

RONALD McLEAN v THE STATE

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, McNALLY JA & SANDURA JA
HARARE, SEPTEMBER 21, 2000

D S Mehta, for the appellant

M Nedamire, for the respondent

SANDURA JA: The appellant was charged in the magistrate's court with culpable homicide, the allegation being that whilst he was driving a pick-up truck he negligently struck and killed Michael ("the deceased"). He pleaded not guilty but was convicted and sentenced to a fine of \$800.00 or, in default of payment, three months' imprisonment with labour. In addition, he was prohibited from driving all classes of motor vehicles for three months.

He appealed to the High Court against conviction only but the appeal was dismissed. He then appealed, with the grant of leave, to this Court.

After hearing counsel, we allowed the appeal and set aside the conviction and sentence. We indicated that our reasons would be given in due course. I now set them out.

The relevant facts are as follows. On 16 February 1996 the appellant left Gweru for Harare and was driving a pick-up truck (“the truck”). By about mid-day he had reached the outskirts of Harare when he saw a commuter omnibus (“the bus”) ahead of him. It was stationary at a bus stop on the left side of the road.

As he drove past the bus, he struck the deceased, a sixteen year old boy. He immediately stopped the truck and rendered the necessary assistance, but the deceased later died in hospital.

The State’s version of what happened was set out in paras 4 and 5 of the summary of the State’s case as follows:

- “4. After alighting from the stationary bus the pedestrian (the deceased) went via the front part of the stationary bus intending to cross the road.
5. Whilst in the process of crossing the road the pedestrian (the deceased) was then hit by (the) vehicle driven by the accused (the appellant).”

The State called two witnesses. These were two women who, at the time the deceased was struck, were on the side of the road just opposite the scene of the accident. They were roasting green mealies for sale.

The first witness was Shirley Mubvumbi (“Shirley”). Her evidence-in-chief was as follows. The bus arrived and stopped on her side of the road about twenty-one paces away from where she was seated. The deceased alighted from the bus intending to cross the road from the rear of the bus. He did not cross the road but was standing on the side of the road when he was struck by the appellant who was travelling at an excessive speed.

However, when cross-examined Shirley said that the bus had stopped, not on her side of the road, but on the side of the road opposite hers. When asked to explain the contradiction, she said that she had been misunderstood in her evidence-in-chief. She added that when the deceased alighted from the bus he waited for it to drive away, and that it was after it had moved away and had covered some distance that the deceased was struck by the truck.

The evidence given by this witness clearly contradicted, not only the summary of the State's case, but also her own sworn statement to the police. In that statement she said that after alighting from the bus the deceased tried to cross the road from the front of the bus, and not from the rear of the bus as stated in her evidence.

Furthermore, in her sworn statement she did not say that she saw the deceased being struck as stated in her evidence. Instead, she said that she heard a bang and that when she looked in that direction she saw the deceased "flying in the air".

The second witness called by the State was Elizabeth Munenzwa ("Elizabeth"). Her evidence was as follows. She was seated with her back to the road and was roasting green mealies when a ZUPCO bus, travelling in the direction of Harare, arrived and stopped at a bus stop on the other side of the road. The deceased alighted from the bus and stood by the side of the road. He did not try to cross the road from the front of the bus. The bus then drove away and when it was about one

hundred metres away from the bus stop she heard a bang and saw the deceased “flying in the air”.

As was the case with Shirley’s evidence, Elizabeth’s evidence contradicted the summary of the State’s case. She denied that the deceased tried to cross the road from the front of the bus and that he was struck whilst in the process of crossing the road, as alleged by the State. In addition, she saw a ZUPCO bus, and not a commuter omnibus.

The policeman who attended the scene of the accident was not called, and no sketch plan of the scene was produced.

The appellant’s evidence was as follows. He entered a fly-over which had a dual carriageway and was travelling at about 50 km per hour. As he approached the point where the dual carriageway converged into a single carriageway with construction works ahead, he slowed down. There was traffic behind him and ahead of him.

He saw the bus stationary just off the road at the point where the road converged into a single lane. He thought that it intended rejoining the traffic to Harare, and this caused him to reduce speed and exercise caution. He did not see any pedestrians at the rear or on the side or front of the bus who might have presented any danger.

As he passed the front of the bus, he heard a bang on the left side of the truck. He immediately applied his brakes, instinctively swerved to the right and came to a halt in the middle of the road. He then moved the truck to the left side of the road, parked it off the road and then rendered the necessary assistance to the deceased. The bus left the scene shortly after the accident.

It was the appellant's evidence that he did not see the deceased before the collision and that he was not negligent.

On the evidence, I am satisfied that the two State witnesses were unreliable and should not have been believed. One of them contradicted her own sworn statement, and both contradicted the summary of the State's case.

On the other hand, the appellant gave his evidence well and was not discredited in cross-examination. He gave a straightforward account of what happened which, in my view, accords with the probabilities.

It seems to me that what happened was that after alighting from the bus the deceased walked around the front of the bus intending to cross the road, without checking whether it was safe to do so, and collided with the truck which was overtaking the stationary bus.

The issue which I now wish to consider is the duty of a driver who overtakes a stationary motor vehicle.

That issue was considered in *Olivier N O v Rondalia Assurance Company of SA Ltd* 1979 (3) SA 20 (A), a case with facts similar to the facts of the present case. The judgment is in Afrikaans, but the headnote at p 21 reads as follows:

“A bus had stopped alongside a pole which served as a bus stop while a passenger, who had left her handbag at home, sent her eleven year old son to go and fetch it. The son climbed on the bus to give it to her, climbed off again and trotted around the front of the bus with the intention of crossing the road homewards. He collided with a motor car which was overtaking the stationary bus. The car was insured by the defendant and driven by C. The child sustained serious injuries and an action for damages was instituted on his behalf in a Provincial Division. The trial judge gave judgment with costs in favour of the defendant. In an appeal it appeared that, when C had driven around an ‘elbow’ in the road and first seen the bus, there were no passengers or pedestrians in the vicinity of the bus visible to him, and also for a further ten seconds thereafter before the collision. C could with safety have swerved more to his right-hand side of the road. He had not hooted.

Held, that the reasonably careful driver would not, in all the circumstances, have foreseen the possibility that a teenager would trot around the front of the stationary bus at the last moment with the intention of crossing the road without first looking to the right, and have regulated his manner of driving in accordance with that possibility.”

According to the English translation, WESSELS JA said the following at 29 G-H:

It cannot, in my opinion, be expected of the reasonably careful driver that he should, without more, be alive to the possibility that there may be a pedestrian concealed behind the front of each and every stationary vehicle who could suddenly appear in front of him in the road. His duty is in fact not that of an insurer.”

I am in complete agreement with the learned JUDGE OF APPEAL. His comments apply to the present case with equal force. The appellant did not see any pedestrians at the rear, or on the side or front of the bus, who might have presented some danger. He was, therefore, entitled to assume that there were no

pedestrians in the vicinity of the bus, and that if any pedestrian intended crossing the road he would do so only after making sure that such a move was safe.

The appellant was, therefore, wrongly convicted, and the conviction and sentence had to be set aside.

GUBBAY CJ: I agree.

McNALLY JA: I agree.

Wintertons, appellant's legal practitioners