THE STATE
versus
MUNYARADZI RONDE

HIGH COURT OF ZIMBABWE
MUSHURE J
HARARE, 5 August 2024

Review Judgment

MUSHURE J:

[1] I have before me a record of proceedings which was submitted for review by the scrutinizing regional magistrate at Harare. The submission is founded on s 58(3)(b) of the Magistrates Court Act [*Chapter 7:10*]. The relevant section allows the scrutinizing regional magistrate, if it appears to him or her that doubt exists whether the proceedings are in accordance with real and substantial justice, to cause the papers to be forwarded to the registrar, who shall lay them before a judge of the High Court in chambers for review in accordance with the High Court Act [*Chapter 7:06*].

[2] The accused was convicted on a charge of negligent driving in contravention of section 52 (2) of the Road Traffic Act [*Chapter 13:11*]. He had been initially charged with reckless driving in contravention of s 53(2) of the same Act. The scrutinizing regional magistrate's view was that the accused's conviction was improper, and that the consequent sentence meted out by the trial magistrate was 'disturbingly inappropriate'.

[3] The factual matrix occasioning the scrutinizing regional magistrate's disquiet is set out as follows:

> On 4 March 2024 around 1845hrs, the accused was driving a public service vehicle, namely a Foton minibus. He was travelling along Robert Mugabe Road, Harare due west. He drove against the flow of traffic and at high speed. In the process, he hit a stationary Isuzu KB truck which was giving way to traffic at the intersection of *Robert Mugabe Road and Simon* v *Muzenda Street*. The accused did not stop. Instead, he proceeded undeterred and went on to hit yet another vehicle, a Honda Fit, which was in the inner lane. Again, he did not stop. He continued driving against the flow of traffic.

> Had it not been for the congestion at the corner of Orr Street and Kenneth Kaunda Avenue that forced him to stop, the accused would have continued to drive, unperturbed by the chaos he had left behind. The congestion enabled the apprehension of the accused person.

[4] He was charged with two counts of traffic violations. The first being contravening s 53 (2) of the Road Traffic Act (reckless driving) and the second being contravening s 70(2)(i) of the same Act, for his failure to stop his vehicle immediately after the accident. Upon his appearance in court, the accused initially pleaded guilty to both charges. As the trial magistrate was recording the plea on the first count, the accused stated that his vehicle had developed a mechanical fault forcing him to drive against the flow of traffic. The plea was altered to Not Guilty and the matter proceeded to trial.

[5] At the end of the trial, the trial magistrate found the mechanical fault explanation false. In convicting the accused person, the trial magistrate reasoned thus:

> "…From the evidence placed on record, the expert vehicle examiner told the court (that) driving against oncoming traffic is a direct and deliberate consequence of the driver wielding the driving wheel in that direction and not the brakes. In the circumstances the court is satisfied that the accused did not commit the offence due to a mechanical fault he deliberately and reckless (sic) drove a public service vehicle. The state has managed to prove its case beyond reasonable doubt. Accused is therefore found guilt for (sic) negligent driving as opposed to reckless driving in terms of section 53 (3) of the Road Traffic Act [13:11]."

[6] On the first count, the accused was sentenced to six months imprisonment which was wholly suspended for five years on condition the accused does not within that period commit any offence involving reckless driving and for which, if convicted, he is sentenced to imprisonment without the option of a fine. In addition, the accused was prohibited from driving all classes of motor vehicles for a period of two years. On count two, the accused was ordered to pay a fine of $200. In default of payment, he would undergo four months imprisonment.

[7] Section 53 (3) of the Road Traffic Act that the trial magistrate relied on to convict the accused of negligent driving provides that:

> '(3) A person charged with an offence in terms of subsection (2) may be found guilty of an offence in terms of section fifty-one or fifty-two, if such are the facts proved.'

Put differently, Section 53 (3) allows the conviction of an accused person for driving without due care and attention or reasonable consideration for others in contravention of s 51 or for negligent or dangerous driving in contravention of s 52 of the Road Traffic Act [*Chapter 13:11*], provided that the facts proved point to either driving without due

care and attention or reasonable consideration for others or negligent or dangerous driving.

[8] To my mind, while it is competent to convict a person initially charged with reckless driving of either negligent or dangerous driving or of driving without due care and attention, the phrase 'if such are the facts proved' is telling. It means that the departure from the initial charge preferred against an accused person to a conviction on the competent verdict must not be a thumb-suck. It can only be taken if the facts fail to prove the charge of reckless driving but establish either negligent driving or driving without due care and attention. There must be a value judgment and a careful analysis of the evidence led on the one hand, and a proper ventilation of that evidence against the law on the other hand, which process should then convince the trial court that an accused ought to be convicted on the competent verdict. There must therefore be a clear articulation of reasons which provides the foundation on which a judicial officer would have reached the alternative conclusion.

[9] In the present case, having been satisfied that the State had proved its case beyond a reasonable doubt on a charge of reckless driving, the trial magistrate made a sudden volte-face and without explanation, convicted the accused of negligent driving. No reasons were given for such a pronouncement. This is what the scrutinising regional magistrate found discomfiting, and rightly so, in the proceedings of the trial court. The need to give sufficient reasons for a decision is a well-trodden path. It is baffling how the trial court merely stated, in concluding its judgment, that the accused had been convicted on a competent verdict of negligent driving without expounding on its findings. The fact that the trial court felt it had to convict on the competent verdict in circumstances where the accused was clearly guilty of the main charge, did not absolve it of the need to give sufficient reasons. In fact, the need to give adequate reasons became even greater given that the conviction was on a competent verdict. The court *a quo*'s conclusion was therefore an arbitrary decision. In the case of *S* v *Mutande & Ano*r HH 521-23 this court pointed at page 4 of the cyclostyled judgment that:-

> "The verdict must accord with the facts and evidence at hand where an accused is to be found guilty of a competent verdict. Where there is inconsistency in the reasoning of a judicial officer leading to a wrong conclusion given the evidence at hand, a conviction cannot be confirmed or upheld. This is because flawed reasoning characterized by failure to measure facts against essential elements of an offence vitiates the proceedings. The essential elements of an offence must be proven and satisfied through the evidence led. It therefore requires a judicial officer to be conscientious and be alive to what it is that has to be proven by the state to secure a conviction. In that regard findings on the facts must then inform the verdict."

The reason for this is simple. As observed by BHUNU JA in *Kereke* v *Maramwidze & Anor* 2019 (3) ZLR 940 (S) at p942G-H,

> "The giving of reasons regardless of whether they are right or wrong eliminates the scourge of arbitrary, capricious or biased judicial decisions that are an abomination to the rule of law in a democratic society. When rendering judgment, a judicial officer speaks through the written judgment……. The rendering of cogent reasons for judgment instils confidence in the due administration of justice without fear or favour and the due protection of the law."

In short, as held in *S* v *Maimba* 2014 (1) ZLR 705 (H) the giving of reasons justifies the decision. The court said (@p711E-F):

> "…. unless reasons are given for a judgment, it is impossible to determine how the ultimate conclusion was reached, and whether it was reached on a proper reasoned basis. The need for this is clear. The trial court cannot just make arbitrary decisions based on mere caprice, whim or casting of lots. A clear thought process based on evidence should be evident…It is trite that a judgment must be reasoned and the reasons for reaching a verdict must not only be stated but also be clear."

[10] In my view, a bare conclusion depicted in the verdict without a statement of reasons exposes a trial court to the suggestion that it has not given the matter enough attention or even that it has allowed extraneous factors to cloud its consideration. A decision does not just come out of the blue. It must be subject of a properly laid out thought process and must lend credence to the old adage that justice must not only be done but must be seen to have been done. The giving of reasons is what distinguishes a reasoned judicial decision from an arbitrary or a capricious decision.

[11] Curiously, in the subsequent exchanges between the trial magistrate and the scrutinizing regional magistrate, the trial magistrate reasoned that the reasons why the accused had been convicted on the competent verdict had been captured in the sentencing judgment. The relevant portion of the sentencing judgment referred to is worded in the following manner: -

> *"*In arriving at the appropriate sentence, the court took into consideration the provisions of section 53 (3) that a person charged with the offence of reckless driving may be found guilty of an offence in terms of section 52 or 51. Accused person is a first-time offender who initially pleaded guilty. He had no intention to waste the court's time and resources. He is a family person as such a custodial penalty would likely cause undue hardship for his dependents. He shows much contrition and remorse for his action. No injury was sustained due to the commission of the offence. And the damages sustained were moderate. Further that court invoked the provisions of section 53 (3) court is of the view that a custodial penalty in consideration of the pre-conviction incarceration a custodial penalty would be too excessive (sic) …. "

[12] The above demonstrates the trial magistrate's complete lack of appreciation of the meaning of s 53(3). It does not empower a trial court to throw a dice at the end of the proceedings and elect which charge to convict an accused of. I have explained above that an accused who is charged with reckless driving must be convicted of that crime if, as *in casu*, the facts of the matter so prove. Even more alarming is the learned magistrate's belief that reasons for an accused's conviction may appear in the sentencing judgment. That the law provides for a sentencing judgment is not intended to have a conviction justified at sentencing stage. A sentencing judgment is passed after the conviction. It is impossible therefore that there can be an *ex-post facto* justification of the trial court's verdict. Even then, in that sentencing judgment as shown above, there is barely any reasons why the magistrate convicted the accused of reckless driving instead of negligent driving, unless the point is that the trial court did so simply because the law allows it to do so. The processes leading to a verdict and to a sentence are completely different. The steps taken to reach either are contained in distinct stages which are like oil and water, they do not mix.

[13] On one hand, following a criminal trial,

> *"*.....the judgment should contain a brief summary of the facts found proved and the trial court's appraisal of the credibility of each witness, stating what evidence was accepted or rejected and giving reasons for its decision."[1]

While on the other,

> "The sentencing judgment consolidates all the information presented and all the evidence tendered during the pre-sentencing hearing inquiry. It is a self-contained stage which standing alone must be capable of informing, in summary terms, any interested person of what happened in the case and what led to the offender getting the punishment which was imposed on him/her."[2]

[14] Both a judgment at the end of a trial and a sentencing judgment are supposed to deliver justice. While a judgment at the end of the trial must resolve the contest between the State and the accused as to the guilt or otherwise of the accused, the sentencing judgment, as observed in the *Sixpence* case *supra*, 'must resolve the contestation between the State and the offender as to what punishment the court must impose'. A sentencing judgment is not a substitute for a judgment at the end of a trial. A magistrate

[1] Citation from S v Ncube & Ors 2003 (1) ZLR 581 (H) at 585 A-E
[2] Per Mutevedzi J in *The State vs Sixpence and Others* HH 567-23 (@ p 20 of the cyclostyled judgment)

cannot, therefore, seek to justify a flawed verdict in the sentencing judgment. This would be tantamount to closing the stables after the horses have already bolted, and if that were to be allowed to stand, would be a gross misdirection.

[15] Yet the above infractions were not the end of the matter. The trial magistrate also sought to justify the competent verdict on the ground that the record would show that the State had preferred the charge of reckless driving simply because one of the complainants was a member of the security forces. There is no such averment anywhere in the record of proceedings submitted for review. In such circumstances, the possibility that either the proceedings were not properly recorded and some of the exchanges in court remained in the trial magistrate's mind or that such utterances were never made and the learned magistrate learnt about them somewhere outside court cannot be discounted in the circumstances. It has been emphasized times without number that in cases where the proceedings are not being recorded mechanically or by a shorthand writer, the integrity of a court record depends on the faithful and diligent record keeping of a judicial officer. Failure to do so makes a trial irregular- S v Mutero *& Ors* 2014 (2) ZLR 139 (H).

[16] In any case, had the trial court, after concluding in its mind that the facts established negligent driving, properly ventilated the facts and the law in its judgment, it may have reached a conviction different from the one it did. In the case of *S* v *Mtizwa* 1984 (1) ZLR 230 (HC), the court found that recklessness connotes not only a wilful disregard for the safety and rights of other road users, but also cases of indifference or rashness or inadvertence in which consciousness of consequences plays no part. In *S* v *Mumpande* HB108/22 DUBE-BANDA J held that driving in the opposite direction of a one way, that is on the incorrect side of the road, connotes recklessness.

[17] I associate myself in full with the above observation. If a court cannot appreciate the danger that is posed by such recklessness and the danger it poses to those riding in the driver's motor vehicle, other motorists and pedestrians, then nothing else can amount to reckless driving. In this case, the trial court found that the accused deliberately and recklessly drove against the flow of traffic. The accused did not deny that he did so at high speed. He did not stop when he hit the first car. He did he stop when he hit a second one. He was only stopped in his tracks by traffic congestion. If

such a brazen act and wilful disregard of the rules of the road and the safety of other road users is not reckless driving, then what would be?

[18] Even assuming that the trial court was correct in convicting the accused of negligent driving, (which it certainly was not) the sentencing process that this matter was subjected to would, in my view, still have failed the test that has been established in a long line of authorities when dealing with such cases. It has been held that a specific finding on the degree of negligence is necessary to inform the sentence to be imposed by the trial court, and that generally a finding of gross negligence or recklessness calls for a term of imprisonment unless there are compelling mitigating factors. See for example *S* v *Mtizwa*, supra; *S* v *Dzvatu* 1984 (1) ZLR 136 (H) & *S* v *Manhenga* 2014 (2) ZLR 705 (H). The record is bereft of such an enquiry having been conducted to enable the court to determine the degree of negligence that would have consequently informed the appropriate sentence. The trial court's misdirection was more glaring when it justified its sentence on the basis of the accused's pre-trial incarceration. I think the magistrate gave undue weight to that fact. The accused was apprehended on 4 March 2024. He was sentenced on 26 March 2024. All in all, he spent a maximum 22 days in custody which in my view, was such a short period to warrant a complete departure from the sentences of imprisonment which are normally imposed on similar transgressions.

[19] In the end, this is a typical case where the trial court did not properly apply its mind. This view is vindicated by the magistrate's reference to a conviction of the accused on reckless driving in the sentencing judgment and the record of the pre-sentencing hearing, as well as the entries at the back of the charge sheet on which the plea, verdict and sentence are recorded. Even the condition of suspending the sentence in the first count related to reckless driving. Had it not been for the subsequent exchanges between the trial magistrate and the scrutinising regional magistrate, one would be confused as to which charge the accused was convicted of given the disjuncture between the judgment, the charge sheet, the pre-sentencing hearing, the sentencing judgment and the sentence.

[20] As stated earlier in this judgment, the accused person initially pleaded guilty to both counts of reckless driving and failure to stop after being involved in an accident. When the plea on the reckless driving charge was altered to not guilty, the second

charge was relegated to oblivion, only to re-emerge on the entries at the back of the charge sheet as 'Verdict- Both Guilty as pleaded' and the sentence pronouncement. There is no record whatsoever of what became of the second charge between the time the trial court endorsed the 'Guilty' plea, to the time it then endorsed the 'Guilty as pleaded' verdict and proceeded to sentence the accused. All the proceedings on the record refer to the first count, including the evidence, the judgment, the pre-sentencing hearing and the sentencing judgment. There is no explanation as to what became of the second count.

[21] In the case of *Mapiye* v *S* SC 214/88, the Supreme Court considered an appeal where the trial court conflated two counts of stock theft and in the process, made no reference in its judgment to the evidence adduced in support of the second count. The court noted that the magistrate had not only omitted material facts but had left out all the evidence on count two and based his judgment on a charge sheet showing one count. The court considered if it was fair to allow or dismiss the appeal where there was no evidence in the judgment pertaining to the second count. The appeal court found that the trial magistrate did not say why he convicted the appellant on the second count. The court concluded that

> "An appellate court cannot be expected to guess what went on in the mind of the trial magistrate.
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> To confirm the conviction on the second count would in my view, result in a failure of justice. The omission to consider and give reasons for convicting the appellant on Count Two is fatal to the prosecution case. It is a gross irregularity" @ page 4 of the cyclostyled judgment.

[22] In my view, the same sentiments hold sway even in the present review proceedings. A look at the record of proceedings will show that after the charge was put to the accused and he pleaded guilty, the court indicated that it would proceed in terms of s 271 (2) (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] whose provisions are captured hereunder for completeness:-

> **271 Procedure on plea of guilty**
> (1) ……
>
> (2) Where a person arraigned before a magistrates court on any charge pleads guilty to the offence charged or to any other offence of which he might be found guilty on that charge and the prosecutor accepts that plea—
> (*a*) ……

(*b*) the court shall, if it is of the opinion that the offence merits any punishment referred to in subparagraph (i) or (ii) of paragraph (*a*) or if requested thereto by the prosecutor—
(i) *explain the charge and the essential elements of the offence to the accused* and to that end require the prosecutor to state, in so far as the acts or omissions on which the charge is based are not apparent from the charge, on what acts or omissions the charge is based; and
(ii) *inquire from the accused whether he understands the charge and the essential elements of the*
offence and whether his plea of guilty is an admission of the elements of the offence and of the acts or omissions stated in the charge or by the prosecutor;
and may, if satisfied that the accused understands the charge and the essential elements of the offence and that he admits the elements of the offence and the acts or omissions on which the charge is based as stated in the charge or by the prosecutor, convict the accused of the offence to which he has pleaded guilty on his plea of guilty and impose any competent sentence or deal with the accused otherwise in accordance with the law:

(3) Where a magistrate proceeds in terms of paragraph (b) of subsection (2)—
(a) the explanation of the charge and the essential elements of the offence; and
(b) any statement of the acts or omissions on which the charge is based referred to in subparagraph (i) of that paragraph; and
(c) the reply by the accused to the inquiry referred to in subparagraph (ii) of that paragraph; and
(d) any statement made to the court by the accused in connection with the offence to which he has pleaded guilty; shall be recorded.

[23] Where a court proceeds in terms of s 271 (2) (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], it is required to explain the charge and the essential elements of the charge to the accused. By operation of s 271 (3) of the same Act, the court is further required to record the proceedings done under s 271 (2) (b). A failure to record the proceedings under s 271 (2) (b) is a fatal irregularity warranting vitiation of the proceedings. See *S* v *Mutero* supra, *S* v *Mutokodzi* HH 299-21; and *S* v *Ndlovu* HH522/23. Assuming that the court intended to proceed with the second charge as a plea, it fell into error by not going through the peremptory motions of s 271 (2) (b) and s 271 (3) of the Criminal Procedure & Evidence Act. It was therefore a gross irregularity for the trial magistrate to then convict and sentence the accused on that charge.

[24] In the final analysis, it cannot be gainsaid that the proceedings in this matter are not in accordance with real and substantial justice. Section 29(3) of the High Court Act provides that:

(3) No conviction or sentence shall be quashed or set aside in terms of subsection (2) by reason of any irregularity or defect in the record of proceedings unless the High

> Court or a judge thereof, as the case may be, considers that a substantial miscarriage of justice has actually occurred.

[25] The proceedings in this case are afflicted with so many irregularities that it is not easy to correct them. The irregularities are what is envisaged under s 29(3) as quoted above. They do not conform to the basic precepts of a criminal trial. In the first count, the trial magistrate clearly concluded that the accused was guilty of reckless driving but for inexplicable reasons entered a verdict of guilty of negligent driving. The facts and the evidence show that he is guilty of reckless driving. Section 29(2) (viii) of the High Court Act allows me in such circumstances, to substitute the erroneous verdict for the correct one. I choose to do so. In the premises, it is ordered as follows:

1. In respect of count one, the verdict of guilty of negligent driving in contravention of s 52 (2) of the Road Traffic Act is set aside. It is substituted with a verdict of guilty of reckless driving in contravention of s 53(2) of the same Act.
2. In respect of count two, the proceedings relating to the second charge, the conviction and sentence are set aside.
3. The matter is remitted to the court *a quo* for the trial magistrate to:
   a. In count 1- sentence the accused afresh on a conviction of reckless driving taking into account the principles which inform a sentence for such a conviction.
   b. In count 2 to properly canvass the essential elements of the charge and if they properly inform a conviction, to thereafter pass sentence on the accused.
4. The registrar of this court is directed to avail a copy of this judgment to the Chief Magistrate to ensure proper training of the trial magistrate given the many and basic issues raised by this review judgment.

MUSHURE J:…….

MUTEVEDZI J ……..agrees