STOCKIL GRENVIL DENZIL
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & MUSHORE JJ
HARARE, 3 March and 28 September 2016

CRIMINAL APPEAL- culpable homicide in terms of s 49 of the Criminal Code- errors in factual findings- doctrine of sudden emergency

D.S Mehta, for the appellant
E. Makoto, for the respondent

MUSHORE J: The appellant was charged and convicted on a charge of culpable homicide in terms of s 49 of the Criminal Law [Codification and Reform] Act: [*Chapter 49*]. At his trial, the State alleged that on the date in question that being the 11th July 2014, the appellant was driving along Longlands Road (outside Marondera), when due to his negligence he collided with cyclist travelling in the same direction that he was driving. Quite unfortunately after the collision occurred the cyclist died. The appellant's story was that he was driving without incident when he saw the cyclist ahead of him and it was as he was approaching the cyclist that the cyclist unexpectedly crossed into his path. He narrated all the measures which he took to avoid hitting the cyclist. He testified that he was not to blame for the accident occurring. However, at the end of the trial, the appellant was convicted of culpable homicide and sentenced to pay a fine of US$300-00; or serve 60 days imprisonment if he defaulted from paying the fine.

Convinced as he is that he took appropriate measures to avoid the accident and that he was not negligent, he filed the current appeal against both the conviction and the sentence imposed.

His appeal is predicated on two main grounds. Firstly, the appellant is challenging the conviction on the basis of factual findings *a quo*. He argues that those findings are so erroneous that they amount to errors in law. Secondly the appellant is submitting that the court *a quo* based its decision on its own speculation and conjecture on important and key

facts, and that therefore in so doing, it arrived at conclusions which are not based upon the recorded evidence. In the result of those two grounds, the appellant submits that the conviction is thereby rendered unsafe.

In support of these grounds, appellant's counsels submitted two sets of Heads of argument. The initial set of Heads were prepared and settled by Mr Phiri who was in practice as an Advocate at that time. In these heads, Mr Phiri elaborated upon the findings made from speculative evidence and argued that such findings had no basis in fact and that therefore the trial court made a legal error by arriving at its finding on facts which were mere speculation on its part. The second set of heads, prepared by Mr *Mehta* expanded on this point somewhat. Mr *Mehta* asked this court to appreciate that the trial court failed to apply the higher standard of proof to the actual facts on record, and that in its failure to do so, the court erred. He stressed that if the higher standard of proof had been applied in this manner, the appellant would have been acquitted altogether of the offence. We have considered both lines of argument in depth as I will now proceed to explain under various sub-headings, because several legal points arise from the facts in this case.

Did the trial court misconstrue the facts and thereby err at law?

The record of evidence contains the usual state outline and defence outline. However at the commencement of the trial, the state and the defence came up with an agreed statement of facts which they made part of the court record. The trial Magistrate referred to those agreed facts in his judgment at pp 11 to 12 of the record, and which went as follows:

"Record pages 11 and 12

(i) Accused person who was driving a Toyota Hilux, was driving facing the same direction with the cyclist who was on the left side of the road.
(ii) That as the accused drove closer to the cyclist, the cyclist started to move from his original position on the left side of the road to the right side of the road.
(iii) That unexpectedly, the cyclist continued to move further to the right side of the road encroaching on the path of the oncoming motorist.
(iv) That as a result, the motorist swerved back to the left side of the road to avoid the cyclist.

(v) That the deceased at that moment looked back and noticed the motorist who was close to him after which he fell off his bicycle.

(vi) That as a result, the bicycle went to the extreme right side of the road and the deceased fell toward the left lane of the tarmac.

(vii) That whilst on the tarmac, the deceased was hit by the right side of the accused's motor vehicle as the motorist was also trying to avoid the accident.

(viii) That the cyclist collided with the right side of the motor vehicle resulting in his death on the spot'

The particulars of negligence cited by the prosecution were that the appellant was:

(a) Travelling at a speed which was excessive in the circumstances and

(b) Failing to stop or act reasonably when the accident seemed imminent"

Although neither the defence nor the state's evidence alluded to oncoming traffic somehow the trial court imagined that there was oncoming traffic. Neither the evidence, nor the diagrams nor the witness testimony speaks of oncoming traffic occurring as part of the accident scenario. So from the very beginning of the trial court's findings, we have a very divergent viewpoint being inserted into the landscape which emanated purely from the imagination of the trial court. Thereafter the trial court's deliberations and findings which were founded on notional facts, made all manner of reasoning to be abstract rather than real. The following is a short summary of the differences between the recorded facts and the projected facts were as follows:-

Firstly, the court *a quo* found that prior to the accident, there was on-coming traffic and yet from the agreed facts and the recorded evidence (including the eye-witness for the state) no mention was made that there was oncoming traffic. The record reflects that prior to; and at the time the collision occurred, the road was clear and the only persons present were the deceased and the appellant.

Secondly, and because the court *a quo* assumed that there was oncoming traffic, (a strangely erroneous addition of a fact not arising from the record), the Magistrate further erred by finding that because of such oncoming traffic, (which of course was not the case), not only were appellant and the deceased likely to collide in the right lane but there was also a possibility of involving a third party in the accident.

Thirdly, the magistrate found that the appellant saw the deceased cyclist moving across his path into the right lane well before the appellant had caught up with the cyclist. There was no such evidence from the single eye-witness or the sketch plan or the agreed facts

F***ourthly***, the magistrate erred in finding that the appellant could have and should have slowed down having seen the deceased crossing into his path from afar and yet the agreed facts suggest that the appellant was placed in a position of sudden emergency.

In traffic accident cases the trial court is supposed to examine the factual circumstances of the accident and account for the totality of facts so that it can determine whether or not the relevant particulars alleged by the prosecution are present in that case. If such an enquiry is done properly and thoroughly, the determination would possibly lead to a conclusion to either void blameworthiness on the part of an accused on the one hand, or serve to highlight the accused's negligence and moral-blameworthiness on the other. In some cases the trial court could arrive at a conclusion that there was contributory negligence and thereafter apportion blameworthiness on the part of either party. However in the present case the trial court premised its decision on facts which were never part of the record, making it difficult to justify any conclusion that it arrived at.

In *Rondalia Assurance Corporation of South Africa Ltd* 1971 (20 SA 598 (A), a case involving a motorist colliding with a young child) HOLMES J.A. listed the factors which ought to be weighed up, although not exhaustively, as:

> "…. The visibility of the children; their apparent age; their proximity to the edge of the road and to the path of the vehicle; their immobility or liveliness; the indications, if any, of an intention to cross the road; the extent of their supervision by a responsible person; the apparent awareness of the latter, and of the children; the approach of the motorist; the available width of the road; and the stopping power of the vehicle in relation to speed, brakes and road surface."

Mr *Mehta*, appearing for the appellant, provided us with some useful cases on the process of reasoning which a trial court has to adopt and apply to <u>all</u> of the factual circumstances and evidence.

In *Director of Public Prosecutions* v *Oscar Leonard Carl Pistorious* (96/2015) [2015] ZASCA 204 (3 December 20150 (cyclostyled judgment), on p 19 para 34, the Appeals Court cited with approval the *dicta* of NUGENT J in *S* v *Van der Meyden* 1999 (1) SACR 447 (W) at pp 449j-450c when he said:

> "…….The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached

> (whether it is to convict or acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may be simply ignored"

In the *Pistorious* case (*supra*), at pp 20-21 [para 36] commented on the test to be applied thus:

> "… it seems to me to also be a legal issue should account not be taken of any evidence placed before the court which ought to be weighed in the scales."

In the present matter, the court *a quo* based its decision on speculative evidence and thereby excluded evidence on record when it weighed up the evidence. The magistrate ignored crucial evidence and by engaging in conjecture on unfounded facts, such conjecture resulted in his making a legal error which renders the conviction unsafe. If a court needs to conclude an accused's guilt or innocence and if the facts upon which it determines its verdict are unfounded, then there can be no inference drawn from those unfounded facts. Refer *Rex* v *Klein* P.H 1947 (1) O.13 p 23 where the appeal court (O.P.D) cites the *dicta* of LORD WRIGHT in *Caswell* v *Powell Duffryn Associated Collieries Ltd*. (1939) (3) A.E.R. p 722 particularly p 733 of that judgment.

