

THE STATE
versus
NIXON BIZA

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 23, 24, 25, October, 2, 22 November 13 December 2017
and 23 February 2018

Assessors: 1. Mr Mhandu
2. Mr Mtambira

Criminal Trial

N Mazvimbakupa, for the state
N Mugiya, for the accused

TSANGA J: The accused faced a charge of murder arising from the death of a policeman he was said to have run over at a police stop with his commuter omnibus registration ABZ 2324 on the 2nd of October 2016. The deceased officer, Tapera Cleopas, was said to have been standing in the inner lane close to the dotted white line whilst facing oncoming traffic which he was trying to stop. As the accused approached the spot where the deceased was, he was said to have changed lanes from the outer lane to the inner lane and accelerated speed. He had hit the deceased with the left corner of his vehicle resulting in the deceased hitting the wind screen and falling to the ground. It was the State case that the accused had then stopped about 100 m from the point of impact, a fact they attributed to his speed.

The accused pleaded not guilty. He acknowledged knowing that they were police at the spot and indeed noticing them, although equally observing that they were none stopping traffic in the middle of the road at that material time.

The state's evidence

The State's chief witness was Patience Chipakanwa a vendor who had been selling drinks on the opposite side of the road. She had earlier on had a conversation with the

deceased about the sale of a drink and when that conversation ended she had continued to observe his activities. From her vantage point, she told the court that at the material point the deceased had been hit, he had been standing in the middle of the road trying to signal the accused's vehicle to stop. Whilst the deceased had indeed attended to a vehicle at the side of the road, according to this witness, he was, however, in the middle of the road at the crucial time as he had finished with that other vehicle.

The accused's vehicle, whilst coming from the direction of town along the Chitungwiza road, had at the spot where the police were stationed, moved from the inner lane to outer lane at high speed and had hit the deceased. She emphasized that the accused had been speeding and pointed to the fact that he had only finally stopped at a considerable distance from the point of impact, a fact which she attributed to his speed. At the inspection in loco she estimated his stopping point of approximately 68m from the point of impact. She had not heard any hooter. The accident happened at about midday on a Sunday when there was little traffic. The policeman was in uniform and had reflectors.

The second witness was Kudzayi Nyangombe, a police constable with Chitungwiza Traffic. He was at the scene on that day and he too reiterated that the accused was traveling at high speed and the fact that he had changed lanes. According to him, when he changed lanes he was already near the police officer standing on the white line who was signalling him to stop. He had increased speed and had hit him with the left side of his vehicle. He said the accused's speed had drawn his attention and he further told the court that a normal person can discern when a car is speeding. He told court that the speed limit in that area is 80 km but that he did not know what actual speed the accused was driving at, at that time. He further corroborated the first witness that the deceased had stopped a vehicle but was through dealing with it at the time of the accident. Since he was through with that vehicle, as far as this witness was concerned, there was no other vehicle at the time. His estimate of the distance where the accused's car had stopped after the impact was about 70 to 100m. He acknowledged that the road block was a blitz and therefore there was no "police ahead" sign or drums.

The third state witness was Chiedza Mapuranga, also a police officer who was at the scene on that day. She told the court that the deceased was standing behind her that day stopping cars. She also repeated that the accused's vehicle had moved from the outer lane to the inner lane whilst increasing speed and that the deceased had been hit whilst standing in the middle of the road. She too told the court that the accused was indeed speeding and that

she had wondered how he would manage to stop given his speed. She also told the court that the accused had intentionally struck the deceased because he did not want to be stopped. She emphasized that since the accused knew there was a roadblock, he should have exercised heightened caution when passing through there.

In summary, all three of the state witnesses said the accused was speeding although they could not state his actual speed. No velocity expert was called. All three said he had moved over from outer lane to the inner lane. The distance recorded where he had stopped at the time of the accident was put by the police at 101 meters. The post mortem report showed that the deceased had died as a result of head injury arising from the road traffic accident.

The accused's evidence

He told the court that at the material time that he got to the spot where the police were, he was traveling at 50 km an hour. He told the court that he had slowed down to 15 km an hour even though he had not been slowed down as police were attending to other vehicles. Just as he was about to go past a vehicle that had been stopped and was on the outer left lane, the now deceased policeman had emerged and rushed onto to the road in front of the his Commuter Omnibus. He had swerved to the right and said he had hooted but that it had been too late and the policeman had been caught by the left mirror. He said he had stopped the car after about 30m from the point of impact and had dashed to assist. His explanation was that he had stopped where he had because that was the safe place to do so and not because he was speeding. He said the accident occurred because the deceased had not checked the road and he surmised that he was in fact trying to cross the road. Whilst accused in his defence outline said he never changed lanes, the fact that he had was a point all three of the state witness were in agreement with.

