HB 197-17
HCA 10-17
XREF FIL 10-16

RONALD HAMUZOFI MAKAWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MATHONSI AND TAKUVA JJ
BULAWAYO 3 JULY 2017 AND 6 JULY 2017

Criminal Appeal

G Sengweni for the appellant
K Ndlovu for the respondent

MATHONSI J: This is an appeal against sentence only. When the appellant, a 61 year old bus driver, appeared before a magistrate at Esigodini on 12 January 2017 charged with culpable homicide in contravention of s49 (b) of the Criminal Law [Codification and Reform] Act [Chapter 9:23], he tendered a plea of guilty. He was, upon conviction, sentenced to 18 months imprisonment 6 of which were suspended on condition of future good behaviour. There was no reference whatsoever to any prohibition from driving or cancellation of his driving licence as provided for in the law. Left with an effective imprisonment term of 12 months, the appellant was aggrieved and noted an appeal against that sentence.

The appellant attacked the sentence on the grounds that the trial magistrate misdirected himself by making a finding that his conduct amounted to gross negligence without carrying out an inquiry to establish the degree of negligence. In fact his negligence was of an ordinary nature. It was a misdirection to conclude that there was gross negligence merely because of the consequences of the negligence. In any event in making that finding the court *a quo* did not take into account that the wet weather was a contributory factor to the accident. The sentence imposed is so harsh and excessive as to induce a sense of shock.

The agreed facts are that the appellant is the holder of a valid driver's licence in respect of classes 1; 2; 4 and 5 and was employed as a bus driver by Inter-Africa Bus Company. At about 1500 hours on 2 October 2016 the appellant was driving a Yutong Omnibus registration number ADS 7140 with 62 passengers on board from Masvingo to Bulawayo along the

Beitbridge-Bulawayo Road. On approaching the 47,4km peg along that road the appellant beheld a hicker by the road side and immediately applied brakes intending to pick that person. As a result of the braking the omnibus swerved to the right on the wet surface and then collided with a Mazda Demio motor vehicle registration number ADJ 7400 which was proceeding in the opposite direction towards Beitbridge and was being driven by Shepherd Nyoni, a holder of a classes 4 and 5 driver's licence.

As a result of the collision, the omnibus overturned on top of the Mazda Demio landing on its right side facing backwards off the road. There was extensive damage on both vehicles. All the four passengers in the Mazda Demio including the driver perished on the spot. The appellant was then charged aforesaid. In the charge sheet which the appellant pleaded guilty to, the particulars of negligence were given as:

"Particulars of Negligence

1. Failing to keep a proper look out in the circumstances.
2. Failing to act reasonably when an accident seemed imminent.
3. Travelling at an excessive speed under the circumstances.
4. Failure to keep the vehicle under proper control."

I agree with Mr *Ndlovu* for the respondent that these are particulars of ordinary negligence to which the appellant pleaded guilty. Nowhere in the charge sheet or indeed the state outline is it alleged that the appellant was guilty of any higher gradation of negligence like gross negligence or recklessness.

That fact did not deter the trial magistrate when assessing sentence, following the truncated trial in which no inquiry was conducted into the degree of negligence, in stating:

> "Had it been that the accused on the day in question was not speeding regardless of the fact that he was fully aware that it had been raining and the road was therefore wet, there is no way accused's bus could have encroached the Mazda Demio's lane on the day in question. <u>The accused person was grossly negligent</u> in the circumstances because it was not reasonable for him to attempt to apply brakes (emergency) the very moment he saw a passenger by the side of the road. That on its own shows that the accused person failed to act reasonably for the sole simple reason that the accused was aware that it had been raining and the road was therefore wet, and also that the speed at which he was driving the bus incapacitated him to apply emergency brakes and pick the so-called passenger regardless of all those factors the accused person went on to apply emergency brakes on a wet road resulting in him swerving to the right side lane ----. In the present case like

> mentioned *supra* the accused person was grossly negligent. In the case of *S* v *Mtizwa* 1984 (1) ZLR 230 (HC) it was held that, in assessing the appropriate sentence in culpable homicide cases, it is important to determine the (degree) of negligence. It was further held that if the accused was reckless or grossly negligent, then imprisonment is the appropriate form of punishment."

