LLOYD CHIKUKWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & MANGOTA JJ
HARARE, 2 October 2014

Criminal Appeal

Bhatasara, for the appellant
E. Mauto, for the respondent

MANGOTA J: On 18 May, 2011 the appellant was driving his Toyota Hiace Omnibus with registration number ABZ 75084 when he was involved in a road traffic accident. The accident occurred at the 72 kilometre peg along the Nyanga – Nyamaropa road. He was *en route* to Nyanga. One person died and one other sustained injuries from the accident, it was alleged.

Subsequent to the accident the appellant was charged with the crime of culpable homicide as defined in s 49(b) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. He was tried and convicted of the charge. The court *a quo* inquired into the issue of the existence or otherwise of special circumstances. It found none. It, accordingly, sentenced him to 2 years imprisonment. It, in addition, prohibited the appellant from driving a motor vehicle other than a commuter omnibus or a heavy vehicle for 6 months. It also prohibited him from driving a commuter omnibus or a heavy vehicle during his life time.

Aggrieved by the decision of the trial court, the appellant appealed against conviction and sentence. His grounds of appeal which he amplified in his Heads of Argument form part of this appeal. They are, therefore, filed of record.

The respondent made a stiff opposition to the appeal against conviction. He, however, softened his attitude somewhat towards the appellant's appeal against sentence. He made reference to the trial court's duty to inquire into the issue which relates to the existence

or otherwise of special circumstances. He remained of the view that the magistrate did not conduct an investigation of that aspect of the case in a satisfactory manner.

The appellant's most pertinent ground of appeal against conviction reads:

> "The State made a critical error in failing to adduce evidence on the cause of death." (emphasis added)

It is the appellant's contention that, whilst the deceased died during or shortly after the accident, he was not the effective cause of the deceased's death. He, in this regard, attributed the death of one Simon Muzengwa to some cause which was separate and different from the manner in which he drove his motor vehicle when the accident occurred.

The charge which the State preferred against the appellant was that he negligently drove his motor vehicle as a result of which he was involved in the accident from which Simon Muzengwa met his death. Evidence which is filed of record showed that:

(a) the appellant drove his commuter omnibus along the Nyanga – Nyamaropa road on 18 May, 2011;
(b) whilst on that road and when he had reached the 72km peg, the appellant was involved in an accident - and
(c) Simon Muzengwa who was one of the passengers in the appellant's vehicle at the time of the accident lost his life.

The State, the court observed, did not produce any evidence which tended to show that the accident was the effective cause of the deceased's death. The cause of the death of Simon Muzengwa remained unknown from the time of the accident todate. There was, in the court's view, no causal link between the occurrence of the accident and the deceased's death. The respondent did not address his mind to this pertinent matter both in the Heads of Argument which he filed in opposition to the appellant's appeal against conviction and at the time that he addressed the court in support of his case against the appellant. It follows, therefore, that the appellant could not have been the effective cause of the deceased's death. No evidence supports that view of the State.

In an outline of its case, the State made mention of the fact that a government medical officer conducted an autopsy of the deceased and compiled a report in which the cause of the deceased's death was spelt out. The report was, however, not produced during the trial of the

appellant. That aspect of the matter left the respondent's case standing on nothing, so to speak. It could not and cannot, from the evidence in the record, be stated with any degree of certainty that the accident which occurred was the effective cause of the death of the deceased. It might, or it might not, have been the cause. The court remains in doubt on that very important aspect of the case and the doubt is not unnaturally interpreted in favour of the appellant.

McNALLY JA (as he then was) discussed the above matter extensively in *S* v *Ramotale*, 1992 (2) ZLR 397 wherein he dealt with an appeal which was on all fours with the present one and remarked that:-

> "the evidence was not adequate to support a conviction on a charge of culpable homicide (emphasis added).

He, in the cited case, quashed the conviction and set aside the sentence which the trial court had imposed. The quashing of the conviction was based on the fact that the State had not produced the medical report which linked the appellant to the offence of culpable homicide arising from a road traffic accident.

It is the court's considered view that, on the basis of the cited case authority and others as read with the observed circumstances of the present case, the conviction of the appellant on a charge of culpable homicide cannot stand. No evidence, direct or indirect, supports that conviction.

Two witnesses who testified against the appellant were *ad idem* on a number of matters. They all stated that the appellant, who was all along driving at what they regarded to have been a safe speed, increased the speed of his motor vehicle when another commuter omnibus overtook his motor vehicle. They corroborated each other's version of events on the point that the appellant's vehicle was going down a steep descent when he increased the speed. They said the vehicle was also approaching a curve when the appellant acceralated the speed of his motor vehicle. (emphasis added). The appellant, on his part, agreed with the witnesses that the stage at which the accident occurred was when he was going down a steep slope and was approaching a curve. He, however, denied that he was travelling at an excessive speed when the accident occurred. The witnesses were adamant that he was driving very fast. They all stated that, because of the speed at which the car was travelling, the appellant failed to negotiate the curve and the car overturned. One of them who said he was a police officer at Ruwangwe Police Camp informed the court that the appellant's motor

vehicle was travelling at about 100 kilometres per hour when the accident occurred. Under cross-examination, the appellant was asked and he answered as follows:-

"Q: Would you as a passenger board such a commuter?
A: No
Q: Why
A: I would fear death as an accident may occur.
Q: So you admit you were negligent.
A: Yes.
Q: …….
A: …….
Q: What speed were you travelling at?
A: 80km per hour. Since it was downhill speed could increase"
(emphasis added)

There is no doubt that the appellant was negligent when he drove and involved himself in the accident. He stated as much and the State witnesses corroborated his version of events on the matter to a point which requires little, if any, debate. The condition of the road at the scene of accident coupled with the speed at which the appellant was driving and the fact that the motor vehicle had a defective steering mechanisation caused the appellant to fail to keep the motor vehicle under proper control, in the court's view. The State alleged as one of the particulars of negligence that he failed to keep the vehicle under proper control. The State proved that particular element of the crime of negligence in an irrefutable way. The appellant did have reasonable foresight of danger coming his way if he drove as he did with the condition of the road as it was and a defective steering mechanisation which his car was having at the time. He, for reasons known to himself, conducted himself in the manner which he did. He, in the circumstances of this case, cannot escape a conviction for the crime of negligent driving.

The respondent, it has already been observed, expressed some reservations on the manner in which the trial court inquired into the existence or otherwise of special circumstances. The court agrees that the trial magistrate did not dig deep into that aspect of the case. The factors which contributed to the occurrence of the accident are in themselves special circumstances which are peculiar to the commission of this offence of negligent

driving by the appellant. The steep slope, the sharp curve, the appellant's excessive speed and the defect in the motor vehicle's steering mechanisation were all in the record for the trial court to have taken note of. The magistrate, therefore, performed his duties in a perfunctionery way when he stated, as he did, that there were no special circumstances in the case which was then before him. Such circumstances were staring him in the face when he refused to acknowledge their existence. He had recorded them during the trial of the appellant and they were, or are, part of the court *a quo*'s proceedings.

The appellant cannot, in the court's view, be convicted of the crime of culpable homicide in contravention of s 49 (b) of the Criminal Law (Codification and Reform) Act. No evidence, it was observed, was led to support the existence of that offence. The appellant cannot, however, escape conviction of the crime of negligent driving. The evidence which was led showed that he contravened s 52 (2) of the Road Traffic Act, [*Cap 13:11*]. That evidence was incontrovertible. Section 52 (4) (c) of the Act makes it mandatory for a court which convicts a person who drives a commuter omnibus or a heavy vehicle negligently to prohibit such person from driving for a period of not less than two years. The proviso to the section states that the only time when a court may remain at large under that set of facts is where special circumstances which pertain to the commission of the offence exist and are endorsed on the record.

In *casu*, the appellant stands convicted of the crime of negligent driving. He was driving a commuter omnibus when the accident occurred. He should, in terms of the law, be prohibited from driving for not less than two years. The court, however, found special circumstances to have been existent in his case. It endorsed those on the record. The court is, therefore, at large to decline to prohibit him from driving on the mentioned basis. The appellant's appeal against both conviction and sentence succeeds in part. It is, in the result, ordered as follows:

1. That the appellant's conviction for culpable homicide as defined in s 49 (b) of the Criminal Law (Codification and Reform) Act be and is hereby quashed.
2. That the appellant be and is hereby convicted of the crime of negligent driving in contravention of s 52 (2) (a) of the Road Traffic Act, [*Cap 13:11*].
3. That the sentence of 2 years imprisonment and the prohibitions from driving which were imposed upon the appellant be and are hereby set aside.
4. That, in their place, the following sentence be and is hereby substituted :

The appellant is sentenced to $400-00 or in default of payment 4 months imprisonment. In addition, the appellant is sentenced to 8 months imprisonment the whole of which is suspended for 4 years on condition the appellant does not within that period, commit any offence involving negligent, dangerous or reckless driving for which he is sentenced to imprisonment without the option of a fine.

HUNGWE J agrees: ……..

Mupanga Bhatasara Attorneys, Appellant's Legal Practitioners
National Prosecuting Authority, Defendant's Legal Practitioners