

STATE
versus
NGWENYA THAMALU

HIGH COURT OF ZIMBABWE
HUNGWE & MUSHORE JJ
HARARE, 31 May 2017

Criminal Review

HUNGWE J The record of proceedings in this matter was placed before me together with the correspondence between the trial magistrate and the learned scrutinising Regional Magistrate. In his letter addressed to the Registrar of this court the learned scrutinising magistrate raises two critical issues. The first issue is the clear failure by the trial magistrate to advert to the provisions of s 64 (3) of the Road Traffic Act [*Chapter 13:11*] and demonstrate a full appreciation of its implication. This failure consequently led to the second issue raised in this correspondence which is the abject leniency of the sentence passed.

The facts of the case are that the accused was driving a motor vehicle laden with passengers. He decided to overtake when the road ahead was not clear resulting in a head-on collision. Three of his passengers died as did another three from the other vehicle which was correctly travelling on the road. All in all therefore six people lost their lives due to the accused's manner of driving. He was charged with culpable homicide and he pleaded guilty. He was sentenced to community service.

Section 64 (3) provides:

“If, on convicting a person for murder, attempted murder, culpable homicide, assault or any other 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)."

The full implication of the provisions in s 64 (3) were extensively discussed in *S v Chaita & Ors* 1998 (1) ZLR 213 (HC) (per CHINHENGO J). It is therefore now trite that in plea proceedings, the degree of negligence must be established when the essential elements are being recorded in terms of the law. Although the particulars of negligence were set out in the Summary of State Case, none of these particulars were put to the accused. It cannot be said that the accused admitted that it was his negligent driving which was the proximate cause of death. Yet this is the pith of the charge where death results from a road accident. In *S v Duri* 1989 (3) ZLR 111 (S) MCNALLY JA stated at p 115C-D:

"The whole basis of the case against the appellant was that he drove negligently. Particulars of negligence were alleged and were found proved. His guilt in relation to culpable homicide was based squarely on that finding of negligent driving. He could not have been found guilty of culpable homicide unless he was first found guilty of negligent driving. The court therefore must have found, and did find, that he was guilty of negligent driving. Therefore it must have considered, and did consider, that the convicted person would have been convicted of an offence in terms of the 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 (s 55(3) (a)) [now s 64 (3) (a)] of Act 48 of 1976 [now Chapter 13:11]."

Following upon this; is the clearly inadequate sentence imposed. Had regard been paid to the provisions of s 64 (3) of the Act, then the accused would have suffered the inevitable consequences of both cancellation and prohibition as is required by the Act. Both these are mandatory and therefore should have been imposed in addition to whatever sentence was settled upon by the trial court. In the event therefore the record of proceedings should be remitted back to the magistrate with an order that the provisions of the said section be complied with.

MUSHORE J agrees.....