

THE STATE  
vs  
BASIL ZVENHAMO MASARA

HIGH COURT OF ZIMBABWE  
PARADZA J,  
HARARE, 22 May, 2002

Criminal Review

PARADZA J: The accused pleaded not guilty to a charge of contravening section 57(1)(b) of the Road Traffic Act, [Chapter 13:11], a section which makes it an offence for a person to drive a motor vehicle belonging to another without the latter's consent.

The facts of this matter are that the accused was an employee of a company known as Bereaved Family Services, where his post was that of Credit Controller. At the time he took up employment with the company, the accused was issued with a motor vehicle, a Mazda 323 Registration Number 679-730 L, which he was entitled to use all the time as part of a benefit arising out of his conditions of employment.

On 27 November, 2001 the accused was told verbally that he had been "dismissed" from employment because he had failed to perform his duties to the satisfaction of his employer. The accused was unhappy about the circumstances in which he was "dismissed" and he insisted that he be furnished with written communication to that effect. No such communication was given to him for a very long period after the so-called dismissal. At least for the duration of the period he drove this motor vehicle prior to charges being raised against him, no such communication was given to him. At the time of the alleged dismissal the accused was advised by his employer that he was required to surrender all property belonging to the employer that was in his possession, including the motor vehicle in question. It is not clear whether any property was

surrendered to the employer by the accused. What is clear, however, is that the accused did not surrender the motor vehicle. Instead, he continued to use it.

The following day he drove the same motor vehicle back to work but was barred from entering the premises because he had been 'dismissed from employment.

Thereafter the employer made frantic attempts to persuade the accused to bring the motor vehicle back but without success. When the employer failed to get the vehicle back, he filed a complaint with the police. That resulted in the charge being preferred against the accused which is the subject of this review.

The accused was convicted of contravening the section referred to above and sentenced to pay a fine of \$2 500,00 or, in default of payment, 4 months imprisonment. The conviction was on the basis of the evidence led by the employer's Operations Co-ordinating Manager, one Chris Chibwana, and the Human Resources Manager, David Mudonzwa. Their evidence gave an account of the alleged dismissal and the fact that after the dismissal the accused decided to drive the motor vehicle away, contrary to what the employer expected of the accused, that is, surrendering the motor vehicle once he had conveyed his personal belongings to his home in Highfield.

In his defence the accused challenged the alleged dismissal, which he described as unlawful. He stated that this was the vehicle which had been issued to him for his exclusive use at the time of his engagement. Further, he hoped that at the time of the termination of his employment, in accordance with the policy of that Company, that that motor vehicle would form part of his exit package.

He drove that motor vehicle away and kept it for a period of twenty-three days until the police arrived to impound the vehicle and dispossess him. Not only did the

police remove the vehicle from his possession, they also preferred charges against him to the effect that he had, for those twenty-three days, driven a vehicle belonging to his employer without the employer's consent.

Having considered the evidence led on behalf of the prosecution the learned magistrate found the accused guilty as charged. Part of his judgment reads:-

"It is therefore the finding of the Court that the accused took the Company motor vehicle as a way of protesting against what seemed to be an unfair dismissal. It is not the duty of this Court to delve into the accused's dismissal as that is not the issue. What is clear is that once the accused was informed of the termination of his employment it was all too clear that he was expected to surrender all property belonging to the Company as he had been advised. Accused did not dispute the assertion that he was warned to return all property including the motor vehicle."

I have noted that the learned magistrate accepted the fact that the accused was protesting against what the learned magistrate described as an "unfair dismissal". In reality and in essence, it is better described as an unlawful dismissal. Not only was the accused advised verbally of the so-called dismissal, but also no steps were taken by his employer to follow the law that deals with the lawful dismissal of employees.

The accused obviously, being a senior employee, was well aware of his rights and hence he challenged the so-called dismissal and labelled it as an "unlawful dismissal". For that reason, he felt he was not expected or required to comply when the employer ordered him to surrender the motor vehicle in question.

I believe it was important for the Court to take note of the fact that there was no evidence before the court to show that the alleged dismissal of the accused, by the company he worked for, was lawful. That being the case the accused maintained his status as an employee of the company until the company had taken proper steps to terminate his employment. His driving away of the motor vehicle was not unlawful

under the circumstances. Accused was not obliged to agree to the surrender of any property simply because the employer had illegally and unlawfully terminated his employment.

