CLEVER MAMBARA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUSAKWA & MUZOFA JJ
HARARE 25 November 2019 & 4 February 2020

Criminal Appeal

J Mambara, for the appellant
T. Mapfuwa, for the respondent

MUZOFA J: The appellant was found guilty of culpable homicide arising out of a motor vehicle accident in contravention of s 49 (a) of the Criminal (Codification and Reform) Act [*Chapter 9:23*] and driving without a licence in contravention of s 6 (1) (a) of the Road Traffic Act [*Chapter 13:11*]. He was sentenced to 24 months imprisonment in addition he was prohibited from driving for life in respect of the first count and 6 months imprisonment on the second count. He appeals against sentence only.

The facts to which the accused pleaded guilty were that on 3 March 2018 at around 08:30 hours he was driving a public service Toyota Hiace vehicle along Harare - Makumbe road towards Makumbe. On board his motor vehicle were two passengers and a load of 10 bags of cement. On approaching the 39 km peg, the appellant overtook a commuter omnibus which had stopped to drop some passengers. In the process of overtaking the appellant's motor vehicle had a head on collision with a Nissan March registration number ACK 2017 travelling from Makumbe. The driver of the Nissan March later succumbed to head injuries sustained during the accident. The appellant, a non-holder of a driver's licence admitted that he was negligent in that he was driving at an excessive speed in the circumstances; he failed to keep a proper look out and failure to stop or act reasonably when a collision seemed imminent.

The appellant appeals against sentence only before this court. The grounds of appeal set out in the notice of appeal can be summed as follows:

1. That the court a *quo* misdirected itself in making a finding that the appellant drove recklessly thus imposing the minimum mandatory sentence of two years.

2. That the court erred in prohibiting the accused from driving for life all types of motor vehicles.

3. The erred in imposing a sentence of six months imprisonment in circumstances where the court did not fully explain the meaning of special circumstances in both counts

Mr *Mambara* for the appellant submitted and correctly so that on a charge and conviction of culpable homicide arising out of a driving offence, the trial court must first make a precise finding on the degree of negligence before assessing the appropriate sentence and referred this court to the cases of *S* v *Fungai Chitepo* HMA 3/17 and *Duduzile Manhenga* v *S* HH 62/15. For the respondent it was submitted that the court a *quo* made a finding based on the facts placed before it. The court correctly found the degree of negligence to be reckless.

The proper position of the law was set out by the appellant's counsel. In a case involving culpable homicide from a driving offence, it is imperative for a court to ascertain the degree of negligence. Culpable homicide always entails some form of negligence. The negligence has a progression path which is relative to the offences in the Road Traffic Act. It could be driving without due care and attention (section 51) negligent or dangerous driving (section 52) or reckless driving (section 53). An assessment of the degree of negligence at the sentencing stage helps the court in coming up with an appropriate sentence. It then becomes important to ascertain exactly what transpired from the appellant of course considering the State case. There must be a factual basis to support the factual finding by the court. This is in tandem with s 64 (3) of the Road Traffic Act. This is the thrust in the *Manhenga* and C*hitepo* cases (supra) see also *S* v *Ngwenya* HH 331/17.

In the present case the court canvassed the essential elements and specifically put the particulars of negligence to the appellant. He admitted that he failed to stop or act reasonable when a collision seemed imminent, *Mr Mambara* tried to explain over the bar that the appellant was driving behind a commuter omnibus which suddenly stopped and the appellant's reaction was meant to avoid hitting the back of the commuter omnibus. He urged this court to take judicial notice of the reckless driving of these public transport drivers. It is a paradox that *Mr Mambara* would make such a submission when the appellant was one of the commuter omnibus

drivers. Taking such notice would certainly be prejudicial to the appellant's case. That submission, in our view confirms the magistrate's finding. Firstly it shows that the appellant was driving too close to the motor vehicle in front. The evidence before the court does not confirm the submission made that this court can adopt the reasoning in *S v Mauwa* 1990 (1) ZLR (235 (SC) that where a driver is put in danger by negligence of another he is not to blame if he does not respond as expected. The commuter omnibus ahead of the appellant did not suddenly stop; there is evidence in the traffic accident book that shows that the driver of the commuter bus indicated the intention to turn left. The appellant confirmed this. The appellant did not reduce his speed or even apply his brakes at all. This is clear from his responses to the Magistrate he did not even mention it. The traffic sketch plan does not even show any brake marks. All these are indicators of over - speeding and non-action by the appellant. In mitigation the appellant was asked why he committed the offence, he stated that he was not concentrating. The totality of the exchange between the court and the appellant shows that appellant was asked questions such that if he wished to give details to the court he could have. If he did not then, that cannot be held against the court.

We totally agree with the judgments of this court relied upon by the appellant on the valid point that a trial court should not completely rely on the broad particulars set out in the state outline. However these provide a critical springboard for all the relevant facts to be set out. As already noted when they are put to the accused it is for the accused to provide information. Where no information is provided, then the court is entitled to make a finding on what is before it.

The appellant overtook without checking whether there was oncoming traffic. There is no doubt about it. Before overtaking a driver must satisfy himself that he is able to clear the path of oncoming traffic timeously and safely. Where an overtaking vehicle collides with an approaching vehicle travelling on its correct side of the road this is strong evidence that the driver was driving recklessly. See *Cooper and Bamford,* South African Motor Law, 1965.Reckless driving has been defined in both case law and authoritative texts. The definition set out in *R v Phillipson* 1957 (1) SA 114(SR) is most reflective of the driver's state of mind, it was said to be,

> '…denoting an intention to bring about a result, or the conscious taking of the risk of bringing about an undesired result , the possibility of which must necessarily have been foreseen.

To my mind, anyone who overtakes without checking the safety of such a maneuver and is involved in a head on collision is *prima facie* reckless. This was in the morning and it can only be assumed that the visibility was good. The possibility of oncoming traffic is obvious and the appellant took a conscious risk to overtake without checking. The court explained in its reasons for sentence why it concluded that the degree of negligence was reckless. We find no misdirection in that finding.

A finding of reckless driving directs the court to sentence the accused in terms of s 53 (4) of the Road Traffic Act. Since the appellant was driving a public service vehicle he was liable to imprisonment for a period not exceeding fifteen years and not less than two years unless there are special circumstances.

As correctly submitted for the respondent, the court explained the meaning of special circumstances but failed to give the appellant an opportunity to respond. Clearly this was a misdirection. We directed counsel to address the court on special circumstances in this case. He highlighted that there was a sudden emergency as the motor vehicle in front suddenly stopped. The appellant had to take evasive action to avoid colliding with the motor vehicle. For the respondent it was submitted that the form of sudden emergency did not constitute a special circumstance. It actually showed that appellant was driving too close to the vehicle in front, over - speeding and did not keep a proper look out.

It is trite that what constitute special circumstances are those factors peculiar to the commission of the offence as defined in the Act. We do not believe there was a sudden emergency. The motor vehicle in front actually indicated its intention to turn left. That indication should have led the appellant to reduce speed and prepare for anything that the motor vehicle in front may do. What transpired on the day was properly summed up by the appellant that he was not concentrating. It is correct that driving without a licence is not a particular of negligence. However there is nothing wrong in a court bearing in mind that the accused, was not a holder of a driver's licence at the time the offence was committed. It is a highly aggravating factor. We do not believe there are special circumstances in this case. Drivers of public service vehicles should

endeavor to exercise a high degree of care to avoid carnage on the roads. The court was therefore entitled to impose the minimum mandatory sentence of 24 months imprisonment.

In addition the court prohibited the appellant from driving all types of motor vehicles. Obviously the court fell into error. Subsection (4) of s 53 of the Road Traffic Act prescribes the sentence as follows,

> (4) Subject to Part IX, a court which convicts a person of an offence in terms of subsection (1) involving the driving of a motor vehicle shall—
> (*a*) if the person has not previously been convicted of a similar offence within a period of ten years immediately preceding the date of such first-mentioned conviction—
> (i) in the case of a first-mentioned conviction which does not relate to the driving of a commuter omnibus or a heavy vehicle, prohibit the person from driving for a period of not less than six months; or
> (ii) in the case of a first-mentioned conviction which does relate to the driving of a commuter omnibus or a heavy vehicle, prohibit the person from driving—
> A. a motor vehicle other than a commuter omnibus or a heavy vehicle for a period of not less than six months; and
> B. a commuter omnibus or a heavy vehicle during his lifetime; or

There was no basis to extend the prohibition to all classes of motor vehicles. The appellant should have been banned for life from driving a commuter omnibus or a heavy vehicle. In respect of other vehicles the court must prohibit the accused from driving for a period of not less than 6 months. It can be argued that the court a *quo* exercised its discretion to give a life ban since the section only gives the minimum. However the court did not justify why the appellant should be prohibited from driving other classes of motor vehicles for life. In the circumstances of this case, there is no basis to ban the appellant for life in respect of other vehicles. The sentence should therefore be interfered with to that extent.

In respect of the second count, the court *a quo* failed to comply with the provisions of the law. A perusal of the record shows that when the plea of guilty was entered the Magistrate proceeded in terms of s 271 (2) (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The section requires that the court explains the charge and the essential elements of the offence to the accused person. The explanation given should be recorded as provided for in subsection (3) thereof. In this case the Magistrate only canvassed the essential elements in respect of the first count. Nothing was referred to in respect of the second count. Surprisingly the verdict was recorded as guilty for both counts.

The requirement to explain the charge and the essential elements cannot be compromised where an accused is facing a possibility of a custodial sentence. The accused has to understand the nature of the offence to which he has pleaded guilty. The nature of the explanation that the court must give reposes to the accused his right to a fair trial. Thus in *S* v *Dube* 1988 (2) ZLR 385 (SC) the Supreme Court held that the procedure in s 271 (2) (b) should be adequate to ensure a fair trial although in some cases it may be necessary for the court to explain to the accused at an early stage that the offence to which he is admitting is serious and attracts a heavy penalty. By parity of reasoning clearly in this case the procedure adopted by the court a *quo* denied the appellant his right to a fair trial.

The appellant did not raise issue with the non-compliance with s 271 (2) (b) of the Criminal Procedure and Evidence Act. Even before this court counsel for the appellant was prepared to sweep the issue under the carpet when his attention was drawn to this anomaly. However this court cannot close its eyes on a glaring irregularity. We are at liberty to exercise our review powers and remit the matter for a proper consideration.

From the foregoing the appeal partially succeeds and the following order is made,

1. The appeal against sentence in the first count is partially upheld.
2. The sentence is set aside and substituted by the following

   "24 months imprisonment. In addition the accused is prohibited from driving any commuter omnibus or heavy truck for life and is also prohibited from driving other classes of motor vehicles for 6 months."

3. The appeal in count two is allowed.
4. The conviction and sentence is hereby set aside.
5. The matter is remitted for a trial *de novo* before a different Magistrate

MUSAKWA J AGREES:……

J Mambara & Partners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners