DISTRIBUTABLE (63) Judgment No. S.C. 101/84
Crim. Appeal No. 324/84

PETA MITCHELL v THE STATE

SUPREME COURT OF ZIMBABWE
DUMBUTSHENA, CJ, BECK, JA & McNALLY, JA,
Harare, OCTOBER 15 & 22, 1984.

D.W. Aitken, for the appellant

M. Werrett, for the respondent

McNALLY, JA: The road accident with which we are concerned took place at the robot-controlled intersection of the Borrowdale road and Churchill Avenue in Harare.

The appellant was travelling south, towards town, and turned right or west at the intersection across the path of oncoming traffic. The oncoming northbound traffic consisted of three vehicles.

In the lead was an Army lorry heading straight across the intersection towards Borrowdale, travelling in the outer lane. Slightly behind it and in the nearside lane was a Datsun 1200 driven by Mrs Sibanda, also heading across the intersection. Behind the two of them, in the right-hand turning lane, and preparing to turn east at the intersection, was the car of the principal witness for the State, Mr Robinson, a law lecturer and legal practitioner.

The time was about a quarter to six in the evening of November *5, 1982.* There was a collision first between the Army lorry and the appellant's vehicle and then between Mrs Sibanda's Datsun and the appellant's vehicle. It is not disputed that both the Army lorry and the Datsun entered the intersection with the green light in their favour. The Army lorry driver has left the Army and cannot be traced, Mrs Sibanda gave evidence but it seems that her view to her right front was at all material times obstructed by the lorry. As a result her evidence does not take the matter much further.

The main conflict of evidence is thus between Mr Robinson on the one hand

and the appellant on the other. He says she drove into the intersection and turned right without stopping, apparently oblivious of the oncoming traffic. She says she drove into the intersection, stopped in the "safe area" behind another car, and started to move off when it was safe to do so. Unfortunately her car stalled and she found herself immobilised and drifting slowly across the face of the oncoming traffic, which then hit her vehicle.

The magistrate did not believe her. In my view he had every justification for coming to this conclusion. He said her evidence was very difficult to understand and did not make sense. This, too, seems to me a proper assessment.

I have two major difficulties with the appellant's version of events. The first is that she says her car stalled, yet she says it was "sort of running" and she hoped it would "wheel down and get out of the way of the Army lorry" (she may have meant "freewheel"). An ordinary non-automatic vehicle in first or second gear would not travel after it stalled unless the appellant depressed the clutch, and she says nothing about that.

Secondly, if, as she suggests, the oncoming traffic was far away from her, so that there was adequate time for her to cross both lanes, then she must have stalled while they were still an appreciable distance away. Yet not only did the Army lorry continue to bear down on her, but very strangely she makes no mention of the frantic efforts she would surely have made to get her car to start again.

In the absence of accurate measurements and of an adequate plan one cannot make too much of a third point, which is that if she was stationary or barely moving it is surprising that her vehicle should have travelled into the path of the Datsun after colliding with the Army lorry.

In the result I find her description of the events a very unconvincing one. Nor did she call as a witness her mother-in-law who was a passenger in the back of the car.

Mr Robinson's impartiality as a witness cannot seriously be questioned. He was subjected to an aggressive and at times unfair cross-examination.

For instance the opening question by defence counsel was

> "You don't seem to be very sure where exactly you were driving from, or where you were at the time of the accident? I beg your pardon?

"You don't seem to be clear where you were, you say that you were driving along Chancellor Avenue, then you say you were driving in Churchill, it seems as though you were in Borrowdale?".

Mr Robinson at no time said he was in Churchill Avenue until after the accident. Nor did he say he was in Borrowdale. Chancellor Avenue is the extension of the Borrowdale road to the south.

It is suggested that his recollection may be faulty, and of course it is notorious what tricks the memory can play in recalling split second events after a long period of time.

The fact is, however, that he said quite firmly that she did not stop in the "safe area". He saw her coming into the intersection and turning across the Army truck in one continuous movement. He also said that the appellant's car "turned across the Army vehicle which was then in the intersection". In other words, her manoeuvre was inherently dangerous and whether or not she stalled at that stage was virtually irrelevant.

Now, it is clear that Mr Robinson formed a positive view that the appellant was in the wrong.
It is also evident that he knew of the reputation of Army drivers because he thought that unless he gave his evidence exonerating the driver it might be assumed that the Army driver was at fault simply because he was an Army driver.

It is suggested for the defence that in an excess of civic zeal Mr Robinson has leapt over hastily to the defence of the underdog and has subconsciously made incorrect assumptions.

For my part, I find his evidence clear and I find his observations to be consistent with the known facts. He was well-placed to see the events which he described. Moreover, he says that a woman spoke to him after the accident. It is common cause that this was the appellant. He says that she sought his view as to whose fault the accident was; he indicated that he thought it was her fault, and she asked him if she should say that she stalled in the intersection.

She denies these exchanges, though she admits there was a conversation.

She claims that he put the blame on the Army driver, saying he came through an amber light. She also claims he offered to come to court to give evidence on her behalf.

Now here there is no possibility of mistake.

One of them is not telling the truth. Mr Robinson has no reason to lie. Moreover, regardless of whether he was right or wrong, he certainly considered the appellant to have been wholly to blame, and he considered the Army driver had done everything possible to avoid the accident. Therefore he could not have said the words she claims he said.

I do not believe that this conflict of evidence can be explained away on the basis of misunderstanding. The two versions are not reconcilable. The magistrate had every reason to accept Mr Robinson' version and to reject the appellant's.

The appellant, it seems to me, is further discredited by the evidence of Mrs Sibanda, who says that after the accident the appellant came to her and said ''I didn't see the Army truck was so near, so I was trying to cross". It was put to her that this was in direct contradiction to what she had said earlier, namely, "She said she did not see the Array truck, the road was clear". I do not think it is fair or proper to suggest that those two statements are in direct contradiction. In essence they are the same; in incidental respects they differ. Either version is destructive of the appellant's case,

I am satisfied beyond a reasonable doubt that on the acceptable evidence the appellant was guilty of negligent driving and was properly convicted of a contravention of s 43(1)(a) of the Road Traffic Act, No 48 of 1976.

By way of punishment the appellant was fined $200, or in default two months' imprisonment with labour and was prohibited from driving for three months.

In dealing with the appeal against sentence Mr Aitken, who appeared in this Court for the appellant, submitted that the appellant had been treated as lucky to have escaped a conviction for reckless driving.

He contended that it was wrong of the magistrate to treat the offence as one involving recklessness.

It is a curious fact that the cyclostyled charge sheet uses the word "recklessly"

in describing the offence, though it seems clear that all parties treated it correctly as a charge of negligent driving.

Furthermore it is true that, in giving reasons for sentence, the magistrate said:-

> "... I feel the accused person was lucky in that she was charged for negligent driving and not reckless driving. Quite a good number of people could have been killed in that accident.
>
> "In the circumstances, I intend to impose (a) high penalty."

In assessing the appellant's moral blameworthiness one must consider the facts in order to determine her state of mind. The appellant, a young woman, was driving into town from her farm. In the front seat was her 86 year old grandmother-in-law as well as a child of 7. In the back were her mother-in-law and two more children. It is overwhelmingly improbable that such a person, with such passengers, would deliberately take the risk of cutting across the face of oncoming traffic, more particularly when the leading vehicle was a big Army lorry. Indeed it is overwhelmingly probable that her behaviour was due to sheer inadvertence or inattention - a brief lapse of concentration. It is well-known that even minor negligence may be attended by the most fearful consequences in terms of death and destruction. So one cannot always gauge the degree of negligence by measuring the extent of the consequences.

It would be right therefore to say that there was not an element of deliberate risk-taking in this offence. But one must be careful about saying that simply for this reason the magistrate was wrong to say she was lucky to escape a charge of reckless driving.

It is a very firmly established principle of the law of this country that recklessness is not only the deliberate taking of unjustifiable risks. It can include gross negligence. This was not always considered to be the law. But those cases which restricted the description "reckless" to instances where there was an appreciation of the risk in the mind of the offender were specifically disapproved, in this country in R v Chitanda 1968 (1) RLR 47 (AD), and in South Africa in R v van Zyl 1969 (1) SA 553 (AD).

van Zyl, supra, STEYN CJ said, at 558E:-

> "It seems, therefore, that the ordinary meaning of 'recklessly' includes cases of

indifference or rashness or inadvertence in which consciousness of consequences plays no part."

It follows from this that the magistrate's comments cannot without further consideration be taken to be misdirection. It cannot be assumed that he was saying in effect "you deliberately took this risk, you rashly carried out this dangerous manoeuvre, and you should be punished accordingly".

What he was saying, in my view, was that her negligence was of a high order, and that if the State had specifically alleged gross negligence this allegation could have founded a charge of reckless driving?

Is that a misdirection? One is dealing here with a value judgment. Generally, perhaps, momentary inattention will be regarded as slight negligence.

But in the situation with which we are here concerned there are two factors which I think imposed on the appellant a heavier duty of care. They were, first, the fact that she was carrying passengers, including three children and an old lady in her eighties; and, second, that she was not simply proceeding along a straight road and carrying out the almost automatic functions of a driver in such circumstances. She was executing a right-hand turn at a robot-controlled intersection.

That is an operation that requires concentration and awareness, and to carry it out while thinking of something else so as to be wholly distracted seems to me to be fairly characterised as negligence of a high order.

The magistrate did not use the expression "gross negligence", but it is certainly a reasonable interpretation of his comments that he did in fact consider that the appellant was grossly negligent.

This interpretation is confirmed by his reply to the notice of appeal. The grounds of appeal against sentence contain the statement

''The Learned Magistrate erred in sentencing the accused when there was no finding as to how the collision occurred and when the learned Magistrate failed to assess a degree of negligence."

In apparent answer to this the magistrate said:-

"I took into account that accused is a first offender - even mentioned that accused should have been charged under section 44 of Road Traffic Act - Reckless driving."

That answer can only mean one thing - that her degree of negligence was such as to warrant a charge under section 44, i.e. it was gross negligence.

The magistrate was not dealing with a charge of reckless driving, and so it was strictly unnecessary for him to determine whether the appellant's negligence was gross (thus enabling him to convict her of reckless driving) or merely serious (thus rendering her liable to a conviction for the lesser offence of negligent driving).

-In my view his finding must be regarded as a finding that her negligence was of a high order.

If one looks at the facts in van Zyl's case, supra,one can hardly quibble with such a finding. Van Zyl had:-

"... on a clear day at about 6.30 pm. in January, last, ... on a level, long, straight tarred road collided with the front of an approaching vehicle on his incorrect side of the road which car he had not noticed. His vehicle had swerved to the right because he was busy doing something in the vehicle and had not had his eyes on the road." (Per STEYN CJ at 556).

His conviction for reckless driving was upheld by the Appellate Division.

Even if the magistrate should properly be deemed to have held that the appellant was grossly negligent I would not quarrel with that finding in the context of a negligent driving charge. The negligence was serious. The (unspoken) finding of gross negligence was not used to justify a punishment for the more

serious offence of reckless driving. Had she been prohibited from driving for six months it might have been possible to say that the magistrate was punishing her for reckless driving while convicting her of the lesser offence. But in fact he only prohibited her from driving for three months. The minimum for reckless driving is six months.

Given the appellant's general economic circumstances I do not consider the fine too high.

Nor do I consider that the magistrate can be criticised for imposing a short period of prohibition from driving for a fairly serious offence under a section which gives him discretion to prohibit.

In the result therefore I would dismiss the appeal both against conviction and

sentence.

DUMBUTSHENA, CJ: I agree.

BECK, JA: I agree.

D.W. Aitken & Co., appellant's legal representatives