

PROSECUTOR GENERAL ZIMBABWE
versus
AMOS CHITUNGO

HIGH COURT OF ZIMBABWE
CHAREWA AND MUZENDA JJ
MUTARE, 9 February 2022

Criminal Appeal

J Chingwinyiso, for the Appellant
No appearance, for the Respondent

MUZENDA J: On 9 February 2022, after noticing that respondent was not in court we gave the following order.

“It is ordered that:

- 1. The appeal be and is hereby allowed.*
- 2. The decision of the court a quo is set aside and substituted with the following:*

‘Amos Chitungo is found guilty as charged and the record is hereby remitted to the Magistrate’s Court for sentencing’.

On 15 February the Deputy Registrar brought the record to me showing that *Messrs Chinzamba and Partners* intended to make an application for leave to appeal and were in need of reasons for judgment. These are they:

On 20 November 2020 the Magistrate Court at Mutasa acquitted the respondent herein on a charge of Negligent Driving in contravention of s 52(2)(a) of the Road Traffic Act, [*Chapter 13:11*]. Appellant applied for condonation for late noting of an appeal. On 11 November 2021 leave to appeal was granted under HC 18/21. On 15 November 2021 appellant noted an appeal against the Magistrate’s Court judgment and spelt out the grounds of appeal as follows.

1. The court *a quo* grossly erred and misdirected itself in both law and fact in acquitting the first respondent by making a finding and concluding that contributory negligence from the speeding complainant driver caused the accident, whereas at law, contributory negligence is not a defence in criminal matters.
2. The learned trial court grossly erred and misdirected itself in fact when it failed to consider and pay due regard to the real and physical evidence of the gorse mark and point of impact noted in the complainant driver’s lane of travel as depicted in the photograph (exhibit 1) and sketch plan as ample and sufficient evidence to support that the first respondent’s motor vehicle or part of it was in its correct lane of travel at the time of collision as stated by witnesses, thereby pointing to the guilt of the first respondent.

3. The court *a quo* grossly erred and misdirected itself by placing too much emphasis on the issue of failure to avail a VID report, an extraneous piece of evidence instead of the *viva voce* evidence and the physical and real evidence presented before it, as the hallmark of its decision in acquitting the first respondent.
4. WHEREFORE the appellant prays for an order that:
 - (a) The appeal succeeds.
 - (b) The acquittal of the first respondent be over tuned and set aside and substituted in its place with a verdict of guilty.
 - (c) The matter be and is hereby remitted to the trial court for mitigation and sentence”.

The appeal is opposed by the acquitted accused.

Facts

On 10 October 2019 at the 38km peg along Selborne- Aberforle Road, Amos Chitungo had a side swipe collision with a Mazda B2 500 being driven by one Peter Maneswa, accused and complainant respectively. The side swipe resulted in Peter Maneswa losing his arm.

The state outline went on to state that on the aforesaid date at around 2000 hours accused was driving an Isuzu Truck, number ACU 1017 along Selborne – Aberforle Road due East. Upon approaching the 38km peg, the accused saw an oncoming Mazda B2500 vehicle registration number ABY 0284 being driven by Peter Maneswa. On passing both vehicles sideswiped resulting in the injury of Peter Maneswa. The later sustained an amputated right forearm as a result of the accident. The Mazda B2500 vehicle sustained extensive front right side damages and the Isuzu Truck sustained no visible accident damages. Accused was said to be negligent in one or more of the following: failing to keep a proper look out under the circumstances, failing to stop or act reasonably when accident seemed imminent and (c) failing to keep the vehicle under proper control.

The accused pleaded not guilty. In his defence outline he stated that on the alleged date he was transporting some tools from Ruda Village to his homestead in Mapeza Village. To him there is a curve that precedes the point of accident, it was just after 6pm and after that curve he saw that there was an oncoming vehicle. On full view of the vehicle he saw that the oncoming vehicle was over speeding. As a person familiar with the road he reduced speed and moved further left. Without much time there was a side swipe with that oncoming truck. He heard a sound from the back of his car. He checked the mirror but could not see the rear light of the said vehicle and to him it meant it had veered out of the road. He stopped 20 metres away to check what had happened. He disembarked from the car and went to check what had happened. He went to the car and saw that there was a person who had been badly injured. He suspected

that Peter's injured hand had been protruding and had contact with his car. There was no contact on the body of his car except the side of his rear wheel. He denied being negligent in any way because he took all the precautions in the circumstances. He blamed complainant whom he said was over-speeding and sideswiped his car.

Court *a quo*'s decision

Having analysed both the law and evidence the court *a quo* concluded that in every criminal case the state is obliged to prove its case beyond doubt and accused's defence succeeds whenever it appears reasonably possible that it might be true. The court further believed accused when he alleged that the complainant's speeding caused the accident. He dismissed complainant's version that accused encroached on complainant's lane. The court *a quo* accepted as common cause that complainant's car hit against the back of the wheel of the accused's truck and veered off the road. The learned magistrate went on to conclude further that in order for the state to prove that the truck was indeed straight (diagonal) the said truck was supposed to be subjected to vehicle inspection and in this case there was no Vehicle Inspection Department Report. The absence of a VID report to the trial court left the case and accused's version at a 50-50 position and as such the benefit of doubt was to be and was accorded to the accused. He acquitted the accused. The acquittal led the appellant to bring this appeal on the grounds outlined hereinabove.

Evidence led by the state at trial

The crucial evidence led by the state was to the following effect: Peter Maneswa stated that when he emerged from a curve proceeding to a straight stretch of the road, he saw accused's truck coming from the opposite direction, it was travelling on the crown of the road. Upon noticing the witness' car, the truck shifted back to its lane but left the loading box and rear wheels still on complainant's lane. Complainant tried to avoid hitting the truck but his right fender hit against the back wheel of the truck which was still in his lane. His vehicle veered off the road. He realised that a piece of his hand was on his leg. He denied over-speeding. David Tendai Maneswa a passenger in Peter Maneswa's vehicle gave an identical version to that of Peter Maneswa.

Abraham Solomon, a traffic accident evaluator gave evidence. He has been a traffic accident evaluator for a period of 8 years. When he visited the scene on 11 October 2019 he found both vehicles still at the scene. The Mazda was still at its final stopping point. He

observed marks left by both vehicles at the scene. The broken front tyre of the Mazda left a gorge mark on the tarmac road. From the observations he further made, accused's Isuzu truck was not straight, it was diagonal, the body of the truck was not straight and that crookedness to the witness caused the truck's rear to encroach complainant's way. The point of impact was on complainant's lane which was marked by a gorge mark at point D1 on the map or sketch plan. His conclusion was that the Isuzu truck was moving diagonally and accused pulled to the extreme left after perception of full beam from oncoming Mazda making the rear part of the truck to encroach the lane of the oncoming Mazda. The traffic accident evaluator blamed the crooked movement of the Isuzu truck prior to the collision which resulted in the accident. The map (on p27 of the record) summarises this witness' evidence. On p19 of the record of proceedings the following exchange between prosecutor and accused is noteworthy.

“Q. Did you see VID report stating that the draggling ball joint was excessive?

A. Yes.

Q. And this is why your vehicle moved diagonally?

A. The police said it is caused by the axle and my axle was not bend.

Q. Correct your vehicle was deemed to be unroadworthy?

A. Yes.

Q. Do you agree with me that none of these defects were linked to the accident?

A. Yes.

Q. Therefore your motor vehicle was not roadworthy before the accident?

A. That is what it means.

Q. Do you agree with me that after the impact your vehicle started to go to your side?

A. Yes”

This exchange forms part of what could be evidence of the cross examination putting probative value to the state's evidence as will be analysed below.

The law

In *R v Ramotale*¹ it was held:

“There is absolutely no examination of the testimony of the men in light of the real evidence on the ground which is important in collision cases. It is notorious that most drivers on collision cases swear that they were driving continuously on the extreme left side of the road. They do

¹ 1992 (2) ZLR 397 at 399 B-D per McNALLY JA

so for one of three reasons: either they were in fact doing so; or they honestly but mistakenly thought they were doing so; or they are not prepared to admit that they were doing so.”

