Judgment No. S.C. 103/84
Crim. Appeal No. 265/84

MARTHA JACOBA FERREIRA v THE STATE

SUPREME COURT OF ZIMBABWE,
DUMBUTSHENA, CJ, GUBBAY, JA & McNALLY, JA,
HARARE, OCTOBER 22 & NOVEMBER 5, 1984.

C.N. Greenland, for the appellant M. Werrett, for the respondent

GUBBAY, JA:. The appellant was convicted of negligent driving in contravention of s 43(1)(a) of the Road Traffic Act, 1976. She was sentenced to a fine of $100 or to 45 days' imprisonment with labour in default of payment, and in addition she was prohibited from driving (the class or classes of motor vehicle being unspecified) for a period of six months.

She has appealed against both the propriety of the conviction- and the severity of the sentence.

The accident that gave rise to the prosecution of the appellant occurred on the morning of 24 May 1983, in clear and dry weather, at the junction of Lomagundi Road and Ely Avenue, Harare. A large truck, measuring 23 feet in length, owned by a furniture removal company and driven by its employee, Edward Mlala, was turning to its right into Ely Avenue. While it was in the process of turning across Lomagundi Road, the appellant, driving a Mercedes Benz motor vehicle, endeavoured to pass it on its off-side, but a collision occurred between the right front portion of the truck and the left front portion of the Mercedes Benz. The point of impact was slightly to the right of the center of the road and directly opposite the entrance to Ely Avenue.

The evidence of the truck driver was to this effect: On the morning in question he was instructed to proceed in one of the company's vehicles to a residence

in Ely Avenue in order to collect the householder's movables for conveyance to Bulawayo. Save that he knew that Ely Avenue is a secondary road forming a junction with the main Lomagundi Road in the suburban area of Greencroft, its exact location was unknown to him. He drove along Lomagundi Road in a westerly direction searching for the turn-off into Ely Avenue. However, when ultimately he noticed it on his left- hand side there was insufficient time within which to negotiate a turn. So he proceeded further along Lomagundi Road for a distance of about one kilometer, executed a U-turn and drove back towards Ely Avenue at a speed of between 30-40 kph. as he neared the T-junction he engaged the right-hand indicator lights of the truck.'

Having done so he observed in his rear view mirror that the appellant's motor vehicle was following behind at a distance of about 50 metres. He reduced the speed of his truck, and just as he commenced to turn across the road into Ely Avenue- he saw in the offside wing mirror that the Mercedes Benz was in the right-hand portion of the road in the process of overtaking. Although he applied the foot brake, it was too late to avoid a collision.

The evidence of the appellant was somewhat different. She said that she entered Lomagundi Road from Salisbury Drive and proceeded towards the city in an easterly direction. Shortly after doing so, she observed ahead of her a removal truck enter Lomagundi Road from her right. At that stage it was between 50 to 100 metres ahead and travelling at a speed which she estimated to be between 30-40 kph. Its presence caused her to reduce the speed of her vehicle and thereafter she maintained a distance of about 15 metres behind it. When the road was clear of oncoming traffic she accelerated and pulled out to the right. As her vehicle came abreast of the cab of the truck it suddenly and without any warning began to turn to the right towards her vehicle and the T-junction which by this time the two vehicles had reached. The appellant could then do nothing and an accident occurred.

In the course of being cross-examined the appellant made three important concessions: First, she admitted that at the moment she proceeded to

overtake the truck she was aware that the Ely Avenue junction was just ahead of her on the right side of the road. Secondly, she acknowledged that the truck was occupying the middle of the left-hand portion of the road. Finally, she accepted - as indeed she had to - that in order to turn into Ely Avenue the truck, which was large and cumbersome, must have been reducing the speed of its approach.

No other witnesses were called upon to testify, which is surprising since there were passengers in both vehicles.

In his judgment, given at the conclusion of the trial, the magistrate made no findings of credibility and so did not resolve the material dispute of whether the truck driver had timeously signalled an intention to make a right-hand turn. He expressed himself thus:-

> "Since the State only called one witness and the court is aware of the dangers of convicting an accused person on the uncorroborated evidence of a single witness, this court in arriving at what it considers to be a just and proper verdict has placed more weight on those facts which are not in issue."

It must therefore be assumed in favour of the appellant that the truck driver failed to indicate an intended right-hand turn. That being so, the narrow point to decide is whether, without receiving such prior signal, the appellant, exercising reasonable skill and care, ought to have foreseen, and then guarded/ guarded against, the possibility that the truck driver might be contemplating a right-angled turn into Ely Avenue. (See Bata Shoe Company Ltd (South Africa) v Moss 1977 (4) SA 16 (W at 22 G-H; Orne-Gliemann v General Accident Fire And Life Assurance Corporation Ltd 1981 (1) SA 884 (Z) at 887 E-H; Tatten and Ano v Minister of Defence and Ano H-B-89-84

Mr Greenland, who appeared for the appellant', is undoubtedly correct in his submission that it is not the law that a motorist is absolutely forbidden from overtaking at an intersection or a T-junction, provided of course the center of the road is not demarcated by an unbroken white line or there is some other prohibitory traffic sign. The circumstances in which the overtaking is carried out are always paramount and the cases of Rabie v The State Supreme Court Judgment No. 54/84 and Castle and Ano v Pritchard 1975 (2) SA 392 (R) (both of which concerned driving on main roads in the open countryside) , upon which reliance

was placed, are unhelpful as being clearly distinguishable on the facts.

In the present matter the appellant was travelling on a national road in a fairly built up residential area. On her own showing she knew of the existence of the T-junction on her right and and appreciated that the truck ahead was travelling at a slow speed. Indeed she accepted, as already mentioned, that it must have reduced speed to the extent of being able to negotiate a right-angled turn. It cannot be accepted, as she contended, that on the spur of the moment the truck driver turned his vehicle to the right, for having passed Ely Avenue when it was on his left-hand side, the overwhelming probability is that he was aware of its location on the return journey. Moreover the appellant had no assurance that the truck driver was conscious of her intention to overtake. It seems to me therefore that, taking account of the nearness of the T-junction and the reducing speed of the truck ahead of her, only two possibilities were open. Either the truck was about to pull over to the left side of the road or was about to execute a turn into Ely Avenue. It was the latter possibility which in my view a reasonably careful and prudent driver in the situation facing the appellant would have warned himself against. He would not have sought to have overtaken the truck until he was certain of what its driver intended to do.

It follows that in my opinion the appellant was shown to have been negligent in attempting to overtake at the time when she did. I do not regard her degree of negligence however as anything but moderate.

As far as sentence is concerned, Miss Werrett, on behalf of the State, conceded that there was no justification for the magistrate to have prohibited the appellant from driving. In so ordering he was influenced by the fact that in January 1975 the appellant had been convicted of contravening the Road Traffic Sign Regulations in driving across on straddling a longitudinal prohibition line. The magistrate erred in the respect, for not only was that offence nine years old, but by its very nature it was of little relevance to the assessment of sentence.
I have no difficulty therefore in agreeing with Miss Werrett and Mr Greenland that the appellant's current transgression did not call for a period of prohibition from driving.

Mr Greenland very fairly accepted that if the prohibition order were to be struck out the fine imposed by the magistrate would meet the justice of the case and so did not press for its reduction.

Accordingly I would dismiss the appeal against conviction but allow the appeal against sentence to the extent that the order prohibiting the appellant from driving for a period of six months is set aside.

DUMBUTSHENA, CJ: I agree.

McNALLY, JA-: I agree.

Honey & Blanckenberg, appellant's legal representatives