RICHARD DAVID THOMPSON
versus
THE STATE

HIGH COURT OF ZIMBABWE
UCHENA J, KUDYA J and CHATUKUTA J
HARARE, 16 September and 24 November 2010

**Criminal Appeal**

*R.T.L Matsika*, for the appellant
*S. Fero*, for the respondent

KUDYA J: This is an appeal against conviction in which I find myself in the same situation HAWTHORN ACJ was in *R v Freddy* 1963 (2) SA 128 (SR) at 128-129 and *R v Oscar* 1963 (2) SA 134 (SR). The appeal came before my brother UCHENA J and my sister CHATUKUTA J on 27 October 2009. Their opinions differed on the matter and in accordance with the provisions of s 4(2) of the High Court Act *[Cap 5:07]*, judgment was suspended until a third judge was present. I was the third judge. Unlike in the *Freddy* case, *supra*, I did not read the judgments prepared by my brother and sister as the matter was in terms of s 4(4) of the High Court Act, *supra*, reset for further argument.

Initially, the respondent was represented by Mr *Chikosha* who opposed the appeal. When the matter was reset for further argument Mr *Chikosha* was indisposed and the respondent was represented by Mrs *Fero*. Unlike Mr *Chikosha*, Mrs *Fero* both in her written heads of argument and oral submissions supported the appeal and conceded that the appellant had been wrongly convicted. She later abandoned the concession in response to our questions on the effect of the admissions made by the appellant during the course of the trial in the court *a quo*.

The appellant was convicted by the resident magistrate Murewa on 21 August 2006 of culpable homicide. He was driving a Honda Odyssey vehicle and drawing a trailer when on 25 February 2005 he hit and killed the nine year old deceased Shylene Motsi at the 46, 5 km peg along the Marondera Musami Road in Murewa. He was sentenced on the date of conviction to a fine of ZWD4 000 or in default of payment to under go 60 days imprisonment. On 30 August 2006, the appellant filed the present appeal. He listed eight misdirections he averred where apparent from the face of the record of proceedings. He averred that the circumstances in

which the fatal collision took place did not support the finding of negligence reached by the trial magistrate.

The facts of the matter are found in the testimonies of four witnesses and four documentary exhibits. The State called the evidence of Rutendo Mazanhi, Yolanda Takarova and the investigating officer Sergeant Gift Karonga while the appellant was the sole witness in his defence. Rutendo Mazanhi and Yolanda Takarova who were nine and seven years old at the time of the accident were in the company of the deceased. They were on their way home from school. Sergeant Karonga wrote in exhibit A, the traffic accident book that he arrived at the scene 30 minutes after the collision while the appellant stated that he did so after 15 minutes.

The appellant was driving a Honda Odyssey light motor vehicle and was towing a trailer along the 7 metre wide bituminous Marondera-Musami road. He was with his wife and two sons in the motor vehicle. He was at the tail end of a convoy of four cars led by Mrs Lesley Swart who was the only person who knew the way to the farm where they were going for a picnic. He had never driven on that road before. Unbeknown to him, at about 2:15pm the deceased was walking from Mabika Primary school in the company of Rutendo, Yolanda and Chenai Murare. The school was on the left hand side of the appellant. Between the school and the main road is a dust road which runs parallel to the main road. The ground between the dust road and the tarred road was covered by grass which was 1, 2m tall. The dust road was connected to the tarred road by diagonally running foot paths. The school girls were walking along the dust road. The deceased, Yolanda and Chenai used one of the diagonal paths to reach the edge of the tarred road; a spot some 200m to 250m from their school. They were all hidden from the appellant's view by the long grass. The deceased emerged from the grass and ran into the road. When she was in the center of the road, she realized that there was an oncoming vehicle traveling in its correct lane. She stopped and hesitated and then ran forwards into the lane for traffic coming from the opposite direction. The on coming vehicle left its lane of travel and went into the lane she had taken and hit her when she was a metre from the edge of the road. She was thrown into the air, fell into the road and instantly died. It was common cause that she died from the injuries sustained from the collision as amply demonstrated by the post mortem report, exhibit C.

The investigating officer compiled the traffic accident book, exhibit B, and drew a sketch plan, which he later enlarged into exhibit A. He recorded statements from the two

school girls who testified in court. He allowed the appellant and his elder son to write down their respective versions of events in the traffic accident book. At his trial, the appellant testified that he did not notice the Mabika Primary School sign, the school itself and the crossing ahead sign for school children that were all on his left hand side. It was the uncontroverted testimony of the investigating officer that the latter sign was 600m before the scene of the accident. He confirmed the testimony of the two school girls on how the accident occurred. He stated that the deceased suddenly emerged from the long grass on the side of the road and ran into the road some 5.5m in front of his vehicle. In order to avoid hitting her, he jumped on his brakes. The little girl looked at him and appeared to be retreating. He released his brakes, swerved to his right into the lane for traffic coming from the opposite direction but the girl carried on running and he hit her with the front of his vehicle where the number plate is affixed and she bounced off the front of his car to the right. He went over her without running her with his wheels. He lost control of his vehicle and went off the road into the long grass on his right hand side. He travelled in the grass for 21.5m before coming to a stop in the tarred road in his wrong lane. He produced four photographs of the danger warning sign that were taken by his legal practitioner a year after the accident, as exhibit E1, E2, E3, and E4.

In his well written judgment, the trial magistrate found the circumstances that prevailed as the appellant was driving were:

1. That Mabika Primary School and its sign post were visible to a driver travelling along the road in question. He, however, found that the danger warning sign for children crossing ahead was 1.5m high though partially obscured by the 1.2m long grass leaving the top portion visible for 30 centimetres would have been visible to the appellant just as it was visible to the investigating officer who drew it in the sketch plan in the traffic accident book on the day of the accident.

2. The 1.2m long grass on both sides of the road made the deceased and her companions inconspicuous to the appellant.

3. That the deceased just ran into the road without checking whether it was safe for her to do so.

4. That the appellant was traveling at a speed of 100km/hr through a built up residential rural area that he was not familiar with. That the maximum speed permissible for light vehicles on that portion of the road was 120km/hr. He was driving a light motor vehicle and was towing a trailer. He was traveling in a convoy and at approximately the same speed with three other vehicles that were not towing any trailers.

He proceeded to apply these circumstances to the three pronged foreseeability test propounded by WE Cooper's *Motor Law* vol 2 'Principles of Liability' (Juta, 1987) at page 49

and found the appellant culpable for the death of the deceased. The first question set out by Cooper is whether a reasonable man in the position of the appellant would have foreseen the possibility of harm to others. The trial court relied on the concession made by the appellant under cross examination that his speed was unsafe in a rural residential area which he was not familiar with and on a road which was bounded on both sides by 1.2m long grass. He found that his visibility was obscured by the long grass and held that a reasonable driver in his shoes would have foreseen the possibility of harm to others in those circumstances. The second question set out by Cooper is whether a reasonable man in these circumstances would have taken precautions to prevent the harm. The trial magistrate reasoned that a speed of 100km/hr was not a safe speed to travel at for a vehicle that was towing a trailer. His reasoning was based on two factors. The first was that his companions who were not towing any trailers were also travelling at that speed. The second was the further concession by the appellant that he did not apply his emergency brakes for fear of overturning. He also found that the failure by the appellant to observe the Mabika Primary School, its sign post and the danger warning sign for children crossing demonstrated that he was not keeping a proper look out. He held that his duty of care towards the deceased began long before he reached and not at the point at which he first observed the deceased. While he accepted that the appellant would not have been able to avoid the accident at the time he first saw the deceased darting across the road, he found that the failure to keep a proper look out and the unsafe speed that the appellant was traveling at prevented him from taking the precautions that a reasonable man in his shoes would have taken to prevent the harm that befell the deceased. The last question posed by Cooper was whether the appellant took the necessary precautions to avert the harm. The trial magistrate held that the measures he took on seeing the child at 5.5 m ahead were compromised by his earlier failures to drive at a safe speed on approaching a school and on seeing a danger warning sign ahead.

In the final analysis the trial magistrate agreed with the appellant's counsel of record that the cases of *S v Duri* 1999 (3) ZLR 111(S), *S v Ferreira* 1992 (1) ZLR 93 (s) and *S v Ball* 1993 (3) ZLR 384 (S) were distinguishable from the present matter in that in those cases the drivers had seen the children at an appreciable distance before the accident. He, however, opined that while the long grass and the failure by the child to check the road before crossing contributed to the accident the appellant failed to reduce his speed to suit the exigencies posed by the school, its sign and the danger warning sign because he was not keeping a proper

lookout. He came to the conclusion that the contributory negligence of the deceased reduced the appellant's negligence to ordinary negligence.

Mrs *Matsika* submitted that the trial magistrate ought to have assessed the negligence of the appellant from the time he first saw the child dart in front of him. She submitted that the long grass and the actions of the deceased created a sudden emergency which exonerated the appellant from any wrongdoing. She further argued that confronted with the sudden emergency the appellant by applying his brakes and swerving to the right acted as would a reasonable driver in his shoes. She, however, conceded that the appellant ought to have seen the school, its sign post and even the danger warning sign before the child suddenly ran into the road. Mrs *Fero* adopted her written submissions and did not support the conviction. She basically agreed with the appellant's counsel by conceding that a sudden emergency was created by the long grass and the actions of the deceased. In fairness to Mrs *Fero*, she abandoned her concession when we sought her comments on the admissions of negligence that appeared to have been made by the appellant under cross examination in the court *a quo.*

In *S v Duri, supra,* Duri was traveling at a speed of between 90km/hr and 100km/hr when he saw the child 80m in front of him on the side of the road. The child dashed into the road after his goat when he was 40m away and Duri hit both the boy and his goat and killed them. At 12F it was found that even if he had been traveling at 20km/hr he would not have been able to avoid hitting the boy. His appeal against conviction was dismissed on the basis that he did not take preparatory steps like slowing down, removing his leg from the accelerator and placing it adjacent to the brake or carefully watch the movements of the boy and his goat for the first sign of dangerous activity on their part that would have empowered him to take evasive action when the collision seemed imminent. At page 113G McNALLY JA stated that:

> "Having made it impossible for himself to deal with what was then no doubt a sudden emergency, he cannot call in aid the doctrine of sudden emergency."

In *S v Ferreira,* at 96A the appellant's conviction of culpable homicide arising from the death of a 7 year old boy who dashed in front of his boat towing vehicle was upheld after a consideration of the "totality of the facts". He had been driving at 90km/hr. He had removed his foot from the accelerator but had not placed it on the brake pedal. The boy dashed in front of him and he violently applied his brakes and veered slightly to his left. He was unable to evade the child. At 95D-F GUBBAY CJ stated that:

> "There is a very definite duty upon a motorist who knows himself to be in the vicinity of young children, for they have a propensity for impulsive and sometimes irrational

> action. Children should not be credited with the same mature intelligence and presence of mind as grown-up people. A motorist must anticipate that a child on or just next to the road may unexpectedly decide to run across oblivious of danger. He must keep his vehicle under such control as to be able to suddenly pull-up if a child starts to cross the line of his route. He must prepare himself for such an eventuality. It has been aptly remarked that young children are "as wide as the road" and are liable to get into the way of a motorist without any overt warning. Thus greater care is demanded towards children than is necessary for the safety of adults."

At 96F-H he emphasised the need to drastically reduce speed as a preparatory step to stopping to avoid a collision in these terms:

> "It is clear to my mind that the scene confronting the appellant was such as to impose upon him a duty to substantially reduce his speed of 90 km/h, albeit there was no indication at that stage of an intention on the part of any of the children to cross the road. Obviously, the appellant was alive to the possibility of a sudden movement into the road by one or more of the children for he took his foot off the accelerator. But that action was totally inadequate. The vehicle was traveling along a level stretch of road and the precaution the appellant took over the rapidly decreasing distance would have barely, if at all, slowed the vehicle down. He ought, additionally, to have realized that the braking power of the vehicle would be adversely affected by the weight of the boat carrying trailer."

In *S v Ball*, *supra* at 385A-C McNALLY JA had this to say about the defence of sudden emergency that was relied on by Mrs *Matsika* and conceded by Mrs *Fero*:

> "In a series of cases involving the unintentional killing of children this court has emphasised the high standard of care that must be exercised by motorists when passing children on the side of the road. See *S v Duri* 1989 (3) ZLR 111 (S); *S v Ferreira* 1992 (1) ZLR 93 (S) and *S v Beets* S-90-93. But there is no absolute liability. Each case turns on its own facts. In each of the cases to which I have referred, it could be said that, when the crisis occurred, there was no way the driver could avoid the child. In each case, therefore, the court was in effect, ruling that a properly cautious driver would have done something before the crisis arose to ensure either that he could avoid it, or that he could prevent it, or both.
>
> By slowing down considerably or moving to the centre or far side of the road when this is possible, one may be satisfied that even if the child does suddenly dash into the road one will be able to avoid him. By hooting or flashing one's lights one may be satisfied that the child is aware of one's presence. With a small child one may need to take both avoiding and preventive action. With an older child one or other may be an adequate and reasonable precaution."

Similar sentiments were expressed by CHIWESHE J, as he then was, in S *v Nortje* 2003 (1) ZLR 255 (H) at 258D-E.

The point made in these cases is that the court does not only look at the actions of the driver when the crisis occurred but also before it does. The trial magistrate properly looked at

the actions of the appellant when the crisis occurred and found that there was nothing he could do at that stage to avoid the accident. He, however, found him negligent on the basis of his omissions before the crisis occurred. I am unable to fault his findings or his reasoning. After all, under cross examination by State counsel, the appellant virtually admitted that he drove negligently. He accepted that he failed to see the school, its sign post and the danger warning sign when he ought to have done so. The evidence of the investigating officer also revealed that other school children were walking along the dust road that was parallel to the school when he arrived at the scene of the accident. The appellant's focus must have been on keeping pace with the vehicles that were in front of him. He incapacitated himself from keeping a proper look out of his surroundings. Had he done so he would have taken adequate preventive measures to avoid the collision. In *Santam Insurance Co Ltd v Nkosi* 1978 (2) SA 784 (A) CORBETT JA at 791F - 792E makes the point that a motorist has an even higher duty of care towards hidden children whose presence he ought reasonably to foresee or anticipate. THRING J adopted this reasoning in *Road Accident Fund v Landman* 2003 (1) SA 610 (C) and found a mother who hit a school girl who suddenly ran in front of her motor vehicle from behind a bus that was dropping school children at a school pick up and drop station negligent in that she proceeded at "an unabated speed of as much as even 40km/hr".

Before concluding, I wish to indicate that the appellant was not traveling at a safe speed. He does not appear to have been aware of his speed at the time of the accident. In the traffic accident book he gave his speed as 60km/hr. In his evidence he said it was 100km/hr. It seems to me that this contradiction demonstrates that he was not paying attention to his speedometer. He was therefore not keeping a proper look out. But even if he were traveling at 100km/hr, it was not a safe speed to travel at in the vicinity of a school and on a road with long grass on its edges. The speed limit for a light vehicle that was not towing a trailer would have been 120km/hr on that road. In terms of the Road Traffic (Maximum Speed Limit) Regulations 1995 SI 63/95 the maximum speed for any light vehicle drawing a trailer in a bituminous road with a width in excess of 6m was 100km/hr. The appellant was traveling at the permissible maximum speed in conditions which required a lesser speed.

I am satisfied that the appellant was correctly convicted. Accordingly his appeal against conviction is dismissed.

UCHENA J: I agree.

CHATUKUTA J: I agree.

*Wintertons*, appellant's legal practitioners
*Criminal Division of the Attorney-General's Office*, respondent's legal practitioners