

THE STATE  
versus  
TAFADZWA SANDE

### **Criminal Review**

HIGH COURT OF ZIMBABWE  
**MUNGWARI & MANDAZA JJ**  
HARARE; 12 December 2024

[1] MUNGWARI J: The background to this tragic accident was that on 23 July 2024 at house number 10 Westview location in Mt Darwin Tafadzwa Sande (hereinafter the accused) and five other men, the deceased included busied themselves as they tinkered around a non-runner DAF truck with registration no 8208. Their collective intention was to repair the motor vehicle and bring it back to life. Unbeknown to them, their endeavors would end in this untold tragedy.

[2] Under the guidance of a motor mechanic Kendros Dambaza all the six men attended to the motor vehicle. At around 10.30 am of the same morning the accused was instructed by Kendros Dambaza to turn on the engine of the motor vehicle. The accused opened the door of the vehicle but did not get inside. Before he checked his surroundings, he started the motor vehicle from where he was standing outside the motor vehicle. Unbeknown to him the motor vehicle was in gear. The vehicle roared to life and went into motion. The deceased who was positioned under the truck repairing some part thereunder was run over by the right rear wheel and was crushed to death. Following the incident investigations were carried out and it turned out that the accused did not possess a driver's licence.

[3] The accused was arrested and on the strength of the above facts two charges were preferred against him. First he was charged with contravening section 6 of the Road Traffic Act [*Chapter 13:11*] "Driving a motor vehicle without a valid driver's licence" and second, with contravening Section 49 of the Criminal Law Codification and Reform Act [*Chapter 9:23*] (the Code) are s 64 of the Road Traffic Act [*Chapter 13:11*] (the Act) "culpable homicide."

[4] On 12 November 2024 the accused appeared before a magistrate sitting at Mt Darwin. He pleaded guilty to both counts and was convicted. In count one he was sentenced to pay a fine of \$100 USD in default of payment 1-month imprisonment. In count 2 he was

sentenced to 24 imprisonment of which 8 months imprisonment was suspended for 5 years on condition of good behaviour. The remainder was all suspended, on condition of performance of community service.

[5] Upon reading the record, which was placed before me for automatic review in terms of s 57 of the Magistrates' Court Act, I detected anomalies in the proceedings. Interestingly I noted that the accused was referred to as a driver. It was stated that he failed to check his surroundings before he drove the vehicle and failed to stop the car when he ought to have. A closer reading of the record of proceedings revealed that in the pre-sentencing hearing the trial court recorded that the accused even failed to keep a proper lookout and rammed into a stationary vehicle. These conflicting statements and new developments, led me to generate the following query addressed to the trial magistrate:

“The accused was charged and convicted of an offence of driving without a licence as well as a culpable homicide.

The two charges arise from the same set of facts. A reading of the entire record and in particular the evidence of Farai Vashiko reveals at paragraph 12 that the accused “started the engine from outside the vehicle while it was in gear. The vehicle moved forward resulting in its rear wheels crushing down on the now deceased person Edmore Gutuza who was underneath the vehicle”

1. Can the charge of Contravening section 6 of the Road Traffic Act be sustained in the circumstances? Can this be deemed to be driving?

Count 2

1. What is the degree of negligence that was assessed by the trial court? The record of proceedings is silent in that regard.

2. In the purported inquiry on the degree of negligence, the trial Magistrate makes mention of the accused failing to control the motor vehicle at a T junction and it ramming into another vehicle. Where did this information come from?

3. Was a community service inquiry conducted by the trial court on the suitability of the accused to perform community service?”

[6] In a response dated 10 December 2024, the trial magistrate conceded that the proceedings were flawed. She said the following:

“I have read the queries raised by the Honorable reviewing Judge and I comment as follows:

COUNT 1

(1) Accused 1 - After a careful perusal of the state papers and exhibits I do concede that the conduct alleged could not be defined as driving in the sense that accused was not inside the vehicle nor was he controlling the steering apparatus of the motor vehicle in question.

I humbly submit that the charge of contravening section 6 of the Road Traffic Act cannot be sustained in the circumstance.

COUNT 2

(1) I noted that on the record of proceedings I only pointed out that the offender was negligent in his conduct. I was not explicit in respect of the actual degree of negligence of the offender. I now appreciate the error I made in

this regard.