Therein lies the misdirection. The appellant, as I have said, was not charged with gross negligence or recklessness but ordinary negligence. The court did not conduct any form of inquiry to establish the degree of negligence but merely drew a conclusion without inviting the accused person to participate in any form of inquiry in that regard. As correctly stated by Mr *Ndlovu* for the respondent, in terms of s146 of the Criminal Procedure and Evidence Act [Chapter 9:07], an indictment, summons or charge must set out the offence with which an accused person is charged with such particularly as is reasonably necessary to inform the accused person of the case he is facing. In the present case the appellant was informed of the charge of ordinary negligence and pleaded to it. It was therefore improper to then sentence him for gross negligence without him pleading to it or it being proved. If the state wanted to prosecute him for gross negligence it ought to have charged him with it and proved it.

Gross negligence has been defined as a very serious or aggravated form of ordinary negligence. It implies conduct in which there is a marked departure from the standards by which responsible and competent drivers habitually govern themselves. See *S* v *Mtizwa* 1984 (1) ZLR 230 (H) 233G -234A. Therefore it is not a feature which a court of law can find by mere conjecture or assumption. It must be established, if there is a trial, from the evidence and if there is no trial, at the plea stage by way of a specific inquiry. It is for that reason that CHNHENGO J made the suggestion of how a charge in cases of culpable homicide arising from motor vehicle accidents should be formulated in *S* v *Chaita and Others* 1998 (1) ZLR 213 (H) 220 E-F. He stated;

> "I think it would be helpful to both prosecutors and magistrates that I should suggest a standard form of a charge in the manner of its formulation. The formulation should advert to the requirement to establish the degree of negligence. Such a formulation should ideally be as follows:
>
> > 'Charged with the crime of culpable homicide in that on (date) day of (month) (year) at ---- the (accused) drove a motor vehicle, namely a ----on a road without

> due care or attention/negligently/recklessly/with a prohibited degree of alcohol/whilst under the influence of alcohol or a drug and thus unlawfully caused the death of ---, more particularly he ---."

The learned judge went on to say at 220 H -221A:

> "To sum up, therefore, on a charge of culpable homicide arising out of a motor vehicle accident the court is required to make a finding of the precise degree of negligence of the accused and is enjoined to approach the matter in terms of s64(3) of the Act. A failure to do so is clearly a misdirection."

I fully associate myself with those remarks and must add that it is incompetent to make a finding on the gradation of negligence without evidence led at the trial or a proper inquiry conducted at the time of recording a plea. Such a finding would be based on speculation as opposed to hard facts especially in a case such as the present where the charge to which the appellant pleaded did not advert to the degree of negligence. I can do no better than recite the passage in *S* v *Chaita and others, supra*, at 219 C-D;

> "The degree of negligence, to use the word in its common signification, is of course established before conviction. It is before conviction that the nature of his driving must be investigated in plea proceedings. In a trial, evidence is put before the court to establish the degree of negligence. Thus at the conviction stage the magistrate will already be in a position to assess the accused's degree of negligence, recklessness or other driving conduct to enable him to arrive at his verdict."

This is what the court *a quo* did not adhere to in this matter. At conviction stage, no evidence as to the degree of negligence or other conduct had been put before the court. The court itself did not conduct an inquiry as to that before convicting the appellant. It simply convicted the appellant of culpable homicide based on the particulars of negligence set out in the charge sheet which particulars I have said were for ordinary negligence.

It therefore becomes clear that when the court relied on the authority of *S* v *Mtizwa, supra*, at the sentencing stage to justify settling for the sentence of imprisonment it was already way down the garden park having misdirected itself by failing to establish the degree of negligence. The court allowed itself to assess the sentence of imprisonment without foundation. The sentence therefore cannot stand and as such the concession made by Mr *Ndlovu* is proper.

The sentence is however improper for yet another reason. It is simply that the effective sentence was 12 months imprisonment.

