DUDUZILE TRACY MANHENGA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 13 & 18 November 2014

Criminal Appeal

E.T. Moyo & I. Mureriwa, for the appellant
Mrs *S. Fero*., for the respondent

BERE J: On 15 March 2010 the appellant who was driving her motor vehicle along Sherwood Drive was involved in a tragic accident that took the life of a motor cyclist one Graham Martin Millard who was cycling going in the opposite direction.

An attempt to save the deceased was futile as he succumbed to the injuries sustained on admission at Westend Hospital in Harare.

The appellant, having offered unequivocal pleas of guilty to the offences of driving without a driver's licence and culpable homicide, was subsequently found guilty as charged on both counts.

In respect of count 1 the appellant was sentenced to pay a fine of US$300 or in default of payment to undergo 3 months imprisonment. The appellant holds no qualms against the sentence imposed.

In respect of the second count of culpable homicide, the appellant was sentenced to 24 months imprisonment of which 6 months imprisonment were suspended for five years on the usual condition of future good conduct leaving her to undergo an effective 18 months imprisonment. It is in respect of this sentence that the appellant felt aggrieved and sought the intervention of this court.

Although on the face of it the appellant appears to have raised six grounds of appeal they can in fact be compacted into basically two grounds, viz, that the court *a quo* erred in its

finding that her driving on the day in question amounted to gross negligence without carrying out a factual enquiry to establish this particular class of negligence.

The second ground of appeal raised by the appellant is that the sentence imposed by the court *a quo* was unduly harsh and excessive to the point of inducing a sense of shock if regard is had to the compelling and weighty mitigatory factors that were presented to the trial court.

In his filed Heads of Argument the respondent's Counsel sought to support the imposed sentence but as the arguments unfolded here in court, the counsel conceded that the appellant's appeal was well founded and further conceded that this court could properly revisit the issue of gross negligence and consequently the sentence which had been informed by that finding by the court *a quo*.

There can be no doubt that the position subsequently adopted by the respondent's Counsel was well founded. I will in this judgment endeavour to demonstrate why this court is of the firm view that this appeal ought to succeed.

It is not in dispute that a specific finding on the degree of negligence will inform the sentence to be imposed by the trial court, and that generally speaking a finding on gross negligence or reckless driving calls for a term of imprisonment unless there are compelling mitigating factors. See *State* v *Mtizwa*[1] and *S* v *Dzvatu*[2].

The main borne of contention by the appellant in this appeal as argued by her Counsel Mr *Mreriwa* is that it was not competent for the trial court to make a specific finding that the appellant's driving conduct amounted to gross negligence without having carried out a factual enquiry to determine such a degree of negligence. I share this view. It is equally true that despite her initial view to the contrary the respondent's counsel ultimately conceded this aspect.

The record of proceedings show that the only hint to the driving conduct of the appellant was informed by para 4 of the summary of the State case to which the appellant admitted. The paragraph reads as follows:

> "The accused person then turned right into number 14, a residential stand in Mabelreign and was hit by the now deceased".

Added to the above were what appears to be standard particulars of the appellant's

[1] 1984(1) ZLR 230
[2] 1984(1) ZLR 136

negligence which were given as follows:-

"PARTICULARS OF NEGLIGENCE

Turning right upon path of oncoming traffic.

Fail to keep a proper look out of the road ahead

Fail to stop or act reasonably when accident seemed imminent[3]".

It does seem to be the position that from these averments in the State Summary the learned Magistrate triumphantly concluded by inference that the appellant's conduct amount to gross negligence. In so concluding he stated as follows:-

> "….Accused stated it was out of necessity but did not furnish the court with proof. Her moral blameworthiness here is very high what is more aggravating is that she turned in front of oncoming that it gross negligence". My emphasis. Therein lies the problem with the Magistrate's reasoning and conclusion.

The view that this court takes is that a finding on gross negligence could not possibly have been made so intuitively on such skeleton allegations as put in the State Summary because such a finding has far reaching consequences in a culpable homicide case which is linked to negligence on the part of the appellant.

That finding as made by the learned Magistrate can only be made by the court after a due factual enquiry has been conducted as was the case in the Mtizwa case (*supra*). In that case the court accepted as a fact that the driver had among other factors driven on the wrong side of the road on a wide tarred road in the face of oncoming traffic. The accused could not explain his vehicle being on the incorrect side of the road or why he could not see the deceased's motor cycle for what appeared to be a considerable length of time before the collision occurred.

It was only after this factual enquiry that the court was able to draw an adverse inference that the accused's driving conduct must have been grossly negligent.

Compare the reproach in Mtizwa with the instant case. There is no indication on record that any factual enquiry was conducted by the trial Magistrate on the driving conduct of the appellant. Turning right in front of oncoming traffic *per se* could not possibly have led the learned Magistrate to conclude that the appellant's driving conduct amounted to gross negligence because that can be a particular of ordinary negligence.

[3] Paras 4 & 7 of summary of case on p 24 of bound record.

The other challenge one faces in dealing with the approach of the court *a quo* is an attempt by the trial magistrate to draw an inference of gross negligence from limited facts – i.e turning in front of oncoming motor cyclists. Finding the appellant or any accused for that matter guilty on inferences carries with it certain challenges as observed by WATERMEYER JA (as he then was) in *R* v *Bloom*[4].

The learned Judge of appeal referred to "two cardinal rules of logic which govern the use of circumstantial evidence in a criminal trial" as follows:-

> "(i) The inference sought to be drawn must be consistent with all the proved facts. If not the inference cannot be drawn.
> (ii) The proved facts should be such that they exclude any reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences then there must be a doubt whether the inference sought to be drawn is correct".

It will be noted that the inference of gross negligence drawn by the trial Magistrate in this case clearly does not exclude any other competing inferences and above all such inference were hinged in air and therefore are not sustainable.

To this extent the appellant's conviction on a finding of gross negligence was erroneous and the subsequent sentence informed by that finding inappropriate. This court remains at large on the question of sentence.

Mr *F Moyo* who argued for the reduction of the appellant's sentence argued to our satisfaction that the court *a quo* did not take into account the inordinate delay of 3 years and 8 months in the conclusion of this case despite it having been a plea. See *S* v *Corbett*[5] referred to by the learned Magistrate but wrongly applied to the appellant's case.

It is trite that an inordinate delay in the conclusion of a criminal trial amounts to serious mitigation of sentence.

There are other salient mitigatory factures in this case which the court *a quo* ought to have seriously considered as opposed to paying mere lip service.

The rigours of imprisonment must not be lightly looked at particularly in this case where the appellant is a mother of 4 and being a first offender.

Given the fact that the court *a quo* had clouded its mind with an inappropriate finding on gross negligence, it is understandable that it then sought to settle for a prison term. Though

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[4] AD 188 at 202 and 203
[5] 1990(1) ZLR 205 (SC)

understandable that approach was clearly wrong in the light of what the court has now accepted on appeal.

In arriving at what I think to be an appropriate sentence in this case I am persuaded by the instructive views of FIELDSEND CJ (as he then was) in *Lusenge* v *The State* when he stated the following:-

> "In my view unless it can be shown by the evidence that the accused is guilty of this class of negligence it would be improper to send a first offender to prison for a driving offence. Such a person should be spared the hardship and humiliation which of necessity would arise from imposing upon prison conditions"[6].

Given the very strong mitigating factors some of which were properly captured by the court *a quo* I feel a monetary penalty coupled with a suspended sentence would meet the justice of this case.

Consequently the sentence in respect of count 2 is set aside and substituted by the following one:-

> "$1000 or in default of payment 3 months imprisonment. In addition the appellant is sentenced to 5 months imprisonment suspended for 5 years on condition the accused does not within that period commit any offence involving negligent driving and for which upon conviction will be sentenced to a term of imprisonment without the option of a fine".

BERE J: ……..

HUNGWE J: agrees …….

Scanlen & Holderness, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners

[6] AD 138/81