

THE STATE
versus
JESCA CHIGWAGWA

HIGH COURT OF ZIMBABWE
MUREMBA & KWENDA JJ
HARARE, 12 May 2021

Criminal Review

MUREMBA J: The accused is a 68-year-old female first offender. She is married and has 6 children. She has two grandchildren that she stays with. She pleaded guilty to driving a private motor vehicle without a licence in contravention of s 6 (1) of the Road Traffic Act [*Chapter 13:11*]. She also pleaded guilty to culpable homicide as defined in s 49 (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] as read with s 64 (3) of the Road Traffic Act.

The brief facts of the matter are as follows. On 21 May 2020 at around 10am, the accused who was not a licenced driver drove a motor vehicle in Glen Norah C, Harare, a high density residential area. Upon reaching a curve, she lost control of the motor vehicle and hit Tracy Mashungu the now deceased who was seated outside her house with her neighbours. Tracy Mashungu fell to the tarmac and was dragged for some meters thereby sustaining head injuries. She was pronounced dead on arrival at hospital. Two other people who were seated with the now deceased were also hit by the motor vehicle and sustained injuries. A finding was made by the court that the accused's degree of negligence was ordinary.

The Accused was sentenced as follows.

“Count 1- \$3000/4 months’ imprisonment

Count 2- \$15 000/6 months’ imprisonment

In addition, 10 months’ imprisonment wholly suspended for 5 years on condition accused does not within that period commit any offence involving negligent driving that cause (sic) death of another person for which upon conviction is sentenced to imprisonment without option of a fine.”

The essential elements of the offences were properly canvassed. The accused was therefore duly convicted and I hereby confirm the convictions. No issues arise out of the sentence for count 1. I also confirm it. I am however concerned about the manner the magistrate approached the issue of sentencing in count 2. It is a requirement of the law in terms of s 64(3)

of the Road Traffic Act that when a person is charged with culpable homicide arising out of a motor accident, the court should establish, before passing sentence, the accused's degree of negligence and pass sentence accordingly. In *casu* whilst the magistrate was aware of the need to establish the accused's degree of negligence in terms of s 64 (3) of the Road Traffic Act before sentencing the accused, it would appear from her reasons for sentence that she had no appreciation why this is done. Over and above that, it is clear from the record of proceedings that she did not know the procedure to be followed in establishing the accused's degree of negligence.

I will start with the reason(s) why the accused's degree of negligence should be ascertained in cases of culpable homicide due to motor accidents. For the avoidance of confusion let me start by making it clear that for the punishment or sentence for committing the offence of culpable homicide, the court should impose on the accused the penalty that is provided under s 49 (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The provision reads,

49 “Any person who causes the death of another person—
(a) negligently failing to realise that death may result from his or her conduct; or
(b);
shall be guilty of culpable homicide and liable to imprisonment for life or any definite period of imprisonment or a fine up to or exceeding level fourteen or both. (my underlining)

The court can thus impose any amount of fine up to or exceeding level 14 or any period of imprisonment up to imprisonment for life depending on the jurisdiction of the judicial officer presiding over the matter. In determining what sentence to impose magistrates should therefore be guided by their ordinary sentencing jurisdiction as provided for under s 50 of the Magistrates Court Act [*Chapter 7:10*]. After sentencing the accused in terms of s 49(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], the court is then required in terms of s 64 (3) of the Road Traffic Act to consider imposing additional punishment of prohibiting the accused from driving for a period which it thinks fit and cancelling the accused's licence. The provision reads,

“64 (3) If, on convicting a person of murder, attempted murder, culpable homicide, assault or any similar offence by or in connection with the driving of a motor vehicle, the court considers—
(a) that the convicted person would have been convicted of an offence in terms of this Act involving the driving or attempted driving of a motor vehicle if he had been charged with such an offence instead of the offence at common law; and
(b) that, if the convicted person had been convicted of the offence in terms of this Act referred to in paragraph (a), the court would have been required to prohibit him from driving and additionally, or alternatively, would have been required to cancel his licence;
the court shall, when sentencing him for the offence at common law—

- (i) prohibit him from driving for a period that is no shorter than the period of prohibition that would have been ordered had he been convicted of the offence in terms of this Act referred to in paragraph (a); and
- (ii) cancel his licence, if the court would have cancelled his licence on convicting him of the offence in terms of this Act referred to in paragraph (a).”

The provision shows that in deciding whether or not to prohibit the accused from driving and whether or not to cancel his or her licence, the court is required to determine which section of the Road Traffic Act the accused would have been charged with had he not been charged with culpable homicide in terms of s 49 (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The court should therefore ascertain whether the accident that resulted in death was due to e.g. ordinary negligence, dangerous driving, gross negligence or recklessness and be guided by what the penalty provision for that offence says in the Road Traffic Act [*Chapter 13:11*] with regards to issues of prohibition from driving and cancellation of licences. For some offences prohibition from driving and cancellation of licences are mandatory if there are no special circumstances. For some offences prohibition and cancellation are not mandatory. Therefore, the reason for invoking the provisions of s 64(3) of the Road Traffic Act and ascertaining the accused’s degree of negligence in cases of culpable homicide arising from motor accidents is to determine whether or not the accused should get the additional punishments of being prohibited from driving and having his or her licence cancelled over and above the main punishment or sentence that he gets under s 49 (a) of the Criminal Law (Codification and Reform) Act. It occurs to me that over and above this, the accused’s degree of negligence is also an important factor which should be considered by the court when imposing the main punishment to the accused under s 49 (a) of the Criminal Law (Codification and Reform) Act. This factor could be either mitigatory or aggravatory. To illustrate this, if the degree of negligence is ordinary, the punishment or sentence should be lenient. If it is gross, the punishment or sentence should be stiff. If the accident was due to recklessness, the punishment or sentence should be stiffer. With ordinary negligence, the accused can be sentenced to a fine or community service, but with gross negligence or reckless driving, the accused can be sentenced to effective imprisonment.

I now turn to deal with the procedure to be followed in establishing the accused’s degree of negligence. In a trial the degree of negligence is established by the evidence that is led during the trial. Therefore, it is just a question of the court analyzing the evidence that was led during trial and making a determination of the degree of negligence. However, in a plea of guilty, like

in the present matter, since no evidence is led, a number of magistrates are at sea with regards to how to establish the accused's degree of negligence. In a plea of guilty what happens is that after the accused has admitted to the charge, the magistrate canvasses the essential elements of the offence by asking the accused some questions to ascertain if his or her plea is unequivocal. For a charge of culpable homicide arising out of a motor accident, the accused's guilt is based on the finding that he or she drove negligently. Therefore, in canvassing the essential elements of the offence, the accused is asked if he admits to the particulars of negligence as stated in the state outline. Whilst these questions and admissions are enough for purposes of convicting the accused for negligently causing death, they do not help much in establishing the accused's degree of negligence. Therefore, in order to establish the accused's degree of negligence more detail of the accident is required. This means that more information needs to be extracted from the accused. The magistrate should therefore ask questions that will assist him or her to establish the accused's degree of negligence. The question that then comes to mind is at what stage does the magistrate ask these questions? The other question is what sort of questions should the magistrate ask? Drawing inspiration from what CHINHENGO J said in *S v Mapeka* 2001 (2) ZLR 90 (H), it is my considered view that the questioning or the inquiry should be done at the time of canvassing the essential elements of the offence before the verdict is pronounced. In the event that this is not done before the verdict is pronounced, it should be done before sentence is passed. In *S v Mapeka* at p 93 CHINHENGO J said,

“If the magistrate omits to ask these questions before he pronounces his verdict he should ask them before he passes sentence. If he does not do so even at this stage, he should then attempt to draw certain inferences from the admitted facts before he can pass sentence.”

Therefore, CHINHENGO J said if the court does not ask the relevant questions before pronouncing the verdict or before passing sentence, it should attempt to draw certain inferences from the admitted facts before passing sentence. I see no reason to depart from this approach.

In *casu* looking at the record of proceedings it is difficult to tell what influenced the magistrate to make the determination that the accused's degree of negligence was ordinary. I will start by looking at the questions the magistrate asked the accused at the time of canvassing the essential elements. These questions arose from the following particulars of negligence that were stated in the state outline.