Burden of proof.

Mr *Mehta* submitted that the court *a quo* erred by its failure to apply its mind to the appellant's testimony and that therefore *"the explanation proffered by the Appellant has not been discredited at all"*. We have already alluded to the fact that there could be no inference made from the unfounded facts which the magistrate speculated upon (*supra*) and thus therefore we agree with Mr *Mehta* that the appellant's version was not rejected beyond reasonable doubt. In *van der Meyden*, NUGENT J (*supra*) stated thus:

> "The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent".

In *casu* the appellant's version stands unchallenged by reason that the evidence was not tested on the proper burden of proof. Therefore we can safely say at this point that the conviction was unjustified.

We have observed that the trial court paid little or no attention to various other legal issues which arose from the circumstances surrounding the collision. I will now deal with those issues.

Sudden emergency and the standard of proof- reasonable man test

The appellant denies that he was travelling at an excessive speed and that he failed to stop or act reasonably when an accident seemed imminent. According to the appellant, it was by the deceased's own errors that the collision occurred. Certainly the facts indicate that the deceased cyclist 'unexpectedly and suddenly' entered into appellant's path. The appellant had to swerve sharply, decelerate and sound his hooter all in a matter of seconds. His evidence (which is corroborated by the diagrams and the sketch plans) describes the events vividly. His testimony withstood the rigours of cross-examination.

This is the account given by the appellant at the trial:

Page 31 to 32 of the record of evidence.

"Cross-examination

Q. Good morning Mr Stockil

A. Morning.

Q. At what distance did you start to see the rightward movement by the deceased?

A. A breath away from me.

Q Plus or minus 5mins?

A. Yes

Q. What was your sudden reaction to the unusual movement of the now deceased?

A. I had to move to my further right and hoot.

Q. When you hooted what did the cyclist do?

A. He came to the right more.

Q. By the time you realised that the cyclist was moving further right what did you do to your speed?

A. I reduced to about 70kpm per hour and also tried to avoid hitting him.

Q. Where you not supposed to stop now that you had observed that the now deceased was confused and meandering?

A. I did not have room to stop before we collided.

q. At the time that you hit him was he still coming to the right side?

A. His bicycle was still angled to the right.

Q. Was this coincidence with a fell (sic) or jumped from the bicycle or did you manage to tell how he fell from the bicycle.

A. I swerved left and he obviously had fallen to the left.

Q. Did you see the now deceased trying to look behind?

A. At the very last minute.

Q. Was this a reaction to the hootering (sic) that you had done?

A. I don't think so.

Q. Was this a reaction to the hootering that you had done?

A. I don't think so.

Q. What was the deceased's reaction after you had sounded the hooter?

A. This happened so fast, I mean the chain of events. When I hooted he was going to the right. A few seconds later he looked behind and fell or jumped. That is what happened.

Q. When you indicated that the deceased was travelling at an unusual pace what immediately came to your mind?

A. What came immediately out of my mind was how to avoid the accident.

Q. how were you going to avoid the accident?

A. My thinking was to avoid the cycle that the cyclist was on to avoid an accident.

Q. Did you not realise that you were supposed to stop to avoid an accident?

A. There was just no time to stop.

Q. Can you tell the court that the distance from which you saw the deceased falling from the place where the fall took place. How far were you from the deceased by the time that he fell from the bicycle of the now deceased?

A. I metre or half a metre away. I was so near.

Q. So you had no time to react to the fall?

A. Definitely.

Q. By this time at what speed were you travelling?

A. maybe 65, I don't know.

Q. Was that not excessive speeding in the circumstances of the case?

A. I was already slowing down and ready to stop.

Q. The state will submit that you failed to stop before the accident because 60km per hour was too much?

A. No I tried to stop.

Q. The State would state that if you were travelling at a safe speed you should have been able to take evasive action?

A. Not at the speed that he came in front of me.

Q. The State will state that your failure to stop when the accident seemed imminent contributes an act of negligence?

A. No.

No Further Question."

