

THE STATE

Versus

NDLOVU NIGEL OBRIAN NTUTUKO

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 28 April 2023

Review judgment

DUBE-BANDA J:

[1] This is a review matter that came before me in terms of s 57(1) of the Magistrates' Court Act [Chapter 7:10]. The accused was charged with the crime of culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It being alleged that on 8 December 2022 along Intemba road, opposite Inzwananzi Primary School, Luveve, Bulawayo, the accused unlawfully caused the death of Juninor Joe Mpofu (deceased) by negligently hitting him with a motor vehicle in a road accident.

[2] The accused pleaded guilty to the charge and was convicted. Nothing turns on the conviction. It is the sentence that is of concern and subject to this review judgment.

[3] He was sentenced to a \$40 000 fine or in default of payment six (6) months imprisonment, and in addition he was ordered to surrender his driver's licence for endorsement with the clerk of court within seven days of the order. It is the sentence that is of concern and subject of this review judgment

[4] The agreed facts that formed the basis of the charge were that on 8 December 2022 at around 0720 hours the accused was driving a Toyota Land Cruiser along Intemba Road opposite Inzwananzi Primary School, Bulawayo. He hit a twelve (12) year old pedestrian. Due to the impact the pedestrian died on the spot. The accident was caused by the negligence of the accused in that he failed to keep a proper lookout in the circumstances; he failed to react reasonably when an accident seemed imminent; and he was travelling at an excessive speed in the circumstances. The accused confirmed that he was driving in the vicinity of a primary

school and that they were school children on the road. And that he hit a school child who died on the spot as a result of the impact.

[5] On a charge and conviction of culpable homicide arising out of a driving offence, the trial court must first make a precise finding on the degree of negligence before assessing the appropriate sentence. See: *S v Chitepo* 2017 (1) ZLR 237 (H); *Manhenga v S* HH 62-15. The finding must be anchored on a sound factual basis. The trial court found that had the accused been charged in terms of the Road Traffic Act [Chapter 13:11] (RTA) he would have been guilty in terms of s 52(2) of the Act. The trial court ruled that the accused's negligence was moderate. I do not agree with this finding. My view is that the accused had he been charged in terms of the RTA he would have been guilty of gross negligence or recklessness. See: *R v Chitanda* 1968 (1) RLR 47; *R v Greenland* 1961 R & N 738, 1962 (1) SA 51. In *S v Mtizwa* 1984(1) ZLR 230 HC the court said:

Our courts have long held that “recklessness in traffic cases means no more than gross or aggravated form of negligence,” and that “it is only where driving shows a complete or wilful disregard for the safety as well as the rights of other road users that it amounts to gross negligence or recklessness.”

See: *R v Phillipson* 1957 (1) SA 114(SR).

[6] In a series of cases involving the unintentional killing of children the courts have emphasized the high standard of care that must be exercised by motorists when passing in the vicinity of children. See: *S v Duri* 1989 (3) ZLR 111 (S); *S v Ferreira* 1992 (1) ZLR 93 (S); *S v Ball* 1993 (2) ZLR 384 (S); *S v Beets* S-90-93.

[7] In general a person who drives through a school without checking whether it is safe or not to do so and manoeuvres along, getting himself involved in an accident involving a school child is grossly negligent or reckless. In *S v Ferreira (supra)* the court held thus:

“There is a definite duty upon a motorist who knows himself to be in the near vicinity of young children, for they have a propensity for impulsive and sometimes irrational action. Children should not be credited with the same mature intelligence and presence of mind as grown-up people. A motorist must anticipate that a child on or just next to the road may unexpectedly decide to run across oblivious of danger. He must keep his vehicle under such control as to be able to suddenly pull-up if a child starts to cross the

line on his route. He must prepare himself for such an eventuality.Thus, greater care is demanded towards children than is necessary for the safety of adults.”

[8] To my mind, anyone who drives at an excessive speed in the neighborhood of a primary school seeing school children in the vicinity of the road and hits and kills a child is *prima facie* reckless. It was around 7:20 in the morning. I take judicial notice of the fact that this is the time children will be running to school. He was travelling at an excessive speed in the circumstances. He hit a twelve-year-old school child who died on the spot as a result of the impact. He was grossly negligent or reckless.

[9] On the facts of this case a sentence of \$40 000 fine or in default of payment six (6) months imprisonment is disturbingly lenient. An appropriate sentence would have been one of imprisonment and a prohibition from driving. In *S v Chitepo* 2017 (1) ZLR 237 (H) the court stated that a sentence of imprisonment is appropriate for traffic culpable homicides where there was gross negligence or recklessness. See: *S v Dzvatu* 1984 (1) ZLR 136; *S v Lusenge* AD 138/81; *S v Chirisa* 1989 (2) ZLR 102 (SC); *S v Mtizwa* 1984(1) ZLR 230 HC. This sentence is far too lenient. Driving at an excessive speed and causing the death of a 12-year-old school child, worse still in the neighbour of a school is intrinsically a very serious offence. The accused’s moral blameworthiness is very high. Any sentence which fails to recognise the seriousness of this crime may lead to society losing its confidence in the criminal justice system. Especially in a society where fatal road accidents have become prevalent and endemic. This is the kind of offence in respect of which suitably deterrent sentence was necessary. The accused can consider himself extremely fortunate that he was treated with such excessive leniency.

[10] The conviction is proper and is confirmed. The sentence is disturbingly inappropriate and not in accordance with the requirements of the law. It is not in accordance with real and substantial justice. In the result, I withhold my certificate.

DUBE-BANDA J: