THE STATE

Versus

NICHOLAS MUMPANDE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 6 APRIL 2022

Criminal Review

DUBE-BANDA J: This review is at the instance of the scrutinising Regional Magistrate. The accused was arraigned before the magistrate court sitting at Western Commonage, Bulawayo. He was charged with the crime of contravening section 52(2) of the Road Traffic Act [Chapter 13:11] "Negligent driving." It being alleged that on the 18 June 2021, and at Luveve Road near Machipisini, adjacent number 214 Sotshangane Flats, Bulawayo, accused drove a motor vehicle negligently opposing one-way and hit a pedestrian, thereby causing minor injuries. He was convicted on his own plea of guilty and sentenced to $18 000 in default of payment 4 months imprisonment, and in addition he was prohibited from driving for a period of six months.

The scrutinising Regional Magistrate noted that the accused should have been charged with a more serious offence under the Road Traffic Act, i.e. reckless driving. This issue arose because of the facts produced and agreed to by the accused in this case. The Regional Magistrate noted that if accused was properly charged, a different sentence would have been imposed. Accused was driving opposing a one-way, i.e. on the incorrect side of the road, and when the essential elements were put to him, he admitted this fact. While driving on the incorrect side of the road he hit a pedestrian. He pleaded guilty and was duly convicted.

The Regional Magistrate noted that the facts disclosed reckless driving as defined in section 53 of the Road Traffic Act [Chapter 11:13]. I agree with this observation. Driving opposing a one-way, i.e. on the incorrect side of the road connotes recklessness. See: *S v Mtizwa* 1984(1) ZLR 230 HC. The Regional Magistrate seems to suggest that the trial magistrate should have insisted on the correct charge, which answers to the facts of the case.

Prof. G. Feltoe in the *Magistrates' Handbook* (Revised August 2021) p. 156-157 opined as follows on this issue:

> The general rule is that the prosecutor is *dominus litis* and has the prerogative to prefer charges against X. See: *S v Sabawu & Anor*. 1999 (2) ZLR 314 (H). However, this rule is not absolute. In the case of *S v Thebe* 2006 (1) ZLR 208 (H) the judge pointed out that while the prosecutor was *dominus litis*, this rule is not absolute. The trial court, as a trier of facts whose main object is to do justice between man and man, therefore has inherent powers to ensure that suitable charges are preferred against those who appear before it. It is, therefore, within its powers to prevent the State from proceeding on a lesser charge where justice clearly requires a more serious one.
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> It is not in the interests of justice that a person should be charged with a lesser offence when the admitted facts show that she/she is guilty of a more serious charge. In such an event, the trial court should at least query why X is being charged only with the less serious charge. Thus if the State allegations clearly suggest that X has committed the crime of assault with intent to do grievous bodily harm but the State has brought only a charge of common assault against X, the magistrate should question the prosecutor on why the lesser charge has been preferred. Similarly, the magistrate should query why a person has only been charged with contravening section 45(1) of the Road Traffic Act [Chapter 13:11] if the evidence discloses a contravention of section 46(1) of this Act. *S v Chidoda & Anor*. 1988(1) ZLR 299 (H). (My emphasis).

In *S v Chidoda & Anor.* 1988(1) ZLR 299 (HC) the court after exploring a number of authorities held thus:

> In this case the magistrate's hands were tied because the State, as *dominus litis*, put the lesser charge. However, the magistrate's sense of justice should have induced him to, at least, query the matter. It may be that some satisfactory explanation would have been advanced although this is difficult to imagine in the light of the admitted facts.
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> In the result, therefore, I decline to certify the proceedings as being in accordance with real and substantial justice. This does not mean that it is this court's function to in any way dictate to the Attorney-General what charges should be preferred in given circumstances. The Attorney-General has an unquestionable constitutional discretion in that regard. It does mean that the proceedings cannot be certified if they do not appear to be in accordance with real and substantial justice test. (My emphasis).

According to Prof. G. Feltoe the trial magistrate can at least query and question the prosecutor the reason why a lesser charge has been preferred against the accused. This is the same point made in *S v Chidoda* (*supra*). The trial magistrate can only query and question and no more. It is important for the court to keep to its lane, and the prosecutor to keep to his lane. In this case there is no evidence on record that the trial magistrate queried nor

questioned the prosecutor in that regard. There is no explanation on record why on such facts a lesser charge was preferred against the accused. As a mark of its displeasure and disquiet this court can withhold its certificate, and no more.

The sentence is also a cause of some serious measure of disquiet. During the canvasing of essential elements the accused agreed that he was driving at an excessive speed in the circumstances and was driving on the incorrect side of the road. He agreed that he hit a pedestrian. Driving on the incorrect side of the road is a serious offence. In *S v Mtizwa* 1984(1) ZLR 230 HC the court said in modern society, when motor vehicles in great numbers are on our roads, and their drivers are travelling at some speed in going about their ordinary affairs, it is of vital necessity that all road users strictly comply with the rules of the road. The court underscored the importance of driving on the correct side of the road.

Accused was deliberately driving on the incorrect side of the road in the face of oncoming traffic. He was opposing a one-way. He showed a complete disregard for the safety as well as the right of other road-users. He is a mature person at 35 years old. He did this at 0650 hours. Putting other road users to risk. To my mind driving on the wrong side of the road ranks at the same level with driving through a red robot and drunken driving.

It was in sentencing that the trial court should have ensured that the accused was appropriately held accountable for his conduct. On the facts of this case the sentence imposed on the accused is a mockery of justice. This type of sentence does not engender confidence in the administration of justice. It is disturbingly inappropriate. His conduct warranted a prison term. Society expects no less. In my view a prison term answering to the provisions of section 52(2) of the Road Traffic Act would have met the justice of this case.

In similar circumstances in *S v Mtizwa* (*supra*) and *S v Chidoda* (*supra*) the learned judges withheld their certificates, and I have no option but to do the same in the present case, for I do not consider that these proceedings are in accordance with real and substantial justice.

In the result, I withhold my certificate.

DUBE-BANDA J ……..