

THE STATE

versus

NYASHA DOMU

HIGH COURT OF ZIMBABWE  
ZISENGWE J  
MASVINGO, 19 SEPTEMBER 2023

### **Criminal Review**

ZISENGWE J: The famous expression “good fences make good neighbours” holds true for the matter at hand. For having his cattle stray into his neighbour’s maize field and destroying a portion a portion of the latter’s maize crop, the accused soon found himself on the receiving end of a criminal conviction for the relatively new offence of “negligently causing serious damage to property” as defined in Section 141 of the Criminal Law (Codification and Reform) Act, [Chapter 9:23] (“the criminal law code”). In the wake of such conviction the accused was sentenced to pay a fine of US\$700 or US equivalent in value in Zimbabwe dollars calculated at the inter-bank rate in default of payment 2 months ‘imprisonment.

The brief facts of the matter are that the accused and the complainant occupy neighbouring plots in the Mushandike area of Masvingo. On the day in question the accused’s cattle as earlier stated strayed into the complainant maize field destroying a portion of the latter’s maize crop in the process your ..... village delict, so to speak. The extent of damage was hotly contested in the trial which took place after the accused denied the charges.

The accused’s defence to the charge was a denial not only of the allegation that his cattle strayed into the complainant’s field but also that the charges are trumped up in order to extract some form of revenge for complainants ‘own wrong doing. He claimed in this regard that it was in fact when his cattle strayed into the complainants’ field, the latter’s worker immediately drove

out the offending animals. Apparently in a fit of anger the complainants' worker destroyed his (ie accused's) crop and assaulted his son, causing injuries necessitating medical treatment. According to the accused, the complainant's worker was arrested and prosecuted for the assault. He was subsequently convicted and sentenced to perform community service.

In the trial which ensued two witnesses testified for the State and the accused and his son testified for the defence. The following is a synopsis of the evidence of the witness.

Bensai Nyengerai

He is the owner of the maize field in question though he did not personally observe the incident which gave rise to the criminal charges against the accused. He however received a phone call from his worker about the accused's cattle having strayed into his maize crop and having damaged a portion thereof.

He testified that in the aftermath of the incident he enlisted the services of the government organ called AREX who proceeded to conduct a physical assessment of the damage caused and compiled a report. According to him about 0,04 hectors of maize yield lost thereby amounted to about one tonne and its value was US\$300.

He would concede under cross examination that as a matter of fact the field in question does not belong to him but to his brother. He however indicated that he is responsible for the maize field in question. However, he would concede under cross-examination that neither him (ie witness) nor the accused nor the owner of destroyed by the accused's cattle and witness the incident but had to rely on what the complainants' employee told them.

Finally, he conceded that this employee assaulted the accused's son, ostensibly for having reflected to properly fend to the cattle resulting in them straying into his field and that the latter said employee was arrested, presented for the assault and earned himself sentence of community service for this transgression.

The complainant's employee, who was at the centre of this incident, Trust Mangoma testified on the 2<sup>nd</sup> and final state witness.

His evidence was basically that the accused's cattle made two successive forays into the complainants' field destroying a section of the crop in the process. He admitted that in a fit of rage he assaulted the accused's son using switches. It was when the accused caused his arrest for the assault and at the instigation of what he referred to as the "village elders". The main part of

the accused's cross examination consisted of disputed the extent of the damage caused. He insisted that the portion destroyed was small and relatively insignificant.

The accused adopted his defence outline as his evidence in chief. He would concede under cross examination that it was his beasts which damaged part of complainants' maize crop. He conceded that he owed a duty of care to avoid his cattle stray into other people's fields.

Accused's son Gift Donn testified as a defence witness. He admitted that it is his father's cattle which strayed into the complainants' field and destroyed a section of the latter's maize crop.

While admitting that it was indeed their (ie his family's) cattle that had strayed into and had damaged the complainants maize crop, he would nonetheless insist that the section of the maize crop. So damaged was insignificant. He estimated that the cattle were in the complainants' field for approximately an hour.

At the conclusion of the trial the court found that since it was not in dispute that it was the accused's cattle which had strayed into the complainants' maize field and had damaged a portion of the maize crop, that therefore the accused was guilty of the alleged offence. It therefore convicted the accused and sentenced him to the fine referred to earlier.

Several issues immediately caught my attention which the record of proceedings why submitted to this court for review in the ordinary course. I therefore directed a query to the learned trial Magistrate expressing my concerns.

The first issue that caught my attention from the evidence was that it was not even the accused who was the proximate cause of the incident. He was not even present in the area when his cattle strayed into the complainant's field occasioning the damage in question. This much is common cause from the evidence.

It was his son, Gift Domu who was apparently entrusted with tending to the beasts and whose inattention led to the beasts straying into the complainants' field. It stands to reason that it was him who should have been charged with the offence and not the accused.

The court appears to have vaguely imputed some of vicarious liability on the accused regrettably applied the logic that because the cattle belonged to him, therefore it was him who was criminally liable. That concept is inapplicable in the context of this criminal offence.

The second issue which exercised my mind was the propriety of the conviction in light of the *mens rea* requirement of the offence.

The section under which the accused was charged reads

141. Negligently causing serious damage to property

*"Any person who, knowing that another person is entitled to own, possess or control any property or realising that there is a real risk or possibility that another person may be so entitled, seriously damages or destroys the property, being grossly negligent in causing damage or destruction shall be guilty of an offence and liable to a fine not exceeding level ten or imprisonment for a period not exceeding five year or both"*

The following are therefore the essential elements of this charge

- (a) Destruction or damage of a serious nature of property belonging to another
- (b) Knowledge by accused (or realisation of risk a possibility that the property belongs to another
- (c) Gross negligence in the destruction damage to complainants' property
- (d) Unlawfulness

The first two essential elements above do not present any conceptional or practical difficulties. Element (c) above however appear to have caused problems on the part of the trial court. The court appears to have erroneously proceeded on the basis of some strict liability, yet from wording of the offence creating provision the state was required to prove "gross negligence" on the part of the accused. The State dismally failed allege let alone establish the pre requisites of negligence, worse still gross negligence. For negligence to be proved, the accused's conduct falls short of the standard is to be found in what a reasonable person would have foresee in the particular circumstances and the care which such reasonable person has exercised in the circumstances.

According to Snyman CR, Criminal Law 5<sup>th</sup> edition at page 209, the following test is generally accepted as the complete test to determine negligence:

*"A person's convict is negligent if*

1. *The reasonable person in the same circumstances would have foreseen the possibility*
  - (a) *that the particular circumstances might exist; or*
  - (b) *that his conduct might bring about those particular results*

2. *The reasonable person would have taken steps to guard against such a possibility; and*
  3. *The conduct of the person whose negligence has to be determined different from the conduct expected of the reasonable*
- The conclusion that the relevant person was negligent can only be drawn once all three above mentioned requirements have been compiled with. "*

In *casu*, the circumstances surrounding the straying of the accused's herd of cattle into the complainants' field were not meaningfully explored. Issues such as the fences, if any between the two neighbouring fields the place where the beasts were ordinarily expected to be at the time they strayed etc needed to be canvassed. Not only did the State fail to establish the reasonable foreseeability leg of the inquiry but also the steps a reasonable person placed in the shoes of the accused would have taken to prevent the consequences which ensued.

This is not one case of the doctrine of *res ipsa loquitur* would be applicable.

The common law requirements for negligence are captured in section of the criminal law code which provides as follows:

.....  
.....

Further, the State as a matter of fact needed to establish more than ordinary negligence, it needed to establish gross negligence which is a heightened form of negligence representing an extreme departure from the ordinary standard of care. I say this mindful of the fact that subsection 2 of section 16 provides that

(2) for the avoidance of doubt, it is declared that paragraph (c) of subsection (1) shall apply to determine the criminal liability of any person accused of culpable homicide, negligently causing serious bodily harm or negligently causing serious damage to property.

The distinction between ordinary and gross negligence is notoriously difficult in state. The following passage from Cooper Motor Law Volume 1 at page 509 though stated in the context of driving offences helps to shed light on the vexed question.

*"The word "gross" in the term gross negligence, connotes negligence of a very serious nature or of a very high degree. It is a term of reproach and suggests something opprobrious. Gross negligence signifies conduct which in terms of the surrounding circumstances has aggravated, flagrant or extreme characteristics. Applied to driving,*

*gross negligence implies conduct in which there is a marked departure from the standards by which responsible and competent drivers habitually govern themselves. The difference between ordinary negligence and gross negligence is thus one of degree; in each case the court has to make a value-judgment. "*

Before concluding I am constrained to comment on the seriousness of the damage to warrant a criminal prosecution. Admittedly this involves a value judgement on the part of the trial court. My misgivings however relate to the admissibility of the AREX report. The name, capacity and qualifications of the person who purported to conduct the assessment of the extent of the damage was conspicuous by their absence.

That report does not qualify as an official document as contemplated in section 276 of the Criminal Procedure and Evidence Act, nor does it qualify for in terms of section 278 of the same Act. In a word therefore the report should not have been admitted into evidence in that form.

A fortiori however, it is the absence of evidence of the manner in which the accused was negligent that vitiates the conviction.

Accordingly, the following order is hereby made:

1. The conviction is hereby set aside and the sentence quashed
2. The accused to have the fine he paid if any refunded
3. The accused to be brought before court without ..... delay to be informed of this review

ZISENGWE J

MAWADZE J agrees.....