

CHIVHARANGE PADDINGTON TONGI
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA and MUZENDA JJ
MUTARE, 19 June and 25 July 2019

Criminal Appeal

TT Sigauke, for the Appellant
J Chingwinyiso, for the Respondent

MWAYERA J: The appellant was convicted on his own plea of guilty to a charge of negligent driving as defined in s 52 (2) (a) of the Road Traffic Act [*Chapter 13:11*]. The appellant who was driving a Toyota Ipsum was alleged to have rammed into a Honda Ballade motor vehicle which was turning to Mutare Sports Club.

The brief facts informing the charge are that on 18 April 2018 along Park road, Mutare the appellant was driving a Toyota Ipsum carrying 13 bales of second hand clothes. On approaching Mutare Sports Club the appellant hit a Honda Ballade motor vehicle turning to the Sports Club being driven by the complainant Brown David Robin. The complainant sustained head injuries and was hospitalised. Both vehicles sustained damages. The appellant admitted he was negligent and that he caused the accident. The appellant who admitted to having negligently caused the accident was sentenced to pay a fine of \$250-00 or in default of payment to undergo 4 months imprisonment. The appellant was further prohibited from driving all classes of motor vehicles for a period of 6 months and his driver's licence was cancelled.

Dissatisfied with the sentence imposed the appellant approached this court seeking that the sentence imposed by the court *a quo* be interfered with by setting aside the cancellation of the driver's licence and the prohibition from driving. The respondent partially opposed the appeal in that the respondent argued that the court *a quo* did not err in prohibiting driving all classes of motor vehicles for a period of 6 months as this was a sentencing discretion bestowed upon the court by the law. The respondent's counsel conceded that the cancellation of the appellant's driver's licence could not stand given the

court *a quo* prohibited the appellant from driving for 6 months. The cancellation of the driver's licence was not automatic following prohibition.

It is important to take note of the distinction made in the Road Traffic Act of negligent driving of a commuter omnibus and or heavy vehicles on one hand and a private vehicle on the other hand. Further it is important to note the distinction on sentencing provisions for a first offender and a repeat offender. In respect of commuter omnibus or heavy vehicle the Act provides for mandatory prohibitions of at least 2 years regardless of whether the convict is a first or repeat offender. It is only for the commuter omnibus or heavy vehicle that the question of special circumstances arise.

In the present case the appellant was driving a private car and was a first offender. The court was at large to impose a sentence as guided by the statute. In so doing the trial court was to properly and judiciously exercise its sentencing discretion. Section 52 (2) of the Road Traffic Act [*Chapter 13:11*] under which appellant was charged and convicted provides as follows:

Sections 52 (2)

“A person who drives a vehicle on a road

(a) Negligently or

(b)

Shall be guilty of an offence and liable to

(i)

(ii) in any case, a fine not exceeding level seven or to imprisonment not exceeding 6 months or both such fine and such imprisonment.

(iii)

(iv) Subject to part ix a court convicting a person of an offence in terms of subsection 1 involving driving of a motor vehicle

(a) may, (underlining my emphasis) subject to para (c), if the person has not previously been convicted of such an offence or an offence, whether in terms of a law of Zimbabwe or any other law of which the dangerous, negligent or reckless driving of a motor vehicle on a road is an element within a period of 5 years immediately preceding the date of such mentioned conviction, prohibit the person from driving for such period as the court thinks fit.”

There is no provision for cancellation as it is specifically spelt out in case of repeat offences and offenders driving a commuter omnibus and or heavy vehicles. It is however discretionary for the sentencing court to decide on whether or not to prohibit a first offender charged under s 52 (2). Given the circumstances of this case and the particulars of negligence namely

1. That accused failed to stop when an accident seemed imminent.
2. Failed to keep his vehicle under proper control.
3. Travelling at an excessive speed under the circumstances.
4. Failing to keep a proper look out under the circumstances.”

One cannot deduce anything more than ordinary negligence consistent with driving without due care and attention. Although vehicles were damaged and injuries sustained there were no fatalities and in fact no evidence on extent of injuries. The effective sentence of a fine of \$250-00 or in default of payment 4 months imprisonment and prohibition from driving all classes of motor vehicles and cancellation of driver's license for class 2, 4 and 5 in the circumstances was unduly harsh. It goes a long way in violating the proper exercise of sentencing discretion.

This is moreso when one considers that the prohibition is not mandatory. A reading of the relevant Act depicts the legislative intention in differentiating first offenders and also differentiating drivers of private vehicle from those of public vehicles and heavy vehicles. In cases of an infraction spelling out ordinary negligence to consider prohibiting of all classes is outrageous as the effective sentence would be too harsh. Whereas sentence is a domain of the sentencing court in circumstances where improper exercise of the discretion is apparent then the appellat court ought to interfere with the sentence.

In this case it was not necessary to consider prohibition and there was no justification for prohibiting from driving for all classes. The court after prohibiting proceeded to cancel the driver's licence yet the prohibition was for 6 months. The court erred in holding that cancellation of driver's licence is automatic pursuant to a prohibition order. Section 52 (2) (a) as read with s 52 (4) does not give the court the power to cancel a driver's licence. The appellat in this case is a first offender who was convicted of negligently driving a light motor vehicle.

See *S v Mujari* 1997 (1) ZLR 508 and *S v Chitepo* 2017 ZLR (1) 237. Also *State v Gaven Chifodya* HH 171/18 CHITAPI J lamented the failure by Magistrates to appreciate traffic offences penalties. It is imperative that a court convicting a motorist for an infraction of the traffic laws as provided for in the Road Traffic Act ought to acquaint itself with the relevant sentencing regimes as the legislature deliberately distinguished first offenders from repeat offenders and further distinguished drivers of light motor vehicle from those of heavy vehicles and commuter omnibuses.

The sentences are structured in such a manner as not to be one size fits all. In other words the circumstances of each case, the nature of infraction, nature of vehicle and nature of offender are all pivotal in relation to the sentencing regimes. A reading of s 52 (2) as read with s 54 (4) (a) and (b) of the Road Traffic Act [*Chapter 13:11*] does not seem to suggest

cancellation of the driver's licence for contravention of s 52 (2) (a) unless the conviction is a second or subsequent conviction.

It is worth noting that the Road Traffic Act is explicit on sentencing provisions including prohibition and cancellation of driver's licence even for offences provided for in the Criminal Law Codification and Reform Act [*Chapter 9:23*] like murder, attempted murder and culpable homicide in connection with driving motor vehicles. It is clear warning on penalty provisions which has to be paid attention to when a sentencing court is exercising its sentencing discretion so as to be in conformity and at the end deliver the just and appropriate sentences. In the present case the cancellation of the driver's licence was not properly sanctioned by the operation of law and thus incompetent as correctively conceded by the State, it cannot stand.

The alternative imprisonment to the fine is disproportionate and it will be interfered with. From the foregoing the appeal against sentence is meritorious.

Accordingly it is ordered that:

1. The appeal against sentence be and is hereby upheld.
2. The sentence by the court *a quo* is set aside and substituted as follows:
\$250-00 or in default of payment 2 months imprisonment

MUZENDA J agrees_____

Gonese and Ndlovu, Appellant's legal practitioners
National Prosecuting Authority, Respondent's legal practitioners