

**THE STATE**

**versus**

**MUNUNURI GOTO                    HCAR 555/15; CRB W/C TFC 35/15**

**THE STATE**

**versus**

**GILBERT SIBANDA                HCAR 615/15; CRB W/C TFC 40/15**

IN THE HIGH COURT OF ZIMBABWE

MUTEMA J

BULAWAYO 30 APRIL, 2015

### **Criminal Review**

**MUTEMA J:** The two cases were dealt with by the same senior magistrate sitting at Western Commonage Magistrates' Court on 27 March, 2015 and 8 April, 2015 respectively. Both involved culpable homicide in contravention of section 49 (1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] emanating from road traffic accidents. I have decided to deal with them *pari passu* because they both involve the same legal issue (s).

In *S v Mununuri Goto*, the 27 year old accused hit the 5 year old deceased Theodore Ncube with the headlight of his Nissan Primera opposite White City Stadium. The deceased was crossing the road with his siblings when he was hit and he fell down and sustained serious head injuries. He was rushed to Mpilo Hospital where he died two hours later. The post mortem report gives the cause of death as brain haemorrhages, head injury and road traffic accident. The accident occurred during the day, visibility was good and the road surface was good.

The accused is a holder of class 4 and 5 driver's licence. The following were the alleged particulars of negligence:

1. Failing to stop or act reasonably when an accident or collision seemed imminent;
2. Failing to keep a proper lookout in the circumstances;
3. Failing to exercise the high degree of care called for from a driver who sees children in the road in front of him;

The accused is a first offender, he pleaded guilty to the charge, is single, has no children and is self employed as a trader realizing about \$300 per month.

The sentence was \$400,00 in default of payment 3 months imprisonment.

In *S v Gilbert Sibanda* the 20 year old accused was driving a public service vehicle – a Toyota Hiace – carrying nine passengers when he hit the 21 year old deceased Mbongeni Sibanda who was crossing the road. The deceased was conveyed to Mpilo Hospital where he was admitted but died one week later due to the injuries sustained from the accident.

The pathologist observed the following injuries on the deceased:

1. Bruised scalp bilaterally on parietal region;
2. Patchy subarachnoid haemorrhages to the brain;
3. Massive right haemothorax of about 1000mls; small left haemothorax; bruised right lung and right posterior rib fractures T 3 to T7; bruised left lung and rib fracture T 4 and T 5 posteriorly;
4. Retroperitoneal blood in the abdomen

The cause of death was given as chest injury, road traffic accident.

The accused holds a driver's licence in classes 4 and 5 obtained on 10 September, 2014 – some six months prior to the fatal traffic accident. He is a first offender, single, not employed and with no children. He pleaded guilty to the charge. The following were the alleged particulars of negligence.

1. Fail to stop or act reasonably when an accident seemed imminent;
2. Fail to keep a proper lookout in the circumstances.

The accident occurred during day time and visibility was good. The commuter omnibus sustained damage on the front windscreen, front grill, left headlight and indicator and bonnet.

Following a finding of no special circumstances the trial magistrate imposed this sentence:

“\$400,00 or in default of payment 3 months imprisonment. In addition accused is prohibited from driving for a period of 24 months.”

In both matters it is a mystery why the police and prosecution overlooked the inclusion of the particulars of negligence of driving at a speed that was excessive in the circumstances especially in the latter case if account is had of the injuries sustained by the deceased as well as the damage occasioned to the vehicle.

In light of the fact that these two cases are not the first in which this same trial magistrate blundered when it came to following the proper procedure in sentencing, I did not deem it necessary to continue seeking his views regarding his failure to invoke the proper statutory provisions in the assessment of the correct sentence.

On 29 September, 2014 in HCAR 1349/14 I wrote a review minute to the same magistrate in the *State vs Dominic Moyo*: CRB W/C TFC 48/14 as follows:

“The accused was correctly convicted of culpable homicide in contravention of section 49 (1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] arising from driving a motor vehicle negligently. He was sentenced to \$500 or in default of payment 9 months imprisonment. I queried with the learned trial magistrate why, in view of the carnage and loss of life, property and limb on our roads, there was no prohibition from driving and cancellation of the accused’s driver’s licence. He has since conceded to the query.

The matter is hereby remitted to the trial magistrate to proceed in terms of section 64 (3) as read with section 65 (6) of the Road Traffic Act [Chapter 13:11] regarding the two issues raised *supra*. In so doing, the learned trial magistrate’s attention is drawn to the provisions of section 65 (8) of that Act.”

Again on 13 October, 2014 in HCAR 1728/14 in *State vs Celani Siziba*: CRB W/C TFC 57/14 I wrote this query to the same magistrate:

“Why did the learned trial magistrate in regard to sentence, specifically in connection with prohibition from driving and accused’s licence, not proceed to cancel his driver’s licence pursuant to section 65 (5) (a) [of the Road Traffic Act] whose provisions are mandatory, clear and straight forward?”

Numerous review minutes and review judgments have been written pertaining to the correct approach to sentencing in respect of the offence of culpable homicide arising from traffic accidents. See for instance *State v Brian Kwedza* HB-128-13 and *S v Bhekimpilo Ndebele* HB-160-13. Culpable homicide is a common law crime which has been codified and is now governed by section 49 of the Criminal Law (Codification and Reform) Act. Culpable homicide which is occasioned through the driving of a motor vehicle is interwoven with certain provisions of the Road Traffic Act when it comes to sentencing. Trial magistrates are strongly urged to acquaint themselves with, understand and invoke this link when it comes to sentence.

Section 64 of the Road Traffic Act, in relevant parts provides that:

“64 Prohibition from driving on conviction of certain offences

- (1) Subject to this part, a court convicting a person of an offence in terms of any law other than this Act by or in connection with the driving of a motor vehicle on a road may, in addition to any other penalty which it may lawfully impose, prohibit the person from driving for such period as it thinks fit.
- (2) ...
- (3) If, on convicting a person of murder, attempted murder, culpable homicide, assault or any similar offence by 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 this 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 from driving 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).” [My emphasis]

Now, culpable homicide involves the negligent killing of a human being. This is precisely why, in respect of traffic culpable homicides, the particulars of negligence are always cited in the state outline or statement of agreed facts. These particulars of negligence will guide the trial magistrate in the determination, when it comes to sentence, which appropriate section of the Road Traffic Act the particular accused would have been charged with (depending on the degree of the negligence), had he not been charged with common law culpable homicide.

On the facts of the *Mununuri Goto* case *supra* had the accused been charged under the Road Traffic Act instead of under the common law, the proper section under the Act would have been contravening section 52 (2) (a) which is negligent or dangerous driving. The main punishment for contravening section 49 (1) of the Criminal Law (Codification and Reform) Act is the one provided for in that section. However, regarding the additional punishment of prohibition from driving and or cancellation of the licence, that has to be extracted from the relevant provisions pertaining thereto from section 52 of the Road Traffic Act. *In casu*, the relevant subsection is subsection (4) (a) of section 52. That provision is not mandatory but permissive for it says the court “may prohibit” the person from driving for a period it deems fit. That is when the question of judicious reasoning comes into play, premised upon the material facts of the case including the degree of the negligence.

In the instant case, the accident occurred during the day when visibility was good and the road surface was good. This was, in a built up area opposite a stadium on a Sunday when many people including children are wont to cross the road to and from the stadium. In *S v Duri* 1989 (3) ZLR 111 (SC) it was held that a motorist has a duty to reduce speed and exercise caution when he observes people, especially children, within the vicinity of the road ahead of him.

Children have a propensity for impulsive and sometimes irrational action and so greater care is demanded towards them than is otherwise necessary. See also *S v Ferreira* 1992 (1) ZLR 93 (SC). It is difficult to comprehend why the accused given the facts of the case failed to avoid the five year old deceased whom he hit with his car headlight. The only reasonable explanation for accused's conduct must be the three particulars of negligence alluded to *supra* which he admitted. He must also have been travelling at an excessive speed in the circumstances. In view of the carnage on our roads stiff and deterrent sentences are called for. While I have no quarrel with the sentence imposed by the trial magistrate I have misgivings about the failure to prohibit the accused from driving for a commensurate period in the absence of special circumstances and cancellation of his licence.

Regarding *Gilbert Sibanda supra*, had he been charged under the Road Traffic Act instead of under the common law, the proper section would also have been section 52 (2) (a) of the Act. In that regard, section 52 (4) (c) as read with section 64 (3) would strictly be apposite regarding prohibition from driving and cancellation of his driver's licence since he was driving a commuter omnibus.

Section 52 (4) (c) provides:

- “(4) Subject to part IX, a court convicting a person of an offence in terms of subsection (1) (*sic*) (should be (2) – Draftsman error) involving the driving of a motor vehicle –
- (a) ...
  - (b) ...
  - (c) in the case of an offence involving the driving of a commuter omnibus or a heavy vehicle shall prohibit the person from driving for a period of not less than two years:

Provided that the court may decline to prohibit the person from driving in terms of paragraph (b) or (c) if it –

- (a) considers that there are special circumstances in the case which justify the court in so declining; and
- (b) endorse the special circumstances referred to in paragraph (a) on the record of the case when passing sentence.”

*In casu* the trial magistrate found no special circumstances and correctly prohibited the accused from driving for two years. The trial magistrate however misdirected himself by failing to go a step further and invoke the provisions of section 64 (3) (b) (ii) of the Road Traffic Act quoted *supra* and cancel the accused's driver's licence.

In terms of section 29 (2) (iii) of the High Court Act [Chapter 7:06] it behoves me to remit the case to the trial magistrate directing him to (1) recall both accused persons pursuant to section 65 (6) of the Road Traffic Act. In so doing, the trial magistrate's attention is drawn to the provisions of subsection (8) of section 65. In respect of accused Mununuri Goto the trial magistrate is directed to enquire into the existence or otherwise of special circumstances and if no such are found, to prohibit him from driving for a period he deems fit and is so doing the trial magistrate's attention is drawn to subsection (5) (a) of section 65. In respect of accused Gilbert Sibanda the trial magistrate is directed to cancel the accused's driver's licence. (2) Also the Prosecutor General is directed to consider whether or not the owner of the commuter omnibus registration number ACL 6607 Toyota Hiace which the 20 year old accused Gilbert Sibanda whose driver's licence was just six months old should not be prosecuted for allowing such an accused to drive a public service vehicle if he/she has not already been prosecuted.

Makonese J ..... I agree