

THE STATE
versus
MAXWELL SIBANDA
and
THE STATE
versus
MISHECK MAGOSVONGWE

HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 4 JUNE 2015

Review Judgment

MAKONESE J: In this matter I shall deal with the above matters on review in one single judgment because the legal issues raised pertain to the same subject. Whilst numerous judgments have been written on how trial magistrates must deal with sentencing in matters involving culpable homicide arising from road traffic accidents, this court continues to find a misapplication of the provisions of section 64 of the Road Traffic Act [*Chapter 13:11*].

State versus Maxwell Sibanda

In this matter the accused appeared before a magistrate at Filabusi on a charge of culpable homicide. The brief allegations being that on 9 October 2014 and at the 201 km peg along the Masvingo – Mbalabala road, the accused who was driving a Mitsubishi Collt pick-up truck registration number DTX 736 GP unlawfully and negligently drove the said motor vehicle resulting in it swerving off the road and hitting Michael Maphosa, a two year old child who was attempting to cross the road. The deceased sustained head injuries and died on the spot.

The accused is the holder of a class 4 and 5 driver's licence. The particulars of negligence were alleged to be as follows:

1. Travelling at a speed which was excessive in the circumstances
2. Failure to stop or act reasonably when an accident or collision seemed imminent.

The accused pleaded guilty to the charge and after canvassing all the essential elements of the charge, the court entered a plea of guilty. A certificate of previous convictions was tendered into the record reflecting that accused had no relevant previous convictions. The accused was sentenced to pay a fine of \$400-00 or in default of payment four months imprisonment.

State versus Misheck Magosvongwe CRB FIL 36/14

In this matter the same magistrate dealt with the matter similar to the previous one. The brief allegations are that on 23 October 2014 and at the 171 km peg along the Mbalabala – Masvingo road the accused who was driving a Toyota Corrola, registration number ABU 7815 unlawfully and negligently drove the said motor vehicle resulting in the death of Tsvakai Moyo a pedestrian who was crossing the road. The pedestrian died on the spot due to severe head injuries sustained in the accident.

The particulars of negligence were alleged as follows:

1. Travelling at a speed which was excessive in the circumstances.
2. Failure to stop or act reasonably when an accident seemed imminent.
3. Failure to keep a proper lookout under the circumstances.

The accused pleaded guilty to the charge. The essential elements were put to the accused and the court being satisfied that the plea of guilty was genuinely and understandingly made entered a guilty plea. A certificate of Previous Convictions tendered into the record confirmed that the accused was the holder of a class 4 and 5 driver's licence. He did not have any relevant previous convictions.

Accused was sentenced to pay a fine of \$400-00 or in default of payment four months imprisonment.

Upon receipt of these two records I addressed a query with the trial magistrate in the following terms:

- “1. The record does not indicate that an enquiry was made by the court as to whether the accused was the holder of a driver's licence?
2. If the accused was the holder of a driver's licence why was there no prohibition? Please refer to section 64 of the Road Traffic Act [*Chapter 13:11*]”

I received a rather lengthy written response to my query in the following terms:

“please place these records of proceedings before the Honourable Justice Makonese with the following comments:

Both records were returned by the reviewing Justice seeking clarification on the stance taken by the presiding magistrate. Because the issues arising are similar and my response to them is slightly similar I beg your indulgence to answer for both records in a single response.

The first clarification that the learned Justice has sought pertains to the absence of an inquiry into whether both accused persons were holders of driver’s licences. The learned Justice’s observations were correct. The reason why there was no inquiry is because it has become common practice that where an accused is brought before the court on a Road Traffic offence, the prosecution also charges him with having no drivers licence if the same had none. The court therefore implies that an accused person did have drivers licence if he is not charged with that offence when he is brought before the court on a Road Traffic offence. I have taken the time to look into the certificate of previous convictions and they indicate that both accused did in fact have driver’s licences.

