JAYLAN RAMA

VERSUS

THE STATE

HIGH COURT OF ZIMBABWE
KAMOCHA AND CHEDA J J
BULAWAYO 15 AND 31 MARCH 2011

Mr J. Maupa, for the appellant
Ms N. Ndlovu, for the respondent

CRIMINAL APPEAL

CHEDA J: Appellant appeals against the sentence passed by the Magistrate Court sitting in Gokwe.

Appellant was charged with contravening section 6 (1) (9) of the Road Traffic Amendment number 3/2000. He pleaded guilty, was convicted and sentenced as follows:

> Sentence
> ''6 months in with labour. In addition accused is prohibited from driving for life motor vehicles of the class to which heavy vehicles belong.''

The facts as outlined by the state are that appellant who was 17 years of age at the time, was arrested driving a heavy vehicle, being a Volvo along Gokwe Business centre at around 1745 hrs. On the way he was stopped by Assistant Inspector Mpofu and Shava who then discovered that he was not a holder of a valid driver's licence.

Appellant now appeals against the said sentence on the basis that:

1) the special circumstances in relation to the mandatory penalty were not explained to him, and

2) that he ought not to have been prohibited from driving heavy vehicles for life.

The respondent agrees with appellant on the basis that the issue of special circumstances were not properly canvassed, Respondent referred us to the following exchanges between appellant and the trial Magistrate.

''Q. Are there any special reasons as to why you should not be prohibited from driving heavy vehicles for life?

A. I am asking for forgiveness.''

In her response, respondent referred us to the case of *State v Dube and another* 1988 (2) ZLR 385 (SC), in that case the court laid down the procedure to be followed where an offence involving a minimum sentence is before the court. It was stated in that case that the issue of special circumstances should be raised at an early stage of the proceedings and the judicial officer should clearly explain to the accused, especially the unrepresented one, that the special circumstances may be peculiar to him or to the commission of the offence.

In casu, the learned trial Magistrate merely asked whether appellant had ''special reasons'' The court *a quo* misdirected itself by referring to ''special reasons'' instead of special circumstances. By failing to ask an appropriate question, he was then given a wrong answer, i.e

''I am asking for forgiveness''

I agree with the respondent that the question of special circumstances was given a cursory attention. The appellant should have been appraised of the looming mandatory sentence in the absence of special circumstances. It should have been further explained to him that the mandatory sentence can be avoided if he can proffer any special circumstances peculiar to him or the commission of the offence which can excuse him from being sentenced to a mandatory sentence. In *S v Chaerera* 1988 (2) ZLR 226 (SC) at 229 A McNally JA ably stated:

> ''... the Magistrate should have gone much further than he did in advising the appellant the case, what the minimum penalty was, and how that penalty could only be avoided by proof of special circumstances. He should have gone to explain what special circumstances were''.

The court *a quo* did not properly couch the sentence in this matter. The proper way of couching a sentence should have been in this form ''6 months imprisonment.'' It is not necessary for the court to prescribe that accused should undergo labour as that is the domain of the prison authorities.

In my considered opinion due process was not adhered to in this matter. The appeal succeeds to the following extent:

<u>Order</u>

1) The conviction is confirmed.
2) The sentence is set aside and the matter is remitted back to the same court for full and proper consideration of the question of special circumstances.

KAMOCHA J .... I agree.

Makonese and Partners, Appellant's Legal Practitioners
Criminal Division, Attorney General's office, Respondent's Legal Practitioners