RAF NYAMHOSVA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA AND NDOU JJ
BULAWAYO 18 JULY 2005 AND 12 OCTOBER 2006

K Ncube, for the appellant
T Mkhwananzi, for the respondent

NDOU J: The appellant was convicted by a Gweru Provincial Magistrate of reckless driving in contravention of section 53(2) of the Road Traffic Act [Chapter 13:11]. He was sentenced to pay a fine of $1000 or in default of payment 1 month imprisonment. In addition he was sentenced to 1 month imprisonment which was suspended for a period of 5 years on conditions of good behaviour. Further, he was prohibited from driving for a period of six months (class 4 motor vehicles only) and his class 4 driver's licence was cancelled. The respondent does not support the conviction on the charge of reckless driving and has submitted that evidence adduced during the trial sustained a lesser charge of driving without due care and attention [or reasonable consideration for others] in contravention of section 51 of the Act. Looking at the evidence led during the trial, I hold the view that the concession was properly made. The background facts are the following: On 18 December 1999 and at around 0730 hours the appellant was driving a Nissan Sunny registration number 406-930P along the Gweru-Bulawayo highway. When he reached the 132 kilometre peg he overtook "two" vehicles. There was, unfortunately, an on coming vehicle, a Nissan Twin cab driven by one Gordon Geddes registration number 721-248P. Mr Geddes flashed his lights and decreased speed, but the appellant's vehicle continued

on Mr Geddes' side of the road instead of falling behind the two vehicles that he was overtaking. Mr Geddes slowed down and pulled to the left side of the road. The appellant pulled to his right and their vehicles came to a halt almost side by side. There was no collision. In his judgment, the trial magistrate relied heavily on the evidence of Mr Geddes and rejected that of the appellant without any reason. The record of proceedings clearly indicates that Mr Geddes was not sure of some material facts. The trial magistrate failed to appreciate blatant inconsistencies in Mr Geddes' evidence. By way of illustration, the trial magistrate accepted Mr Geddes' testimony that the appellant was attempting to overtake two vehicles. Mr Geddes testified that when he came out of a (blind) dip he saw the appellant's vehicle already in his side and there were two vehicles on his left lane. So Mr Geddes did not know whether the appellant was overtaking only one or both of the vehicles on his left lane. It is common cause that Mr Geddes did not see the point at which the appellant started to overtake. The appellant was already on the right lane when Mr Geddes emerged from the blind dip. In the circumstances, the appellant's version is the only one on this issue and the trial court should not have rejected it out of hand. No onus rested on the appellant (as an accused) to convince the court of the truth of the explanation that he gives. The court did not have to believe his story still less believe it in its details, it was sufficient if the court thought that there was a reasonable possibility that it may have been substantially true – *S* v *Kuiper* 2000(1) ZLR 113 (S) at 118B-D; *R* v *Difford* 1937 AD 370 and 373; *Chindunga* v *S* SC-21-02 and *S* v *Zvobgo* HB-136-05. The appellant's explanation is that when he saw the collision imminent he took evasive measures to avoid collision with Mr Geddes' car. The appellant would in my view, have been reckless if he maintained his course on the left

lane oblivious to the danger he was exposing fellow road users to. The evidence shows that that was not the case here. It is common cause that the appellant was already on the right lance when Mr Geddes emerged out of the dip. Mr Geddes initially said that the appellant had an option of correcting himself to his original position when he saw him. However, under cross-examination he goes on to say that the appellant had no option but veer off the road to his right in order to avoid the collision. He said all the four vehicles were so close to each other that if he had collided with the appellant, the other two vehicles would have been involved as well. When asked at what point he saw the appellant for the first time, Mr Geddes said his memory was clouded but he thought that appellant was already in his path at that stage. With this kind of evidence from the only material state witness the trial magistrate was wrong by going on to find that the appellant "consciously assumed the risk in deliberately continuing his overtaking manoeuvre." This crucial finding is not supported by evidence in the record and the sketch plan that he so heavily relied upon. According to the indications in the sketch plan, the distance from the point at which the appellant crossed over into the right lane, in an attempt to overtake, to the point at which he veered off the road before stopping is 89,4 metres. What this means is that the appellant had covered a reasonable distance of the 89,4 metres when Mr Geddes shot into sight. His explanation is that when he saw Mr Geddes and after indicating that he could not go back to the left lane, he veered off the road to the right to avoid an imminent collision. There is no evidence in the record that he saw this imminent danger at the time he decided to overtake. It cannot be disputed from the evidence adduced that the appellant satisfied himself that it was safe to overtake. There was about 300 metres of clear road ahead of him at the time he started overtaking. It is

