

THE STATE
versus
LESSON NGWENYA

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 2 Feb 2015

Review judgement

DUBE J: On 21 January 2014 the accused was driving a haulage truck from Gweru to Chinhoyi. When the accused approached the 108km peg along the Harare-Bulawayo Road, he lost control of the vehicle and side swiped an oncoming haulage truck. The deceased who was a passenger in his vehicle sustained multiple fractures from which he succumbed on admission to hospital.

The accused was convicted on his own plea to contravening s 49 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] the Act (Culpable Homicide). He was sentenced as follows;

“To pay a fine \$300-00 or in default of payment 3 months imprisonment. In addition, the accused person is hereby being prohibited from driving all classed of motor vehicles for 6 months.”

The learned regional magistrate who scrutinised the proceedings has raised concern over the prohibition from driving. He queried whether it was appropriate for the trial magistrate to prohibit the accused who had been charged and convicted of culpable homicide from driving. The regional magistrate relies on a judgement of Karwi J in *Cuthbert Mhishi v S* HH 85-11 for the proposition that prohibition from driving cannot be imposed in cases involving culpable homicide arising as a result of a road traffic accident. The court in that case held as follows in relation to cases of culpable homicide charged in terms of s 49 of the Act,

“The penalty provision of that section does not provide for the cancellation of an accused driver’s licence nor does it provide for prohibition from driving. It therefore follows that the learned magistrate should neither have cancelled the appellant’s drivers licence nor prohibited him from driving”

The offence of culpable homicide is created by s 49 of the Act. Section 49 reads as

follows,

“49 Culpable homicide

Any person who causes the death of another person

- (a) negligently failing to realise that death may result from his or her conduct; or
 - (b) realising that death may result from his or her conduct and negligently failing to guard against that possibility;
- shall be guilty of culpable homicide and liable to imprisonment for life or any shorter period or a fine up to or exceeding level fourteen or both”.

The penalty section of the Act simply provides for a sentence of life or any shorter period or a fine up to or exceeding level fourteen or both. It does not provide for prohibition from driving.

This section requires to be read in conjunction with s 64 of the Road Traffic Act [Chapter 13:11]

Section 64 of the Road Traffic Act provides as follows,

“64 Prohibition from driving on conviction of 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 on 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) Subject to subsection (3), on a second or subsequent conviction for an offence at common law, which offence involves killing or injuring or attempting to kill or injure a person by or in connection with the driving of a motor vehicle on a road, the court concerned shall prohibit the person convicted from driving for a period of not less than twelve months unless such court, having regard to the lapse of time since the date of the previous or last previous conviction for such offence, prohibits the person convicted from driving for a shorter period or declines to prohibit such person from driving and endorses its reasons for so prohibiting or declining on the record of the case when passing sentence.
- (3) If, on convicting a person of murder, attempted 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 an offence instead of the offence at common law; and.....”

Section 64 (1) empowers a court convicting a person of an offence in terms of any law other than the Road Traffic Act or in connection with the driving of a motor vehicle on a road to, in addition to the penalty which he may lawfully impose, prohibit the person from driving. Section 64 (3) entitles a court convicting an offender of murder attempted murder, culpable homicide, assault or any similar offence or any offence involving driving of a motor vehicle, where the court is satisfied that the convicted person would have been convicted of an offence in terms of this act prohibit such person from driving. The import of this section is that it permits a court which has convicted a person of a driving offence whether in terms of

the Criminal Code or any other law, to order prohibition from driving a specified class of vehicles for a specified period. It is immaterial that the penalty section of s 49 does not provide for prohibition as a sanction. The intention of the legislature is clear from s 64 that its intention was that prohibition from driving be considered in any case involving a driving offence.

This position was articulated in *S v Chaita* 1998 (1) ZLR 213 (H). In this case, the accused had been sentenced to a fine for culpable homicide. Chinhengo J at 220 H-221 A in reviewing the proceedings said the following about prohibition cases;

“To sum up, therefore on or 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 matters in terms of s 64 (3) of the Act. A failure to do so is clearly a misdirection”.

Another case in point is *S v Chassis Sithole* HB 21/13 where CHEDA J in a case involving the same sort of circumstances said the following on prohibition:

“The trial magistrate did not investigate or address his mind with regards to prohibition from driving which is a requirement for such type of offence. In that regard it is clear that there was a misdirection on the part of the magistrate.”

I do not agree with the position adopted by Karwi J in *Mhishi v S (supra)* that because the penalty section of s 49 of the Act does not provide for prohibition from driving, it is not competent for a court assessing sentence in such cases to prohibit the offender from driving.

Ultimately, the trial court did not misdirect itself when it imposed an order prohibiting the accused from driving. The Regional magistrate who scrutinised the proceedings, fell into the error of supposing that only offenders who are charged in terms of the Road Traffic Act are liable for prohibition. In any case where an offender has been convicted of a driving offence or the offences category prescribed in s 64 (3), it is competent for the court convicting such a person to prohibit him from driving specified classes of vehicles for a specified period. Where an offender is charged with contravening s 49 of the Act or any other offence involving driving of a vehicle, it is prudent that the charge sheet indicate that the section charged is read with either section s 64(1) or (3) of the Road Traffic Act.

The trial court cannot be faulted for the stance it took. I am satisfied that proceedings in this matter were conducted in accordance to real and substantial justice.

I confirm the proceedings.