

ENOCK SAUNGWEME
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHAREWA and MUZENDA JJ
MUTARE, 17 November and 25 November 2021

Criminal Appeal

D. Tandiri, for the Appellant
M. Musarurwa, for the State

MUZENDA J: This is an appeal against both conviction and sentence passed by the Magistrate sitting at Mutare on 12 May 2021 where appellant was convicted of Culpable Homicide arising out of a road traffic accident as defined in s 49 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] and was sentenced to 4 months imprisonment. In addition he was prohibited from driving all classes of motor vehicles and his license was cancelled.

The appeal is opposed as against conviction but not opposed as against sentence.

Background

Appellant is employed by City of Mutare as a class 2 driver and holds a driver's license in respect of classes 2, 4 and 5. On 31 October 2019 appellant was on duty driving a Nissan UD truck delivering water to residents staying in the high density area. Upon arrival at an intersection of Chineta and Liverpool Roads he ran over a pedestrian old lady and broke her leg. Deceased later died in hospital on 23 December 2019 whilst undergoing treatment. The state alleges that appellant was negligent by failing to stop or act reasonably when the accident seemed imminent, he failed to keep the vehicle under proper control and that appellant was travelling at a high speed under the circumstances. Appellant pleaded not guilty to the charges and stated in his defence that he was not speeding because he was driving a lorry which was heavily laden carrying two tanks full of water, he was moving slowly. He was actually surprised when two men stopped the lorry he was driving and informed him about the accident. Upon going back to the scene, deceased had been ferried to the hospital. He denied all the particulars of negligence outlined by the State, he denied causing the death of the now deceased and in his defence he attributed the death to medical negligence. He prayed for acquittal.

Decision of the Court *a quo*

The trial court after summarising both state and defence witnesses' evidence concluded that the following issues were not in dispute, that appellant passed through Chineta and Liverpool intersection, that now deceased was run over by appellant's motor vehicle and sustained an injury which resulted in her death, that appellant was stopped by bystanders who informed him about the accident, that appellant was travelling at low speed and proceeded to look at the essential elements for the charge of culpable homicide.

The trial court adopted the theory of rationalisation and concluded that the appellant's lorry which had passed by is the one which had ran over the person who was injured. She dismissed the appellant's argument that the now deceased died due to medical negligence. She found no break between the accident of 31 October 2019 and the subsequent death of the pedestrian. The court went on further to reject appellant's argument of contributory negligence on the part of the now deceased. It was the finding of the court *a quo* that appellant's conduct landed the now deceased in hospital and proceeded to convict the appellant.

Aggrieved by the conviction and sentence the appellant noted an appeal and spelt out the grounds as follows:-

1.0 AD CONVICTION

- 1.1 The court *a quo* grossly erred by finding that the appellant was grossly negligent in circumstances where there was no evidence to support that finding.
- 1.2 The Learned Magistrate grossly misdirected herself by finding the appellant guilty of culpable homicide when the state had clearly failed to prove the essential elements of negligence in the circumstances.
- 1.3 The court *a quo* further grossly misdirected itself by ignoring the glaring and material discrepancies and inconsistencies in the testimonies and evidence of the state witnesses.
- 1.4 The Learned Magistrate grossly erred by not giving due weight to and disregarding the evidence of the expert witnesses.
- 1.5 The court *a quo* also grossly erred by finding that there was no *novus actus interveniens* in this matter yet it was clear that the cause of deceased's death was sepsis.

2.0 AD SENTENCE

- 2.1 The court *a quo* grossly misdirected itself by imposing imprisonment without following sentencing guidelines in particular by not considering non-custodial sentences such as fine and community service.
- 2.2 The sentence imposed by the court *a quo* is grossly unreasonable and irrational and manifestly excessive in all the circumstances of this case and induces a sense of shock.
- 2.3 The court *a quo* erred by finding that there are no special circumstances in this matter.
- 2.4 The court *a quo* erred by prohibiting the appellant from driving light vehicles for 6 months without proffering reasons for that sentence.

Appellant prayed that the appeal be upheld and that the conviction be set aside and that a verdict of not guilty be returned, alternatively that the appeal against sentence be upheld and prison sentence be set aside and substituted by a monetary penalty of \$20,000.

Analysis of the appeal

The appellant's counsel made submissions against conviction highlighting principally what is contained in the notice and grounds of appeal ratified by the heads of argument. However, in the midst of the submissions the defence counsel made a paradigm shift on appellant's stance and admitted that during the hearing of the matter before the court *a quo*, it was copiously clear that there was overwhelming evidence established by the state that appellant's vehicle is the one that crushed deceased's leg. This concession by counsel for the appellant was so fundamental that it changed the colour and tempo of appellant's appeal against conviction. The concession was properly made by the appellant in my view. Once the concession is made it squarely realigns with the entire reasoning of the court that the conduct of the appellant led to the subsequent death of the pedestrian, the now deceased. We find no fault or misdirection on the part of the trial court. The appeal against conviction has no merit and is accordingly dismissed.

The appeal against sentence is not opposed by the respondent state. The concession made by the state sounds well placed. The trial court found that appellant was grossly negligent. A perusal of the record shows that there is no factual basis for such a finding. The state did not make any submission relating to gross negligence. No witness called by the state alluded to such evidence and this is typically a classical example of the Learned Magistrate embarking on

a frolic of her own. It is a factual misdirection which typifies a misdirection at law. Such a misdirection largely creates a room for an appeal court to interfere with the sentence of the court *a quo*.

Appellant is a professional municipal driver who earns a living from rendering driving duties to his employer. Driving is his calling. A sentence of imprisonment would obviously lead to loss of employment, moreso if his license is cancelled, it will be very difficult for him to get another employment. Indeed the sentence passed by the court *a quo* induces a sense of shock. Appellant cooperated with all stakeholders right from the date of accident and that conduct exhibits contrition and he ought to have been rewarded for that. Both submissions by the state and defence find favour before this court and a non-custodial sentence will be appropriate.

Disposition

It is ordered that:

- (i) The appeal against conviction be and is hereby dismissed.
- (ii) The appeal against sentence be and is hereby upheld, the sentence of the court *a quo* is set aside in its entirety and substituted by the following:

\$50 000-00 or in default of payment 3 months imprisonment.

CHAREWA J agrees _____

Tandiri Law Chambers, Appellant's legal practitioners
National Prosecuting Authority, Respondent's legal practitioners