

THE STATE
versus
GILBERT NYIKADZINO

HIGH COURT OF ZIMBABWE
CHITAPI & FOROMA JJ
HARARE, 8 March 2022

Review Judgment

FOROMA J: This matter is an automatic review. The record was accompanied by a letter from the presiding magistrate who convicted the accused of contravening section 49 (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] Culpable Homicide and contravening s 6(1)(a) of the Road Traffic Act [*Chapter 13:11*]. The learned magistrate in regard to the Culpable Homicide count indicates that he realized that he had made a mistake in that he had misinterpreted the sketch plan which placed the point of impact in accused's lane as opposed to his finding that the point of impact was in the complainant's lane. This error resulted in the court convicting the accused of negligent driving with the ground of negligence being that the accused encroached on the oncoming traffic lane thus causing a fatal collision with a motor cyclist whereas in truth the motor cyclist appears to have encroached on accused's lane as confirmed by the point of impact being in the accused's lane.

The realization of the error by the trial magistrate is a clear indication that the State did not prove its case (negligence) beyond reasonable doubt. The accused actually pleaded guilty to the charge of Culpable Homicide. The sketch plan was produced by consent. Whilst ensuring that the plea was genuine and proper by ensuring the accused accepted the essential elements of the offence the court asked the following questions among others,

1. *Q - Admit you encroached into the oncoming lane. A- yes.*
2. *Q - Admit any reasonable driver would have foreseen that encroaching into the oncoming lane could result in a fatal accident and admit any reasonable driver would have taken steps to keep his vehicle in his left lane and slow down. A – Yes.*
3. *Q - And you failed to take such steps. A – I failed.*
4. *Q - Any defence to offer?*

The accused was accordingly found guilty and sentenced to 36 months imprisonment with 12 months imprisonment suspended on the usual conditions of good behaviour. It is clear that had the magistrate realized timeously that the sketch plan did not support the basis of negligence the State was relying on then he ought to have altered the guilty plea to Not guilty.

In the circumstances the accused was wrongly convicted and punished.

Regrettably the learned magistrate's errors did not end with the faulty conviction. After convicting the accused of contravening s 6(1)(a) of the Road Traffic Act [*Chapter 13:11*] he proceeded to sentence him to 12 months imprisonment which he ordered to run concurrently with the sentence for culpable homicide. After convicting the accused of driving without a class one licence the magistrate realized that the State papers did not disclose why the vehicle accused was driving required a class one as opposed to the class two which accused possessed. The charge sheet indicates that the accused was driving a Mercedes Benz Sprinter vehicle registration ADC 3739 when he was involved in the accident. It is clear that in respect of count 2 accused was also improperly convicted of driving without a licence for the type of vehicle he was driving. In the circumstances the proceedings cannot be confirmed as being in accordance with real and substantial justice. The conviction and sentence in respect of both counts should be and are hereby quashed and set aside.

FOROMA J:.....

CHITAPI J: agrees