INNOCENT MUDOYA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & MUSHORE JJ
HARARE, 22 September 2016 and 25 January 2017

Criminal Appeal

O Marwa, for the applicant
T Mapfuwa, for the respondent

MUSHORE J: This is an appeal against sentence only. During the appeal hearing, the appellant properly, in our view, abandoned his appeal against conviction because it lacked merit.

The facts were that appellant, who was ferrying passengers in his commuter omnibus, by his negligence, collided with another commuter omnibus when he cut across lanes directly in front of another commuter omnibus, causing his own vehicle to overturn and tragically kill the deceased, a one year old infant, on the spot. It was common cause that the reason why appellant drove so recklessly was because he was attempting to flee Municipal Inspection Police. He was found guilty and sentenced to 12 months imprisonment. In addition he was prohibited from driving heavy vehicles and commuter omnibuses for 2 years and his driver's licence was cancelled.

This appeal has been made against the straight term of imprisonment imposed. The appellant's contention is that in not suspending a portion of the sentence of imprisonment, the court *a quo* misdirected itself and imposed an unduly harsh sentence. The basis of his submission is that the other driver's actions contributed to the accident which ought to have been taken into account in mitigation. He submitted that the other driver was speeding such that but for that, an accident could have been avoided.

The appellant makes a valid point. The accident evaluator, who gave unbiased and convincing evidence testified that the accident was caused by the negligence of both drivers.

Unsolicited by either counsel, it was his opinion that the other driver, FELIX NHIRA was unable to take preventative measures because of the speed at which he was driving.

The respondent's counsel had no hesitation in conceding this point. We find the respondent's concession that there was contributory negligence to be proper in the circumstances.

Both parties cited *S* v *Bhowa* 1983 (20 ZLR 127 (HC) as a case in point. Referring to the *dicta* of KUMBELEN J in *S* v *Snygans* 1975 (3) SA 928 (O), REYNOLDS JA said:-

> "…it was held (by KUMBELEN J) that contributory evidence 'could never per se diminish the appellant's degree of negligence, nor be a mitigating factor'. It seems to me, with respect, that the first part of his opinion is correct, but the second part may be open to question. If by a "mitigating factor' is meant a circumstance that calls for the moderation or reduction of the severity of a sentence, then it is my opinion that joint or contributory negligence is, with reservations, a factor which must be considered in assessing sentence in a criminal case"

REYNOLDS AJ also referred to MILLER J'S *dicta* in *S* v *NGCOBO* 1962 (2) SA 333 (N) at p 336 where MILLER J said:-

> "….the basic measure for determining punishment for a negligent motorist must be the degree of culpability or blameworthiness'".

In the present matter, the fact that contributory negligence existed has opened the door to a review of the sentence imposed *a quo* because it mitigates the appellant's blameworthiness. The trial court did not factor that aspect into its sentence. We find the proposition made by both counsel meritorious enough to warrant us to suspend a portion of the 12 months imprisonment and therefore effectively impose a less severe sentence on the appellant.

The appellant's counsel suggested that we suspend 6 months of the sentence and the respondent suggested that we suspend 3 months. We considered the argument made by the appellant's counsel that a longer suspended term of imprisonment is likely to serve more effectively in deterring the appellant from any future misconduct. Some of the authorities are aligned to this point of view. Glanville Williams in his book "*Criminal Law*" rationalises this point at pages 123 - 4 by saying:

> 'A supporting consideration is that punishment may deter in respect of some subsidiary rule of prudence the breach of which is intentional. Although the harmful result of careless driving is not intended, there is often an element that is intended (e.. pulling out of a blind corner),

> and the punishment, coupled with a recollection of the circumstance of the accident, may "condition", the driver not to repeat his mistake and may even cause him to be more careful in other respects. Conceivably it may also improve the conduct of others who may come to know of the mistake that was made. In the same way although the threat of punishment may not be able to make me remember something I have already forgotten, it may cause me so to impress a fact on my mind that I do not forget."

It seems to us that the current case and its circumstances are such that the general deterrent effect of an impressionably longer suspended sentence does apply. The appellant was looking out for his own interests when he drove off because he was attempting to flee an inspection by municipal police officers. Suspending 6 months imprisonment as has been proposed by the appellant seems to follow the logic of the above authorities rather than suspending 3 months as proposed by the respondent. The appellant needs a reminder of the consequences of such impulsivity in the event that he was ever to get behind the wheel again.

Accordingly we order as follows:

> "Appeal succeeds. The sentence of the court *a quo* is set aside and substituted as follows:-
> ' 12 months imprisonment of which 6 months imprisonment is suspended for 5 years on condition that accused is not convicted of an offence involving the negligent driving of a motor vehicle is an element for which he is sentenced to imprisonment without the option of a fine.
>
> In addition the accused is prohibited from driving classes of motor vehicles to which commuter omnibuses and heavy vehicles apply for 2 years. Accused's licence is cancelled"

Hungwe J agrees:……..

Rubaya & Chatambudza, applicant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners