

## **R v AMOS BANDA AND FOSTER LIWAYO (1963 - 1964) Z and NRLR 51**

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[Before the Honourable Mr. Justice CHARLES on the 24th February, 1964.]

### **Flynote**

**Causing death by dangerous driving - aiding and abetting the commission of the offence - suspension of the driving licence of person aiding and abetting - what constitute special reasons for not doing so - driving while unlicensed and permitting an unlicensed driver to drive - sections 110 (1), 123 (1) and 210 of the Roads and Road Traffic Ordinance, Cap. 173 - section 21 of the Penal Code, Cap. 6.**

### **Headnote**

The second accused, when driving a lorry, felt ill and instructed the first accused to drive it, although knowing that he had no licence. The first accused crashed the vehicle and a passenger was killed. The first accused was convicted of causing death by dangerous driving and driving while unlicensed. The second accused was convicted of aiding and abetting the first accused in causing death by dangerous driving and of permitting him to drive without a licence. Both accused were given suspended sentences of imprisonment and fines were also imposed. The senior resident magistrate disqualified the first accused from holding a driving licence for one year and suspended the driving licence of the second accused for a like period. The senior resident magistrate referred the case to the High Court for review:

*Held:*

(a) The second accused could be, and had been, properly convicted of aiding and abetting the first accused in causing death by dangerous driving.

(b) The suspension of the second accused's driving licence was obligatory as result of his conviction, and special reasons did not exist which would have permitted the court to avoid taking this course.

(c) Special reasons, within the meaning of section 123 (1) of the Roads and Road Traffic Ordinance, Cap. 173, must be special or unusual to the commission of the offence, as opposed to special or peculiar to the accused himself.

Convictions, sentences, disqualification and suspension confirmed.

Cases cited:

(1) *R v Baldessare* 22 Cr. APP. R70.

(2) *R v Harris* 1964 Crim. Law Review 55.

### **Judgment**

**Charles J:** The first accused pleaded guilty before a senior resident magistrate to a count of having caused death by dangerous driving, contrary to section 210 of the Roads and Road Traffic Ordinance, Cap.173, and to a count of driving a motor vehicle while he was unlicensed, contrary to section 110 (1) of the said ordinance. The second accused pleaded guilty before the senior resident magistrate to a count of having aided and abetted the first accused in having caused death by dangerous driving, contrary to section 210 of the said ordinance and section 21

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of the Penal Code (Cap. 6) and to a count of having permitted the first accused to drive a motor vehicle while the latter was unlicensed, contrary to section 110 (1) of the Roads and Road Traffic Ordinance (Cap. 173). The learned resident magistrate found the two accused guilty on the respective counts against them and imposed suspended sentences of imprisonment and fines on both. He also disqualified the first accused from holding a driving licence for one year and suspended the driving licence of the second accused for twelve months.

The admitted facts were that the second accused was the authorised driver of a motor lorry which he was driving on the 7th January, 1964, with six other persons, including the first accused, in it; that feeling ill, the second accused instructed the first accused to take over the driving; that the first accused, who, to the second accused's knowledge, did not hold a driving licence, reluctantly agreed; that during the journey the other passengers complained of the way in which the first accused was driving, and on two occasions asked the second accused to stop and resume the driving himself; that the second accused refused, and that eventually, the vehicle, while being driven by the first accused down a steep gradient and on a wet and slippery surface, got out of control and turned over, one of the passengers being killed.

The learned senior resident magistrate had doubts as to the validity of the count of aiding and abetting on the ground that causing death by dangerous driving did not permit of aiding and abetting. Those doubts were resolved against the accused by reference to *R v Baldessare*, 22 Cr. App. R 70. The learned senior resident magistrate also held that having convicted the second accused of aiding and abetting he was bound to suspend the second accused's driving licence under section 123 (1) (a) of the Roads and Road Traffic Ordinance. As he considered that such suspension was not wholly equitable, the senior resident magistrate has very fairly and properly submitted the case to this court for review.

In my judgment the findings of guilty, on the accused's pleas of guilty, and the sentence and disqualification imposed were both legal and proper.

It is only the case of the second accused which calls for comment. *R v Baldessare (supra)* and the recent case of *R v Harris* (1964) Crim. Law Review 55 are clear authorities for the proposition that there can be an aiding and abetting in an offence of negligence: as this case shows, those authorities accord with good sense. I also agree that the suspension of the second accused's driving licence was obligatory by reason of his conviction of having aided and abetted in the commission of an offence contrary to section 210 of the Roads and Road Traffic Ordinance. Section 21 of the Penal Code is not limited to offences against the Penal Code itself but, having regard to the definition of " offence " in section 5 of the code, applies to offences committed against any law. Consequently an aider or abettor in the commission of an offence under section 210 of the Roads and Road Traffic Ordinance is to be deemed to have actually committed the offence, and is subject to punishment and disqualification accordingly.

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It is to be noted that section 123 (1) of the Roads and Road Traffic Ordinance permits of an otherwise obligatory suspension of a licence not being imposed in a case where special circumstances exist. As has been held, under similar English provisions, the special circumstances must be special or unusual

as to the commission of the offence, as distinct from special or peculiar to the accused himself, in order to warrant non-imposition of a disqualification. (See Stone, *Justices Manual*, 1963, Vol. 2, page 2386, note (d)). The circumstances in which the second accused committed the offence here may be regarded, perhaps, as special or unusual to the commission of the offence. However, I cannot regard them as being such as to warrant suspension not being imposed: on the contrary, I think that they fully justified the suspension. On the admitted facts, morally the real offender was the second accused, since he insisted on the first accused taking over the driving and then on him continuing to drive after he had manifested his inability to drive properly.

The convictions, sentences and disqualifications are confirmed.

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