The accused raised a *bona fide* claim of right and by so doing the Court could not ignore that defence. That *bona fide* claim of right arose from the nature and extent of accused's employment with his employer. If one were to analyse the accused's mind at the time he drove away, one would easily conclude that in his mind he had a reasonable belief that he had a right to drive the motor vehicle from his workplace because his contract of employment had not been lawfully terminated. Under those circumstances it would be difficult to find the requisite *mens rea*. He would have believed that, while the dispute relating to the termination of his employment was pending, he could continue to drive the motor vehicle until a final determination had been properly made, determining the fate of his employment. Should the employer so decide and require that the accused surrenders the vehicle, that would have to be done by way of an application or action in the civil court. What it means, therefore, is that the matter was not supposed to be resolved in the manner it was resolved, that is by instituting a prosecution under section 57(1)(b) of the Road Traffic Act. To do so would amount to applying the provisions of the Act to a set of circumstances to which it was not intended to apply.

Section 57(1)(b) of the Act deals with people who, with a criminal intent or otherwise, decide to drive other people's motor vehicles without their consent and to those people's detriment. This section reads as follows -

"57. Unlawful Contact with or Use of Vehicles

1. A person who-
  - (a) ...

- (b) without the consent of the owner or person in lawful charge of the vehicle, drives or rides in the vehicle; or
  - (c) ...
  - (d) ...
  - (e) ...
- shall be guilty of an offence and liable to a fine not exceeding \$10 000 or to imprisonment not exceeding 2 years or to both such fine and such imprisonment".

The law is very clear as to the requirements that have to be satisfied before a person is convicted under this section. (See *R v Strauss* 1948 (1) SA 42(N)). A person is regarded as being in lawful charge of a vehicle if he has the care and the custody of that particular motor vehicle. (See *R v Naidoo* 1948 (4) SA 69 at p 71; *R v Forde* 1949 (2) SA 92 and *R v Nabengu & Ors* 1959 (4) SA 630(M).) It follows therefore that a person who has been given the exclusive use of a motor vehicle by reason of a contract of employment cannot be charged for a contravention of this section simply because the employer has decided to terminate his employment and has not done so lawfully. Such a person would obviously require and be entitled to receive the protection of the law.

Where an employee departed from his instructions and the terms of employer's consent and used the vehicle for his own purposes, it has been held not to amount to a contravention of this provision of the law. In the case of *S v Chigwida* 1970 (2) SA 523(R) the Court quashed the conviction and set aside a sentence in circumstances where the appellant had been given certain instructions and limited use of a motor vehicle to enable him to carry out those instructions, but had instead driven the car through muddy places for long distances and damaged the clutch of the vehicle, in the process making the motor vehicle unfit for use. In my view that case was worse than the one under consideration. In the present case, the consent of the owner was purportedly withdrawn

as a result of a disagreement between the employer and the accused. Before the accused could be held to have contravened the law, it was necessary to be satisfied that the employer had acted lawfully in denying the accused the benefit of the use of the motor vehicle. This was not done in the present case. By refusing to comply with the order to surrender the vehicle, the accused was acting under a *bona fide* belief that, because his employer was not acting lawfully, he was entitled to drive the motor vehicle away and to continue using it.

I am also convinced that even if the State had charged the accused under section 57(1)(d) of the Act, it would have had the same difficulties in finding the accused to have contravened the law.

Paragraph (d) reads as follows -

"(d) being an employee in lawful charge of a vehicle belonging to, or in the lawful charge of his employer, drives such vehicle on a journey or for a purpose which was not authorised by his employer".

If the employee is authorised to drive that vehicle all the time for his own personal use, and for purposes relating to his employment, an employer cannot simply change that arrangement without the danger of committing an unfair labour practice.

The conviction and sentence in this matter cannot be allowed to stand. When a motor vehicle is given to an employee as a benefit arising out of his conditions of service, it cannot be withdrawn simply because the employer has decided that he is unhappy with the employee's standard of work. Such conditions of service can only be varied in accordance with the law. In the case on hand, the employer decided to dismiss the employee without going through the normal legal requirements that should be followed

on suspending and before dismissing an employee. If the employee decided to ignore those orders to surrender the vehicle, the employer would only have himself to blame. The employer would not be entitled to proceed with a prosecution of the employee on the basis that he has driven the motor vehicle without the necessary consent of the employer. To do so would be a total lack of appreciation of what the Legislature intended when the provision under which the accused has been charged was enacted. I therefore make the following order -

The conviction is quashed and the sentence is set aside. The trial magistrate is hereby instructed to ensure that the money paid by the accused by way of a fine is refunded to him without delay.

SMITH J, I agree.