(2) I apologize for the phrase that was inserted as a typing error.

(3) As the trial court 1 did not conduct the community service inquiry and relied only the pre-sentence inquiry report by the community service officer.

I stand guided by the Honorable Reviewing Judge”

[7] Clearly, the first misdirection was to accept without question, the charge of driving without a licence in count 1 and proceeding to convict and sentence the accused for the same defective charge. From the facts and a further reading of the evidence of Farai Vashiko it is clear the accused neither entered the motor vehicle nor had control of the steering wheel of the same car. The trial magistrate did not consider what a driver in terms of the Act is. Under the definition section of the Act, a driver is defined as a:

“person having control of the steering apparatus of a vehicle ...”

[8] The charge preferred against the accused is that he drove such a vehicle without a licence when in reality he did not even get inside the motor vehicle. He did not have control of the steering apparatus of the car. He simply started the engine of the motor vehicle on the instruction of the mechanic, whilst standing outside the truck. The failure to check the correctness of a charge by the trial amounts to a serious misdirection. It does not follow that anyone who causes a motor vehicle to move must possess a driver’s licence. If it were so, it would mean that even those that are requested to assist in push - starting a car would be liable to driving it without a driver’s licence. In this case, the accused never drove the motor vehicle. It was wrong for the trial magistrate to ask the accused whether he drove the car because driving from the definition in the Act is a technical term that ought to have been explained to him in simpler terms. Being a self-actor and unaware of what driving entailed he accepted that he had driven the vehicle when he clearly had not.

[9] The errors did not stop there. S 6 (1) provides that:

“Subject to this Act, no person shall drive a motor vehicle **on a road** unless he:-

(a) Is the holder of a valid driver’s licence...” (the bolding is my emphasis)

[10] In this case, the accident occurred at a residential premises. The prohibition relates to driving a motor vehicle on a road. The word road is defined in the definition section of the act as meaning:

“Any highway, street or other road to which the public or any section thereof has access.”

It was then expanded to include other places such as bridges, ferries, or pontoons over which a road passes; any approach, culvert, cutting, dam, ditch, drain, embarkment, fence, grid kerb, parapet, subway or other work or thing belonging to or connected with or forming part of a road and any public place and any private car park or private road. What is common amongst the places and things mentioned above is that they are places or things that the public have access to. Even if it were to be accepted (which it cannot), that the accused drove the motor vehicle, the question would have still remained that the trial magistrate did not interrogate whether the purported driving occurred on a public road. My reading of the Act is that it is not the driving of a motor vehicle without a driver's licence per se that is prohibited. It is driving such vehicle on a road in accordance with the definition of road in the Act. For instance, a tractor is a motor vehicle but people who drive tractors on a farm during cultivation of the farm land are not required to have drivers' licences for that class of vehicles because the place on which they drive do not fit into the definition of a road. The facts *ex facie* the record show that this accident may have occurred at a private residence which would not be covered by the definition of a road.

[11] Furthermore, the trial court did not inquire as to the type of motor vehicle the accused purportedly drove. Ordinarily and in terms of s 6(5), a contravention of s 6 attracts a maximum penalty of a fine not exceeding level six or imprisonment not exceeding 12 months or both such fine and such imprisonment. Only when the motor vehicle was a commuter omnibus or a heavy vehicle can a penalty higher than the above stated be levied. That was important because the sentencing considerations are different depending on the type of motor vehicle. Clearly, the vehicle in issue here was not a commuter omnibus. It was a truck. The Act defines a heavy vehicle as a vehicle with a net mass exceeding two thousand three hundred kilograms yet there was never any determination of the mass of the vehicle in question here. Without a verification of that in the facts of the case, there was no justification for the sentence imposed by the trial court. It is baseless given the above misdirections, which go to the root of the charge, the conviction of the accused cannot be allowed to stand and should therefore be vacated.

