THE STATE
versus
MAXIM MATSETU

HIGH COURT OF ZIMBABWE
UCHENAJ
HARARE, 4 March 2013

Criminal Review

UCHENA J Maxim Matsetu who I will in this judgment call the convicted person appeared before a senior Magistrate at Mbare magistrate's Court charged with the contravention of s 49 (1) (a) of the Criminal Law (Codification and Reform) Act [*Cap 9;23]* (culpable homicide). He pleaded guilty and was convicted on his own plea. He was sentenced to 6 months imprisonment of which 2 months were suspended on conditions of good behaviour.

The record of proceedings was forwarded to an Acting Regional Magistrate for scrutiny. The Acting Regional Magistrate raised issues on the propriety of the procedure followed by the trial Magistrate, and ultimately the conviction. Her letter to the trial Magistrate reads as follows;

> "It is the propriety of the procedure and ultimately the conviction which I am concerned with. The trial Magistrate proceeded in terms of s 271 (2) (b) and in terms of that law, accused's responses should amount to an irrevocable admission of the essential elements of the offence and where there is doubt and where the accused raises a defence the plea should be altered to not guilty.
>
> The cases of *State* v *Ndlovu and Another* HB 30/02 and *State* v *Makuvatsine* HH 102/04 are relevant.
>
> In canvassing the essential elements the following exchange took place between the Magistrate and the accused person;
>
> Q. Any variations to make?
>
> A. I did not intend to cause the accident. I did not do it deliberately.

Despite the fact that accused said he did not intend to cause the accident and thereby raising a defence at law which should have led to the alteration of the plea to not guilty. The trial Magistrate still proceeded with "canvassing essential elements".

Q. Why did you fail to stop your car before hitting the pedestrians?

A. I saw him when he was only about 3 meters away, I could not stop in time.

Q. Why did you not see him in time?

A. I had dipped my lights. There was another kombi that had stopped, it was coming from the opposite direction and its lights were flashing into my eyes, I could not see properly.

The following further exchange clearly shows that the trial Magistrate had serious doubts. Instead of canvassing essential elements I cannot be faulted to conclude that this was now cross-examination of the accused by the trial Magistrate.

Q. Why did you not stop?
A. There were other vehicles behind me.
Q. What did you do after seeing the kombi that had stopped?
A. I reduced my speed to about 60km/hr.
Q. Why did you reduce your speed?
A. As a person who had seen that there was a kombi that had stopped I did not know if it was picking or dropping a passenger.
Q. Do you admit that Crispen Mukize died as a result of the accident in which your vehicle hit him?
A. Yes I had 18 passengers on board.
Q. Did you have a right to drive in the manner you did, not keeping a proper lookout on the road, not stopping when you were not seeing properly etc?
A. No.
Q. Any defence to offer?
A. No".

The accused was nevertheless convicted despite raising what I believe were triable issues. After convicting the accused person the trial Magistrate then decided to explain himself which is not normally done if the proper procedure in s 271 (2) (b) is followed or adopted which I concluded was now his reasons for the judgment.

If the trial Magistrate can comment.

> Was the proper procedure followed, was the accused not raising triable issues which can only be resolved in a trial, was the accused therefore properly convicted and sentenced?"

The trial Magistrate, courteously, boldly and confidently, responded as follows;

> "I must start by apologizing for responding to your query late. What happened is that I received the query on 2 November 2012, which was a Friday. Then I went to Mutoko on Sunday 4 November 2012 and was there until 09 November 2012 doing partly heard cases. Any inconveniences caused by the delay are sincerely regretted.
>
> You raised issue with the propriety of the procedure, and ultimately the conviction, in the above matter. My response to the issue you raised is found hereunder.
>
> I will begin by an exposition of my understanding of the offence of culpable homicide. This offence consists in causing the death of a human being through negligence. Where negligence is an element, as is the case in culpable homicide cases, it is not what the accused person intended that is relevant, but what a reasonable person would say about what the accused person did. So, an accused person might not intend to cause an accident, yet he drives his motor vehicle at an excessive speed in the circumstances. If he hits and kills a person, he will be guilty of culpable homicide, even though he never intended to cause the accident. A person does not plan to be negligent. All that happens is that his actions, as he is going about his business, fail to measure up to the reasonable expectations of others. If those actions cause the death of a person, then the accused will be guilty of culpable homicide.
>
> Another important aspect of negligence is that it is not factual, but is inferred. It all depends on the circumstances. I would thus not expect an accused person to be asked, "Do you admit that you were negligent?" in canvassing essential elements of culpable homicide. Such a question would not be clear because negligence is relative. Indeed if an accused person is asked if he was negligent and he says "Yes" , we should be worried, because his "Yes" might well be inappropriate, regard being had to the circumstances of the case.
>
> It follows therefore that a court must ask an accused to admit the facts, and then infer negligence from the admitted facts, in a case of culpable homicide. Instead of asking, "Do you admit that you were traveling at an excessive speed in the circumstances?" I would rather ask, "What speed were you traveling at? What time of the day was it? How was visibility? How busy was the road at the time? Etc), and then infer from the answers given if the accused's speed was excessive in the circumstances".

I will deal with the issues you raised;

(a) That the accused person was raising a defence when he said "I did not intend to cause the accident. I did not do it deliberately". With all due respect, I do not think this was a defence. Indeed accused would not have been charged with culpable homicide, but murder, if he had intended to cause the accident and caused it deliberately. Like I explained above, it is not what the accused intends to do that is relevant, but what a reasonable man would say about what the accused has done. It is therefore not a defence for the accused to say he did not intend to cause the accident, because specific intent is not an element in a case of culpable homicide.

(b) "Instead of canvassing essential elements, I cannot be faulted to conclude that this was now cross-examination of the accused by the trial Magistrate."

As I explained above, I do not believe in asking an accused to admit negligence directly, because such an admission would be very doubtful. The approach that I adopt is to ascertain the facts from the accused, and then decide if negligence can be inferred from them. This approach necessarily entails asking the accused several questions. So for example I asked, "Why did you fail to stop your vehicle before hitting the pedestrian?" The answer the accused gave, "I saw him when he was only 3 meters away, I could not stop in time," would suggest that he had not been keeping a proper look out on the road. A person who only sees a pedestrian when he is only 3 meters away must have been inattentive. But I would not ask the accused, "Do you admit that you had not been keeping a proper lookout on the road?"

Now having ascertained the facts, I would then need to state the inferences I would have made.

(C) "After convicting the accused person, the trial Magistrate then decided to explain himself"

Like I said above, the approach I adopt is that I would not ask the accused person to admit negligence directly. It follows therefore that after getting the facts, I must then state the conclusions I draw from the facts. I do not know if that would amount to explaining myself.

In conclusion, I believe that I properly convicted the accused person. I would also suggest that you assist me in formulating the questions (just as an illustration) that you would consider proper and the answers to those questions you would also consider proper for a conviction on a charge of culpable homicide.

On receipt of this response the Acting Regional Magistrate remained of the view that the accused person's plea should have been altered to one of not guilty. She forwarded the record of proceedings for review by a Judge of this court with a request that she and the trial Magistrate be guided on whether or not the convicted person was correctly convicted and sentenced. The lot fell on me. I have to determine whether or not the trial Magistrate followed the correct procedure and correctly convicted the accused.

The trial Magistrate, courteously and confidently defended his work. He did not merely reply "I stand guided" as most Magistrates do. His response is well reasoned and explains why he conducted the proceedings in the manner he did. He clearly and respectfully responded to the issues raised by the Acting Regional Magistrate.

I fully quoted the correspondence between the scrutinising Acting Regional Magistrate and the trial Magistrate to lay the basis for this judgment. There is a lot to be learnt from their exchange of ideas on how to conduct a plea in general and particularly on a charge of culpable homicide.

Canvassing of Essential Elements in general

The Acting Regional Magistrate seems to suggest that the trial Magistrate should have asked direct questions and altered the plea to one of not guilty when the convicted person's answers seemed to raise triable issues. The trial Magistrate said he uses indirect questions and infers from them the guilty of an accused person. He said he does so to get the facts from which he can, infer the accused's guilty or innocence. He assesses the accused's answers to determine whether or not they raise real triable issues. I agree with the trial magistrate that it is permissible, to ask indirect questions and infer from them, the accused's guilty or innocence. An indirect question usually brings out the truth as it does not warn the accused of the effect his answer may have. It overcomes the problem of an accused person's appreciation of legal concepts. It brings out real justice as it seeks

facts without cloathing the question in legal jargon. This approach is preferable because legal concepts are not easy to master. In the case of unrepresented accused persons the explanations of the charge and its elements should not be expected to fully inform them of the offence to the extent of expecting them to correctly and from an informed position answer direct questions based on legal concepts. In the case of *S* v *Nyambo* 1997 (2) ZLR 333 (HC) at page 336 D SMITH J commending on how to deal with difficult legal concepts, said;

> "The accused was not represented. He is hardly likely to have appreciated the significance of the word `prepared' in this context ... I agree with the opinion expressed by the Attorney-General that preparation envisages some process or activity which is intended to ensure that the dagga is ready for smoking".

Judicial officers should therefore always be careful when canvassing essential elements, to avoid being satisfied by an accused's admission or denial of facts couched in legal jargon. They should ensure through careful probing that the accused is admitting or denying such facts.

In the case of *S* v *Tichaona & Anor* 1994 (2) ZLR 402 (HC) @ p 403 B CHATIKOBO J said;

> "If the magistrate thinks that the accused's denial of foresight might be the result of a lack of appreciation of the import of the question, he should probe further. There is no exhaustive list of questions, nor any limit to the ways in which the questions should be put."

It is not therefore helpful for the Acting Regional Magistrate and trial Magistrate to dispute over how questions should have been put to the convicted person. The trial Magistrate explained why he does not ask direct questions. He is of the view that if an accused person is asked whether he admits that he was negligent, and he answers "yes" that answer does not mean that he was indeed negligent. The magistrate who fully appreciates what negligence means must ask questions which will enable him to establish whether or not the accused was negligent. In the case of *S* v *Dube & Anor* 1988 (2) ZLR 385 (SC) at page 389 H - 390 A-B DUMBUTSHENA CJ said;

> "There have been a number of recent judgments in which it has been pointed out how careful a judicial officer must be when faced with a plea of guilty. Not every fact should be regarded as proved simply because it is admitted. Thus an admission of "being in a prohibited area" should not be blindly accepted. The

> court should require proof that the area was indeed a prohibited area - *S* v *Deka* & *Anor* S-199-88. The same is true of an admission of "possession". **The court must be careful to establish what it is that the accused is admitting, because possession is a difficult legal concept** - *Attorney General* v *Chimwadze* 1982 (2) ZLR 218 (SC); *S* v *Zvinyenge & Anor supra*; *S* v *Hoareau* S-143-88; S v Dyer S-204-88*. And see generally the remarks of REYNOLDS J in *S* v *Chirodzero* HH-14-88" (emphasis added)

In this case the trial Magistrate convincingly explained his approach in dealing with pleas to a charge of culpable homicide. His explanation is logical and well grounded in a desire to dispense real and substantial justice. It can not be faulted. It should infact be encouraged.

Accident not intended and not deliberate

The Acting Regional Magistrate said; "Despite the fact that accused said he did not intend to cause the accident and thereby raising a defence at law which should have led to the alteration of the plea to not guilty" the trial Magistrate proceeded with the canvassing of essential elements. She thus reasoned that when the now convicted person said; he did not intent to cause the accident and that his actions were not deliberate the trial Magistrate should have altered the plea to one of not guilty. The trial Magistrate's response was an explanation of the difference between murder and culpable homicide. He concluded that what the Acting Regional Magistrate suggested would have been correct if the now convicted person was facing a murder charge. He was again correct even though a plea of guilty can not be accepted on a charge of murder. He was merely pointing out that if the convicted person had deliberately intended to cause the accident, he should have been charged with the crime of murder.

A judicial officer is expected to know the law applicable to the offence charged. That will enable him to avoid being distracted by answers not relevant to the issues before him. In fact s 271 (2) (b) of the Criminal Procedure and Evidence Act [*Cap 9;07]*, requires a judicial officer to have such knowledge as it requires him to explain the charge and its essential elements to the accused and to be satisfied by the facts he gathers during the canvassing of essential elements of the accused's guilty. It provides as follows;

"(2) Where a person arraigned before a magistrates court on any charge pleads guilty to the offence charged or to any other offence of which he might be found guilty on that charge and the prosecutor accepts that plea—

(*a*) ----------]

(*b*) the court shall, if it is of the opinion that the offence merits any punishment referred to in subpara (i) or (ii) of para (*a*) or if requested thereto by the prosecutor—

(i) explain the charge and the essential elements of the offence to the accused and to that end require the prosecutor to state, in so far as the acts or omissions on which the charge is based are not apparent from the charge, on what acts or omissions the charge is based; and

(ii) inquire from the accused whether he understands the charge and the essential elements of the offence and whether his plea of guilty is an admission of the elements of the offence and of the acts or omissions stated in the charge or by the prosecutor; **and may, if satisfied that the accused understands the charge and the essential elements of the offence and that he admits the elements of the offence and the acts or omissions on which the charge is based as stated in the charge or by the prosecutor, convict the accused of the offence to which he has pleaded guilty on his plea of guilty** and impose any competent sentence or deal with the accused otherwise in accordance with the law:" (emphasis added)

The trial Magistrate's approach to the convicted person's answer indicates that he knew the elements of culpable homicide hence his proceeding with the canvassing of essential elements in spite of the convicted person's abovementioned response.

Scrutinising Regional Magistrates must also have a good grasp of the law applicable to the case under scrutiny. If one is not sure it is important to check before referring a case for review. Section 58 (3) (b) of the Magistrate's Court Act [*Cap 7;10]* provides for a referral of a case under scrutiny to a Judge for review "if it appears to him that doubt exists whether the proceedings are in accordance with real and substantial justice". A doubt which justifies a referral to a judge for review must be one which lingers on after the Regional Magistrate has fully played his part. Scrutinising, means looking, deeply and closely into a matter. It is not a cursory examination of the record without applying ones knowledge of the law into what the trial Magistrate did.

The offence which was before the trial Magistrate was culpable homicide. He therefore correctly carried on with the canvassing of essential elements because the accused's answer was not a valid defence to the offence charged.

Section 272 of the Criminal Procedure and Evidence Act [*Cap 9;07*), on the basis of which a judicial officer alters a guilty plea to one of not guilty provides as follows;

> "If the court, at any stage of the proceedings in terms of section *two hundred and seventy-one* and before sentence is passed—
>
> (*a*) **is in doubt whether the accused is in law guilty** of the offence to which he has pleaded guilty; or
> (*b*) **is not satisfied that the accused has admitted or correctly admitted all the essential elements** of the offence or all the acts or omissions on which the charge is based; or
> (*c*) **is not satisfied that the accused has no valid defence** to the charge;
> the court shall record a plea of not guilty and require the prosecution to proceed with the trial:." (emphasis added)

The provisions of this section are triggered by;

(a) a judicious doubt as to whether the accused is in law guilty of the offence to which he has pleaded guilty. The doubt must be grounded in the law. In this case, the law on culpable homicide, justified the trial Magistrate's proceeding with the canvassing of essential elements.

(b) Lack of the judicial officer's satisfaction that the accused has admitted or correctly admitted all the essential elements of the offence charged or all the facts or omissions which prove the offence charged. In this case the trial Magistrate was correctly satisfied that the convicted person was correctly admitting the elements of culpable homicide.

(c) Lack of the judicial officer's satisfaction that the accused does not have a valid defence. It is not every seeming defence which justifies the alteration of a plea of guilty to one of not guilty. If the judicial officer is not satisfied that the accused does not have a valid defence, he should alter the plea to one of not guilty. If he is however satisfied that what seems to be a defence is not a valid defence at law, he should not alter the plea to one of not guilty.

The whole exercise therefore depends on the judicial officer's knowledge of the law. Where the judicial officer is not in doubt as the trial Magistrate was and he was satisfied as he said he was there was no need to alter the plea to one of not guilty. In the case of

State v *Makuvatsine* HH 102/04, reported as *S* v *Makuvatsine* 2004 (1) ZLR 459 @ 462 A referred to by the Acting Regional Magistrate I said;

> "Magistrates must be alert to the provisions of s 272 to enable them to guard against the conviction of persons whose answers to questions raise doubt, or do not satisfy them of the accused's guilt or whose answers reveal that the accused may have a defence."

In this case the accused's answer did not raise any doubt in law, as regards culpable homicide. It satisfied the trial Magistrate of its irrelevance to culpable homicide. It did not reveal a valid defence to culpable homicide.

Dazzled by the lights, of an on coming motor vehicle

The Acting Regional Magistrate also believed the trial Magistrate should have altered the plea to not guilty as the accused seemed to be raising a defence of sudden emergency. Again ones knowledge of the law is an aid to knowing when to alter an accused's plea to one of not guilty.

The convicted person told the Magistrate that he reduced his speed to 60 km/hour. He thus proceeded into the accident at 60 km/hour unable to see ahead. That is the maximum speed one should travel at in an urban area. He was driving along Simon Mazorodze road in Waterfalls Harare. Traveling at such a speed on a busy urban road, when he could not see what was happening on the road, ahead was therefore clearly negligent. His own words justified the trial Magistrate's continuing with the canvassing of essential elements. The trial Magistrate asked the convicted person if he had a right to drive in the manner he did, "not keeping a proper lookout on the road, not stopping when he was not seeing properly". The convicted person's response was that he did not have such a right. A reasonable driver would have slowed down and stopped. Driving on blindly at 60 km/hr as the convicted person did, had the effect of endangering the lives of his 18 passengers. There was, no need to alter his plea to one of not guilty.

The law on being dazzled by the lights of on coming traffic was settled in the case of *S* v *Mandwe* 1993 (2) ZLR 233 (SC) @ 241 B - F where KORSAH JA dealing with a sudden emergency as a result of the appellant's eyes having been dazzled by the lights of an on coming motor vehicle said;

> "And when the appellant found himself dazzled by approaching headlights, he should at once have stopped or slowed down to a very slow pace in case there should be someone, such as the deceased, or something in his path, so that he could stop or take evasive action. As GUBBAY ACJ (as he then was) remarked in *S* v *Ruzario* 1990 (1) ZLR 359 (S) at 366E-F:
>
> "... if at that stage he found that his vision was somewhat impaired, his duty was to instantly pull up and wait until he could see properly before proceeding further, or reduce his speed so as to be able to stop within the range of his vision" (my emphasis).
>
> The appellant contended that he had slowed down. **The fact is, he was proceeding without a clear vision of what was in front of him and was unable to stop within the range of his vision.** As McNALLY JA observed in *S* v *Duri* 1989 (3) ZLR 111 (S):
>
> "... slowing down is merely a preparatory step - it is a step which makes it possible to take evasive action if need arises."

The same view was expressed by GUBBAY CJ in *S* v *Ferreira* 1992 (1) ZLR 93 (S) at 97; 1992 (2) SACR 425 at 428g-h (ZS) when he said:

> "... **in not significantly slowing down, the appellant incapacitated himself from taking effective evasive action.**" (emphasis added).

In view of these authorities from the Supreme Court, the trial Magistrate proceeded with his canvassing of essential elements, undeterred by the convicted person's purported defence, guided by the law which he seems to have a good grasp of. He proceeded correctly. He did not offend the provisions of s 272 (*supra*). He is infact supported by a plethora of authorities in the form of precedents from the highest court of the land.

Cross examination

In view of my finding that the trial Magistrate correctly continued with his canvassing of essential elements, he cannot be said to have cross examined the convicted person. Judicial officers when proceeding in terms of s 271 (2) (b), are free to ask the questions they deem fit to ascertain the guilty or innocence of an accused person. See the case of *S* v *Tichaona & Anor* (*supra*) @ page 403 B where CHATIKOBO J said;

> "If the magistrate thinks that the accused's denial of foresight might be the result of a lack of appreciation of the import of the question, he should probe further. There is no exhaustive list of questions, nor any limit to the ways in which the questions should be put."

Explanation

The Acting Regional Magistrate is of the view that the trial Magistrate was aware that he had crossed the red line hence his unnecessary explanation of the reasons why he convicted the accused. If I had found that the trial Magistrate erred in continuing with his canvassing of essential elements the conclusion reached by the Acting Regional Magistrate would have been justified. In this case one can only say the giving of an explanation for the conviction was unnecessary, but does not offend against the sense of justice. The reasons for the conviction were apparent from the answers the convicted person gave during the canvassing of essential elements. The trial Magistrate must have acted out of an abundance of caution which his approach to the canvassing of essential elements reveals he has.

Real and substantial justice

I must conclude by saying scrutinising and reviewing judicial officers must be guided by the attainment of the standard of "real and substantial justice" by the work they will be scrutinising or reviewing. That is what determines whether he should confirm the proceedings or refuse to certify them as being in accordance with real and substantial justice or take such other remedial action permitted by the law.

The attainment of "real and substantial justice" is ascertainable by checking for the things mentioned in the case of *S* v *Lee Kawareware* HH 268 /11 at p 8 of the cyclostyled judgment where I said;

> "The crucial question should always be has the accused been correctly convicted and sentenced. If he has the proceedings should be confirmed. If not the certificate should be withheld.
>
> The main features to look out for in scrutinising or reviewing proceedings are therefore;

1) The correctness of the charge preferred
2) The agreed facts or state and defence outlines
3) Compliance with statutory requirements in taking a plea of guilty or in conducting a trial where the accused pleads not guilty
4) The acceptance or proof of the facts on which the charge is based
5) The assessment of evidence i.e matching of the law and the accepted or proved facts
6) The trial court's reasons for judgment
7) The correctness or otherwise of the conviction, and
8) The justifiability of the charge or sentence as discussed in Chidodo (*supra*)

Since the codification of our criminal law, all sentences are provided for in the code or the statute which creates the crime charged. All the reviewing or scrutinising judicial officer should do is check if the sentence suits the offence and the offender within the range of sentences provided for in the code or other statutes"---

The trial Magistrate's handling of this case has satisfied me that these proceedings are in accordance with real and substantial justice. I therefore duly confirm them.

BERE J

I have had the privilege of reading my brother judge, UCHENA J's thoughtful and well reasoned judgment. The exposition of the law and the legal principles applicable is beyond reproach.

I comment the interactive process between the trial magistrate and the acting regional magistrate. It is such seemingly insignificant exercises that enrich or nourishes the development of our jurisprudence.

I wish to emphasize as correctly pointed out by the trial magistrate and reinforced by my brother judge that "an intention to cause an accident" is never an issue in a culpable homicide case as liability stems from an inference of negligence deriving from proven or established facts.

As aptly observed by Cooper[1],

"The court assumes the role of the reasonable man-

[1] Motor Law, Volume Two, Principles of Liability (published by Juta) p 50

> '--- and decides what the reasonable man would regard as just on the facts of the case. The hypothetical "reasonable man" is personified by the court itself. It is the court which decides[2].'

It should be noted that the test of negligence in criminal cases is the same in civil cases hence in a criminal matter reference can be made to a civil matter and vice versa.

With these few remarks I record my concurrence with my brother judge, UCHENA J.

BERE J ……..

[2] Fibrose Spolka AK'cyjna v Fairbain Lawson Combie Barbour Ltd (1943) AC 32 at 70