Credibility in such cases cannot be measured by demeanour. It can only be measured by comparing the testimony against the real evidence. This the magistrate simply cannot do so.

THE REAL (OR CIRCUMSTANTIAL) EVIDENCE

The real evidence in this case consisted of-

1. Photographs of the damaged vehicles,
2. Facts recorded in the Traffic Accident Book,
3. The sketch plan of the scene.”

The above case law cited primarily encapsulates in detail how courts should deal with traffic cases. The point of impact is very central in traffic accident matters. Glass fragments, clods of earth or piles of dust help as a general indicator of the area where the accident took place.²

Applying law to the facts

The trial court analysed the facts placed before it and came out with a 50-50 chance for the state case and defence case. The court *a quo* attributed the speeding of the complainant as the cause of the accident. Speeding of the complainant in my view was irrelevant if it is considered he was in his correct lane not anticipating anything to disturb him. The court *a quo* misdirected itself in totally ignoring real evidence placed before it especially the map or sketch plan. The sketch plan shows point D1 a gorge left by the Mazda. The gorge gives an approximate point where the sideswipe occurred and point D1 is on the lane or direction of travel of complainant. Point D1 is not at the crown of the road which would have created an impasse before the court *a quo*, point D1 cannot be adjudged to create a 50-50 situation spoken of by the court *a quo*. Point D1 is apt to show that point of impact occurred on complainant’s side and that alone would show that accused encroached on complainant’s lane.

The court *a quo* impugned the state for not producing VID report. In my view that report was completely secondary to the state case. Accused admitted that his motor vehicle was pronounced unroadworthy by VID. So what did the trial court want to know about the Isuzu truck? Accused conceded under cross examination that the defects he admitted to were in existence prior to 10 October 2019, they were not products of the accident. The traffic accident

² S v Ramotale, supra, at 401 F-G

evaluator told the court further that the accused's truck was moving diagonally on the road, causing the hose to be on the left lane and loading tray in the right lane. The traffic accident evaluator attributed that defect to the axle, the accused blames the defective motor vehicle part as the cause of the diagonal movement of the truck. However the accused further admitted that the defect caused the truck to move diagonally and that might have caused the accident. The probative value of the VID report was academic in view of all these concessions. The concessions of the accused to a large extent added credence to the complainant's version more particularly on the point of impact. The collision involved the right fender of the Mazda and the rear wheel of the Isuzu truck and the side swipe took place on complainant's lane. These factors alone point to the negligence of the accused.

The defence of the accused to me was not reasonably possible as concluded by the court *a quo*. It was baseless as placed next to what the state had proved before the court. Speed was denied by complainant, what caused the side swipe was the sudden presence of the loading tray of the Isuzu truck on complainant's lane. Accused's defective truck caused the accident and all the particulars of negligence were proved by the state. Accused failed to keep proper control of the Isuzu truck and moved diagonally on a public road thereby endangering other road users. Had the Isuzu truck safely kept its hose and loading tray in an aligned position no side swipe could have occurred. Upon sight of complainant's motor vehicle coming accused told the court *a quo* that he moved the hose to the extreme left but still could not avoid the side swipe. All the state's evidence ought to have been believed and the state had managed to prove its case beyond any reasonable doubt.

It should be pointed out that on the date of hearing of the appeal respondent's legal practitioner was not in attendance but a lawyer from his legal firm, Mr Gwizo was in court. We agreed to deal with the appeal on merits than to proceed as a default judgment. Both parties had filed quite helpful heads and we considered both appellant and respondents heads before coming to the conclusion of upholding the appeal.

It was after we considered all the papers placed before us that we concluded that the court *a quo* misdirected itself at law and on facts in acquitting the respondent (accused). It was consequently ordered that:

1. The appeal be and is hereby allowed.
2. The decision of the court *a quo* is set aside and substituted with the following:-

“Amos Chitungo is found guilty as charged and the record is hereby remitted to the Magistrates Court for sentencing.”

CHAREWA J agrees_____

National Prosecuting Authority, appellant’s legal practitioners.
Mugadza Chinzamba & Partners, for respondent