STATE
versus
MIKE MADZIMBAMUTO

HIGH COURT OF ZIMBABWE
MUSAKWA J WITH ASSESSORS
HARARE, 7, 8 & 11 October 2013

Criminal trial

E. Nyazamba, for the state
J. Makiya, for accused

MUSAKWA J: This case typifies the relentless enmity that appears to have evolved between Police officers and commuter omnibus crews. The accused pleaded not guilty to contravening s 47 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. The charge alleges that-

> "In that on the 20th day of October 2010 and at the junction of Julius Nyerere Way and Robson Manyika Road, Harare, Mike Madzimbamuto unlawfully and with intent to kill or realizing that there was a real risk or possibility that death might occur pushed Ngororombe Dzvova out of a fast moving vehicle resulting in Ngororombe Dzvova hitting on the tarmac and sustaining injuries on the head, legs and back which injuries caused his death on 21 October 2010."

The facts of the case are that on 20 October 2010 a team of Police officers was conducting an operation dubbed "100% Total Decongestion of the CBD." Upon reaching the intersection of Julius Nyerere Way and Robson Manyika Avenue the team observed a Toyota Hiace commuter omnibus vehicle registration number ABQ 2419 loading passengers at an undesignated point. The accused was the conductor. When the deceased got into the vehicle in a bid to effect arrest the driver of the vehicle suddenly drove off whilst the accused was trying to push him off. The door of the vehicle dislodged resulting in the deceased falling down and sustaining injuries from which he died on the following day.

The accused's defence is a denial of the allegations. He states that he was seated in the vehicle just behind the front seat. He saw a Police officer holding onto the sliding door of the vehicle. The driver immediately took off and side swiped against another vehicle by the side where the deceased was. The Police Officer and the door fell off. The vehicle proceeded

to the Fourth Street terminus where they dropped some passengers. Thereafter they proceeded to Queensdale where the driver left the vehicle with a relative.

The state opened its case by producing the post-mortem report on the deceased with the consent of the defence. The following injuries were noted:

Gross pulmonary oedema of the right lung

Haemoperritoneum of the peritoneum

Ruptured liver

The cause of death was established as hypovolemic shock secondary to ruptured viscus secondary to fall from moving vehicle. The confirmed warned and cautioned statement recorded from the accused that was produced by consent is framed along the same lines as the defence outline.

The evidence of five state witnesses as summarised in the summary of state case was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Cap 9:07*]. It is not contentious. Essentially it relates to how the deceased was treated, how the driver of the vehicle involved in this matter conducted himself after the incident and how the accused person was arrested.

The leader of the Police team Dyson Mhepo testified that when they arrived at the intersection the deceased stepped onto the vehicle with part of his body outside. The accused then tried to push the deceased off as he tried to get inside the commuter omnibus. The deceased then fell off and they rushed to his rescue. The witness clarified that the commuter omnibus hit against another vehicle by the door. That is when the deceased fell as the door fell off. Thereafter the commuter omnibus and the accused then went away. The commuter omnibus had a few passengers. He was adamant that it was only the accused who pushed the deceased.

Under cross-examination the witness was put to task concerning a portion of his statement which stated that inside the vehicle was the conductor and tout. He clarified that the accused acted as tout and conductor. The moment the deceased stepped inside the vehicle, it took off as he held onto the inside with part of his body outside. The deceased fell as the commuter omnibus struck another vehicle. He further clarified that the deceased's head was inside the vehicle. The accused then applied pressure around the deceased's chest in a bid to push him off. The pushing was continuous as the deceased struggled to get inside.

Onias Chakanya testified that the intersection in question was congested. The accused was touting for passengers. When the deceased stepped onto the vehicle with his head inside

the accused tried to close the door. The accused next tried to push off the deceased. The vehicle took off whilst the deceased clung on with the accused still trying to push him off.

The speeding commuter omnibus hit against another slow moving one. In the process the door fell off and so did the deceased. The officers arrived and took the injured deceased to Harare Central Police Station Clinic.

The witness was also cross-examined on the contents of his statement. In particular he clarified that the accused was both conductor and tout. He differed with the previous witness on who else was in the commuter omnibus. He insisted that there were only three people, the driver, the accused and the deceased.

With this evidence the state closed its case. Mr *Makiya* for the accused intimated that he wanted to apply for discharge of the accused. That application was dismissed and the full reasons were given.

The accused testified in his defence. He stated that they were picking up passengers at an undesignated point. When the deceased stepped onto the vehicle and held on the door, the driver of the omnibus took off. The Police officer did not get inside the vehicle as he stood by the step. There were two passengers inside. The accused was seated on the second row of seats.