only after he was in the process of overtaking that Mr Geddes' car appeared and the danger of a [head-on] collision became imminent. He then acted reasonably by veering off the road to avoid the accident. Is this reckless? I do not agree with the trial magistrate's finding that the appellant was reckless. The credible evidence shows that as soon as the risk became obvious the appellant did not persist in driving on the right lane but displayed regard for the rights of the other road users by quickly moving off the road. As a result his actions and those of Mr Geddes as well, an imminent collision was avoided and no vehicle or person was damaged or injured. Reckless driving is driving with a complete disregard for the rights of other road users – *Kunda* v *R* 1947 SR 15 at 17. In *R* v *Ellis* 1959(4) SA 497 ( ), YOUNG J rightly defined driving recklessly in the following way:

> "In order to support a conviction for driving recklessly the evidence must show that there was a substantial risk of harm to other users of the road, that the accused appreciated such risk, and that his state of mind was such that he did not care whether there was harm to others or not. The third element above would usually be established by evidence that the risk was so obvious that the accused must have appreciated and therefore by inference did appreciate it and yet persisted without justification in his course of conduct." See also *Attorney General* v *Munganyi* SC 109-86; *S* v *Shupikai* 1973(1) RLR 13 (AD), 16H-17B; *Moyo* v *S* AD 102-78; *Ezekiel* v *R* AD 100-69 and *S* v *Ephraim* 1971(4) SA 398 (RAD) at 402.

According to the Supreme Court, "Reckless" in section 53(1) of the Act denotes a conscious advertence by an accused driver of the risks involved in his conduct (that is *dolus directus* or *dolus eventualis*) as well as a gross and aggravated form of negligence, close in degree to wilfulness – *S* v *Kandozvo* SC-32-90; 1990(1) ZLR 186 (S) at 188G. This is not the case in this matter. The evidence here shows an error of judgment of a kind which is not excusable by standards of a reasonable driver. The manoeuvre in which the appellant was involved was a simple and

common place one i.e. overtaking on a blind rise – *S* v *Ndanga* 1995(2) ZLR 258 (SC). His driving conduct amounted to driving without due care and attention or reasonable consideration for others.

As far as the sentence is concerned the prohibition from driving and the cancellation of the class 4 driver's licence are still competent for a conviction under section 51 of the Act. The only issue is whether they would have been appropriate if the appellant had been properly convicted. In light of the concession by the respondent, I do not think that such prohibition, cancellation and additional prison sentence are justified. They were designed for reckless driving. There was no collision or injury or damage in this case. A fine will meet the justice of the case. At the time of offence the maximum fine was $250 for such offences. The appellant's conduct is borderline between driving without due care and attention and negligent driving [section 52] and as such the maximum fine is appropriate in light of the appellant's position and earning capacity at the time.

Accordingly, the appeal succeeds in part. It is ordered that the conviction of the trial court is quashed and substituted as follows:

> "Guilty of contravening section 51(1) of the Road Traffic Act, Chapter 13:11, that is, Driving Without Due Care and Attention or Reasonable Consideration for Others."

The sentence imposed by the trial court is set aside and substituted as follows:

"$250 [old currency] or in default of payment 1 month imprisonment."

Cheda J …….. I agree

Muzangaza, Mandaza and Tomana, c/o Job Sibanda & Associates, appellant's legal practitioners
Criminal Division of the Attorney General's Office, respondent's legal practitioners