

**DUMILE BHEBHE**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
NDOU & BERE JJ  
BULAWAYO 9 AND 19 JULY 2007

*Ms N Ncube* for the appellant  
*W B Dube* for the respondent

Criminal Appeal

**NDOU J:** The appellant was charged and subsequently convicted of the crime of culpable homicide by a Bulawayo Magistrate on 3 November 2004. He was sentenced to 24 months imprisonment of which 8 months was suspended on the usual conditions of future good behaviour. He was prohibited from driving any class of motor vehicle for two(2) years and his drivers' licence cancelled. The appellant has appealed against both conviction and sentence. At the commencement of this appeal hearing the state conceded that there is merit in the appeal against sentence. In other words, the state conceded that the trial court misdirected itself as far as sentence is concerned. The background facts of the matter are the following.

On 28 October 2003, the appellant was driving a Toyota Land Cruiser along Intemba Road, Gwabalanda. Around 0615 hours, opposite Maplanka Shopping Centre, he struck and killed 12 year old Thandekile Dube who was trying to cross the road towards a Peugeot 504.

The prosecution case consisted of the testimonies of three witnesses, namely, Misheck Maphosa, Black Lunga and Police Officer Wonder Sanyangore. I propose to consider the testimonies of these witnesses and that of appellant in turn.

**Misheck Maphosa**

He was repairing his cycle next to the road. He saw the now deceased from the western direction, direction of the cemetery. The now deceased was crossing the road and he suddenly heard a sound of the striking of the child. The appellant's

vehicle carried the now deceased on vehicle bumper for a distance estimated by the trial court, after his indications, at about 30 metres before dropping the now deceased on the road and running over her. He said the road at the scene of the accident is straight with no obstructions. He also testified that once the now deceased started crossing the road she did not change direction until the impact occurred. He opined that the cause of the accident was that the appellant's vehicle was over speeding. He conceded that just prior the impact he was pumping his cycle and could have missed some of the events. He disputed some of the contents of the statement he allegedly made to the police.

### **Black Lunga**

He stated that he was driving going to Chigumira [Shopping Centre] to pick up teachers. In his testimony he does not say what vehicle he was driving, but from the police evidence and that of the appellant he was driving the Peugeot 504 station wagon. As he was approaching Maplanka he saw the now deceased standing amongst a number of people. The now deceased signalled him to stop as she was known to him. He then moved off the road but did not switch off his vehicle engine. He was waiting for the now deceased to come so that he would open the door for her. Before he opened the door he heard the sound of brakes and impact. The appellant's vehicle skidded for some metres and went past his own vehicle. He was shocked. He waited for a few minutes and then proceeded to inform the people who were waiting for him

what had happened. The appellant's vehicle followed him where he was picking the teachers. He picked the teachers and they returned to the scene. He attributed the accident to the appellant travelling at a speed that was excessive in the circumstances. He said he was unable to comment whether the now deceased was crossing the road towards his vehicle and suddenly changed and retreated as the now deceased was

approaching from behind and he did not clearly observe what happened. He said visibility was fine and it was a clear day. He denied the appellant's assertion that he (the witness) brought his vehicle to a sudden halt resulting in the accident. He said if that was the case the appellant would have rammed into the back part of his (witness') vehicle. He said he left the scene without notifying the police as the appellant, who was the one involved in the accident was at the scene and was obliged to do so.

**Wonder Sanyangore**

He is the police detail from Bulawayo Traffic West who attended the scene at around 0700 hours. He found the now deceased and the appellant at the scene. He drew up a sketch plan from indications made by the appellant. He completed the Traffic Accident Book (TAB). He also observed skid marks. He measured the skid marks by pacing and they were 32 paces long. He also observed that the accident was on a straight road and the maximum speed in the area is 70 kilometres per hour. The area is near a shopping centre. He opined that the appellant was travelling at an excessive speed on account of the length of the skid marks i.e. 32 paces. He said if he was not over speeding he would have stopped on seeing the child cross the road. He said he paced the skid marks because he did not have a tape measure. He said his pace is about a metre long.

**Appellant**

He is a licensed driver with 13 years experience. He said he was driving behind the Peugeot 504 and on his right hand side was another white Sunny motor vehicle. He said the driver of the 504 opened the door of his vehicle whilst he was still on his travelling lane. Whilst he was still looking at the Peugeot 504, the now deceased suddenly ran from the eastern to the western direction. The Sunny vehicle sounded its horn, the deceased ran to the Peugeot 504 and the driver closed the door when the now deceased was about to reach the vehicle resulting in the now deceased running backwards. The bumper (front fender) of his vehicle 'hooked' the now

deceased. The now deceased's track suit (I suspect it is the track top) was caught by the aerial of his vehicle. The now deceased fell under the wheel of his vehicle and the vehicle ran over the child. He said he was travelling at 60 kilometres per hour at time of accident. He said he saw the Peugeot 504 stop in the left travelling lane in front of him. The impact also occurred on the left lane in which he was travelling in. It was pointed out to him under examination that with the Peugeot stationary in front of him he would have rammed at its rear. He explained that the right wheels of his vehicle were encroaching to the right. From his narration he was watching the now deceased's movements in front of him and the events around the Peugeot prior the accident. He could not explain how he failed to avoid the accident in such scenario. He could not explain why he failed to stop or reduce speed to avoid colliding with the now deceased.

### **Zwelo Ndebele**

He was a passenger in the appellant's vehicle. He did not say where he was seated but from the other evidence it can be safely inferred that he was in front passenger seat. He said the appellant was travelling about 60 kilometres per hour. He is a licensed driver with two years experience. He said the Peugeot was parked on the side of the road "but a little bit in". He said it was not blocking the lane. He accepted that there were skid marks but said he could not estimate their length. He said if he was in the appellant's position he would have reacted as follows:

"If it was me, I would stop, but one can check and reduce speed and filter through if its safe".

Under cross examination he was adamant that the Peugeot was on the side of the road but said the appellant's view in front of him was not "100%" clear because the driver of the Peugeot had opened the driver's door partially obstructed his view. He made indications on the sketch plan which seem to suggest that the opened door obstructed about half of the left lane in which the appellant was travelling.

The evidence found to be credible by the court *a quo* is that the appellant's vehicle caused skid marks about 32 metres long after hitting the now deceased. This finding by the trial court cannot be faulted simply because the attending police detail paced the distance instead of using a tape measure. Whilst pacing lacks the precision found in measurement by tape, it is a reliable way of giving an estimated distance. It is common cause that after the impact the now deceased was dragged for some metres whilst hooked onto the front fender before she fell down and was tragically run over by the appellant's vehicle. It is clear from the evidence accepted by the trial court that

the appellant saw the now deceased ahead of him proceeding towards the Peugeot 504. He did not reduce speed.

According to his own witness, Ndebele, the Peugeot was parked off the road but with its right hand side door opened thus encroaching into the lane the appellant was travelling on. The opened door covered about half of the lane. Ndebele said in that situation the appellant should have stopped (or at least reduce speed) rather than try to "squeeze" his vehicle in that limited space. This evidence, coupled with length of the skid marks and the distance the vehicle carried the now deceased after impact is indicative of the appellant travelling at an excessive speed in the circumstances. It is clear that appellant failed to stop or act reasonably when an accident seemed imminent as evinced by the testimony of his own witness Ndebele. From his own testimony, the appellant said he saw the now deceased a child crossing the road ahead of him. He did not say he reduced speed and all the evidence shows that he failed to exercise the high degree of care and caution expected from a driver who sees children in front of him – *S v Ferreira* 1992 (1) ZLR 93; *S v Beets* S-90-93; *S v Duri* 1989 ZLR 111 (S) and *S v Ball* 1993 (2) ZLR 384 (SC). The overall picture that emerges from the evidence is that the appellant was negligent and the trial court's finding cannot be faulted. We are however, in agreement with the respondent that there was a misdirection on the finding on the degree of negligence. The trial court assessed the degree of negligence as reckless. The facts do not justify such a finding. From a reading of the trial magistrate's reasoning, the tragic manner of driving over the now deceased played a prominent role in the assessment of negligence. It is the manner of driving prior the accident and his reaction when accident was imminent that should play a dominant role in the assessment of the degree of negligence. In this case the

appellant exercised poor judgment on the situation that presented itself. From what has been highlighted above, his degree of negligence is moderate – *S v Chaita & Ors* 1998 (1) ZLR 213 (H).

On the question of sentence I have already alluded to the respondent's attitude in this regard. In brief, the respondent does not support the sentence. The sentence was based on the wrong assessment of the appellant's degree of negligence. In our view, because the degree of negligence is moderate, a fine coupled with a period of prohibition will meet the justice of the case.

Accordingly, the conviction is confirmed. The sentence imposed by the trial court on 3 November 2004 is set aside and substituted by the following:

“\$1 000 000 or in default of payment 3 months imprisonment. In addition the accused is prohibited from driving for a period of 10 months. The period of prohibition is to run with effect from the date of the initial sentence on 3 November 2004.”

Bere J ..... I agree

*Lazarus & Sarif*, appellant’s legal practitioners

*Attorney-General*, respondent’s legal practitioners