

IN THE MUNICIPAL COURT OF APPEALS  
OF THE CITY OF EL PASO, TEXAS

MICHAEL CARZOLI, Appellant

vs.

NO. 86-MCA-1703

STATE OF TEXAS, Appellee

O P I N I O N

Appellant was charged in Municipal Court for passing a school bus under the name of "Muguel Carzoli". Everywhere else in the record, including Appellant's Brief, Appellant is referred to as Miguel Carzoli.

Appellant contends that there is a material and fatal variance between the allegation and the proof of the name of the Defendant, thus rendering the evidence insufficient to sustain the conviction, and invokes the doctrine of idem sonans.

The State's response requests this Court to reverse the Trial Court's Judgment and remand for new trial without indicating which of Appellant's points of error are well taken. However, this Court has reviewed Appellant's Brief and the Statement of Facts, and has determined that Appellant's point of error relating to the insufficiency of the evidence and the variance between the name alleged is sufficient to justify reversal.

Appellant requests that this Court reverse the case and dismiss the complaint, and the State suggests that this Court reverse and remand the case for retrial. However, if the evidence is insufficient, this Court must reverse and render in Appellant's favor. Bank v. U. S., 437 U.S.1, 98th S.Ct. 2141, 57 L.Ed 2d 1 (1978), Green v. Massey, 437 U.S.19, 98th S.Ct. 2151 57 L.Ed 2d 15 (1978).

Further, even though Appellant's points of error may raise other issues which would require a reversal, this Court is obligated to review any question raising the insuf-

ficiency of the evidence, even though it may have sustained some other point of error. That is, an Appellate Court is obligated to review a question of the sufficiency of the evidence if raised, even though other points of error may be well taken also.

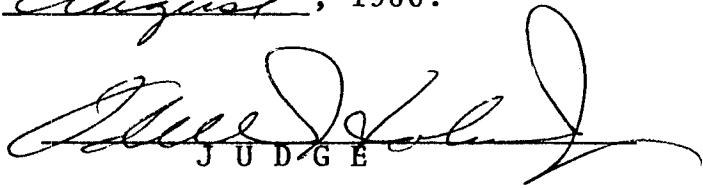
The doctrine of *idem sonans* requires that the names be capable of sounding the same, and applies if the attentive ear finds difficulty in distinguishing them when pronounced, or if common and long-continued usage has made them identical in pronunciation. In other words, identity of sound is regarded as a surer method of measuring the similarity of names than identity of spelling, and so long as the names can be sounded alike without doing violence to the powers of the letters, any variation in orthography is immaterial, provided the misspelling does not transform the name into a wholly distinct appellation. Grant v. State, 568 S.W.2d 353 (Tex.Cr.App. 1978), Martin v. State, 541 S.W.2d 605 (Tex.Cr.App.)

In this case, the sounding of these two names is patently incapable of being sounded the same, and therefore the evidence is insufficient to convict Appellant of the present offense.

In view of this Court's finding on this point, Appellant's other points of error are not considered, with the exception of noting that the fine assessed in this case is below the minimum fine established for this type of offense in Article 6701d, Section 104a, which provides a fine of not less than \$50.00 nor more than \$200.00. A fine which is below the minimum prescribed by law requires a reversal of a case and a remand for trial. However, the remand is not for a new trial, but rather only for reassessment of punishment. Mersiovsky v. State, 638 S.W.2d 527 (Tex.Civ.App. - Tyler, 1982), Jenkins v. State, 615 S.W.2d 231 (Tex.Cr.App. 1981).

For the reasons stated, the judgment of the Trial Court is hereby reversed and rendered in Appellant's favor.

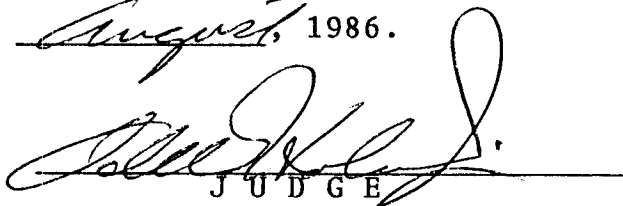
Signed this 11 day of August, 1986.

  
J U D G E

J U D G M E N T

This case came on to be heard, the same being considered, because it is the opinion of this Court that there was error in the Judgment, it is ORDERED, ADJUDGED and DECREED by the Court that the Judgment be in all things reversed and rendered in Appellant's favor, and judgment of acquittal be entered in his behalf.

Signed this 11 day of August, 1986.

  
J U D G E