

THE STATE  
versus  
DAVID SHONHIWA

HIGH COURT OF ZIMBABWE  
HUNGWE J  
HARARE 4 September 2002

HUNGWE J: The record of proceedings in the above matter was placed before the learned scrutinising magistrate who commented as follows:

- “1. In Count 1 the accused was charged with C/S 52(2) of the R.T.A. Chapter 13:11 No. 48/76. He was sentenced to pay a fine of \$1 500 i.d.p. 2 months.
2. In Count 2 accused was charged with C/S 30(1)(b) ARW section 30(2) of the C P & E Act Chapter 9:07 and he was sentenced to 3 months wholly suspended for 5 years on condition accused does not commit a similar offence for which he shall be imprisoned without the option of a fine.
3. The scrutinising Regional Magistrate queried why accused was not also charged with driving without a driver’s licence. The record did not show that this matter had been dealt with. The trial magistrate in his reply said that accused paid an admission of guilty. I am not sure why the mater would have been dealt with in a piecemeal fashion.
4. The scrutinising magistrate again queried the wording of sentence in respect of Count 2. Accused was given 3 months wholly suspended for 5 years on condition he did not commit a similar offence. It appeared to the scrutinising magistrate that the wording of the sentence was not definite and that it was ambiguous.

The trial magistrate partially admitted that the condition is ambiguous though he feels that if it is interpreted in the context of similar being another contravention of the same section then it would be acceptable.

I felt restrained to confirm the proceedings in view of the foregoing. The record is respectfully referred to your Lordship for guidance.”

The first point to make is that the offence of negligent driving is created by section 52(2)(a) of the Road Traffic Act, [*Chapter 13:11*]. Subsection (2)(a)(ii) of section 52 sets out the penalty provisions for contravening section 52(2)(a). Section 52(3) allows the conviction for contravening section 51 of the Act, of someone who may have been charged under section 52(2)(a) and (b) of the Act, if such facts have been proved.

Subsection (4) of section 52 sets out additional penalties which a court may impose in addition to those provided under section 52(3) and includes the circumstances where it is mandatory to prohibit a convicted person from driving as well as cancel his driver’s licence.

The agreed facts in this case are that the accused, who did not hold a driver's licence collided with a cyclist as he executed a right turn. On being questioned by the attending police detail one Constable Makanjera the accused gave false personal details to him. He was however traced and charged for the two offences. The first offence, as pointed out above was wrongly cited. A correction to reflect a contravention of section 52(2)(a) of the Road traffic Act, [Chapter 13:11] would not result in any prejudice to the accused. The charge is therefore accordingly corrected.

The sections cited in Count 2 do not create any offence. The Criminal Procedure and Evidence Act [Chapter 9:07] does not create an offence in section 30. There is no subsection (1) or (2) in that section. It is a provision which allows a citizen's arrest of a person upon reasonable suspicion that such other person has committed any offence specified in the First Schedule. The facts disclose the offence created by section 11 of the Miscellaneous Offences Act [Chapter 9:15]. The maximum penalty for contravening this section is \$100 or 6 months imprisonment.

The trial court imposed 3 months imprisonment which was wholly suspended on condition the accused does not commit a similar offence. As was correctly pointed out, and accepting for a moment that this was a competent sentence, the condition of suspension of the sentence were couched in too general terms thereby creating an ambiguity. However as the accused was wrongly charged, it follows that he was wrongly sentenced. Had the court appreciated that the appropriate charge was to be found in the Miscellaneous Offences Act, it would have probably considered imposing a fine. This is an example of what happens when both the prosecutor and the magistrate do not pay attention to detail where statutory offences are preferred. It escaped the attention of the learned scrutinising Acting Regional Magistrate.

As the facts disclose a contravention of section 11 of the Miscellaneous Act [Chapter 9:15], the charge in Count 2 is altered to read:

“Contravention of section 11 of the Miscellaneous Offences Act, [Chapter 9:15] in that ...”

The sentence imposed by the court *a quo* in Count 2 is set aside and the following imposed – “\$100 or 10 days imprisonment.”

As the accused had only paid for the fine imposed in Count 1, he must be recalled and the alterations to his sentence explained to him.

**Chinhengo J, I agrees.**