LAZARUS NDLOVU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
KABASA & DUBE-BANDA JJ
BULAWAYO 4 & 14 OCTOBER 2021

Criminal Appeal

B. Mhandire, for the appellant
K.M. Nyoni, for the respondent

KABASA J: The appellant appeared before a Gwanda Magistrate facing two counts. The first count was contravening section 6 (1) (a) of the Road Traffic Act, Chapter 13:11 and the second culpable homicide as defined in section 49 (b) of the Criminal Law (Codification and Reform) Act, Chapter 9:23. The appellant pleaded guilty to both counts and was duly convicted.

On the first count the appellant drove a silver grey Toyota Fun-cargo registration number ADX 6829 on 12th June 2019 using an unnamed road in Phakama suburb, Gwanda, while not being a holder of a valid driver's licence. On the second count the deceased, a 2 ½ year old child who resided at number 1218 Phakama, Gwanda was playing on the road near her parent's home. When the appellant went past number 1218, he ran over the deceased who sustained head injuries and died on the spot.

The cause of death was severe brain damage from crash injury.

The appellant was said to have negligently caused the deceased's death by:

(a) Failing to have proper look-out of the road ahead *(sic)*
(b) Fail to exercise the high degree of care called for from a driver who sees or anticipates children on the road in front of him.

Following his conviction, the court *a quo* took both counts as one for purposes of sentence and the appellant was sentenced to 12 months imprisonment of which 2 months were suspended for 3 years on condition the appellant does not commit within that period any offence that has negligent driving as an element for which upon conviction he is sentenced to a term of imprisonment without the option of a fine.

Aggrieved by this sentence, the appellant appealed. The basis of the appeal against sentence is:

1. The effective custodial sentence of twelve months imposed on the appellant is manifestly excessive regard being had to the following factors:
   (a) The appellant pleaded guilty to the charges levelled against him. He never wasted the court's time and was contrite.
   (b) The appellant is old being fifty-seven years old and the sentence imposed is so harsh considering that prison conditions are so hard and vigorous.
   (c) The appellant is a first offender.

The appellant had raised 4 grounds of appeal but the other grounds of appeal that is grounds 2, 3 and 4 are just a repetition of the first ground of appeal as they all speak to the fact that the penalty is severe and induces a sense of shock given the appellant's mitigatory factors. These grounds are therefore subsumed in the first ground of appeal. There was therefore effectively one ground of appeal.

At the hearing of the appeal counsel for the appellant conceded that he could not raise new grounds of appeal in heads of argument. He thereafter abandoned the issues relating to the defectiveness of the charge in count 1 and the failure to make findings on the degree of negligence in count 2.

The appeal being based on the severity of the sentence, it is important to note that sentence is pre-eminently a matter of the trial court's discretion.

In *S* v *Ramushu and Others* SC—25-93 GUBBAY CJ had this to say:

> "But in every appeal against sentence, save where it is vitiated by irregularity or misdirection, the guiding principle to be applied is that sentence is pre-eminently a matter for the discretion of the trial court, and that an appellate court should be careful not to erode such discretion. The propriety of a sentence, attacked on the general ground of being excessive, should only be altered if it is viewed as bring disturbingly inappropriate." (See also *S* v *Msindo and Others* HH-25-02)

In arriving at the sentence he imposed, the learned magistrate had this to say:

> "In assessing evidence *(sic)* the court will consider that accused is a first offender and pleaded guilty to this offence.

> The court will also consider that a life of a child was lost to the negligence of accused *(sic)*. Accused is not a holder of a drivers' licence and caused the death of the deceased. An option of a fine in such cases may be too lenient and an option of community service may send the wrong message to the community. Drivers must exercise great caution when driving where there are children."

The learned magistrate, whilst not saying it in so many words, made a finding that the appellant failed to exercise the high degree of caution expected of drivers when there are children on the road.

The facts revealed that the unnamed road is a road in a residential area and the deceased was playing on that road which is opposite where her parents reside. The accident occurred in broad daylight, around 1430 hours. There was therefore nothing militating against visibility and the particulars of negligence speak to the appellant's failure to keep a proper look-out and failure to exercise caution. Had he been exercising caution and keeping a proper look-out, he would not have run over the 2 ½ year old child.

In *S* v *Duri* 1989 (3) ZLR 111 (SC) the court held that "a motorist has a duty to reduce speed and exercise caution when he observes people, especially children, within the vicinity of the road ahead of him. Children have a propensity for impulsive and sometimes irrational action and so greater care is demanded towards them than is otherwise necessary". (See also *S* v *Ferreira* 1992 (1) ZLR 93 (SC).

In *S* v *Chitepo* HMA-3-2017 MAFUSIRE J emphasized the importance of making findings on the degree of negligence. The learned judge said:

> "It is now trite that in a charge and conviction of culpable homicide arising out of a driving offence, it is essential that the trial court should first make a precise finding on the degree of negligence before assessing the appropriate sentence. See *S* v *Dzvatu* 1984 (1) ZLR 136 (H); *S* v *Mtizwa* 1984 (1) 230 (H); *S* v *Chaita and Others* 1998 (1) ZLR 213 (H); *S* v *Mapeta & Others* 2001 (2) ZLR 90 (H); *S* v *Muchairi* HB-41-06 and *S* v *Wankie* HH-831-15"

In casu the learned magistrate made these findings. The particulars of negligence were also put to the appellant when he pleaded guilty to the charge. To still argue that specific findings of the degree of negligence ought to have been made is really emphasizing form over subsistence.

Had the accused been charged under the Road Traffic Act, Chapter 13:11, the charge would have been contravening section 52(1) which is negligent driving. Subsection (4) thereof provides that:

> (4) Subject to Part IX, a court convicting a person of an offence in terms of subsection (1) involving the driving of a motor vehicle—
> (*a*) may, subject to paragraph (*c*), if the person has not previously been convicted of such an offence or of an offence, whether in terms of a law of Zimbabwe or any other law, of which the dangerous, negligent or reckless driving of a motor vehicle on a road is an element within a period of five years immediately
> preceding the date of such first-mentioned conviction, prohibit the person from driving for such period as such court thinks fit;

The learned magistrate's decision not to invoke the provisions in Part IX as provided in section 64 (1) of the Road Traffic Act, (Chapter 13:12 on prohibition, may reasonably be because the degree of negligence was not deemed reckless or gross. He therefore did not deem it necessary to prohibit the accused from driving, a discretion he had in light of the aforementioned provisions.

The appellant's being a first offender is not in itself reason to interfere with the court *a quo's* sentencing discretion. It is not trite that in every case first offenders should be spared effective imprisonment. *In casu* the court *a quo* applied its mind to all the relevant mitigating factors, including the appellant's status of being a first offender.

The appellant's personal circumstances, *viz*, that he is a 57 year old first offender who pleaded guilty, married with 5 children and unemployed and that he assisted with financial expenses does not justify interfering with the court *a quo's* discretion in imposing an effective term of imprisonment. The learned magistrate reasoned that a fine or community service were not appropriate. Such reasoning cannot be faulted.

In *S* v *Chitepo (supra)* MAFUSIRE J considered a sentence of 2 years imprisonment with 1 year suspended as appropriate for a tractor driver who had driven a tractor whilst drunk, permitted a passenger to sit on the mudguard and attempted a hill start at night using one arm to control both the steering wheel and the gear, resulting in the tractor rolling down a slope with the appellant's attempts to engage gear failing causing the tractor to jerk forward and throwing off the deceased who was then run over by the left rear wheel.

Whilst the circumstances in *Chitepo* cannot be equated to the ones *in casu* when it comes to the degree of negligence, the discretion to impose a custodial sentence based on the failure by the appellant to exercise caution when he saw the 2 ½ year old on the road cannot be faulted. The effective term of 10 months

imprisonment is not disturbingly inappropriate. The ground of appeal which attacked an effective 12 months as unduly harsh failed to state the correct sentence. 2 months were suspended and so the effective term is 10 months imprisonment.

Counsel for the appellant's submission that the appellant could not have been expected to exercise the same degree of caution as would be expected of a licenced driver actually works against the appellant. His conduct cannot be excused or mitigated by virtue of his being an unlicenced driver who could not have been expected to behave like a licenced one. He ought not to have been driving in the first place, creating a hazard for other drivers and road users and failing to avoid running over the 2 ½ year old child.

An appellate court also does not interfere with a trial court's discretion because it CAN, it must interfere because it MUST. *In casu*, to interfere with the court *a quo's* discretion is merely to substitute the appellate court's discretion for the trial court's.

In the absence of a misdirection, an appeal court should not unnecessarily fetter the trial court's exercise of discretion by unjustifiably interfering. No misdirection occurred *in casu* and none was pointed out by *Mr. Mhandire.*

Before concluding I must stress the importance of proper citing of charges. The charge ought to have been cited as contravening section 6 (1) (a) as read with section 6 (5) of the Road Traffic Act, Chapter 13:11. This is so because section 6 (1) (a) merely states who should drive a motor vehicle, section 6 (5) then criminalises a failure to comply with section 6 (1) (a), that is driving without a valid drivers' licence.

The charge which was read to the accused stated:

> "In that on the 12th day of June 2019 and at around 1430 hours Lazarus Ndlovu unlawfully drove a silver Toyota Fun Cargo vehicle registration number ADX 6829 along an unnamed road in Phakama, Gwanda while not being a holder of a valid driver's licence as required by the provisions of the Act".

The appellant knew what the charge was and pleaded to that charge with knowledge of what it is that he was being accused of. I therefore see no prejudice in amending the charge so it reads as captured above.

Having made the finding that the sentence is within the learned magistrate's discretion and cannot be described as disturbingly inappropriate, I find no basis to interfere with the sentence.

In the result, I make following order:

The appeal against sentence be and is hereby dismissed.

Dube-Banda J ……. I agree

Masawi & Partners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners