

THE STATE  
versus  
ANYMORE GUTSA

HIGH COURT OF ZIMBABWE  
CHITAPI J  
HARARE, 5 June 2023

### **Criminal Review**

**CHITAPI J:** The record of proceedings in the above matter was placed before me on automatic review. The proceedings were presided over by the learned provincial magistrate Mr Maburo at Mount Darwin Magistrates Court on 23 September 2022. The accused was convicted on two charges arising from the same set of facts.

In the first count the accused was charged with and acquitted on the offence of driving a motor vehicle without being the holder of a driver's licence in contravention of the Road Traffic Act [*Chapter 13:11*]. In the second count it was alleged that he drove the vehicle negligently. He was convicted. The facts were that on 5 March 2022 at the 149 km peg on the Harare / Mukumbura road the accused was driving a Nissan Patrol vehicle when he made an overtaking error of overtaking an articulated truck on a bend. There was another vehicle approaching from in front of the accused's direction of travel. The driver of the other vehicle in order to avoid a collision pulled off the road to his extreme left. The accused then failed to control his vehicle and drove towards the vehicle which had pulled off the road and collided with that motor vehicle head on. The accused had five passengers in the vehicle. The other party's vehicle a Nissan Hardbody had eight passengers on board.

In relation to the aftermaths of the accident, both vehicles sustained extreme frontal damages as so described in the vehicle examination reports produced in evidence. Both vehicles had to be towed from the scene because of serious damage they suffered. Apart from the damages to the vehicles, seven passengers in the vehicles were injured. Medical reports were produced in relation to two of the passengers who suffered fractures of left arm and fractured teeth respectively amongst other injuries. The traffic accident book (TAB) and diagram of the scene were produced.

The accused in his statement in the TAB stated that a motor vehicle which he was following behind suddenly reduced speed and to avoid hitting into it, he overtook it in front of oncoming traffic in the form of a private vehicle and caused the head-on collision. The other driver stated that the accused was in the process of overtaking an articulated truck at a bend. When the driver who was coming from the opposite direction noted that an accident was imminent he drove off the road to his extreme left. The accused lost control of his vehicle and collided with the other vehicle head-on on the verge of the road off the lane of oncoming traffic.

In the charge sheet and in relation to the charge of negligent driving in contravention of s 52(2) of the Road Traffic Act, the particulars of negligence were stated as:-

- following too close to a vehicle in front
- overtaking error
- failing to stop or act reasonably when an accident seemed imminent

The trial of the accused was disposed of by guilty plea procedure in terms of s 271(2)(b) of the Criminal Procedure and Evidence Act, [*Chapter 7:10*] as read with s 271(3) thereof. Upon conviction, the accused was sentenced to pay a fine of RTGS\$80 000 in default of payment, 4 months imprisonment. In addition the accused was sentenced to 4 months imprisonment wholly suspended for 5 years on condition that the accused is not convicted of any offence involving negligence whereupon conviction, the accused is sentenced to imprisonment without the option of fine.

The record of proceedings was placed before me on review. I raised two queries for the learned magistrate to address as per my minute dated 8 November 2022. I paused the questions:-

- “(a) Did the learned magistrate record the explanation of the charge which he gave to the accused before the accused pleaded. It appears from the record that what is recorded is “charge read and understood”
- (b) Did magistrate make a specific finding on the degree of negligence *S v Mambua* HH 126/20 .....

I also directed that a transcript be prepared and that the transcribed record should be resubmitted within 14 days of the date of the query.

The learned magistrate responded to the queries as follows in a minute dated 10 January 2023:-

“10<sup>th</sup> January 2023

**The Registrar High Court of Zimbabwe  
Harare**

**REVIEW MINUTE: THE STATE V ANYMORE GUTSA MTD1342/22**

The above subject matter refers.

**AD paragraph 1**

The explanation to the charge and the accused response was indeed recorded as can be depicted from the transcribed record of proceedings.

**AD paragraph 2**

In the case *in casu* the accused was convicted and sentenced for contravening section 52(2) of the **Road Traffic Act [Chapter 13:11] “NEGLIGENT DRIVING”** as opposed to a case of Culpable Homicide. The cited case of *S v Mambara* HH 126/20 is a case of Culpable Homicide arising from a Traffic accident.

Section 52(2)(a) of the RTA provides that:

**“52 Negligent or dangerous driving**

- (1) .....
- (2) A person who drives a vehicle on a road –
  - (a) negligently; or
  - (b) .....

The penalties for contravening the provisions of section 52(2)(a) are as follows:

- 1. Where the vehicle was a commuter omnibus or a heavy vehicle
  - (a) a fine not exceeding level ten.
  - (b) imprisonment for a period not exceeding one year
  - (c) both such fine and imprisonment
- 2. Where the vehicle is not a commuter omnibus or a heavy vehicle
  - (a) A fine not exceeding level seven
  - (b) Imprisonment for a period not exceeding six months
  - (c) Both such fine and imprisonment
- 3. Where the accused has no previous conviction for dangerous, negligent or reckless driving in the five year period preceding the conviction, the court may prohibit him from driving for such period as it thinks fit.
- 4. Where the accused has a previous conviction for dangerous, negligent or reckless driving in the five year period preceding the conviction, the court may
  - (a) prohibit him from driving for such period as it thinks fit, unless the vehicle is a commuter omnibus or a heavy vehicle in which case the accused shall be prohibited from driving for a mandatory two year period.
  - (b) cancel his licence in respect of the classes that he has been prohibited from driving.

Section 64(3) of the Act presupposes that the magistrate will make precise findings on the degree of negligence involved in relation to a charge of Culpable Homicide i.e. on a charge of culpable homicide arising out of a motor vehicle accident the court is required to make a finding of the precise degree of negligence of the accused and is enjoined to approach the matter in terms of s 64(3) of the Act. A failure to do so is clearly misdirection.”

In this case am of the view that since it's a contravention of section **52**

**Negligent or dangerous driving** there was no need on the part of the trial magistrate to categorize the degree of negligence and to make a specific finding on the degree of negligence.

**AD paragraph 3**

The instruction was complied with.

**AD paragraph 4**

The record was received at out station on the 10<sup>th</sup> of January 2023 and the response crafted on the same day.

I stand guided and to be corrected.

**Maburo A.T**  
**Trial Magistrate**  
**Mount Darwin Court.”**

The learned magistrate as can be seen from the reply takes the view which unfortunately is erroneous and with due respect illogical and lacking sound legal reasoning in stating that on a charge of negligent or dangerous in contravention of s 52 of the Road Traffic Act, and to use his words:-

“.....there is no need on the part of the trial magistrate to categorise the degree of negligence and to make a specific finding on the degree of negligence.”

The starting point in correcting the learned magistrate is to go back to the basics of defining negligent driving conduct. The charge itself in the case of negligent driving must state the details of the negligent conduct. It is these particulars of negligence which the State must establish or prove beyond a reasonable doubt to secure a conviction against the accused on a charge of negligent driving. Negligent driving is proven where evidence beyond a reasonable doubt is adduced by the State showing that the accused drove a motor vehicle in a manner that departs from the standard of care for other road users expected of the ordinary circumspect or prudent driver in the circumstances obtaining at the particular time. The level or extent of deviation from the expected standard constitutes the degree of negligence. The learned magistrate would be aware of terms like ordinary negligence, moderate, gross or near recklessness.

The rationale for making a finding on the degree of negligence will be even easier to appreciate when regard is had to the sentence options provided for in s 64(2)(a) – (c) of the Road

Traffic Act as quoted. The penalties provide for range from a fine not exceeding level seven, imprisonment not exceeding six months or both and a fine and a period of imprisonment. The assessment of an appropriate sentence in any given case upon a conviction for negligent driving informed by a consideration of the circumstances of the case which entail a finding on the extent of the accused's deviation from the expected standard. This finding is balanced against the individual or personal circumstances of the accused and the society's interests. It therefore is illogical to reason that where a charge of negligent driving in contravention of s 52(2) of the Road Traffic Act is preferred, the degree of the accused's negligence is inconsequential and that it is an unnecessary factor to consider on trial and in particular in relation to assessing sentence.

In the trial of the accused, the accused admitted the facts of the case as set out in the State outline. The facts were that the accused commenced overtaking an articulated vehicle in front of him at a "blind bend .....where he could not see sufficiently far ahead to safely complete the maneuver." The accused disregarded the no overtaking continuous white lines which prohibit overtaking on that area of the road. In canvassing the essential elements the learned magistrate asked the accused:

- “Q. Confirm you were following too close to the motor vehicle in front?
- A. Correct
- Q. Confirm you made an error in judgement when overtaking the motor vehicle in front?
- A. Correct
- Q. Confirm you failed to stop or act reasonable (sic) when the accident seemed imminent?
- A. Correct.”

What the learned magistrate did was to interrogate with the accused the particulars of negligence as per the charge sheet. There is nothing amiss about that. The learned magistrate did not however then relate to the admitted facts. Once admitted, the facts were then the evidence in proof of the commission of the offence by the accused. An accused is convicted on the evidence and evidence amplifies the charge. The facts were clear that the accused overtook on a blind bend where overtaking was prohibited with continuous lines prohibiting overtaking being marked on the road. The accused lost control of his vehicle and hit into the vehicle which had taken evasive action with the driver moving off his lane of travel to the offside of the road. The issue then is how the court describes a level of negligence where the accused defies road markings and overtakes at a blind bend when he does not have a clean view of the road in front of him and loses

control and drives into a car which had gone off its lane of travel to afford the accused space to pass. Such driving conduct in my view shows a level of negligence which proximates to gross negligence.

One striking feature of the learned magistrate's ludicrous assertion that there is no need to categorize the degree of negligence and make a specific finding on it except if the charge is culpable homicide is to be found in his self-contradiction. In the reasons for sentence the learned magistrate without specifically pronouncing on the degree of negligence stated:-

“the extent of the negligence cases(sic) plays an important role in coming to an appropriate sentence which should neither be too severe nor too light/lament.”

Despite the correct extrapolation of the law by the learned magistrate, he did not then make any findings on the extent or degree of negligence which the accused's conduct constituted. For the learned magistrate to then make an about turn and say the extent of negligence is inconsequential would appear to show confusion on the learned magistrate's part. It is trite in cases of negligence that in assessing sentence the appropriate sentence is one which is commensurate with the level of the accused's blameworthiness. It simply becomes crucial to consider and make a finding on the extent of deviation by the accused from the expected standards. If the extent is slight, a light sentence is imposed and the sentences progress in severity depending on the level or extent of negligence established on the evidence proved. By not making a finding on the degree or level of the negligence of the deceased, the learned magistrate was misdirected.

In relation to the explanation of the charge which the learned magistrate said it is borne from the record, I would say that there was a bit of confusion in the procedure adopted for a guilty plea on the part of the learned magistrate. From the record, the charge was read and the accused called upon to plead. He pleaded guilty. The facts were read and accused agreed with them. Exhibits were produced. Thereafter the charge was explained by the learned magistrate. He also explained the essential elements. The way the learned magistrate went about it is wrong. The whole idea of explaining the charge as stated in *State v Mangwende* HH 695/20 is to ensure that the accused understands the nature of the offence charged before he is called upon to answer or plead to it. There is no point to be gained by having the accused plead to the charge first, then explain it later. In this regard, I must observe that there are no longer many or notable numbers of review proceedings coming before the court where there is a failure to strictly comply with the

requirements of s 271(2)(b) as read with s 271(3) on the part of the magistracy. The magistracy must be applauded for embracing the correct procedure as set by this court.

After pointing out the learned magistrates's shortcomings and corrected him on points of law arising as discussed herein, I must decide whether or not to confirm the proceedings as being in accordance with real and substantial justice. I am not persuaded that the procedural failings by the learned magistrate resulted in a failure of justice. There was no prejudice suffered by the accused who admitted causing the accident through his negligence.

After careful thought and noting that the learned trial magistrate has been disabused of his mistaken view that it is unnecessary to determine the degree of negligence in cases of negligent driving under s 52 of the Road Traffic Act, I reluctantly issue my certificate of confirmation of the proceedings as according with real and substantial justice. This I have done because in terms of s 29(3) of the High Court Act, [*Chapter 9:06*], a conviction or sentence shall not be set aside for an irregularity in the decision or proceedings unless the judge is satisfied that an account of the irregularity, a substantial miscarriage of justice has actually occurred. I have indicated that I am not satisfied otherwise.

CHITAPI J:.....