In appellant's first set of Heads of Argument, Mr Phiri cites the case of *S* v *Mauwa* 1990 (1) ZLR 235 (SC). The appeal court was determining a case in which the sudden emergency doctrine defence had been raised. At page 236 of that judgment, the appeal court stated:

> "……. it is not every wrongful act on the part of a person which constitutes negligence. Where a person or third party is placed in danger by the wrongful act of another, that person is not negligent if in the agony of the moment, he exercises such care as may be reasonably expected of him in the reasonable apprehension of danger in which he is so placed. He is not to blame if he does not do quite the right thing in the circumstances"

The test to be applied under such circumstances is the reasonable man test to determine if the precautions taken by a person placed in a precarious position were sensible. It is the events and the circumstances surrounding the collision that ought to be measured rather than the results after the accident has occurred. In *S* v *Matimba* 1989 (3) ZLR 173 (SC) DUMBUTSCHENA CJ referred to several cases on this point and the remarks made by CORBETT JA in *Santam Insurance Co Ltd* v *Nkosi* 1978 (2) S A 784 at p 792 A-C:

> "…….It will be observed that the standard of conduct is a high one.
> At the same time the law recognises that life's possibilities are infinite and in general concerns itself only with those possibilities of harm to others which are sufficiently real or immediate to cause the diligens paterfamilias to take precautions against their happening. …….And in deciding whether precautionary action is warranted, the diligens paterfamilias might have to weigh the seriousness of the harm, should it occur, against the chances of its happening"

And then on p 176 the learned Chief Justice himself added:

> "If Plaintiff had been a man of iron nerve he might have done so, but this was asking too much of any driver. It appeared to Plaintiff that a fast moving car was coming right into his

> path on a curve. He did the only thing that he thought possible and tried to get to the wrong side…plaintiff reasonably obeyed a natural impulse to preserve his life…… He twice reduced his speed that at the last moment, with what looked like death staring him in the face, pulled to the right. The fact that this action was unfortunate is immaterial. The court must not judge by the results but must look at the matter as it appeared to plaintiff in a moment of emergency" (My emphasis)

On the agreed facts together with the testimony and other evidence we find that appellant took the necessary care which was expected of him in the circumstances. The precautions which he took to avert disaster which involved swerving; hooting and braking to slow down in split seconds, showed that he did all that was reasonably, humanly possible to avoid colliding with the cyclist. The deceased cyclist reaction to the sudden emergency he had created, were understandably panicked and unpredictable.

Proximate cause.

It did not occur to the trial court that appellant's actions most probably were not the proximate cause of the death of the deceased. Having concluded appellant's guilt from the wrong facts and having excluded all exculpatory evidence when it was determining the matter, the possibility that the appellant's actions were not the proximate cause of death was not considered or determined. From the evidence it is plain to see that when the deceased cyclist realised that the appellant's vehicle was coming up right behind him, he swerved into the appellant's path going right. He then he looked back at the appellant's vehicle. At this point his bicycle was angled to the right when he either jumped or fell off his bicycle forwards and into the direct path of the appellant who was trying to avoid him. The sketch plan shows that after the accident, the deceased's body ended up somewhere in the middle of the road in the opposite lane. The distance between where the deceased ended up being after he jumped off or fell off his cycle, and the resting point of his bicycle was some 6.6 metres away. It appears that deceased hurtled himself forward leaving his cycle 6.6 metres behind him. The sketch plan also shows us that the resting point of the appellant's vehicle after the accident was on the extreme left of the road which corroborates the appellant's testimony that he had had to veer to the left side of the road to try avoiding hitting the appellant at the time that he had suddenly observed the deceased angling his bicycle to the right directly in his path. Furthermore, the distance between the resting position of the appellant's vehicle (on the extreme left hand side of the road) and the body of the deceased (somewhere in the middle of

the road in the opposite lane) was marked as being 5.3 metres. As far as we can deduce it was the deceased's actions, during and after impact, which led to his unfortunate death.

Taking all of the above into account, it is our considered view that the conclusions reached by the court *a quo* were erroneous and constituted a legal error. The trial court's determination leaves a lot to be desired. In the light of the foregoing, the conviction is clearly unsafe. Accordingly we order as follows:-

"The appeal is hereby granted. The conviction is quashed and the sentence set aside."

D.S. Mehta, c/o Mafuka and Associates, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners