THE STATE
versus
ISLAND MUKUCHA

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 23 May 2014

Criminal Review

MAWADZE J: This record of proceedings which came before me on review epitomizes the trial magistrate's total failure to apply his or her mind to judicial proceedings resulting in an unnecessary serious miscarriage of justice.

The record of proceedings was referred to me under cover of the minute from the learned Regional Magistrate (Mrs Kudumba – may her should rest in eternal peace) who after raising queries with the learned trial magistrate and receiving the response was unable on scrutiny to certify the proceedings as in accordance with real and substantial justice.

The accused who was an officer with the Zimbabwe Prison Service in Marondera was convicted on his own pleas of guilty at Marondera Magistrates Court of three counts which are:-

Count 1: Contravening s 6(1) of the Road Traffic Act [*Cap 13:11*] in that on 5 May 2012 at around 2020 hours the accused unlawfully drove a motor vehicle namely Mazda 626 registration number AAV 5017 along Harare – Mutare road well knowing he is a non-holder of any driving certificate or licence.

Count 2: Contravening s 49 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] in that on 5 May 2012 around 2020 hours accused unlawfully drove a motor vehicle namely Mazda 626 registration number AAV 5017 along Harare-Mutare road negligently causing the death of a pedestrian ANOBI JAMES.

Count 3: Contravening s 70 (2) (1) OF THE Road Traffic Act [*Cap 13:11*] in that on 5 May 2012 at around 2020 hours the accused after having

> been involved in an accident with his motor vehicle a Mazda 626 registration number AAV 5017 along Harare-Mutare road, the accused failed to stop after the accident.

The brief agreed facts are that the accused who is not a holder of a valid drivers licence was on 5 May 2012 at 2010 hours driving the said motor vehicle along Harare –Mutare road towards Harare carrying two passengers on board. On approaching the 74 km peg along the same road the accused hit a pedestrian ANOBI JAMES who was trying to cross the road at a non-functional robot site.

The pedestrian was left lying on the ground unconscious. The accused who was well aware that he had been involved in an accident did not stop after the accident. JAMES ANOBI was later ferried to Marondera hospital where he was pronounced dead few hours upon his arrival as a result of severe head injuries and multiple trauma arising from the accident as per the post mortem report produced as exh 4.

The particulars of negligence alleged in court 2 are stated as follows;

"- Drive without a Driver's licence
- Using a defective vehicle with low candle power on headlights
- Failed to keep proper lookout under the circumstances".

In respect of sentence all the 3 counts were treated as one and the accused was sentenced as follows:

> "$300 fine/6 months imprisonment. Time to pay 30-10-2012. In addition 6 months imprisonment wholly suspended for 5 years on condition accused does not within that period commit any offence involving negligent driving of which upon conviction accused will be sentenced to imprisonment without the option of a fine".

I note that the granting of accused time to pay was included in the body of the sentence imposed. This is improper and unnecessary as the issue of the application and granting of time to pay will arise after sentence and should be endorsed on the record after the sentence. However this is the least of improprieties in this matter.

The first misdirection by the learned trial magistrate is the failure to keep a proper record of proceedings in the matter. In count 1 and 2 he learned magistrate proceed to accept the accused's pleas of guilty in terms of s 271 (2)(b) of the Criminal Procedure and Evidence Act [*Cap 9:07*].

This entails the putting of essential elements of the offence to the accused and recording the answers given. The learned trial magistrate failed to abide by this basic, simple, albeit important procedure. The record of proceedings is illustrative;

"Count 1

Charge read and understood

Q. How do you plead

A. G S 271 (2)(b)

Factor read and understood

Annexure 'A'

Q. Do you agree with the facts

A. Yes

Q. Any variation

Explanation

Q. Are you a holder of a valid driver's licence

A. No

Q. Admit that on that day you drove a vehicle without a licence

Guilty as pleaded

Count 2

Charge read and understood

Annexure 3

Plea Co S 271 (2)(b)

Q. Facts read and understood

Annexure 13

Q. Do you agree with the facts

A. Yes

Q. Any variation

A. No

Explanation

Q. Correct on 5th May 2012 at around 2010 hours you drove a Mazda 626 registration AAV 5017 along Harare – Mutare road.

A. Yes

Q. Correct that on approaching a 74 km peg there you met a pedestrian Anobi James trying to cross the road.

A.

Q. Correct that you hit a pedestrian with your vehicle

A.

Q. Correct that the pedestrian died immediately after the accident

A. Yes

Q. Admit that you were not a holder of a driver's licence

A. Yes

Q. Admit that you were using a defective vehicle that no candle power on in Headlights

A. Yes

Q. Admit you failed to keep a proper took out

A. Yes

Q. Any right to act in the manner you did

A. No

Q. Any defence

A. No

Guilty as pleaded".

It is clear that the learned trial magistrate failed to record answers given by the accused to questions asked in adducing the essential elements of the offences in count 1 and 2 from the accused. In count 1 accused did not give an answer to the crucial question of whether he drove the motor vehicle without a licence. This is the graveman of the offence in count 1. Some vague reference is then made to this crucial issue in count 2.

In count 2 no answers are recorded from the accused in relation to whether he met the pedestrian trying to cross the road and most crucially whether he hit the pedestrian with the motor vehicle. Further the accused was not asked in clear and specific terms if as a result of hitting the pedestrian with the motor vehicle he inflicted the injuries outlined in the post mortem report from which the deceased died which is essential in a charge of culpable homicide arising from a road traffic accident. While the particulars of negligence were put to the accused, this should be linked to the charge of culpable homicide, that is the death of the pedestrian. It is therefore not sufficient to simply regurgitate particulars of negligence to the accused in charge of culpable homicide as this may also be done where death does not result, that is, in a case of driving without due care and attention, negligent driving or reckless driving (see sections 51, 52 and 53 of the Road Traffic Act [*Cap 13:11*].

In response to the non-recording of accused's answers in count 1 and 2 the learned trial magistrate said;

> "I humbly submit that when I was writing I omitted to write the answers of the accused person. I really appreciate that I erred and I am asking or pleading that the next time I will not repeat the same mistake and will guard against such irregularity".

While the learned magistrate makes passionate assurances for not repeating the same errors, this would not cure the irregularities in this matter. The record of proceedings simply shows that the accused did not give crucial answers to the questions asked. If he did, then its unfortunate that the answers remained stored in the mind of the learned trial magistrate. The consequences of such an omission were aptly stated by MUCHECHETERE J (as he then was – may his soul rest in eternal peace) in *S* v *Ndebele* 1988 (2) ZLR 249 at 254 wherein the learned Judge said;

> "All courts are courts of records and are required to keep full comprehensive records of proceedings ……..The need to do so is quite obvious. In the absence of such record how is the review or appellate Tribunal to assess the correctness and validity of any proceedings placed before it for adjudication?"

It is therefore important for judicial officers to apply their minds to all judicial proceedings. In *casu* it is not clear if the accused gave any answers to those questions and if he did what answers he gave. The Reviewing Court cannot speculate on such crucial matters. Failure by the trial magistrate to record accused's answers to such essential and crucial questions constitute a serious misdirection.

In respect of count 2 which relates to culpable homicide the leaned trial magistrate did not make a finding of the precise degree of negligence for purpose of not only to properly assess the overall sentence but to abide by the provisions of s 64 (3) of the Road Traffic Act. See *S* v *Chaita & Ors* 1998 (1) ZLR 213 (H) at 220 H-221 A in which CHINHENGO J said;

> "To sum up, therefore on or charge of culpable homicide arising out of a motor vehicle accident the court is required to make a finding of the precise degree of negligence of the accused and is enjoined to approach the matters in terms of s 64 (3) of the Act. A failure to do so is clearly a misdirection".

The reason for the need to make a finding of the precise degree of negligence of the accused in such cases is two fold. Again this was lucidly put by CHINHENGO J in *S* v *Chaita & Ors supra* at 218 H-219A-C as follows;

"A magistrate who presides over a case of culpable homicide arising from a motor vehicle accident must satisfy himself that if the accused had been charged under the Act, he

would have been convicted of either driving without due care and attention or reasonable consideration for others (s 51); or of negligent or dangerous driving (s 52); or of reckless driving (s 53); or of driving with or prohibited concentration of alcohol or drug or both (s 54); or of driving while under the influence of alcohol or a drug or both (s 55). Such a determination will not only enable the magistrate to make a precise finding on the degree of negligence to found a verdict of culpable homicide but will also provide the magistrate with a proper basis for considering the appropriate sentence. This consideration is the foundation of the statement in *S* v *Combrink* HB-91-96 where CHATIKOBO J (may his soul rest in external peace) said that;

> "When a person is convicted of culpable homicide on the basis that he was negligent (or other similar conduct) the issue of prohibition from driving and cancellation falls to be dealt with in terms of these provisions (s 64 (3) (b) (II) as read with s 52 (4) (b))".

It would appear that this exhortation made by CHINHENGO J escapes the minds of many magistrates who deal with cases of culpable homicide arising from road traffic accidents. I hope magistrates would and should always familiarise themselves with these pertinent provisions.

In *casu* the precise degree of negligence relates to the fact that the head lights of accused's motor vehicle were malfunctioning and that he failed to see the pedestrian. No further inquiry was made as to the exact nature or extent of the faulty headlights as this was at night or why accused failed to see the pedestrian crossing the road in front of him. As already said the failure by the learned trial magistrate to make a finding of precise degree of negligence in count 2 is clearly a misdirection.

The third aspect in which the learned trial magistrate misdirected himself or herself relates to how he or she approached the question of sentence after proceeding in counts 1 and 2 in terms of s 271 (2) (b) and in count 3 in terms of s 271 2(a) of the Criminal Procedure and Evidence Act [*Cap 9:07*]. The misdirection arises from the fact that all counts were then treated as one for purposes of sentence. This resulted in an incompetent sentence being imposed. This is so because in terms of s 271 (2) (a) of the Criminal Procedure and Evidence Act [*Cap 9:07*] the maximum penalty the court can impose is a fine not exceeding level three.

In *casu* the sentences imposed of US$300/6 months with additional 6 months imprisonment wholly suspended is clearly incompetent cannot be allowed to stand.

Lastly I wish to emphasise the point made by the learned scrutinizing Regional Magistrate that all exhibits which are relevant in proceedings held in terms of s 271 (2) of the Criminal Procedure and Evidence Act [*Cap 0:07*] should be produced before and not after the verdict if they are pertinent to prove the accused's guilt. This basic procedure seems to escape many magistrates. It is only these exhibits which may be relevant to sentence only which may be produced after verdict.

It is clear that the proceedings in this matter are not in accordance with real and substantial justice. I have agonised over the proper course of action to take in view of the time lapse from the time the accused was convicted and sentenced in September 2012. However in view of this nature of the misdirection I have highlighted I am left with no option except to quash the proceedings and refer the matter back for a trial *de novo*.

I should however point out that the accused should not, if convicted, be sentenced to an overall sentence exceeding the one which was imposed before even if the counts are treated separately for purposes of sentence.

Accordingly it is ordered that the proceedings in CRB 1173/12 be and are hereby set aside and a trial *de novo* be held by the same or any other magistrate.

MUSAKWA J: agrees …….