

THE STATE

Versus

ERNEST CHIFUMURO

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 13 DECEMBER, 2018

Criminal Review

MAWADZE J: This review judgment has been occasioned by the rather incomprehensible conduct by the learned Provincial Magistrate based at Masvingo Magistrates Court. It is difficult to understand as to why the learned Provincial Magistrate with all his experience would conduct himself as a loose cannon. The baffling thing is why he decided not to follow simple, straightforward and clear instructions outlined in the Order granted by this court. What is unfortunate is that the learned Provincial Magistrate would want to make this court part of the patently injudicious antics.

The background facts in this matter are as follows;

The accused was arraigned before the learned Provincial Magistrate sitting at Masvingo on 6 April 2018 facing a charge of culpable homicide arising from a road traffic accident. The matter proceeded by way of trial as the accused pleaded not guilty to the charge.

The facts giving rise to the charge are that on 7 January 2018 the 49-year-old accused, at about 15.10 hrs, was driving a public service vehicle, a Higer bus registration number ABX 6489 along the Beit Bridge, Masvingo Road towards Masvingo and had 27 passengers on board.

At about the 3 km peg from Masvingo the accused was driving behind a DNC Bus going in the same direction. In front of that DNC Bus was also a small motor vehicle also

travelling towards Masvingo. The accused decided to overtake both vehicles at an open curve with his vision clearly impaired. Unknown to the accused there was another bus belonging to

Khaye Bus Company registration number HD 77 HG GP which had broken down near the 3 km peg as it was also travelling towards Masvingo and was encroaching on to the Masvingo bound lane. There were triangle reflective signs placed near this bus to warn other motorists of the hazard. This prompted the small vehicle and the DNC Bus in front of the accused to stop as there was a Land Rover Discovery registration number AEB 0047 driven by Kudakwashe Jani travelling in the opposite direction towards Beit Bridge.

The accused, in total disregard of basic road rules, and oblivious of this danger, proceeded to overtake both the DNC Bus and the small vehicle which had stopped to allow safe passage of the Land Rover Discovery vehicle. The driver of the Land Rover vehicle, upon realising that a head on collision with accused's bus was imminent, swerved to his far left and off the road but his valiant efforts were in vain as the accused, also in panic, swerved to the same direction. This resulted in a head on collision. The accused's bus literally climbed over the Land Rover vehicle and dragged it for about 18 metres. The bus only stopped when its front axle was suspended in the air and its rear axle suspended in a ditch. Tragically all the 6 people in the Land Rover Discovery vehicle died. These were Kudakwashe Jani, Savanna Jani, Cecilia Mpalisa, Beatrice Mpalisa, Fungai Manyangadze and one Mahera. Three of them died on the spot and the other three on admission at Masvingo General Hospital. Fortunately, no one in accused's bus was injured.

It is clear from these facts that the accused was negligent. This is so because the accused *inter alia* decided to overtake on a bend, was following too close to the DNC Bus, was over speeding in an 80km zone without keeping a proper lookout, hence he failed to stop or act reasonably when the accident was imminent. The accused clearly disregarded other road users.

Despite his rather misplaced protestations the accused who was legally represented during the trial was properly convicted of the charge. The evidence against him was simply overwhelming and the facts simply did speak for themselves. The only issue which may arise is whether the accused should have been charged of one (1) count of culpable homicide or six (6) counts of culpable homicide as 6 people died, albeit arising from the same bad driving conduct. This issue may be properly resolved after informed argument and is not the gist of this review judgment.

The accused was surprisingly sentenced to a fine of \$1000 or in default of payment to serve 6 months imprisonment with additional 6 months wholly suspended for 5 years on the usual condition of good behaviour. Again, not surprising accused paid the fine. Further, the accused's licence was spared and accused was only prohibited from driving any motor vehicle for 6 months !! Needless to say this sentence induces a sense of shock for its leniency.

Instead of simply allowing sleeping dogs to lie as it were the accused had the temerity to approach this court on appeal in respect of both the conviction and sentence. The accused even callously suggested that a fine of \$400.00 was appropriate in this case. The accused's sense of justice is warped to say the least and his lack of contrition is beyond measure.

This matter was set before my brother MAFUSIRE J and myself on appeal on 3 October, 2018 for argument. Both my brother MAFUSIRE J and myself felt that grave injustice had been done in this case and eagerly wanted to hear what meaningful argument Counsel for the accused would advance. Apparently the State Counsel *Mr Tembo* as per the heads of argument filed of record had also glossed over such grave injustice and simply submitted that the appeal in respect of both conviction and sentence lacked merit without dealing with other anomalies evident in this matter. This is precisely why we were both eager to hear what *Mr Muchineripi* of Muchineripi and Associates whose correspondent legal practitioners were Ruvengo Maboke and Company would say.

For reasons yet to be explained accused's Counsel decided not to turn up for the appeal hearing despite being properly served for the hearing. One may simply suspect that the accused and his legal practitioner realised the folly of their decision to proceed with the appeal. *Mr Tembo* for the State rightly applied to have the appeal dismissed for want of prosecution.

Be that as it may, we inquired from *Mr Tembo* about the other anomalies in this matter and sought his views. This related to the manifestly lenient sentence, the failure by the trial court to make a clear finding of accused's gross negligence, and the failure to impose mandatory sanctions provided for in terms of s 64 of the Road Traffic Act [*Cap 13:11*] relating to cancellation of accused's driver's licence and prohibition from driving commuter omnibus and heavy vehicles for life. We pointed out to *Mr Tembo* that his approach in this matter was perfunctory as he did not address these mundane issues. We thus inquired from

Mr Tembo as to the proper way forward. *Mr Tembo* agreed that this matter be remitted to the trial court to

remedy the omissions of failure to comply with the provisions of the Road Traffic Act [Cap 13:11].

Our view in this matter was that despite the manifestly lenient sentence which raised our judicial eyebrows we were hamstrung to increase the sentence as the accused was in default. Fairness and justice would demand that before such a drastic action could be taken as provided for in s 38(4) of the High Court Act [Cap 7:06] the accused should be heard. Indeed, if the accused or his Counsel were present we would have, without doubt, interfered with the substantive sentence of the court *a quo* by setting aside and substituting it with a custodial sentence of not less than two years. This is informed by the fact that the accused was grossly negligent while driving a public service vehicle carrying passengers and totally disregarded road regulations causing the loss of six innocent lives without even being contrite. Be that as it may, we still felt that the accused could not escape the sanctions provided for in terms of s 64(3) of the Road Traffic Act [Cap 13:11]. The provisions of s 65(6) of the Road Traffic Act [Cap 13:11] should therefore be invoked.

In the result we granted the following Order in default:

“In default

IT IS ORDERED THAT;

- 1. The appeal be and is hereby dismissed for want of prosecution. It is however noted that the sentence passed is manifestly lenient.*
- 2. The matter be and is hereby remitted to the trial court for purposes of complying with the provisions of s 64 of the Road Traffic Act [Cap 13:11] relating to a proper order on prohibition and cancellation of the driver’s licence.*
- 3. That the degree of negligence is reckless and that the provisions of s 53 of the Road Traffic Act [Cap 13:11] should be invoked in the absence of special circumstances.*
- 4. That Mr Tembo be and is hereby directed to summon the appellant (the accused) within 14 days of granting of this order for purposes of complying with paragraphs (2) to (4) of this order.”*

The drama in this matter continued. We were pleasantly bemused when, on 8 October 2018, we received a letter from *Mr Tembo* dated 4 October, 2018 requesting a written judgment and full reasons thereof in respect of the Order we had granted. We responded the same day and politely reminded *Mr Tembo* that we granted the Order for dismissal of the matter for want of prosecution after he had made the application for such an Order as the Counsel for the appellant (accused) was in default and that the remittal of the matter to the trial Magistrate was for purposes of complying with the law relating to assessment of prohibition from driving

motor vehicles and cancellation of the driver's licence in accordance with the provisions of s 64 of the Road Traffic Act [Cap 13:11]. Further we pointed out that we gave these brief reasons in the presence of *Mr Tembo* himself and that we had directed him, as Counsel for the State present, to ensure compliance with the Order or to give teeth to the Order as it were.

The accused was subsequently summoned and the brief notes by the Learned Provincial Magistrate reflect that he protested that his legal practitioner was the author of his problems. Surprisingly the learned Provincial Magistrate did not probe as to what accused meant by this or why the accused was blaming his legal practitioner presumably *Mr Muchineripi*. Thereafter the accused opted to proceed without legal representation.

The record of proceedings reflects the following;

"What special circumstances are explained to the accused and understood.

By Court

Do special circumstances exist in this case?

A. Yes it was an accident. I did not think that such an accident was going to happen.

This problem was caused by my lawyer. I have 3 wives and 11 children.

Findings

No special circumstances in this case.

Sentence altered as per Judge's request to imprisonment.

3 years imprisonment of which 6 months is suspended for 5 years on condition accused does not contravene s 51, 52, 53 of the Road Traffic Act or driving under influence of a drug for which upon conviction accused is sentenced to imprisonment without the option of a fine.

In addition accused is prohibited from driving a motor vehicle other than a commuter omnibus or a heavy vehicle for a period of 2 years and is prohibited from driving a

commuter omnibus or a heavy vehicle during his life time. Accused person's licence is declared cancelled. Further the Clerk of Court is instructed to refund accused \$1000 within 7 days.

Accused to surrender his licence with the Clerk of Court within 7 days.” (sic)

It is indeed mind boggling as to how the learned Provincial Magistrate proceeded in this manner. A number of issues arise from this.

In terms of procedure the learned Provincial Magistrate should have explained to the accused why he had been summoned and to read out the High Court Order to the accused. Probably this was done but the record reflects otherwise.

The learned Provincial Magistrate was enjoined to fully and properly explain to the accused, who was now unrepresented, what special circumstances entail and the consequences arising from an absence of such special circumstances: See *S v Manase 2015* (1) ZLR 160 (H) as per MUREMBA J. The accused's right to a fair hearing as enshrined in s 69 of the Constitution cannot be taken lightly. As an experienced Magistrate one would not expect the learned Provincial Magistrate to approach proceedings in such a cursory manner.

It is important to note that in the initial reasons for judgment soon after the trial the learned Provincial Magistrate had not specifically dealt with the factual finding in relation to accused's degree of negligence other than simply mentioning in passing that accused's degree of negligence was high (whatever that means). Again there are a plethora of cases from this court dealing with this aspect. See *S v Dzvatu 1984* (2) ZLR 136 (H), *S v Mtwizwa 1984* (1) ZLR 230 (H), *S v Chaita & Ors. 2001* (2) ZLR 90 (H).

What is even worrying is that the trial prosecutor while addressing the court in aggravation soon after the accused's conviction specifically referred the learned Provincial Magistrate to the provisions of s 64 of the Road Traffic Act [*Cap 13:11*]. Apparently this still did not find traction with the learned Provincial Magistrate who simply proceeded to

prohibit the accused from driving any class of motor vehicle for 6 months after imposing a fine of \$1000.00, which sentence was manifestly lenient.

The major concern however is why, in purporting to comply with the Order of this court the learned Provincial Magistrate decided to mislead the accused that this court had directed

that accused should be sentenced to a term of imprisonment. He then proceeded to impose a sentence of 3 years imprisonment without even asking the accused to show cause why such a sentence should not imposed. In fact, it is difficult to appreciate why the learned Provincial Magistrate deemed it fit to deal with paragraph (1) of our Order which relates to the substantive sentence. That Order is crystal clear that the accused was to be summoned by the trial court for purposes of complying with paragraphs (2) to (4) of that Order and not paragraph (1). It is therefore disingenuous for the learned Provincial Magistrate to untruthfully suggest, let alone allege that this court ordered him to alter the accused's substantive sentence. As already said, the learned Provincial Magistrate simply decided to take leave of his senses and cause further confusion in this matter by embarking on a frolic of his own.

The learned Provincial Magistrate should have appreciated that he was now *functus officio* in relation to the substantive sentence he had imposed on the accused of a fine of \$1 000.00. As a result, he could only competently revisit that sentence after being ordered to do so by this court and after this court had interfered with such a sentence and setting it aside. This court had clearly not done so for obvious reasons despite noting that a clear injustice had been occasioned by imposing a manifestly lenient sentence. The effect of the conduct of the learned Provincial Magistrate is not only to taint the image of this court but to ignore all basic aspects of procedural law. In essence therefore the accused now has two separate sentences on the same matter, one of a fine of \$1 000.00 and the other of a custodial term of 3 years. Both sentences are *extant*. Such conduct is clearly improper and incompetent. This court is enjoined to correct such an anomaly by exercising its review powers to ensure that basic tenets of justice are adhered to.

This court is quite alive to the fact that the accused deserved a harsher penalty other than the fine initially imposed. However, as things stand this court is unable to correct such an injustice in relation to the substantive sentence for reasons already stated.

What is proper in the circumstances is to now correct all these anomalies by setting aside the sentence of 3 years imprisonment imposed by the learned Provincial Magistrate, the order relating to prohibition from driving any motor vehicle for 6 months and the order in relation to the refund of \$1 000.00. The order in relation to prohibition from driving any motor vehicle other than an or commuter omnibus or a heavy vehicle for 2 years and from driving or commuter omnibus or a heavy vehicle for life and the cancellation of the accused's driver's licence should be upheld.

In view of the aforementioned we are still unable to certify the proceedings as in accordance with real and substantial justice in relation to the substantive sentence of a fine of \$1000.00 which sentence shall remain operational despite the misplaced endeavour by the learned Provincial Magistrate to alter that sentence improperly.

In the result the following order is made;

IT IS ORDERED THAT;

1. The conviction of the accused be and is hereby confirmed.
2. The sentence of 3 years imprisonment of which 6 months imprisonment is suspended for 5 years on the usual conditions be and is hereby set aside.
3. The initial sentence imposed by the court *a quo* of a fine of \$1000 or in default of payment 6 months imprisonment with additional 6 months imprisonment suspended for 5 years on condition accused does not negligently cause the death of another person arising from a road traffic accident be and is hereby reinstated.
4. The accused be and is hereby prohibited from driving any motor vehicle other than a commuter omnibus or a heavy vehicle for a period of 2 years and is prohibited from driving a commuter omnibus or a heavy vehicle during his lifetime.
5. The accused's driver's licence be and is hereby cancelled.
6. In relation to the substantive sentence of a fine of \$1000 or in default of payment 6 months imprisonment with additional 6 months wholly suspended, we are

unable to certify that sentence as being in accordance with real and substantive justice and therefore we withhold our certificate.

7. The Registrar be and is hereby directed to bring this review judgment to the attention of the Chief Magistrate to ensure that the conduct of the learned Provincial Magistrate is not repeated.

The accused should again be recalled and advised of this outcome. If accused pays the fine he should be released from prison forthwith.

Mafusire J. agrees.....