LUCIUS KUTANI
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA & MANGOTA JJ
HARARE, 7 October 2015 and 4 March 2016

Criminal Appeal

S Muhlekiwa, for the appellant
Ms *S Fero*, for the state

MANGOTA J: The appellant was convicted, on his own guilty plea, of:

(i) driving without a supervisor in contravention of s 9 (6) of the Road Traffic Act [*Chapter 13:11*] – and

(ii) carrying more than seven (7) passengers for a reward in contravention of s 6 (1) of the Road Traffic [Carriage of Passengers] Regulations [Statutory Instrument number 76 of 1984].

The court *a quo* treated both counts as one and sentenced him to 12 months imprisonment.

The state allegations were that on 22 February, 2013, and at the 51 km peg along Mazowe – Centenary Road. the appellant who was a holder of learner's licence drove his Mazda Bingo motor vehicle without a supervisor. He was carrying twenty-five (25), instead of the permitted seven (7), passengers in the vehicle. He carried the passengers for a fee.

The appellant appealed against sentence. He moved the court to have the sentence set aside and substituted with that of a fine or community service. His grounds of appeal were that the trial court:

(a) should not have imposed a custodial sentence on him but a fine;
(b) did not place any weight on the fact that he was a first offender who pleaded guilty and showed contrition;
(c) should have acknowledged the principle that non-custodial sentences were or are preferable in cases where a person is sentenced to 24 months imprisonment and below;
(d) over-emphasized the aspect of prevalence when it meted out such a harsh sentence as it did – and
(e) failed to appreciate that the cause of the accident was not that the appellant was not under supervision of a qualified driver when he drove but that the child jumped from a moving vehicle.

The respondent did not oppose the appeal. It concurred with the appellant on the point that the sentence which the trial magistrate imposed was severe. The sentence, it said, induced a sense of shock. It referred us to the penal provisions of the Act and the regulations under which the appellant was convicted. It submitted, on the basis of the mentioned provisions, that the trial magistrate misdirected himself. It moved us to set the sentence aside and substitute it with a sentence which was less severe than the one which had been imposed.

The parties were, in our view, correct when they submitted that the sentence which was imposed on the appellant was divorced from the penal provisions of the Act and the regulations under which he was convicted. The maximum penalty for contravening s 9 (6) of the Road Traffic Act is a level five fine or six months imprisonment. The maximum penalty for contravening s 6 (1) of Statutory Instrument 76 of 1984 is a fine of one hundred Zimbabwe dollars [Z$100-00].

The trial magistrate did not take the trouble to check and satisfy himself of the above stated penal provisions. If he had done so, he would have realised that the sentence which he imposed on the appellant was incompetent. That would have been more so in regard to the second count where a sentence of imprisonment is not provided for as a penalty.

The criticism which has been leveled against the magistrate applies with equal force to the public prosecutor. He should have researched on the penal provisions of the Act and the regulations under which the appellant was convicted. He had an obligation to properly guide the

court *a quo* on what sentence it should have imposed. He abdicated his duties in the mentioned regard.

Magistrates are judicial officers whose duty is to mete out justice to all manner of people. They are enjoined to administer justice without fear or favour. They are, by and large, guided by the Constitution of Zimbabwe, statute law, case law authorities and subsidiary legislation in the discharge of their respective duties. They should, therefore, make every effort to ensure that correct charges are preferred against accused persons and that penal provisions are adhered to without fail.

The present is a case where two court officials failed in the discharge of their respective functions. They did so much to the prejudice of the appellant who was sent to prison when other forms of punishment would have sufficed.

The parties' second line of argument was that the trial magistrate failed to recognize the appellant's mitigatory factors. The magistrate stated in his reasons for sentence, as follows:

> "The accused person pleaded guilty to the offence saving the court's valuable time. Accused is a first offender and courts are reluctant to sent (sic) first offenders to prison unless otherwise justified as this will harden them into hard co-criminals" (sic).

Having stated as he did, the magistrate treated both counts as one and sentenced the appellant to a lengthy term of imprisonment. He, no doubt, paid lip-service to the appellant's mitigatory factors. What he did in *casu* runs contrary to the *dictum* of Ebrahim JA who, in *S* v *Buk*a 1995 (2) ZLR 130, 134 H-135 A remarked as follows:

> "….judicial officers do not always give sufficient weight to where an accused person tenders a plea of guilty to a charge leveled against him. It is important not merely to pay lip-service by repeating what one is expected to say when a plea of guilty has been tendered. One often reads in a judgment the following: 'I have taken into account that you have pleaded guilty, that you are a first offender and that you have expressed contrition.' It is not enough to repeat those phrases without giving due weight to the plea proffered. They are factors of mitigation and judicial officers should take proper account of them".

The fact that the appellant was a first offender who pleaded guilty as the trial magistrate acknowledged should have earned the appellant a reduction in sentence. The magistrate should have been persuaded by those facts. He should, therefore, have suspended a portion of the sentence which he imposed upon the appellant. Our views in this regard find fortification in the words of McNally JA who, in *S* v *Sidat*, 1997(1) ZLR 487(S), 493B said:

> "…….. a plea of guilty must be recognized for what it is - a valuable contribution towards the effective and efficient administration of justice. It must be made clear to offenders that a plea of guilty, while not absolving them, is something which will be rewarded. Otherwise, again, why plead guilty?"

The magistrate did not suspend a portion of the sentence which he imposed. He gave no reasons for not suspending a portion of the sentence. He misdirected himself.

There is no doubt that the offences which the appellant committed are fairly serious. He made up his mind to, and he did actually, break the law. He, as a holder of a learner's licence, drove his motor vehicle without supervision. He carried twenty-five (25), instead of the legally permitted seven (7), passengers in his vehicle. He placed the lives of the persons whom he was carrying into grave danger. He was a danger to other road users who were travelling on the road along which he was driving. He cannot, therefore, go unpunished.

The fact that the appellant had a learner's licence meant that he lacked the requisite experience to drive the motor vehicle without the assistance of a qualified driver. There is always a reason why the Legislature spelt out the law in the form that it appears under s 9 (6) of the Road Traffic Act and/or s 6 (1) of Statutory Instrument 76 of 1984. However, as the appellant correctly submitted, the accident which caused his arrest and prosecution was not attributed to his action or inaction. The child who jumped out of the moving car would not have been prevented from doing so by the fact that there was a qualified driver who supervised the appellant as he drove his motor vehicle along the road. With or without a qualified driver supervising the appellant's manner of driving, the accident which occurred was inevitable. It would have occurred as it did. That factor places the appellant's moral turpitude on a low scale.

The appellant submitted, and in our view correctly so, that the offences which he committed did not warrant a term of imprisonment to have been imposed on him. He stated that the court *a quo* should have acknowledged the principle that non-custodial sentences are preferable to custodial ones in cases where a convict is sentenced to twenty-four (24) months imprisonment or less.

The appellant was sentenced to twelve (12) months imprisonment for both offences. A fine or community service was regarded as trivializing offences which he committed. No reasons were advanced for the stated position.

The fact that the first count attracted maximum penalties of a level five fine or 6 months imprisonment or both such fine and such imprisonment meant that the appellant could justifiably have been sentenced to a heavy fine coupled with a wholly suspended term of imprisonment. The suspended sentence would have acted as a deterrent upon him. The fact that the second count attracted a maximum penalty of one hundred Zimbabwe dollars (Z$100) meant that the appellant could easily have gone away with a caution and discharge. The offences were, therefore, not as serious as the trial magistrate said they were. They were fairly serious but not as serious as to justify the imposition of a custodial sentence let alone such a lengthy term of imprisonment which exceeded the penal limits which are laid down in the Road Traffic Act and the regulations.

The court *a quo* visited an injustice upon the appellant. He will, in our view, be adequately punished by sentencing him to a heavy fine coupled with a suspended term of imprisonment for the first count. A caution and discharge suffices for the second count.

The sentence which the court *a quo* imposed is, accordingly, set aside as it does not accord with the notion of real and substantial justice. It is substituted with the following sentence:

Count 1: $300 or, in default of payment, 3 months imprisonment. In addition the accused is sentenced to 3 months imprisonment all of which are suspended for 5 years on condition he does not, within that period, commit any offence involving the contravention of s 9 (6) of the Road Traffic Act for which he is sentenced to imprisonment without the option of a fine.

Count 2: Cautioned and discharged.

CHATUKUTA J agrees……..

Mahuni & Mutatu, appellant's legal practitioners
National prosecuting Authority, respondent's legal practitioners