Material to his evidence was that he told the court in cross examination that he had seen the police at that spot as it was common for them to be there. He had also seen them on the other side of the road as well on his way into town earlier that day. His primary defence therefore was simply that at the point in time when he drove through, they had been no police on the road to stop him. He had increased speed because he assumed that he was not being stopped.

As was put to him in cross examination:

Q: You indicated you were travelling at 50km an hour and reduced speed. To what?

A: To around 15-20 km.

Q: Now do you confirm that when you approached the bus stop you noticed the police.

A: Yes.

Q: After you reduced speed did you increase again?

A: Yes, on the road there were no police, so I increased.

Q: To what?

A: To about 40kms

Q: So when you hit deceased is it your evidence you were travelling at 40km?

A: Maybe 40 or a bit below.

He told court that when he hit the deceased he had in fact stopped about 10m but that due to safety issues as there were cars behind him he had proceeded to stop where it was safety do so, on the outer lane. He also surmised that if the deceased had been facing him, then he would have sustained facial injuries instead of being hit at the back of his head. He denied travelling at a speed that threw the deceased into the air.

Tatenda Chigocha who was also in the vehicle with the accused gave evidence. He was a conductor on the vehicle. He had not seen the deceased being struck but had merely heard a thud. The driver had applied brakes and had stopped where safe to do so. Materially he could not tell the court how the deceased was struck because he had not seen this himself.

Teddy Shoniwa also gave evidence. He was in the front passenger seat when the accident occurred. His evidence did not add much to the factual matrix other than that he was the one who had shouted out that there was a person on the road just before he was struck. He too said that there was a car on the left and that is why the driver may not have seen him emerge. He too merely surmised that he may have been crossing the road. He said the driver had stopped the car about 10m before they told him to park where safe. He had not noticed the police himself but had seen them there immediately after the accident.

Analysis

The crucial issue in this trial is whether accused was traveling at a high speed at all and if so whether he did so with the intention of killing the policeman. We deal firstly with the issue of speed. Whilst no evidence was before this court as to the actual speed he was

traveling at, this court believed the witnesses who said he was traveling at high speed. This is because the acquisition of that memory was closely linked to the happening of the event. It would have been retained by the witnesses as a material aspect of their evidence of the cause of the accident. We do not believe that the witnesses were distorting memory when they said the accused was speeding. Also, if the accused was travelling at the low speed which he claimed to have been travelling, which he claimed was 40km an hour or lower, he would have been able to effectively apply his brakes and to stop.

Furthermore, the accused himself conceded that he had seen the police. This is crucial. The accident did not happen because the accused person was totally oblivious of the police presence. In his own words, he had seen the police, and his point, to re-emphasise, was simply that they were not in the middle of the road at the time. Whilst he denied changing lanes the evidence from all State witnesses was that he had done so. We believed the witnesses on this score as it tallies with his own admission that he had increased speed because they were no police on the road. There was no reason for them to lie. If, as we do, accept the evidence that there was a car that was on the outer left lane, then all the more reason why he would have moved to the inner lane as that is generally the faster lane.

As stated in *S v Chitepo* HMA 3 /17, "it is now trite that in a charge and conviction of culpable homicide arising out of a driving offence, it is essential that the trial court should first make a precise finding on the degree of negligence before assessing the appropriate sentence.

Now *in casu*, the accused knowing as he did that the police were present at the spot for the sole purpose of stopping cars, it makes no sense that he would have increased his speed unless his intention in doing so was to avoid being stopped. To increase speed when going through a police check point was highly culpable. He also failed to keep a proper look out and the accident also happened during the day when visibility was very good. Because of his speed he had clearly been unable to stop when the accident was imminent.

To quote from *S v Duri* 1989(3) ZLR 111 (SC):

"To be liable a driver need not have foreseen the precise manner in which his conduct led to the occurrence which caused the complainant harm. Provided the manner in which the harm occurred was 'within the range of ordinary human experience' the defendant is liable."

Having in fact seen the police his action in increasing speed within that police area was in fact grossly negligent if not bordering on being reckless as he should have realised the

delicate nature of the zone he was travelling through and the real possibility of knocking someone within that area. Indeed he had a duty to slow down precisely because of that very real possibility of the police emerging to stop him in that zone. It made absolutely no sense to increase speed. If he was initially travelling at 50 km/hr as he claimed and then slowed down to 15 km/hr only to peak at 40 km/hr or below, it seems unlikely that the accused would have been unable to stop his vehicle or even that the deceased policeman would have sustained the fatal injuries that he did. The post mortem report which was produced in court as an exhibit No.1 showed that the accused had as a result sustained multiple bruises and a fracture and had died of head injury due to the road traffic accident. The windscreen had been shattered, the rear view mirror broken whilst the car had also been dented in front as a result of the impact. The accused though told the court that a dent to the front of the car was already there before the accident.

It is our view that he was grossly negligent in driving through the area at high speed well knowing the police were present. We do accept that the deceased policeman may have just completed dealing with another vehicle at the time that he tried to stop the accused. What is clear is that at the material time that he was hit he was indeed on the demarcated white line in the middle of the two lanes. We do not believe that he was trying to cross the road without looking. That is mere conjecture and if the accused and his witnesses had seen that it was indeed what he was trying to do, there would have an opportunity to take corrective action if the accused was driving at the low speed he claimed to have been driving. The whole purpose of reducing speed is to enable a car to stop suddenly if need be. It would be unrealistic to pretend that Kombi drivers do not loath being stopped by the police and that his intention was all probability to avoid being stopped when he increased speed within that zone.

It is not surprising that the witnesses on both sides varied on estimation of distance in particular how far the car had stopped and also on how many cars were in fact at the scene on the that day. Memory decays over time and on both sides there would have been exposure to post accident information. The accident was anxiety producing and overestimates or underestimates of where the car had stopped are to be expected depending on whose side the evidence is given. However from the witness statements and the state case, what we accept is that the car had stopped at least a maximum distance of 100 meters from the point of impact.

We are however not convinced that he intended to kill in the sense of committing a murder. In the result against the backdrop of the facts we find the accused not guilty of

murder in terms of s 47 but guilty of culpable homicide in contravention of section 49 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

Sentence

The accused is 46 years old, married with three children. He is said to be the sole breadwinner. In mitigation, his cooperation with the police was highlighted including his assistance to the deceased's family for funeral expenses. He has been out on bail and has attended court without fail. In sentencing him the court was urged to take all these factors into account. In aggravation he was said to have been driving a public service vehicle and had passengers in the vehicle when he sped through the police point which he knew was there.

As regards when a term of imprisonment is appropriate in cases of culpable homicide resulting from negligent driving, courts will normally impose a sentence of imprisonment without the option of a fine where the driver has been reckless or grossly negligent or was under the influence of liquor or drugs. See *S v Lusenge C AD-138-81*. A custodial sentence is appropriate in this case because there is clearly a need for the police to be respected at all times. In passing sentence this court takes cognisance of the tendency of Commuter Omnibus drivers to try and avoid the police and the common practice of speeding and of reckless manner of driving by such drivers. This cannot be ignored. His behaviour clearly put the lives of many at risk.

Culpable homicide arising from a road traffic accident is also referenced to the Road Traffic Act when it comes to sentencing in that prohibition from driving may also be included in addition to any other penalty imposed. See s 64 of Road Traffic [*Chapter 13:11*] *S v Goto* and *S v Sibanda HB-88-15*. The accused was a first offender. Negligent driving which involves a Commuter Omnibus would generally attract the additional penalty of prohibition from driving unless there are special circumstances. Whilst the accused clearly drove highly negligently if not bordering on recklessness in passing through an area where he knew they were police at high speed and failing to keep a proper lookout, there was an element of contributory negligence on the part of the police. Besides being an unmarked road block, the practice by the police of suddenly springing onto the road is clearly undesirable and dangerous not only to the police themselves but to members of the public who may be travelling in the vehicle they will be attempting to stop. In the courts view, these were the special circumstances in this matter which permit the court to refrain in this instance from prohibiting him from driving. Whilst cancellation of the licence and prohibition from driving

will not be passed in this instance, the case calls for a custodial sentence in that by increasing speed in an area where they were police officers in order to avoid being stopped, the accused then failed to keep a proper look out. As a result, there was a needless loss of life.

Accordingly the following sentence is imposed:

30 months imprisonment of which 18 months is suspended for five years on condition the accused does not during that time commit an offence involving negligence to which he is sentenced to a term of imprisonment without the option of fine. Effective sentence: 12 months.

National Prosecuting Authority, State's legal practitioners
Mugiya & Macharaga Law Chambers, accused's legal practitioners