When their vehicle hit against another vehicle the deceased fell off. He told the driver that the Police officer had fallen but he sped off. They then dropped the two passengers at the fourth street bus terminus. From there they proceeded to Queensdale where the driver left the vehicle with his relative.

The accused denied pushing the deceased. It was his evidence in-chief that the driver caused the deceased to hit against another vehicle and thus fell off.

Under cross-examination, although maintaining that he did not push the deceased the accused admitted that a person boarding the vehicle would have faced him as he sat in the vehicle. He also admitted that he was the only other crew member apart from the driver. He however, disputed that he was touting for passengers. He also disputed that the omnibus travelled for about twenty to thirty metres before the collision, preferring a distance of about seven metres. Quizzed on why the deceased failed to board the omnibus over that short distance, he replied that he must have been scared by the manner in which the driver took off. When he was asked to explain how the deceased had fallen off he answered that he was clinging onto the door. Asked to explain how the door got unhinged he said he did not see

that save that it remained along Julius Nyerere Way. He could also not say whether the collision with the other vehicle was deliberately caused by the driver.

The accused also admitted that he was arrested after seven days. Asked why he had not given himself up or reported the incident to his employer, he stated that the fugitive driver is the one who engaged him as conductor. He also believed he was not responsible for the deceased's death.

Under re-examination, he was asked what caused the deceased to fall down and he stated that the driver caused him to hit against another vehicle.

In his closing address Mr *Nyazamba* quite correctly conceded that the evidence led does not disclose an actual intention to kill. However, he then submitted that the court should return a verdict of murder with constructive intent. Since the inception of the Code, the term constructive intent is no longer part of our law. Many legal practitioners, prosecutors and judicial officers could still be steeped in this warp. This is because s 15 (4) of the Code provides that-

> "For the avoidance of doubt it is declared that the test for realisation of a real risk or possibility supersedes the common-law test for constructive or legal intention and its components of foresight of a possibility and recklessness wherever that test was formerly applicable."

When it was pointed out to Mr *Nyazamba* as to what actually caused the deceased to fall down, he submitted that there was doubt that it was the accused's push. However, he further submitted that the deceased fell down when the vehicles collided as he was being pushed by the accused. In such a case, he thus submitted that the accused may be found guilty of culpable homicide.

On the other hand Mr *Makiya* submitted that the elements of murder have not been proven. He also submitted that for the distance covered by the vehicle whilst the accused pushed at the deceased, the latter did not fall. The fall occurred when the vehicles collided. It is that impact which led to the deceased's death after he was injured. He further submitted that it was not foreseeable that death would result from pushing the deceased. Whether deliberate or through oversight, Mr *Makiya* prayed for the total acquittal of the accused without submitting whether the evidence discloses any permissible verdict which the court can arrive at.

The facts of the matter are simple. The accused and another were picking passengers at an undesignated point. When Police officers arrived the deceased boarded the commuter

omnibus in which were the accused and his colleague. From the evidence of both the state witnesses and the accused, the deceased did not completely get inside. The moment he placed his feet on the step the vehicle took off. State witnesses said he held onto the inside of the vehicle with his head inside. The accused said he was standing whilst gripping the sliding door with his head outside. It is immaterial which version is the correct one. The relevant factor is that he did not get inside the vehicle and that the vehicle was immediately driven off.

The state witnesses claimed that the accused commenced to push the deceased the moment he stepped onto the vehicle. The accused claimed he was seated away from the door and did not push the deceased. However, there again is convergence between the state witnesses and the accused on the fact that the commuter omnibus collided with another vehicle. The only difference is the distance it had travelled. Again, it is not vey clear whether the driver of the commuter omnibus deliberately rammed against another vehicle in order to discard the deceased.

What seems not to be in dispute is that the speeding vehicle hit against another by the side where the deceased was. The accused's defence outline sates that "immediately the driver Samuel Muwomo started moving the motor vehicle and he side hit against another commuter vehicle by the door which was being handled by the Police Officer." By side-hit, it looks like it was meant to say side-swipe.

The probability seems to be that in the mad rush to escape from the Police Officers the get- away vehicle side-swiped against another. The accused was not sure whether this was deliberate. It was only during re-examination that he claimed it was deliberate. He never expressly stated so in his defence outline. The same applies to his warned and cautioned statement whose version of the collision is exactly the same as that in the defence outline.

We accept the version of state witnesses that the accused tried to push the deceased from the vehicle. That the accused was preventing the deceased from boarding the vehicle fits well with their bid not to submit to the Police Officers. The accused could not have been seated stoically as a passenger as he claimed. Both Police Officers who testified maintained that the accused continued to push at the deceased as the vehicle sped away. Their testimony was not discredited through cross-examination.