1. Failing to stop or act reasonably when the accident seemed imminent.
2. Failing to keep a proper lookout of the road ahead.
3. Failing to keep car under proper control.

Pursuant to these particulars of negligence, the essential elements were canvassed as follows.

“

Q. Do you admit that when you drove the said vehicle you failed to stop or act reasonably when the accident seemed imminent?

A. Yes.

Q. Why did you fail to stop?

A. It just happened in a split of a second.

Q. You also admit that you failed to keep a proper lookout of the road ahead?

A. Yes

Q. Why did you fail to keep a proper lookout of road ahead?

A. I just did not see the people.

Q. Accused you admit you failed to keep your vehicle under proper control?

A. Yes.

Q. Why did you fail to keep vehicle under proper control?

A. I panicked.

Q. Any right to negligently drive your vehicle and cause the death of Tracy Mashungu?

A. No it was an accident.

Q. Any defence to offer?

A. No.

I find you guilty as pleaded.”

Looking at these questions I was tempted to believe that in trying to establish the accused's guilt, the magistrate was at the same time trying to establish the accused's degree of negligence, i.e. trying to kill two birds with one stone. However, what then ensued after the verdict of guilt was pronounced shows that the questioning that was done during the canvassing of the essential elements had nothing to do with the court trying to determine the accused's degree of negligence. The court was only trying to ascertain the guilt of the accused. After the verdict was pronounced, the public prosecutor made submissions on the accused's degree of negligence which resulted in her killing the deceased. The public prosecutor submitted that the accused's degree of negligence was ordinary for the following reasons. She failed to stop the car or act reasonably when an accident seemed imminent. She failed to keep the car under proper control and did not keep a proper look out. The accident occurred at a curve and she lost control of the vehicle. He went on to submit that that could have been caused by her inexperience in handling a car. The trial magistrate then said,

“The degree of negligence of the accused person is ordinary. Accused person failed to keep a proper lookout of the road and accident occurred at a curve.”

So to the magistrate, the accused’s degree of negligence was ordinary for two reasons. Firstly, the accused failed to keep a proper lookout of the road. Secondly, the accident occurred at a curve. But what is curious is that in making her determination the magistrate made no reference to the questions that she asked the accused when she was canvassing the essential elements of the offence and the answers that the accused gave in response. The magistrate also made no reference to the submissions that were made by the public prosecutor. She made no interrogation of the case at all. She just made a determination without substantiating it. All that mattered to the magistrate was the fact that the accused did not keep a proper lookout and that the accident occurred at a curve. It is not stated why the magistrate settled for these two factors. The rest of the circumstances did not matter. Even the fact that the accused was an unlicensed driver did not matter. Clearly the approach that was taken by the magistrate was improper.

In a case of this nature the court needs to interrogate the case thoroughly. The questions that the accused is asked should be based on the circumstances of the case and the particulars of negligence as alleged in the State outline. If the accused gives inadequate or shallow answers the court should ask follow up questions in order to extract as much information as possible. This in turn enables the court to have a better appreciation of how the accident happened. In *casu* the magistrate would have done well if she had assessed the accused’s degree of negligence on the basis of the questions asked and answers given during the canvassing of the essential elements of the offence. However, even then, the magistrate needed to be thorough with her questions to the accused. I will proceed to illustrate what I mean. When the accused was asked why she failed to stop when the accident seemed imminent, she said that the accident happened in a split of a second. When the accused was asked why she failed to keep a proper lookout she said that she just did not see the people. But these people were not on the road. They were seated outside their house off the road. The accused hit them because she failed to negotiate a curve, veered off the road and encroached into their yard. Obviously a number of questions come to mind, the critical question being what caused the accused to fail to negotiate the curve? Was it because of excessive speed, or was she distracted or did someone or something confuse her or was it because of lack of experience in driving since she was not licensed? The magistrate therefore ought to have asked the accused what caused her to fail to negotiate the curve and what speed she was doing. The other critical issue which needed to be ascertained was the distance between the road and the place where the deceased was seated.

The other critical question is that the accused was unlicensed, why was she driving? Was she compelled by a special situation to drive on the day in question? All these questions should have been put to the accused to enable the court to make a correct determination of the accused's degree of negligence. The court should ask questions until it is satisfied that the accused has given it enough information to enable it to make a determination of the accused's degree of negligence.

In *casu* in the absence of a proper inquiry or interrogation of the case, I am unable to agree with magistrate's finding that the accused's degree of negligence was ordinary. Besides, a person who sets out to drive a motor vehicle on a public road, in a residential area, more so a high density one, knowing fully well that they are not licensed, and gets involved in an accident by themselves, cannot be said to be negligent in an ordinary manner. The accused knew the risks involved in driving without a licence. She knew that she was likely to cause harm to other people, but she decided to drive nonetheless. Nothing on record shows that there are circumstances that compelled her to drive the motor vehicle on the day in question. Her conduct was more than simple carelessness and mere negligence. Then she went on to miss the curve, and hit the deceased and two other people that were seated with her outside her house. She drove her motor vehicle with actual appreciation of the risks involved, and she was indifferent to the risks. She disregarded the safety of others. With the accused having given no good explanation why she missed the curve, her degree of negligence can only be classified as gross negligence. With this finding if the accused had been charged for an offence under the Road Traffic Act instead of culpable homicide, she would have been charged under s 52 (2) for negligent driving. This is the same provision that is preferred for ordinary negligent driving which the magistrate said the accused was guilty of. The lawmaker in this Act made no distinction between ordinary and negligent driving. The duty to make that distinction is left to the courts. The court makes the distinction by way of making an assessment of the degree of negligence after it is satisfied that the accused was negligent in the manner that he or she drove the vehicle. This distinction is done for the purpose of arriving at the appropriate punishment for the accused. The punishment has to be congruent with the level of negligence. Gross negligence should attract a stiffer penalty than ordinary negligence. Therefore, in *casu* by parity of reasoning, if the magistrate had made the finding that the accused's degree of negligence was gross, in count two she would have imposed a stiffer penalty than the penalty she imposed. However, the accused being an old female first offender, she might have been spared an

effective custodial sentence. A heftier fine than what was imposed might have been imposed though.

The accused in *casu* had never been convicted for a traffic offence before being convicted of the present culpable homicide offence. For a person being convicted for the first time under s 52 (2) of the Road Traffic Act for driving a motor vehicle other than a commuter omnibus or a heavy vehicle negligently, the court may in terms of s 52(4) prohibit the person from driving for a period it thinks fit. Prohibition is not mandatory but discretionary since the provision says the court “may” prohibit. The court therefore exercises its discretion on whether or not to prohibit the accused from driving. Section 52(4) provides,

“(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;

(b) shall, subject to paragraph (c), if the person has previously been convicted of an offence referred to in paragraph (a) within the period referred to in that paragraph, prohibit the person from driving for such period as such court thinks fit and, if the person is the holder of a licence, cancel the licence in respect of motor vehicles of the class to which such prohibition from driving extends;

(c) in the case of an offence involving the driving of a commuter omnibus or a heavy vehicle, shall prohibit the person from driving for a period of not less than two years:

Provided that the court may decline to prohibit the person from driving in terms of paragraph (b) or (c) if it—

(a) considers that there are special circumstances in the case which justify the court in so declining; and

(b) endorses the special circumstances referred to in paragraph (a) on the record of the case when passing sentence.”

So if the accused in *casu* had been charged with and convicted of negligent driving in terms of s 52 (2) the court would have decided whether or not to prohibit her from driving. S 64(3) of the same Act provides that if the court convicts an accused of culpable homicide arising out of a motoring offence and the court considers that had it convicted the accused in terms of the Road Traffic Act it would have been required to prohibit him from driving and additionally, or alternatively, cancel his licence; it shall, when sentencing him for culpable homicide, prohibit him from driving for a period that is no shorter than the period of prohibition that would have been ordered had he been convicted of the offence in terms of the Road Traffic Act; and cancel his licence, if the court would have cancelled his licence on convicting him of the offence in terms of the Road Traffic Act. The reasons for sentence in this matter do not show that the magistrate was alive to the meaning of this provision. She only

said that if the accused had been charged under the Road Traffic Act, she would have been charged in terms of s 52 (2) and ended there. She did not go further to discuss the effect of her finding in relation to the issue of prohibition from driving. The issue of cancellation of licence does not arise because s 52 does not provide for cancellation of licences. Besides, even if the provision provided for cancellation of licences, in this case that issue would not arise because the accused was not licenced. The reasons for sentence are completely silent on the issue of prohibition of the accused from driving. The magistrate just went on to sentence the accused by imposing a fine and an additional prison term which was suspended on condition of future good behaviour. No consideration was made whatsoever about whether or not the accused should be prohibited from driving. The accused just was not prohibited from driving without saying why. Whilst the magistrate had the discretion not to prohibit the accused from driving, she ought to have discussed and explained in her reasons for sentence what factors she considered in exercising her discretion. In a case where the court has discretion, it ought to demonstrate that it exercised that discretion judiciously for the purpose of not giving effect to its will but to the will of the law. Failure to do so is a gross misdirection. For a discretionary decision to withstand scrutiny, the court should clearly show its reasoning and the logic in its decision. The court needs to show that it has given careful consideration of the facts and circumstances of the matter. The exercise of discretion should be shown to be sound and reasonable.

Prohibition from driving forms part of sentence and sentencing for any offence has a social goal. The magistrate therefore ought to have shown that in exercising her discretion not to prohibit the accused from driving, she balanced the interests of society and those of the accused. The accused was not licenced when she drove her motor vehicle and her manner of driving resulted in the loss of a life. Two other people were injured. Clearly the issue of whether or not to prohibit the accused needed serious consideration. Society needs some protection from unlicensed drivers. They are a danger as they operate with reckless disregard for the safety of others. I want to believe that the distinction that is made by the court between ordinary negligence and gross negligence has a bearing on whether or not the accused who is being convicted for the first time should be prohibited from driving. It is in cases of ordinary negligence that prohibition from driving may not be ordered. In cases of gross negligence prohibition from driving may be ordered. In *casu* if the magistrate had made a proper inquiry on the degree of negligence and determined that the accused was grossly negligent, she might

have been inclined to prohibit the accused from driving for a period. With this, I am unable to certify the sentence in count 2 to be in accordance with real and substantial justice.

Before I conclude this judgment I feel compelled to comment on a side issue that I observed. I observed that despite the fact that the accused hit two other people that were seated with the complainant, the record does not show that the accused was charged for this. Clearly she ought to have been charged with a third count for negligent driving under the Road Traffic Act. I do appreciate that the prosecution is *dominus litis*, and that ordinarily courts are not at liberty to interfere with the prosecutor's discretion except in exceptional circumstances. For instance, in cases where it is clear that the prosecutor did not exercise his or her discretion properly. In *casu* the accused was charged for driving without a licence and for culpable homicide for causing death. The question that arises is why was she not charged for hitting the other two victims who did not die? It is a clear injustice to these victims and it is surprising that the magistrate did not inquire from the prosecutor why the accused was not charged. It could be that the omission of this charge was as a result of an oversight on the part of the prosecution and an inquiry by the magistrate would have made the prosecutor to consider whether or not to prefer a third charge of negligent driving. In the circumstances of this case I do not believe that an inquiry on this issue by the court would have been construed as undermining the independence of the prosecution as provided for in s 258¹ and s 260² of the Constitution of Zimbabwe, Amendment (No. 20) Act 2013. In making the inquiry the magistrate was not going to direct the prosecutor to charge the accused, but to simply point out the omission. The decision to prosecute was going to be for the prosecution. Be that as it may, the mere fact that the accused hit these other two people clearly shows that the culpable homicide offence was committed in aggravatory circumstances.

In conclusion, whilst I have confirmed the convictions and the sentence in count 1, I am unable to certify the sentence for count 2 to be in accordance with real and substantial justice. I thus withhold my certificate.

¹ "There is a National Prosecuting Authority which is responsible for instituting and undertaking criminal prosecutions on behalf of the State and discharging any functions that are necessary or incidental to such prosecutions".

² "(1) Subject to this Constitution, the Prosecutor-General—
(a) is independent and is not subject to the direction or control of anyone"

MUREMBA J

KWENDA J agrees.....