Where a sentencer settles for an effective sentence of 24 months or less, the matter immediately falls within the community service grid. The sentencer is then required to proceed as set out in the case *S* v *Antonio and Others* 1998 (2) ZLR 64 (H). In other words he or she must conduct an inquiry into the suitability of community service as an option. If, following such inquiry, the sentencer comes to the conclusion that community service is not appropriate in the circumstances, he or she must give cogent or sound reasons for arriving at that conclusion which reasons must appear on the record. If a fine is a permissible sentence for the crime in question, the sentencer should consider the option of a fine. In the end if the sentencer considers that none of these options, that is a fine or community service, are appropriate but that an effective term of imprisonment is the only option, he or she should give reasons for that decision. See also *S* v *Chinzenze and others* 1998 (1) ZLR 470 (H); *S* v *Silume* HB-12-16; *S* v *Mutenha and Another* HB 35-16.

It has been repeatedly stated that failure to do the foregoing is a misdirection entitling the appeal court to interfere with the sentence. The appellant is a 61 year old first offender who pleaded guilty to the charge, thereby showing contrition. Until the unfortunate circumstances where his negligence led to the tragic death of four people, he had had a blameless driving career of 18 years as an omnibus driver, but lost his job as a result of the accident. He is married with four children. It occurs to me that these weighty mitigatory factors taken together with the fact that the state preferred ordinary negligence charges against him commend him for the sentence of a fine. What may have clouded the magistrate's reasoning was the number of casualties. In the end he misdirected himself. This is a matter in which a fine was appropriate.

However I have to consider another issue, that of prohibition from driving which Mr *Ndlovu* for the respondent alluded to. The magistrate did not prohibit the appellant from driving. Neither did he cancel his licence. This was a misdirection, which regrettably magistrates appear to fall into with alarming frequency. It is an issue which was considered by this court in *S* v *Chiyangwa* HB-37-16. In terms of s64 of the Road Traffic Act [Chapter 13:11];

"(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 on a road, may, in addition to any other penalty which it may lawfully impose, prohibit the person from driving for such a period as it thinks fit.

(2) ---.

(3) If, on convicting a person for murder, attempted murder, culpable homicide, assault or any other 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 would have 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 not 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)."

When deciding the appropriate sentence on a conviction of culpable homicide arising out of a traffic accident the court should always have regard to the provisions of s64 (3). This is so in order to decide whether, in addition to the penalty imposed, the convicted person should also be prohibited from driving and/or his licence cancelled. When the court finds that the degree of negligence was gross it must prohibit the convicted person from driving and/or cancel the licence. The prohibition and cancellation are part of the penalty imposed by the court. In this case the court did not even consider that aspect of the penalty although it pronounced that the negligence was gross.

The authorities illustrate that where a person is convicted of culpable homicide in breach of the common law which, in our jurisdiction, has been codified in the Criminal Law [Codification and Reform] Act [Chapter 9:23], that person would have been convicted of negligent driving in breach of s52 of the Act. For that reasons s64 (3) requires the court to consider prohibiting that person from driving. Section 52(4) (c) makes it mandatory for a court

convicting a person for negligently driving a commuter omnibus to prohibit the convicted person from driving for a period of at least 2 years, unless the court finds special circumstances as would inform a refrain.

I am aware that the state did not counter appeal for the mandatory prohibition and cancellation to be imposed. However in light of the fact that that part of the sentence is mandatory, this is a matter in which we are entitled to invoke our review powers in terms of s29 of the High Court Act to order a correction of the sentence. Thankfully Mr *Sengweni* for the appellant conceded that the matter be remitted to the trial magistrate to comply with the mandatory provisions of the Road Traffic Act.

In the result, it is ordered that;

1. The appeal against sentence is hereby upheld.

2. The sentence of the court *a quo* is hereby set aside and substituted with the following sentence;

   "The appellant shall pay a fine of $400-00 or in default of payment 4 months imprisonment. In addition, 6 months imprisonment wholly suspended for 5 years on condition he is not during that period convicted of negligent driving for which he is sentenced to imprisonment without the option of a fine."

3. The matter is hereby remitted to the same magistrate who shall recall the appellant before 12 July 2017 for purposes of conducting an inquiry into the existence of special circumstances as to why the mandatory penalty of prohibition from driving and the cancellation of his driver's licence should not be imposed.

4. If no such special circumstances exist to prohibit the appellant from driving and cancel his driving licence as provided for in s52(4) (c) as read with s65 (5) (a) of the Road Traffic Act [Chapter 13:11].

Takuva J agrees……..

Sengweni Legal Practice, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners