

LEONARD GWATA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUSAKWA & MUZOFA JJ
HARARE, 7 October 2019 & 28 January 2020

Criminal Appeal

Appellant in person
E. Makoto, for the respondent

MUSAKWA J: The appellant, having sought the requisite leave noted an appeal against conviction and sentence. We dismissed the entire appeal. A request has been made for our detailed reasons for dismissing the appeal.

The appellant was convicted of negligent driving. He was sentenced to pay a fine of \$500 or in default of payment to undergo 5 months' imprisonment. In addition, he was prohibited from driving all classes of motor vehicles for 24 months. His licence was also cancelled.

The grounds of appeal will be summarised as follows:

- (1) The trial court erred in convicting the appellant in the absence of proof of any particulars of negligence.
- (2) The trial court erred in convicting the appellant where the state witnesses contradicted each other in respect of how the accident occurred.
- (3) The trial court erred in concluding that the appellant was negligent whereas it was the other driver who was negligent.
- (4) The trial court erred when it held that the appellant was not entitled to overtake when in fact it was safe for him to do so.
- (5) The trial court erred in concluding that the other driver had satisfied himself that it was safe to turn and yet he had failed to see that there was a bus that was overtaking.

- (6) The trial court erred in concluding that the appellant tried to overtake a vehicle that was turning, whereas the other driver tried to turn when the bus was in the process of overtaking.
- (7) The trial court erred in ordering the cancellation of the appellant's licence.
- (8) The trial court erred in not making a finding on the degree of negligence for purposes of imposing the appropriate sentence.
- (9) The trial court erred in not adequately explaining the meaning of special circumstances. Related to that was the contention that in failing to find that the other driver contributed significantly to the accident, the trial court erred in not finding that as a special circumstance.

The Facts

The accident in question occurred at the ninety kilometre peg along the Harare-Beitbridge highway. The appellant was driving a bus. In the process of overtaking a Honda Fit vehicle that was being driven by Richard Chimaire the two vehicles side-swiped.

Richard Chimaire testified that he signalled to turn right and had slowed down and moved to the far right side of the left lane when the impact occurred. He then straightened the vehicle and stopped in the right lane. The bus knocked down a give way sign and stopped some 200-330 metres from the point of impact.

The accident was witnessed by Gladys Mukanyanyangi who happened to be selling her farm produce on the right side as one faced the Harare direction (the direction of travel of both vehicles). According to her the Honda Fit signalled to turn right at a sign post written "Nhungure Housing". The Honda Fit driver had signalled from about 100 metres before the sign post. The bus was not far behind and it was speeding.

Maxwell Marimbata did a reconstruction of the scene some four months later. The appellant and Richard Chimaire made some indications. He noted that there is a steep gradient and a curve. The point of impact was in the right lane. This was confirmed by the attending Police detail. Maxwell Marimbata concluded that the appellant should not have overtaken and Richard Chimaire should have checked his blind side. That the point of impact was in the right lane was also confirmed by the attending detail, Silas Zowa.

The appellant claimed to have hooted as he started to overtake. He claimed that Richard Chimaire only signalled to turn when he the appellant was already in the process of overtaking.

Disposition

With this set of facts, I do not think that the trial court can be faulted for finding that the appellant was negligent. The task was made easier because of the undisputed point of impact. Unless Richard Chimaire had for some reason lost control of his vehicle there was no way he could have been close to or in the right lane unless he was intending to turn right. Therefore the conclusion one makes is that either the appellant ignored or thought that he could overtake the vehicle that was ahead of him despite that it intended to turn right. He may also not have been keeping a proper lookout of the road ahead.

I do not think that it matters that the place where the accident took place allowed for overtaking as evidenced by broken lines. The real issue was whether it was safe to do so at the particular time. A driver who overtakes road traffic must satisfy himself that it is safe to do so.¹ A picture of the scene that was taken shows that there were vendors within the vicinity. The aspect of vendors and the fact that the appellant attempted to overtake a vehicle that was intending to turn right meant that it was not safe to do so. That brings about the issue of negligence. It does not matter that according to the observations of the accident evaluator, Richard Chimaire should have checked his blind side. In any event, the right side of Richard Chimaire cannot be described as his blind side. I do not think that the accident was avoidable on the part of Richard Chimaire.

The trial court believed the state witnesses. In the absence of misdirection in the manner in which the trial court assessed the credibility of state witnesses an appellate will not interfere with the findings.

Coming to sentence, the trial court found the appellant's degree of negligence to be ordinary. It conducted a proper enquiry on whether or not to prohibit the appellant from driving. In this respect s 52 (4) of the Road Traffic Act [*Chapter 13:11*] provides that:

“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;

[Paragraph amended by section 16 of Act 3 of 2000.]

(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

¹ Cooper And Bamford – South African Motor Law

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;

[Paragraph amended by section 16 of Act 3 of 2000.]

(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.”

The appellant could have avoided prohibition from driving if he advanced special circumstances. Section 52 (1) defines special circumstances as follows:

“In subsection (4)—

“special circumstances” means special circumstances surrounding the commission of the offence concerned, but does not include special circumstances peculiar to the offender.”

The appellant’s submission regarding special circumstances was that Richard Chimaire contributed to the accident. As correctly observed by the trial court, the appellant did not explain in what way Richard Chimaire contributed to the accident. I do not see anything peculiar or out of the ordinary arising from the appellant’s driving conduct that amounts to a special circumstance.

It was for these reasons that we dismissed the appeal in its entirety.

MUZOFJA J agrees.....