[12] The second misdirection is in respect of count 2 which relates to the culpable homicide charge. The trial magistrate did not properly canvass the essential elements of that charge. It must have struck the trial magistrate at this stage that the accused did not drive the motor vehicle as she simply asked whether the accused turned on the motor vehicle engine to which he replied that he did. He was then asked whether he failed to check underneath the

car before he switched on the engine to which he confirmed that he indeed failed to do so. I am constrained to understand what checking needed to be done. The accused knew that the deceased was under the broken-down vehicle. The usual rhetoric on whether he knew it was unlawful then followed until on the 7<sup>th</sup> question the accused was found guilty as charged.

[13] The essential elements which comprise the particulars of negligence were never fully canvassed and with sufficient particularity. At the point of conviction, it is evident that the negligent conduct that the accused is supposed to have engaged in was not known. It appears that even the trial magistrate did not know. This could not therefore have been a proper plea of guilty. To further buttress that point, at the presentencing stage nothing was canvassed including the degree of negligence. The court did not make a finding of the precise degree of negligence for purpose of not only to properly assess the overall sentence but to abide by the provisions of s 64 (3) of the Road Traffic Act.

[14] In the above regard, I can do no better than to quote the remarks of CHINHENGO J in *S v Chaita & Ors* 1998(1)ZLR213 at 218 H-219A-C where he held as follows:

“A magistrate who presides over a case of culpable homicide arising from a motor vehicle accident must satisfy himself that if the accused had been charged under the Act, he would have been convicted of either driving without due care and attention or reasonable consideration for others (s 51); or of negligent or dangerous driving (s 52); or of reckless driving (s 53); or of driving with or prohibited concentration of alcohol or drug or both (s 54); or of driving while under the influence of alcohol or a drug or both (s 55). Such a determination will not only enable the magistrate to make a precise finding on the degree of negligence to found a verdict of culpable homicide but will also provide the magistrate with a proper basis for considering the appropriate sentence. This consideration is the foundation of the statement in *S v Combrink* HB-91-96 where CHATIKOBO J said that;

“When a person is convicted of culpable homicide on the basis that he was negligent (or other similar conduct) the issue of prohibition from driving and cancellation falls to be dealt with in terms of these provisions (s 64 (3) (b) (II) as read with s 52 (4) (b))”

[15] From my analysis of the facts the precise degree of negligence is that the accused switched on the engine of the motor vehicle without checking whether the motor vehicle was actively engaged into gear and without checking his surroundings. However, no inquiry was made as to the exact nature or extent of that. For the avoidance of doubt therefore, in a charge of culpable homicide arising out of a motor vehicle accident the court is required to make a finding of the precise degree of negligence of the accused not only

for purposes of the conviction but to also assist it during sentencing. It is enjoined to approach the matters in terms of s 64 (3) of the Act. A failure to do so is a misdirection

[16] The third misdirection relates to the failure to keep a proper record of proceedings which in this case distorted everything. It left the integrity of the proceedings in question in tatters. In between the proceedings the trial magistrate mentioned that the particulars of negligence are that the accused failed to keep a proper lookout because he was speeding and rammed into another vehicle at a T- junction. Those pronouncements were totally unrelated to the proceedings at hand and the trial magistrate conceded to that error. Unfortunately, the damage had already been done. I need not over-emphasise that a failure by a magistrate to keep a proper record of proceedings constitutes a misdirection. The Magistrate's court is a court of record per section 5 (1) of the Magistrates Court Act [Chapter 7:10].

[17] Lastly, the magistrate did not carry out an inquiry into the suitability of the accused to perform community service as required by the Criminal Procedure and Evidence (Community Service) Regulations 1998, SI 12/98. See the case of *S v Confidence Kamuchachari and Ors* HH411-24.

[18] Due to the myriad of misdirections pointed out above, it is clear that the proceedings in this matter are not in accordance with real and substantial justice. The nature of the misdirections go to the very root of the convictions and leaves me with no option but to set aside the convictions in both counts.

**DISPOSITION**

In the premises, IT IS ORDERED THAT:

1. The conviction of the accused for driving without a driver's licence and for culpable homicide under CRB MTD 1487/24 and the imposition of the two sentences for the charges be and are hereby set aside.
2. The matter is remitted to the Magistrate's court for trial *de novo* before a different magistrate.
3. In the event of a conviction, the three weeks already served shall be considered as part of any sentence which may be imposed.

**MUNGWARI J:** .....

**MANDAZA J:** ..... **Agrees**