On the distinction between actual intention and the discarded constructive intention My *Nyazamba* referred to the case of *S* v *Mugwanda* 2002 (1) ZLR 574 (S) in which at 580-581 CHIDYAUSIKU CJ had this to say-

> "Professor G Feltoe, in his book *A Guide to Zimbabwean Criminal Law* discusses the distinction between positive or actual intent, and constructive intent or legal intent in a manner that is vey lucid and instructive. The learned author characterises the distinction as follows:
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> "Actual Intention
>
> (a) Desires death. Death is aim and object.
>
> Or
>
> (b) Death is not aim and object but in process of engaging in some activity foresees death as a substantially certain result of that activity and proceeds regardless as to whether this consequence ensues.
>
> Legal Intention
>
> Does not mean to bring about death but foresees it as a possibility whilst engaged in some activity and proceeds with the activity regardless as to whether death ensues.
>
> (a) Subjective foresight
>
> (b) As to possibility not probability
>
> (c) Recklessness."

The learned Chief Justice went further to state that-

> "On the other hand, a verdict of murder with constructive intent requires the foresee ability to be possible (as opposed to being substantially certain, making this a question of degree more than anything else). In the case of culpable homicide, the test is: he ought to, as a reasonable man, have foreseen the death of the deceased."

Whilst the test for realisation of risk or possibility still remains subjective in terms of the Code, it is now defined as follows in s 15 (1)-

> "Where realisation of a real risk or possibility is an element of any crime, the test is subjective and consists
>
> of the following two components ·
>
> (*a*) a component of awareness, that is, whether or not the person whose conduct is in issue realised that
>
> there was a risk or possibility, other than a remote risk or possibility, that ·
>
> (i) his or her conduct might give rise to the relevant consequence; or
>
> (ii) the relevant fact or circumstance existed when he or she engaged in the conduct; and
>
> (*b*) a component of recklessness, that is, whether, despite realising the risk or possibility referred to in
>
> paragraph (*a*), the person whose conduct is in issue continued to engage in that conduct."

With the above provision in mind, was there awareness on the part of the accused that their vehicle might collide with another leading to the consequence that ensued. It is not an easy question as this did not come out from the evidence led. If this awareness had been proved, it could have been inferred that there was recklessness in the accused's conduct. This is permissible by virtue of s 15 (3) of the Code which states that-

> "Where, in a prosecution of a crime of which the realisation of a real risk or possibility is an element, the
> component of awareness is proved, the component of recklessness shall be inferred from the fact that ·
> (*a*) the relevant consequence actually ensued from the conduct of the accused; or
> (*b*) the relevant fact or circumstance actually existed when the accused engaged in the conduct; as the case may be."

It was incumbent upon the prosecution to prove that the accused was aware of the real risk or possibility of death and despite that realisation he persisted in the unlawful conduct. In my view it was not enough to prove that the accused pushed the deceased. This is because it is not the pushing that led to the deceased's fall.At least there remained some doubt on account of the fact that the pushing coincided with the collision. The direction of travel and the state of the road could have given an insight into the issue at hand. For example, was the route through which they fled also congested with other vehicles such that it was foreseeable that there would be a collision. In any event it is not the accused who chose the route of flight.On account of the absence of proof of the requisite awareness it would be unsafe, although borderline, to convict the accused for murder.

However, the same can not be the case in respect of the permissible verdict of culpable homicide where negligence is an essential element. In this respect s 16 (1) (a) of the Code provides that-

> "Where negligence is an element of any crime ·
> (*a*) constituted by the performance of an act, the test is objective and consists of the inquiry whether the accused person's performance of that act was blameworthy in that ·
> (i) a reasonable person in the same circumstances as the accused would not have performed that act;
> or
> (ii) the accused failed to perform the act with the care and skill with which a reasonable person in the same circumstances would have performed that act; whichever inquiry is appropriate to the crime in question; or……."

If we accept as we have done that the accused prevented the deceased from boarding the vehicle by trying to push him off, it is self-evident that a reasonable person would not have performed such a dangerous act, especially when the vehicle was in motion. The accused enhanced a dangerous situation where by upon the deceased boarding a vehicle the driver took off at high speed, with the accused trying to eject the deceased who could not enter the vehicle. In that case the accused negligently failed to realise that death might result

from his conduct. In my view, the precise manner of death is immaterial. It suffices that the accused's conduct of preventing the deceased from completely boarding a moving vehicle was blameworthy as a reasonable person would not have done that.

Accordingly, the accused is found not guilty of murder but is found guilty of culpable homicide as defined in s 49 of the Code.

James Makiya Legal Practitioners, counsels for the accused.
Attorney General Office, for the state