

THE STATE
versus
ALLEN NYAMBO

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 16 November 2018

Criminal Review

CHATUKUTA J: The accused was convicted of contravening s 49 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was sentenced to \$300 in default of payment 30 days imprisonment. In addition 30 days imprisonment was wholly suspended on condition of future good behaviour.

The following facts giving rise to the conviction are undisputed: On 9 October 2016, the accused was driving a Yutong bus with 50 passengers on board. He was driving along the Harare-Mutare Road towards Rusape and behind another vehicle, a Nissan Presage. On approaching the 160.5 km peg, the other driver reduced speed as visibility was not clear as a result of smoke from a veld-fire. The accused's visibility was also impaired and he did not observe the driver reducing speed. He rammed into the back of the other driver's vehicle. One of the passengers in that vehicle died from injuries sustained in the accident.

The scrutinizing regional magistrate withheld his certificate because the trial magistrate made a finding that the accused's conduct amounted to driving without due care and attention yet the Outline of the State Case stated that the accused was negligent. He referred the matter on review with the following comments:

“The accused person is facing a charge of culpable homicide as defined in section 49 of the Criminal Law (Codification and Reform) Act Chapter 9:23 as read with section 64 (3) of the Road Traffic Act Chapter 13:11.

I did withhold my certificate because of the trial magistrate's failure to comply with Section 64 (3) of the Road Traffic Act Chapter 13:11.

The trial magistrate is saying she made a finding that the accused's conduct amounted to driving without due care and attention hence the accused should not be prohibited from driving or to have his licence cancelled.

The state had preferred a charge of culpable homicide as a result of traffic accident. A person died as a result of the accused person's conduct.

Particulars of his negligence are well stated in the state outline. I now wonder why the trial magistrate is now making a finding that the accused's conduct amounted to driving without due care and attention.

It is not the trial magistrate who prefers charges but the prosecution. The conduct of the accused person resulted in the death of a person that is the reason why accused had been charged with culpable homicide.

It is my strong belief that the trial magistrate should have complied with Section 64 (3) of the Road Traffic Act Chapter 13:11 as illustrated in *State v Goto and Another 2015 (1) ZLR 636*. Your guidance in this matter is highly appreciated."

The scrutinizing magistrate had raised the above issues with the trial magistrate who responded as follows:

"I make a finding, as appears from my reason for sentence that accused's conduct amounted to driving without due care and attention considering the circumstances of the case. Accused had driven at about 40 km/ per hour trying to escape from the smoke and raging fire which had engulfed the road, a circumstance which the court perceived to be beyond accused's control, although even in the circumstance he was expected to be even more careful though.

Now if a person is convicted with driving without due care and attention, the Road Traffic Act does not prescribe prohibition or cancellation of a driver's licence, which is the reason why in spite of having convicted accused. I did not prohibit him from driving, considering the circumstances of the case."

The scrutinizing magistrate is correct on the law that where an accused is charged under any law for an offence that would ordinarily fall under the Road Traffic Act, the trial magistrate must have regard to s 64 of the Road Traffic Act. (See *S v Goto & Anor, supra*). However, it appears the scrutinizing magistrate overlooked the fact that in terms of s 64 (3) it is not in all cases that a trial magistrate must prohibit an accused so convicted from driving.

Section 64 (3) reads as follows:

“If, on convicting a person of murder, attempted murder, culpable homicide, assault or any similar offence 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 the 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
- b) that if the convicted person had been convicted of the offence in terms of this Act referred to in paragraph (a), the court would have been required to prohibit him from driving and additionally or alternatively, would have been required to cancel his licence;

the court shall, when sentencing him for the offence at common law –

- i. prohibit him for a period that is no shorter than the period of prohibition that would have been ordered had he been convicted of the offence in terms of this Act referred to in paragraph (a), and
- ii. cancel his licence, if the court would have cancelled his licence on convicting him of the offence in terms of this Act referred to in paragraph (a).”

Section 64 (3) is clear that prohibition from driving and or cancellation of a licence when a person is conviction of culpable homicide as in this case is peremptory where the accused would have been convicted of one offence under the Road Traffic Act that provides for such prohibition and/or cancellation.

Had the accused been charged under the Road Traffic Act, the State would have proceeded under s 51 of that Act which relates to driving without due care and attention or reasonable consideration for others. Driving without due care and attention is in fact a category or gradation of negligent driving. (See *S v Vincent Chingazha* HH 72/15, *S v Mapeka and Anor* 2001 (2) ZLR GO (H). Driving without due care and attention is therefore a lesser degree of negligent driving as set out in s 52 (2) of the Road Traffic Act. The fact that someone died does not necessarily follow that the accused should have been convicted of contravening s 52 (2).

Section 51 (2) as read with Part IX Road Traffic Act gives a trial magistrate the discretion to prohibit an accused from driving for such period and on such conditions as he deems fit. It is not peremptory to prohibit or cancel the licence of person convicted under that section. It is only peremptory to do so under provisions such as s 6 (6), s 52 (4), 53 (4), 54 (4) and 55 (4) (unless special circumstances exist justifying the court to decline imposing the prohibition or cancellation).

The trial magistrate exercised his discretion, in my view properly, in decided that prohibition and or cancellation was not warranted. The trial magistrate took into account the power visibility as a result of a veld fire in arriving at her decision. She remarked in her reasons for sentence that:

“The road was engulfed in smoke after a veld fire broke out. The accused rammed into complainant’s vehicle as he tried to get out of the smoke not realizing that the complainant was ahead of him that is when he bumped into complainant’s car from behind resulting in the unfortunate incident. The circumstances were not of accused’s making but nevertheless he was expected to exercise more caution.”

She cannot be faulted for the decision she took. She however erred in her response to the query raised by the scrutinizing magistrate in commenting that s 51 does not provide for prohibition and cancellation of licences. This however does not have an impact on the decision that she took not to prohibit the accused from driving or to cancel his licence. Under the circumstances I am of the view that the decision of the trial magistrate was proper.

The proceedings are in accordance with real and substantial justice and are accordingly confirmed.

CHATUKUTA J: