

## R. v. ZEMBA CHINDA.

CRIMINAL REVIEW CASE NO. 254 OF 1941.

*Procedure on plea of guilty—lorry with insufficient guard rail—whether driving lorry without guard rail is an “offence in connection with the driving of a motor car”.*

In the judgment hereunder the procedure to be adopted on a plea of guilty is set out. The Court is entitled after judgment has been entered to receive evidence in order to determine the proper sentence (Criminal Procedure Code section 273).

The powers of a Court to order suspension, cancellation or endorsement of a driving licence are now contained in section 123 of the Roads and Road Traffic Ordinance (Cap. 173) and the Second Schedule to that Ordinance specifies the offences in relation to which that power may be exercised. There is now no general power to make an order for an “offence in connection with the driving of a motor car”.

Robinson, J.: First I would like to observe generally on the case.

I see a plea of guilty was entered, quite properly.

The prosecution then outlined the facts. This is to inform the Magistrate of the facts of the case. It is not proof. The offence has been admitted. Therefore at the end of it, it is not right to put “Close of case for Prosecution”.

It is proper for the outline to be interpreted to the accused and for him to be asked if he agrees with the Crown story. If he does not in some essentially material point, it may well be that the plea of guilty was wrongly entered through misunderstanding—a plea of “Not Guilty” should then be entered and the case be proved. If the accused does not agree with the prosecution outline in some minor details which cannot affect the admitted commission of the offence, it does not matter.

After a plea of guilty, the proceedings are somewhat informal. The Magistrate has to be satisfied he was right in entering a plea of guilty and he wants to know the facts of the case for the purposes of sentence. It is wrong, therefore, for the record to read, as it does “Accused no witnesses. Accused duly cautioned elects to say from the dock I have nothing to say but that owing to the accident I have lost my driver’s licence, tax receipt and other papers. . . . Close of Defence.”

The correct way would be for a note to be made “Accused agrees facts”.

Judgment is then entered. The police are asked if the accused has any previous conviction or if they have any comments to make. Lastly the accused is asked if he has anything to say in mitigation, and sentence is passed.

Secondly I would observe particularly on the case.

The charge was *contra* Regulation 9 (4) Construction and User, Part III, Cap. 138 and section 16, Cap. 138, in that the accused drove a motor lorry for conveyance of natives, the said lorry not having sufficient guard rails.

The sentence was a fine of £2 or one month I.H.L. and his certificate of competence suspended for six months under section 12 (1), Cap. 138.

Section 12 (1) states "Any Court before which a person is convicted of any offence *in connection with the driving of a motor car . . .*" may suspend, etc. Is this offence of using a lorry without a sufficient guard rail an offence in connection with driving ?

It is a difficult point because the offence complained of is user. Section 16 says "No person shall cause or permit a motor car to be used . . . or have charge of a motor car when so used unless the motor car complies with the prescribed conditions as to Construction and User". An offence can, therefore, be committed by the owner, perhaps 100 miles away at the time, and the driver. The owner could easily have forbidden the person using the motor car to use it contrary to the regulations. The provision is absolute and I think he would still have committed the offences but it would be manifestly unfair to suspend his certificate on the ground that the offence was in connection with the driving of a motor car. I am satisfied that the true meaning is that section 12 applies only to an offender when actually driving a motor car in motion.

Section 12, Cap. 138, is in similar terms to section 4 of the Motor Car Act, 1903 (3 Edward, 7, C. 36) which was repeated in section 6 of the Road Traffic Act, 1930 (20 and 21 George 5, C. 43) and there have been various decisions thereunder. For instance, it has been held that obstruction is not an offence "in connection with the driving of a motor vehicle", but driving a vehicle not having an identification mark is, and so are not having the back plate illuminated, driving without a light or using too powerful a light, and taking too many passengers under a limited trade licence (see *Stone*, 1938 ed., p. 1736).

Therefore, in construing section 12, the actual facts of each case must be considered.

On the facts of this case, there was ample evidence upon which the Magistrate could come to the conclusion that the offence was "in connection with the driving of a motor car" and in my opinion he was right in so doing and he was entitled to suspend the certificate of the accused.