

**STATE**

**VERSUS**

**BHEKIMPILO NDEBELE**

HIGH COURT OF ZIMBABWE  
MUTEMA J  
BULAWAYO12 AND 21 NOVEMBER, 2013

Criminal Review

MUTEMA J: The accused person *in casu* was arraigned before a magistrate in the traffic court at Drill Hall facing a charge of culpable homicide in contravention of section 49 of the Criminal Law (Codification and Reform) Act, [Chapter 9:23].

The agreed facts are that on 19 February, 2013 at 20:00 hrs at the 15km peg along the Bulawayo –Beitbridge road accused was driving a commuter omnibus vehicle, to wit a Toyota Noah registration number ACJ 9413 carrying four passengers when he negligently caused the death of Aaron Munsaka. The deceased was struggling to cross the road when he was hit by the accused’s vehicle and he fell on the road side and sustained multiple head injuries. The deceased was rushed to hospital in an unconscious state, was admitted but later died on 30 March, 2013. According to the pathologist, multiple injuries as a result of the road traffic accident was the cause of death. These multiple injuries included bruises on the right face, forehead, hip, left face, frontal region, buttocks, chest wounds and fracture of ribs 3-8.

The first offender accused pleaded guilty to the charge and was duly convicted as charged. Nothing turns on the conviction.

Accused was sentenced as follows:

“US\$400 fine / 6 months imprisonment. In addition 5 months imprisonment is wholly suspended for 5 years on condition that the accused does not within that period commit any offence involving culpable homicide upon which if convicted accused is sentenced to imprisonment without the option of a fine. P/S accused’s driver’s licence be and is hereby cancelled. Accused to be submit (sic) his driver’s licence to the clerk of court today the 06/09/13 for cancellation,”

When the record of proceedings landed on my desk on automatic review I queried with

the trial magistrate whether he had bothered to acquaint himself with the provisions of section 52 (4) (c) as read with section 64(3) of the Road Traffic Act, (Chapter 13:11) which make prohibition from driving for at least two years if accused was driving a commuter omnibus unless special circumstances exist and also to cancel the driver's licence.

His response was this:

"May the record of proceedings be placed before the learned reviewing judge Justice Mutema.

All the records that were tried and finalised by the trial magistrate have the same error and the trial magistrate is happy to say that he acquainted himself with the provision of Section 52 (4) (c) and Section 64 (3) after having had received a review judgment from Honourable Justice Mutema on the 12<sup>th</sup> of September 2013 addressing the same issue.

So all the records for review by the same trial magistrate finalised before the 12<sup>th</sup> of September 2013 i.e before the review minute by his lordship have the same error, which error was addressing after the 12<sup>th</sup> of September 2013, after the trial Magistrate took note of the correct procedure and he is now implementing such.

As was highlighted in your review judgment dated 12 September 2013, the trial Magistrate is now aware that he is capable of rectifying the irregularities in terms of 65 (6) (a) and (b) and (8) of the Road Traffic Act by causing a notice to be served upon the accused directing him to appear before the court at a time and place specified therein to show cause why prohibition from driving for at least 2 years should not be made. The trial magistrate is also now aware after the review judgment on the 12<sup>th</sup> of September 2013 that the notice in terms of Section 65 (8) must be given within 6 months from the date of conviction which is 6 September 2013.

Thanking you for your unwavering guidance".

The response clearly shows that the trial magistrate was at sea when he waded into the traffic jungle regarding sentence. Several other reviewable proceedings from other magisterial stations reveal that quite a number of magistrates have no clue regarding traffic penal provisions engendered by either a deliberate or careless refraining from acquainting themselves with the relevant provisions. Judicial officers are once again urged to diligently apply their minds to their work.

Culpable homicide is a common law crime which has been codified and is now governed by section 49 of the Criminal Law (Codification and Reform) Act. Culpable homicide which is occasioned through the driving of a motor vehicle is interwoven with certain sections of the

Road Traffic Act when it comes to sentencing. Trial magistrates are strongly urged to understand and invoke this link when it comes to sentence.

For the purposes of these proceedings section 64(3) of the Road Traffic Act, which falls under Part 1X, provides:

“64 Prohibition from driving on conviction of certain offences

(1) .....

(2) .....

(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).”

Now, culpable homicide involves the negligent killing of a human being. This is precisely why, in respect of traffic culpable homicide, the particulars of negligence are always cited in the state outline or statement of agreed facts. *In casu* these were cited as:

- travelling at an excessive speed in the circumstances;
- failing to keep a proper look out;
- failing to keep vehicle under proper control

- failing to act reasonably when an accident seemed imminent.

So had the accused not been charged with the codified common law crime of culpable homicide, but with that offence in terms of the Road Traffic Act, he would have been charged with contravening section 52 (2), viz negligent or dangerous driving.

N.B: There exists a draftman's error in that subsections (3) and (4) of section 52 make reference to subsection (1) instead (2) of section 52 as the offence – creating provision. Subsection (1) simply defines special circumstances.

Now if the accused had been charged with culpable homicide in contravention of section 52 (2) of the Road Traffic Act, and had been convicted as charged section 52 (4) (c) as read with section 64 (3) would strictly be apposite regarding prohibition from driving and cancellation of his driver's licence. Section 64 (3) has already been cited *supra*. Section 52 (4) (c) provides as follows:

"4. Subject to Part 1X, a court convicting a person of an offence in terms of subsection

- (1) (sic) involving the driving of a motor vehicle –
  - (a) .....
  - (b) .....
  - (c) in the case of an offence involving the driving of a *commuter omnibus* or a heavy vehicle, *shall* prohibit the person from driving for a period of not less than two years:

Provided that the court may decline to prohibit the person from driving in terms of paragraph (b) or (c) 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."

So from the foregoing it is crystal clear that since the accused *in casu* was driving a commuter omnibus when he committed the offence he stands convicted of, in terms of section 52 (4) (c) as read with section 64(3) of the Road Traffic Act, the trial magistrate was mandatorily enjoined not only to prohibit the accused from driving for at least two years in the absence of

special circumstances, but to also cancel his driver's licence.

*In casu* the trial magistrate only cancelled the accused's driver's licence without any prohibition from driving for the required period. He even failed to first enquire into the existence or otherwise of special circumstances – the record is deafeningly silent regarding whether that crucial aspect was ever adverted to. In fact, it was not. This was a serious material misdirection on his part.

In terms of section 29 (2) (b) (iii) of the High Court Act, Chapter 7:06, it behoves me to remit the case to the trial magistrate directing him to proceed in terms of section 65 (6) of the Road Traffic Act, Chapter 13:11. In so doing, the trial magistrate's attention is drawn to the provisions of subsection (8) of the said section 65.

Mutema J.....

Moyo J agrees.....