THE STATE

Versus

ALBERT MHONDIWA

IN THE HIGH COURT OF ZIMBABWE
MUTEMA J
BULAWAYO27 & 30 JANUARY, 2014

Criminal Review

MUTEMA J: Accused was charged with, pleaded guilty to and was convicted of contravening section 55(2) of the Road traffic Act [Chapter 13:11]. He was sentenced as follows:

"US$300 fine/6 months imprisonment"

The charge was framed in the following vein: "Charged with the crime of: Driving whilst under the influence of alcohol as defined in section 55(2) of the Road Traffic Act Chapter 13:11. In that on the 23rd July 2013 at about 20:13 hours and at (*sic*) along Plumtree road, Bulawayo Mhondiwa Albert unlawfully drove a granvia registration numbers ACQ 3053 whilst under the influence of alcohol, that is to say accused drove such vehicle with an alcohol concentration of 187 mg/100mls of blood."

Four queries were raised by the learned scrutinizing regional magistrate and responded to by the trial magistrate as follows:

1. Why is the charge couched in a language that suggested that the accused contravened section 54 of the Road Traffic Act?

   Answer: The accused was properly charged given that both the state and the bench felt that accused had contravened section 55(2) of the RTA precisely as the state preferred section 55(2) and not section 54 after going through the contents of the docket.

2. Why was the accused not prohibited from driving?

   Answer: Accused was not driving a public vehicle but rather it was a private vehicle.

3. And why was the accused's driving licence not cancelled?

   Answer: Because accused is not a second or third offender see section 55(b)(i) and (ii) (*sic*).

4. Why is the trial magistrate in the habit of writing "fine" in front of the figure of the amount of fine imposed? Where does he derive that practice from?

   Answer: The trial magistrate derives that practice from his mentor i.e. the late J.

> Masimba (former Provincial Head for Matabeleland North Province) and if the scrutinizing Regional Magistrate is not happy with it the trial magistrate is prepared to abandon the word "fine", but that has been the way the trial magistrate was taught.

The learned scrutinizing regional magistrate has recommended that the proceedings be quashed and the case remitted to a different magistrate for trial *de novo*.

I will deal with the queries raised and the replies proffered in their order.

Regarding the first query it goes without quarrel that the manner in which the charge is framed and also the manner in which the trial magistrate canvassed the essential elements of the charge evince a dearth of failure to correctly capture the essential elements of the charge. The essential elements of contravening section 55(2) of the Road Traffic Act are that (a) one drove/attempted to drive a motor vehicle; (b) while one is under the influence of alcohol or drug or both; (c) to such an extent as to be incapable of having proper control of the vehicle.

It is important therefore that the charge must incorporate all the above elements and that the trial magistrate must also canvass them all with the accused person. This must be so especially where before the trial magistrate is an unrepresented accused person. Unfortunately this was not done *in casu*.

I am aware of the provisions of paragraph (a) of subsection (3) of section 55 of the Road Traffic Act which are to the effect that once it is proven that a concentration of alcohol in accused's blood was not less than 150mg/100ml at the time of the offence, a rebuttable presumption arises that the accused was at such time under the influence of alcohol or a drug or both to such an extent as to be incapable of having proper control of the vehicle concerned. *In casu* accused's alcohol-blood level was 187mg per 100mls of blood. The presumption alluded to *supra* applies and was not rebutted. However, sight must not be lost of the fact that issues to do with presumptions are legal issues not subscribed to by the common lay person. Both the charge and the canvassing of the essential elements did not encompass the words "…to such an extent as to be incapable of having proper control of the vehicle …" The charge and the canvassing of the elements merely alluded to that the accused's alcohol-blood level was 187mg per 100mls. The presumption was never brought to accused's attention.

However, the omission of the words alluded to above from both the charge and the canvassing of the essential elements should not in the instant case warrant the quashing of the proceedings. The accused admitted driving under the influence of alcohol and that his alcohol-blood level was 187mg per 100mls. He agreed with the facts that he lost control of his vehicle and collided with a stationary vehicle that was correctly parked facing a shopping centre. Accused's conduct admits of no doubt that as a result of the influence of the alcohol he was incapable of exercising proper control of his vehicle. His guilt is beyond reproach.

Regarding the second query, that of failure to prohibit accused from driving and the response proffered therefor, it is beyond caevil that the trial magistrate missed the law as evinced by his reply. Section 55(5)(a)(i) of the Road Traffic Act provides that a court which convicts a person of an offence in terms of subsection (1) (*sic*) (this is a draftsman's error for the

offence-creating provision is subsection (2)) shall if the person has not previously been convicted of a similar offence within a period of ten years immediately preceding the date of such first mentioned conviction, prohibit the person from driving for not less than six months where the current conviction does not relate to driving a commuter omnibus or a heavy vehicle. It is therefore clear as day follows night that prohibition is mandatory where no special circumstances exist. *In casu* the trial magistrate did not bother to explore the aspect of prohibition from driving let alone special circumstances. He therefore fell into error.

The same obtains in respect of the third query. The trial magistrate failed to exhibit an appreciation of the law as envisaged in section 55(5)(a)(i) which goes further to provide that "… and shall, if the person is a holder of a licence, cancel the licence in respect of motor vehicles of the class to which such prohibition from driving extends." Cancellation of the licence is also mandatory even for a first offender.

Trial magistrates are urged to first acquaint themselves thoroughly with the relevant statutory provisions before sentencing convicted persons. An astute judicial officer does not just sentence in the dark.

The fourth query was most probably an icing on the cake by the learned scrutinizing regional magistrate. It is of no consequence or moment to warrant adverting to it and I am sure that is why he did not pursue it in his minute to the reviewing Judge.

In the event, while confirming the conviction, the sentence by the trial magistrate is set aside with the resultant directive that the matter is remitted to the same trial magistrate to recall the accused and sentence him anew after first enquiring into the issue of special circumstances in terms of section 55 (5)(a)(i) of the Road Traffic Act as pointed out above.

The subsequent substantive sentence must not exceed the earlier one of $300 or in default of payment 6 months imprisonment.

Makonese J ……I agree