TALENT MUDZIMBA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & WAMAMBO JJ
HARARE, 9 October 2018, 14 November 2018

Criminal Appeal

N Chigoro, for the appellant
F I Nyahunzvi, for the respondent

HUNGWE J: The appellant was convicted of culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. He was sentenced to five years imprisonment of which two years imprisonment was suspended on condition of future good behavior. His driver's licence was cancelled. He appeals against both conviction and sentence.

The crisp question for determination in this appeal is whether the court *a quo* erred in dismissing the appellant's defence of sudden emergency. If the Court *a quo* was wrong then the appeal succeeds, if it was not, the appeal fails.

At the hearing the appellant persisted with the appeal against both conviction and sentence. The facts on which the conviction for culpable homicide rested after trial were as follows:

Police mounted a road block on Alpes Road, Hatcliffe. One of the police officers present at this road block signaled the appellant to stop. Appellant was driving a Commuter Omnibus. Appellant reduced his speed and went to the left side of the road in obedience of the police sign. All of a sudden the appellant went back into the road at high speed. He struck the deceased who was standing next to another motor vehicle at the scene conducting his duties. The police officer who had signaled appellant to stop had to jump out of appellant's path of travel to avoid being run over by the appellant. A private motorist, in whose full view these events occurred, blocked appellant causing him to stop his commuter omnibus. By then appellant had dragged the deceased from the point he had struck him to where he stopped his motor vehicle.

State witnesses testified that the scene of the occurrence is on a straight stretch of the road. The court *a quo* found that the deceased was stationary and attending to another motorist when he was struck by the appellant. The court also found that the appellant contradicted himself on whether he saw the deceased or not. In any event upon hitting the deceased the court reasoned that a prudent driver who had suddenly hit some object, whose presence on the road he was unaware of, would stop. The appellant did not, indicating that he had acted without due regard to the safety of the police officers at the road block. The court concluded that the absence of skid marks on the tarred road, also confirmed that he had no intention to stop and that he was fleeing from the scene.

The doctrine of sudden emergency has been formulated thus;

> "A man who, by another's want of car, finds himself in a position of imminent danger, cannot be held guilty of merely because in that emergency he does not act in the best way to avoid the danger." See *Cooper Motor Law* (*Principles of Liability*) (Vol 2) at p 90.

In *S* v *Mauwa* 1990 (1) ZLR 235 (S) at 241B the Supreme Court expressed the view that:

> "Where a person is placed in danger by the wrongful act of another, that person is not negligent if, in the agony of the moment, he exercised such care as may be reasonably expected of him in the reasonable apprehension of the danger in which he is placed. He is not to blame if he does not do quite the right thing in the circumstances. But each case must depend on its own facts."

In the present case, the facts do not support the defence of sudden emergency. The appellant was waved down by a police officer manning a road block. He responded by slowing down. One must infer from this reaction that he became fully aware that there was traffic control by the police officers manning a road block. He would, in those circumstances, as a reasonable driver proceed on the instructions of that same officer who had waved him down. He claims that he was signaled to proceed and suddenly the deceased ran into his motor vehicle as he took off. This version was rejected by the court *a quo,* and quite correctly so, in our view. Had the appellant been maneuvering his motor vehicle in obedience to the officer who had waved him to stop, he would have proceeded cautiously without incident. The officer who signaled him to stop instead told the court that she had to jump to safety as the appellant suddenly sped off resulting in the striking down of the deceased. In our view this version, rather than the appellant's version rings truer and accords more with the probabilities of the case rather than the appellant's version. It was his manner of driving recklessly, probably in an attempt to avoid an inspection of his motor vehicle that led to the death of the deceased. The fact that it took a third party to block his path of travel confirms his intention to avoid the police inspection by dashing away from the road block.

We are of the firm view that in the factual situation, as found by the court *a quo;* the doctrine of sudden emergency is of no application. The facts show that the deceased was attending to another motorist when he was hit by the appellant. No one created any dangerous situation beside the appellant himself who tried to speed off from the police road block before he was attended to.

In the result we dismiss the appeal against conviction.

As for the appeal against sentence, it was submitted that the sentence was so harsh as to induce a sense of shock. Generally an appeal court is entitled to interfere with sentence only if the sentencing court committed an irregularity or a misdirection. Section 38 (4) (a) of the High Court Act *[Chapter 7:06]* permits this court to interfere with sentence if it thinks that a different sentence ought to have been imposed. In doing so, the court is always careful not to interfere with the trial court's discretion. The exercise of a judicial discretion involves a value judgment. It is difficult to set strict parameters within which to circumscribe the exercise of such discretion. Suffice to say that the provisions in section 38 provide a wide berth for the exercise of that discretion. A court that interferes with a sentence imposed by a lower court itself exercises a discretion when it imposes a new sentence and there cannot, therefore, be a ready-made test in the strict sense of the word. Nor is it advisable to attempt to lay down a general rule as to when the court's discretion to alter a sentence will be exercised. The decisions clearly indicate that a court of appeal will not alter a determination arrived at by the exercise of discretionary power merely because it would have exercised that discretion differently. There must be more than that. The court of appeal, after careful consideration of all the relevant circumstances as to the nature of the offence committed and the circumstances and the person of the accused, will determine what it thinks the proper sentence ought to be, and if the diference between that sentence and the sentence actually imposed is so great that the inference can be made that the trial court acted unreasonably, and therefore improperly, the court of appeal will alter the sentence. If there is not that great difference the sentence will not be interfered with. The function of this court in an appeal of this nature is not to determine whether the decision of the court *a quo*, in the exercise of its own discretionary power, was right or wrong. This court will interfere only where the court *a quo* has committed such an irregularity or misdirection, or exercised its discretion so unreasonably or improperly, as to vitiate its decision in the absence of any irregularity or misdirection. This court will, on the basis of the alleged severity or harshness, only interfere if it considers that there is a striking disparity between

the sentence passed and that which the court of appeal would have passed. See *R* v *Mpofu* 1968 (3) SA 142 (R: AD).

The facts of this case show that the appellant took a decision to disobey police signs and instructions and decided to speed off. The police officer signaling him had to jump to safety. She avoided being run over by taking this action. The deceased whose attention was on another motorist had no such luck. He was knocked down by a speeding motorist with fatal consequences. It is no secret that some police officers who had such experiences when faced with this situation had escaped death or serious injury by clinging to the offending vehicle's windscreen wipers. This court has dealt with such cases on appeal. Commuter omnibus drivers, in most cases have, been the major culprits when they played a cat and mouse game with traffic police in Harare. When the lower courts descend heavily on them, as happened in this instance, this court will hardly be persuaded to assess the sentence differently. The reasons given for the sentence imposed by the court *a quo* are sound. In our view there was no misdirection in the assessment of the sentence nor do we find the sentence so harsh as to induce a sense of shock. It is a just dessert for the highly reprehensible and reckless behaviour exhibited by the appellant, a driver of a public service vehicle. Nothing can justify such conduct on our roads. In our view the appeal against sentence lacks merit.

Consequently the appeal is dismissed in its entirety.

WAMAMBO J: agrees ……..

Chigoro Law Chambers, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners