

ZONDAI MADHONGI  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
BHUNU J  
HARARE, 3<sup>rd</sup> March 2015 and 24 March 2015

*A Moyo*, for the applicant  
*E Mauto*, for the respondent

**Bail Application.**

BHUNU J: This is an application for bail pending appeal against sentence only. The applicant was convicted on his own plea of guilty of contravening s 6 (1) as read with s 6 (5) of the Road Traffic Act [*Chapter 13:11*] in that he drove a passenger public service motor vehicle Commonly referred to as a kombi without a driver's licence. The section requires that a person found guilty of driving such a motor vehicle without a driver's licence be sentenced to a minimum sentence of 6 months imprisonment subject to a maximum of 5 years imprisonment.

The applicant was sentenced to the minimum mandatory sentence of 6 months imprisonment without the option of a fine. Aggrieved by the severity of the punishment meted out he now applies for bail pending appeal. The guidelines in determining applications of this nature were laid down in the case of *S v Dzawo* 1998 (1) ZLR 5396 (S) at 539 by Gubbay CJ and may be summarized as follows:

1. The likelihood of abscondment. See *Aitken & Anor v Attorney-General* 1992 (2) ZLR 249 (S).
2. The prospects of success of the appeal in respect of both conviction and sentence. See *S v Williams* 1980 ZLR 466 (A) at 468G-H
3. The right of the individual to liberty and
4. The potential length of delay before the appeal can be heard.

The only issue which arises concerns the applicant's prospects of success on appeal. The facts giving rise to the applicant's conviction and sentence are by and large common

cause. He is the owner of a Kombi motor vehicle registration number ACZ4315 which he uses to ferry passengers for hire or reward. He is not the holder of a driver's licence but employs a driver to drive the kombi for him. On 21 July 2014 the driver abandoned the bus at Total service station protesting none payment of his wages.

The accused with the full knowledge that he was not licenced to drive the motor vehicle then took over and drove the motor vehicle from Total Service Station to Mutoko Bus Terminus. Upon approaching a road block manned by vehicle inspection department officers and police details he made a U-Turn in a bid to flee the authorities. Assistant Inspector Noris Sangare and Constable Ishumael Musara pursued and arrested the applicant who failed to produce a valid driver's licence. At his trial the applicant pleaded guilty and did not dispute the above facts. He failed to convince the trial magistrate that there were any special circumstances pertaining to his case and was therefore convicted and sentenced to the minimum mandatory sentence of 6 months imprisonment.

Aggrieved by the sentence he noted an appeal to this Court on 18 February 2015 against sentence only. In his appeal he did not seek to challenge any of the facts forming the basis of his conviction. His grounds of appeal were limited to blaming the magistrate for failure to properly explain to him the meaning and import of special circumstances. He further alleged that the magistrate had misdirected himself in sentencing him to the minimum mandatory sentence when he had established that there were special circumstances entitling him to a more lenient sentence. He further complained that the magistrate's finding that the motor vehicle was full of passengers was not backed up by evidence.

In para 8 of his grounds of appeal the applicant states that:

- "8. The Applicant contends that the magistrate erred materially in addressing his mind to the issue of 'special circumstances'. The appeal is not centred on the plea but rather on the imposition of a mandatory sentence imposed by *the court aquo*. I herein refer to **Annexure "D"** herein for detailed reasons for this Appeal."

The above submission makes it clear that the defence has no quarrel with the facts as presented by the State at the applicant's trial. Before this court counsel for the applicant sought to dispute from the bar some of the facts which were never disputed before the trial magistrate. For instance he sought to dispute that upon approaching the road block his client made a U-Turn and fled from the police. He also sought to dispute that when he drove the motor vehicle it was full of passengers.

A perusal of the record of proceedings shows that the trial magistrate explained to the

applicant who was unrepresented at the time in the following fashion:

“Court: The law provides for a minimum 6 months (imprisonment) for this offence. You have to satisfy me that there were special circumstances i.e. unique mitigating factors in this case.”

The applicant understood the explanation and responded in the following vain:

“The Driver had refused to drive on account of non-payment of wages. I wanted to take the passengers to our vehicle.”

What the accused told the trial magistrate sounds truthful and consistent with all the available evidence. On the other hand the submissions now being made by his legal practitioner from the bar sound far-fetched and a product of recent concoction fabricated with hindsight.

The trial magistrate did explain the concept of special circumstances though in a rather perfunctory manner. Generally speaking special circumstances are extraordinary factors. The applicant however did understand the explanation and duly addressed the court on special circumstances. Now that he is represented his legal practitioner does not seem to have been able to improve on his submission.

The new submission made by his legal practitioner based on ignorance of the law is ridiculous and not worth of belief by any reasonable court. I am of the firm view that it is absurd to suggest that a person who operates a public transport motor vehicle is ignorant of the fact that it is a serious criminal offence to drive such a motor vehicle without a driver’s licence. The applicant’s behaviour in fleeing from the police upon approaching a roadblock undoubtedly betrays knowledge of the criminality of his conduct.

His legal practitioner’s new submission that the kombi was not full of passengers is inconsistent with what the accused told the trial magistrate. A perusal of the record of proceedings shows that he told the magistrate that when the driver abandoned the kombi he drove it because he wanted to take the stranded passengers to another motor vehicle. The mere fact that the driver had refused to drive in circumstances where he had not been paid his wages cannot amount to a special circumstance. It is now settled law that it is against public policy that one should benefit from his fault or wrong. There appears to have been no compelling reason why the applicant drove the kombi which had been parked at a service station. Had the kombi been abandoned in a deserted place in the middle of nowhere then, it would have been arguable that there are special circumstances pertaining to this matter.

Having perused the entire record of proceedings and listened to both counsel I am

convinced that there are no reasonable prospects of success on appeal as the applicant was guilty of the very mischief for which the minimum mandatory sentence was imposed. In the result the application can only fail.

It is accordingly ordered that the application for bail be and is hereby dismissed.

*Allen Moyo Attorneys, applicant's legal practitioners*

*The Prosecutor General's Office, respondent's legal practitioners*