The second clarification sought by the learned Justice pertained to why there was no prohibition from driving. In this regard the learned Justice referred me to section 64 of the Road Traffic Act [CAP 13:11]. The presiding magistrate was aware of the said provision in giving out a sentence. I was of the opinion that the provision gives the presiding officer discretion on whether or not to prohibit the accused. In deciding against prohibition I took into account that the degree of negligence was not gross/reckless. I also looked at the circumstances prevailing in each case. The accused in the first record (Maxwell Sibanda) negligently killed a 2 year old child. The road where this occurred is a highway and I felt whoever had care of the child was negligent as well by not monitoring the child’s movements in an area experiencing fast moving traffic.

The accused in the second record (Misheck Magosvongwe) negligently killed a person who was crossing the road. The state outline indicates that the deceased crossed the road emerging from behind a truck. The court felt that the deceased’s actions were contributory in negligence in that she reduced her chances of being seen. In both records the negligence of the other parties in no way absolved each driver but was extenuating. I remarked in each record that I saw no reason for suspending their respective licences. I however stand guided by the reviewing Justice on both clarifications sought.

M.Moyo
Presiding Magistrate, Filabusi”

As I have already indicated, numerous such cases have been dealt with by this court. The correct approach in sentencing in respect of culpable homicide arising from road traffic accidents has been stated in the following cases: *State v Brian Kuedza* HB 128/13 and *S v Bhekimpilo Ndebele* HB 160/13. Culpable homicide is a common law crime which is governed by section 49 of the Criminal Law (Codification and Reform) Act, [Chapter 9:23]. Magistrates ought to be alive to the fact that culpable homicide occasioned through the negligent or unlawful driving of a motor vehicle has certain provisions under the Road Traffic Act that automatically come into play upon conviction on a charge of culpable homicide. The prohibition or cancellation of a driver's licence arising from such a conviction are governed by section 64 of the Road Traffic Act, which provides as follows:

“64 Prohibition from driving on certain offences

- (1) Subject to this part, a court convicting a person of an offence in terms of any law other than this Act by or in connection with the driving of a motor vehicle or a road may, in addition to any other penalty which it may lawfully impose, prohibit the person from driving for such period as it thinks fit.
- (2) -----
- (3) If, on convicting a person of 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 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 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).”

See also the case of *State v Mujati* 1997 (1) ZLR 508. It is trite law that culpable homicide involves the unlawful and negligent killing of a human being. The accused in a traffic case does not desire to bring about the death of the person but due to his negligence causes death as a proximate cause of his negligent conduct. In both cases under review the conviction on a charge of culpable homicide in traffic cases is regulated by provisions of section 64 of the Road Traffic Act.

The learned trial magistrate states in his response that he believed that he had a discretion in whether or not to prohibit the accused from driving. If the magistrate took the view that in both cases the negligence was not gross, this should have come out in his reasons for sentence. In any event section 64 (3) (i) of the Road Traffic Act places a mandatory requirement for prohibition upon of an offence at common law. The magistrate was thus required to either effect the prohibition and or cancellation. I have deep suspicion that the learned magistrate did not at the time of sentencing these accused persons have any regard to the provisions of the Road Traffic Act.

I must observe that in a recent judgment, *State v Mununuri Goto and State vs Gilbert Sibanda* HB 88/15, MUTEMA J, dealt with similar cases of culpable homicide, where the trial magistrate failed to apply the law pursuant to convictions of culpable homicide. I associate myself with the views expressed in that judgment.

In both cases under review the trial magistrate ought to have imposed a prohibition from driving. The degree of negligence in both cases is on the high side. Accordingly, in terms of section 29 (2) (iii) of the High Court Act [*Chapter 7:07*] the matters are remitted to the court *a quo*, with an order directing accused persons to be recalled for the court to impose prohibition from driving in terms of section 64(3)(i) of the Road Traffic Act.

Makonese, J.....

Mutema J agrees.....