HB 155/16
HCA 496A/12

SAM TOGAREPI

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
BERE & MATHONSI JJ
BULAWAYO 13 JUNE 2016

Criminal Appeal

Ms N. Ncube, for the appellant
T. Hove, for the respondent

BERE J: On the 13th of December 2010 around 2100 hours, and along Bulawayo – Gwanda Road an accident which claimed the life of one Alfred P. Moyo (the deceased) occurred. The deceased was the driver of a DAF truck bearing registration number AAC 4363 which was heading towards Bulawayo whilst the appellant was driving a freight-liner heavy vehicle bearing registration number ABB 5780 towing a trailer and heading in the opposite direction. The two vehicles collided along the way and the appellant was charged and convicted of contravening section 49 (b) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] and some other offence for which he was acquitted and is consequently of no relevance to this appeal. After trial the appellant was convicted and sentenced to 2 ½ years imprisonment and in addition prohibited from driving certain classes of motor vehicles for varying periods of time.

Aggrieved by both the conviction and sentence the appellant lodged this appeal against both. The main complaint by the appellant is that the court *a quo* erred in its assessment of the evidence that it relied upon in convicting him, the argument being that he ought to have been acquitted at the close of the proceedings as the evidence did not support his conviction.

In its response to the appeal the respondent has conceded that the conviction was not supported by the evidence which was at the disposal of the court *a quo*. I agree.

It is quite clear that the court *a quo* itself was not impressed by the evidence of the key witness in this case, *viz,* the deceased's wife, who was clearly not on a vantage position to enable her to see clearly how the accident had occurred. Her ability to see clearly was compounded by the bad weather which was prevailing at the time. She was the only witness who was expected to give direct and credible evidence but as the court *a quo* noted that evidence had its own short comings. As regards the 2nd witness, the court found him to have been sincere but unhelpful and unable to corroborate any of the other witnesses.

Philimon Mupasiri who claimed to have been driving in front of the deceased's vehicle before the impact could not in all probabilities be said to have been able to give a credible account of what happened since he clearly reacted to the collision of the motor vehicles. This witness only stopped as a result of the collision and his evidence could not have assisted the court *a quo* in determining the alleged negligence of the appellant.

The fourth witness, the police accident evaluator's evidence was largely compromised by not having been at the scene at the time of the accident. The witness' testimony created even more confusion when he came up with two possible points of impact and his sketch plan was found by the court *a quo* not to have been comprehensive enough.

The court's view is that, in the light of the unconvincing evidence led by the state the appellant should have been believed when he testified that the deceased's vehicle appeared to have encroached into his lane of travel thereby causing the accident.

The evidence, looked at in its totality did not satisfy the threshold of proof beyond a reasonable doubt and the benefit of doubt should have been given to the appellant at the close of proceedings.

In conclusion and in passing, it should always be noted that in traffic matters a finding of gross negligence or reckless driving must be properly anchored. Such findings must accord with the factual enquiry carried out by the court in any proceedings. This observation flows from the findings by the court *a quo* that the appellant was "reckless in his driving". The findings of the

court in this regard were not factually supported by the weak evidence led by the state. See *S* v *Mutizwa*[1] and *S* v *Duduzile Tracey Manhenga*[2] on how the court should arrive at such a finding.

I am satisfied that the concession made by the state not to support the conviction was well made.

The conviction is quashed and the sentence is set aside.

Mathonsi J ……I agree

Web, Low & Barry, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners

1. 1984 (1) ZLR 230
2. HH-62-15