision reached as supported by or based on the reasons for the order. The order which the Provincial Magistrate made is what counts. *In casu* it is clear that he did not specify to whom the details of the accused’s conviction and sentence were to be forwarded for anticipated future endorsement.

It is further evident from the record that although the Provincial Magistrate stated in his response to the Regional Magistrate’s query by stating inter alia that he prohibited the accused from driving, this was a misstatement because the record is clear in the reasons for sentence that the Provincial Magistrate stated:

“... In this case the court was of the view that the degree of negligence of the accused was not severe to warrant a prohibition as such court will temper justice with mercy by sparing him prohibition from driving.”

It was within the discretion of the Provincial Magistrate in terms of s 6(b) of the Road Traffic Act, to prohibit the accused for such period as the court considered fit. Although the prohibition of an accused who drives a vehicle without a driver’s licence thus contravening s 6(1) (a) of the Road Traffic Act which prohibits anyone from driving a vehicle on a road without being the holder of a driver’s licence is discretionary, it appears to me that where the accused as in this case committed a serious offence of negligent driving in which his driven vehicle knocked a pedestrian who by the grace of God survived, serious thought ought to have been given to the desirability of prohibiting the accused from driving. The period of prohibition could as an example be qualified by ordering that the prohibition is say for 6 months unless the accused obtains a driver’s licence earlier in which case the prohibition terminates on the date that the accused has obtained a licence. In my view such prohibition could encourage or incentivize the convict to seek to get licenced quicker and become a qualified and licenced driver thereby ceasing to be a danger to society as an unlicensed driver.

Reverting to the propriety of the order of the Magistrate that the record of conviction be forwarded for endorsement of the accused’s licence should he obtain one, the Provincial Magistrate has clarified that he intended to state that the conviction record should be forwarded to the Registrar Central Vehicle Registry. Clearly the Provincial Magistrate was again misdirected because s 4 of the Road Traffic Act, creates the position of Registrar of Road Traffic licences and not the Registrar of Central Vehicle Registry. There is in fact a Registrar

of vehicles who is created by vehicle Registration and Licencing Act, [*Chapter 13:14*]. There was therefore confusion on the part of the Provincial Magistrate regarding the office of Registrar of Vehicles *vis-a- vis* the Registrar of Road Traffic licences.

The duties of the Registrar of Road Traffic licences *inter alia* includes the duties reposed by s 5 of the Road Traffic Act which reads as follows:-

**“5. Register of licences**

The Registrar shall keep-

- a) In a form approved by the Minister a register of all persons to whom internal licences have been varied; and
- b) Such books, records and registers other than the register referred to in paragraph (a), as may be directed by the minister.”

There is no provision in the Road Traffic Act that requires that records of convictions of persons convicted for driving without a licence or other offences provided for in the Act whilst not holding a drivers licence should be forwarded to the Registrar so that he or she keeps a watch out that should the convict decide to obtain a licence, then if successful in obtaining it, the licence is then endorsed with a conviction that was made prior to obtaining the licence. The Provincial Magistrate was clearly mistaken because there is no legal justification for a future or prospective endorsement of a yet to be obtained licence. If there is no licence to endorse then no endorsement should be ordered albeit a prohibition may be imposed.

The proceeding therefore suffer from a gross irregularity in that the Provincial Magistrate made a legally incompetent order that the conviction record of the accused should be forwarded to the Registrar for endorsement whoever the Registrar was.

In consequence, the sentence needs correction and the following order is made:

- a) The conviction of the accused is confirmed
- b) The sentence imposed is partly set aside by the quashing of the second part of the sentence which directs the clerk of court to forward the details of conviction.
- c) For the avoidance of doubt, the sentence imposed on the accused shall read as follows:

“ZWL 15 000.00 or in default of payment 60 days imprisonment.”

MUSITHU J Agrees.....