

THE STATE
versus
VINCENT CHIZANGA

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 28 January 2015

Criminal review

MAFUSIRE J: The accused was charged with two counts. The first count was contravention of s 6(1)(a) of the Road Traffic Act [*Cap 13:11*], i.e. driving a motor vehicle on a road without a valid licence. To this charge he pleaded guilty. The second count was contravention of s 52(2) of the same Act, i.e. driving a vehicle on a road negligently. To this count the accused pleaded not guilty.

The circumstances of the offences were that the accused was driving a motor vehicle on a road without a driver's licence. At a robot controlled intersection he turned right in front of oncoming traffic. There was a collision. Police were called. The accused was arrested and eventually charged as aforesaid.

The accused's plea of guilty to count 1 was taken in terms of s 271(2)(a) of the Criminal Procedure and Evidence Act, [*Cap 9:07*] ("*the CP & E Act*"). He was sentenced to a fine of \$50-00, or in default of payment, twenty days imprisonment.

A trial was conducted in respect of count 2. The accused's defence was that the driver of the other vehicle entered a red robot. He said when he arrived at the intersection the robot in front of him was green. He was turning right but had to give way to oncoming traffic. The robot changed to amber. He commenced his turn. It changed to red whilst he was still in the intersection. The other vehicle was coming from the opposite direction and proceeding straight on. It was travelling at an excessive speed. It crashed into his vehicle and stopped some twenty meters away from the point of impact.

Despite his story, the accused was nonetheless convicted. He was sentenced to six months imprisonment of which three months imprisonment was suspended for five years on condition of good behaviour. The remaining three months imprisonment was suspended on condition the accused performed community service.

On scrutiny, the regional magistrate declined to certify the proceedings as having been in accordance with real and substantial justice. I paraphrase his reasons as follows:

- The reasons for sentence in count 2 (negligent driving) did not allude to the degree of negligence;
- On count 1, the accused was sentenced to a fine which was in excess of level three yet his plea had been taken in terms of s 271(2)(a) of the CP & E Act;
- There was no indication in the record that the State had closed its case when the defence case opened;
- The endorsement that the State had closed its case appeared only at the end of the defence case.
- The accused was asked if he wished to call any witnesses only once at the start of the defence case, yet it would have been helpful if he had been asked again after the cross-examination of himself by the State, given the effects of the cross-examination.

The trial magistrate had responded. Again I paraphrase his responses as follows:

- The issue of the degree of negligence had been adequately addressed in the main judgment during the analysis of the evidence and the particulars of negligence. The sentence had been arrived at after considering the accused's personal circumstances, the offence and the surrounding circumstances;
- The accused had been charged under s 52(2) of the Road Traffic Act. That section clearly provides for a fine of up to level 10, or imprisonment of up to one year, or both such fine and imprisonment. However, it was a mistaken belief that the level of the sentence under s 271(2)(a) of the CP & E Act was \$100.
- The categorisation of the degrees of negligence is confined to cases of culpable homicide arising from traffic accidents and where an accused person is charged with contravention of s 49 of the Criminal Law (Codification & Reform) Act, [Cap 9: 23] ("*the Criminal Code*"). Such categorisation would then be necessary to ascertain the degree of negligence in relation to the categories specified in sections 51, 52 and 53 of the Road Traffic Act. In a case where the accused is charged under the Road Traffic Act itself, there is no need to repeat the provisions under which he is charged as the degree of negligence would be

clearly spelt out. The case of *State v Mapeka & Anor* 2001 (2) ZLR 90 (H) clearly outlines the assessment of the degrees of negligence necessary in relation to cases of culpable homicide where the accused is charged under s 49 of the Criminal Code.

- It was a mistake to have omitted to endorse that the State had closed its case. It was also a mistake to have endorsed at the end of the defence case “close of state case”.
- The accused had been asked after the opening of the defence case whether he would be calling any witnesses so that the court could know in advance the number of witnesses and their relevance. It is not understood how the stage at which the court asks an accused person whether or not he intends to call any witnesses, i.e. either at the opening of the defence case, or after cross-examination of himself, may alter his defence.

The trial magistrate concluded his responses by accepting to stand guided and corrected. But having declined to certify the proceedings, the scrutinising magistrate referred the record of proceedings to this court in terms of s 58(3)(b) of the Magistrates Court Act, [*Cap 7:10*].

I now deal with the matter in the manner and sequence below.

Regional magistrate’s power of scrutiny

In terms of s 58 of the Magistrates Court Act, the court of a regional magistrate is empowered to scrutinise automatically the criminal proceedings of any court of the magistrate, other than itself, where the sentence imposed on a convicted person who is not represented at the trial, or which is not a company, is imprisonment for any period in excess of three months, but not exceeding twelve months, or is a fine in excess of level four (\$100), but not exceeding level six (\$300).

What is scrutiny?

In terms of section 58(3) of the Magistrates Court Act a scrutinising magistrate is required to satisfy himself that the proceedings of the trial court are in accordance with real and substantial justice. The section reads:

“(3) The regional magistrate shall, as soon as possible after receiving the papers referred to in subsection (1), upon considering the proceedings –

- (a) if he is satisfied that the proceedings are in accordance with real and substantial justice, endorse his certificate to that effect upon the proceedings which shall then be returned to the court from which they were transmitted;
- (b) if it appears to him that doubt exists whether the proceedings are in accordance with real and substantial justice, cause the papers to be forwarded to the registrar, who shall lay them before a judge of the High Court in chambers for review in accordance with the High Court Act [*Cap 7:06*].”

Where the record has been placed before him for review, the judge has also to satisfy himself that the proceedings were in accordance with real and substantial justice. Section 29(2) of the High Court Act:

- “(2) If on review of any criminal proceedings of an inferior court or tribunal, the High Court considers that the proceedings-
 - (a) are in accordance with real and substantial justice, it shall confirm the proceedings;”

If he is not satisfied that the proceedings were in accordance with real and substantial justice, the reviewing judge exercises any of the powers set out in paragraph (b) of subsection (2) of s 29. These include the power to alter or quash the conviction; reducing the sentence; correcting the proceedings, *et cetera*, subject to the guidelines set out therein.

Commendably, the legislature refrained from defining what “*real and substantial justice*” means. But case law has. What is “*real and substantial justice*” is left entirely to the scrutinising magistrate or reviewing judge. He makes a value judgment and exercises his judicial discretion, of course, guided by certain principles. In the case of *S v Chidodo & Anor*¹ GREENLAND J said²:

“The power of certifying proceedings as being in accordance with real and substantial justice is an additional power more particularly viewed as a prerogative. It seems clear from the words employed, ie ‘in accordance with real substantial justice’, that a judge (and regional magistrate) is required to make a value judgment on the question. He must be satisfied that everything that transpired at the criminal trial conforms with the notions of justice that these words imply.”

The test of what is real and substantial justice is an objective one. What is considered to be just depends on the norms and sense of values generally prevailing in society³. In ordinary parlance “*scrutiny*” means “*a careful and thorough examination*”. To “*scrutinise*” is “*to look at, or examine something carefully*”⁴. Thus under the ordinary meaning of

scrutiny the microscopic eye will pick out even the most minute infraction. But legal scrutiny under s 58 of the Magistrates Court is something less exacting. It excludes a pettifogging analysis.

In *S v Kawareware*¹ UCHENA J held that for the purposes of both s 58(3) of the Magistrates Court Act, and s 29(2) of the High Court Act, “*real and substantial justice*” is the considerable judicious exercise of judicial authority by the trial court, which satisfies, in the main, the essential requirements of the law and procedure. **The failure to comply with minor requirements, minor mistakes and immaterial irregularities should not result in the scrutinizing or reviewing judicial officer refusing to certify the proceedings as being in accordance with “real and substantial justice”**. The learned judge said that the critical consideration is whether the proceedings **broadly** satisfy the requirements of justice (my emphasis).

At p 289C – E of the judgment, the learned judge laid down some guidelines on the main features to look for when scrutinising or reviewing proceedings. These are:

- 1) the correctness of the charge preferred;
- 2) the agreed facts or the State and defence outlines;
- 3) compliance with statutory requirements in taking a plea of guilty or in conducting a trial where the accused pleads not guilty;
- 4) the acceptance or proof of the facts on which the charge is based;
- 5) the assessment of evidence, i.e. matching the law and the accepted or proved facts;
- 6) the trial court’s reasons for judgment;
- 7) the correctness or otherwise of the conviction; and
- 8) the justifiability of the charge or sentence.

I now turn to the particular queries raised by the regional magistrate on scrutiny. In my view, the errors were either non-existent or so minor as not to warrant the withholding of his certificate.

- (i) The reasons for sentence in count 2 (negligent driving) do not allude to the degree of negligence

The trial magistrate, with all due respect, was correct in pointing out that the

scrutinising magistrate was confusing the necessity of specifying the gradations of negligence as directed by CHINHENGO J in *S v Mapeka & Anor, supra*, in cases of culpable homicide arising out of negligent driving. There is no need for such categorisation where the charge is directly one of negligence under s 52(2) of the Road Traffic Act. The provision simply makes it an offence to drive a vehicle on a road negligently. The other gradations or categories of negligent driving, such as driving without due care and attention, or reckless driving, are provided for elsewhere in the Act. *In casu*, the particulars of negligence were spelt out. They were:

- a) failing to keep a proper lookout;
 - b) turning across the path of oncoming traffic;
 - c) failing to stop or act reasonably when a collision was imminent.
- (ii) There is no indication that the State had closed its case when the defence case opened
- (iii) At the end of the defence case there appears the endorsement “close of State case”

I am satisfied by the explanation proffered by the trial magistrate that he simply made a mistake by failing to note, before the opening of the defence case, that the State had closed its case, and for recording “close of State case” at the end of the defence case. Such an explanation is consistent with probability given that in reality the State had indeed closed its case when the defence case had opened. The accused had indicated that he would be calling no witnesses. So he would have closed his case after declining to re-examine himself following his cross-examination of himself by the State. The trial magistrate’s errors are insignificant. They are no more than what GILLESPIE J referred to as mere “*technical imperfections*”: see *S v Gore*¹. Such mistakes are easily explained by the overwhelming pressure that judicial officers always operate under.

- (iv) Accused was asked only once at the start of the defence case whether he wished to call any witnesses

Admittedly, courts do try and lean more in favour of unrepresented persons. But this is simply to ensure fair play in order to achieve justice. In this case, the trial court did ask the accused whether he intended to call any witnesses. That in his own discretion the scrutinising

magistrate, if he had conducted the trial, could have asked the accused again after his cross-examination by the prosecutor, would not be a reason to withhold the certificate. The discretion under scrutiny is not that of the scrutinising magistrate, but that of the trial magistrate. There was no misdirection by the trial magistrate. Just like an appeal court, a scrutinizing magistrate or reviewing judge, should not lightly interfere with trial court's sentencing discretion unless there was manifest misdirection which induces a sense of shock: see *S v de Jager & Anor*¹; *S v Mugwenhe & Anor*²; *S v Mundova*³ and *S v Kawarware, supra*.

- (v) On count 1 the court sentenced accused to a fine in excess of level 3 [yet] a s 271(2)(a) plea procedure had been adopted

Section 271(2)(a) of the CP & E Act reads:

“271 Procedure on plea of guilty

- (1)
- (2) Where a person arraigned before a magistrate court on any charge pleads guilty to the offence charged and the prosecutor accepts that plea-
- (a) the court may, if it is of the opinion that the offence does not merit punishment without the option of a fine or a fine exceeding level three, convict the accused of the offence to which he has pleaded guilty and impose any competent sentence other than-
- (i) imprisonment without the option of a fine; or
- (ii) a fine exceeding level three;
- or deal with the accused otherwise in accordance with the law;”

Level three on the scale of fines in the First Schedule to the Criminal Code is \$20.

I have previously dealt with a review matter in which an accused person's plea of guilty was accepted in terms of section 271(1)(a) of the CP & E Act, but with the court going on to impose a fine of \$50, or in default, twenty days imprisonment. In that case, *S v Mazhindu*, CRB No.8340/13, with the agreement of TAGU J, I agreed with the scrutinising magistrate's observation and altered the fine imposed by the trial magistrate. But I allowed the proceedings to stand. Here is how I resolved the matter through a review minute dated 31 October 2014:

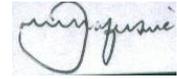
- “6 The State having accepted the accused's plea of guilt, and the court having

decided to take it down in terms of s 271(2)(a) of the CP & E Act, the fine should not have exceeded US\$20.

- 7 However, in spite of my findings above, I have considered it unnecessary to upset the proceedings of the trial court. On the whole there was no danger to the interests of justice. But the accused is entitled to a refund of the fine paid in excess of the level permitted by law.
- 8 In the circumstances the fine of US\$50-00 imposed by the trial court is hereby set aside and substituted with a fine of US\$20. The accused shall be refunded US\$30-00. The rest of the sentence remains.”

This matter is on all fours with the previous one referred to above. In the circumstances I hereby issue exactly the same directive as before.

28 January 2015



TAGUJ agrees