PROFESSOR CHIYANGWA
versus
THE STATE

HIGH COURT OFZIMBABWE
MATHONSI AND MOYO JJ
BULAWAYO 8 FEBRUARY AND 18 FEBRUARY 2016

Criminal Appeal

D. Charamba for the appellant
T Hove for the respondent

MATHONSI J: The appellant was arraigned before a magistrate at Kwekwe on 25 March 2014 on a charge of culpable homicide in contravention of s49 (a) of the Criminal Law Code [Chapter 9:23], it being alleged that on 19 July 2013 at the 49km peg along Kwekwe-Gokwe road he had driven a Toyota Hiace Commuter Omnibus registration number ACL 7574 negligently thereby causing the death of a cyclist Polite Zhou.

The appellant pleaded guilty to the charge and upon conviction he was sentenced to an effective 9 months imprisonment. In addition the appellant was prohibited from driving public service vehicles for a period of two years.

The facts are that on 19 July 2013 at about 1005 hours the appellant was driving the aforementioned commuter omnibus towards Kwekwe along Kwekwe-Gokwe road. At the 49km peg, he knocked down the deceased who was cycling from Zororo shopping centre from the opposite direction but intending to cross the road to the other side of it. After hitting the deceased the appellant's vehicle veered off the road stopping at a distance of about 30 metres from the point of impact. The deceased was carried on the windscreen and thrown off 22,5 metres away from the point of impact sustaining head injuries and a fractured hand. He died on admission to Gomola clinic where he had been ferried for treatment. The particulars of negligence were given as failing to stop or act reasonably when an accident seemed imminent, failing to keep a proper look out in the circumstances, failing to keep the vehicle under proper control and driving at a speed that was excessive in the circumstances.

In arriving at the sentence that was imposed the court *a quo* reasoned thus:

> "In assessing the appropriate sentence the court took into account all that was said by the accused in mitigation. He is a first offender. Pleaded guilty without wasting the court's time. Contrite and remorseful shown by his contribution towards the funeral expenses of the deceased. Married to three wives with four children.
>
> However, in his disfavor the court found no special circumstances to the case. His moral blameworthiness is very high and that the now deceased contributed by having earphones does not change the face of the case. His degree of negligence to me is gross in that he hit a cyclist and threw him away as a result of the impact 22,5m from the point of impact. That on its own does not need an expert to show that his speed was very excessive and the impact is consistent with maximum collision. It is further supported by the fact that he only managed to stop his vehicle 30 meters away after veering off the road.
>
> He was driving a public service vehicle with passengers aboard and his conduct is least expected of a Public Service vehicle driver. The court cannot condone such conduct as it risks loss of more life at the hands of reckless drivers such as the accused. The sanctity of human life must be preserved and man made accidents avoided at all costs as there is no replacement for the lost life even if one becomes contrite and contributes they must pay for their sins and the court must impose sentences that send a message to other public service vehicle drivers to desist from recklessness."

The reasoning of the court *a quo* was quite impressive indeed. Clearly the court was alive to the provisions of s64 (3) of the Road Traffic Act [Chapter 13:11] and did apply its mind also to the need for an inquiry to be made into the possibility of prohibition from driving as part of the sentence even when the appellant was charged under the Criminal Law Code as opposed to the Road Traffic Act. The only blemish is that the court did not appreciate at all that it was required to inquire into the suitability of community service as an option having arrived at an effective sentence of nine months' imprisonment.

The appellant was unhappy with the sentence and noted an appeal to this court on the following grounds:

> "1. The sentencing court erred in imposing a sentence which is manifestly excessive to induce a sense of shock in the circumstances.
> 2. The sentencing court grossly misdirected herself by alluding to a legal aspect of special circumstances which is not a requirement under section 49 (a) of the codification (sic).

3. The sentencing court grossly erred by giving undue credence to the seriousness of the offence and overlook mitigatory features which would have assisted the appellant in receiving a less severe sentence.
4. The sentencing court grossly erred by failing to canvas other forms of punishment which is now the general pattern in arriving at sentences where an accused is sentenced to a sentence of 24 months or less.
5. The sentencing court further erred by failing to take into cognizance that the deceased also contributed to the accident by cycling whilst with headphones on which could have impaired his hearing facilities and fail (sic) to realize the oncoming vehicle.
6. The sentence also failed to take into account that the appellant pleaded guilty and that he was a first offender."

Only number four of the appellant's grounds of appeal has merit and is therefore sustainable. In terms of s64 (1) of the Road Traffic Act [Chapter 13:11] a court convicting a person of an offence in terms of any law in connection with the driving of a motor vehicle may prohibit the person from driving.

What the court was required to do on convicting the appellant was to ascertain the degree of negligence in order to determine whether to prohibit the appellant from driving and to cancel his driving licence.

In terms of s64:

"(1) Subject to this Part, a court convicting a person of an offence in terms of any law other than this Act by or in connection with the driving of a motor vehicle on a road may, in addition to any other penalty which it may lawfully impose, prohibit the person from driving for such period as it thinks fit.

(2) --

(3) If, no convicting a person for murder, attempted murder, culpable homicide, assault or any other similar offence by or in connection with the driving of a motor vehicle, the court considers –

(a) that the convicted person would have been convicted of an offence in terms of this Act involving the driving or attempted driving of a motor vehicle if he had been charged with such an offence instead of the offence at common law; and

(b) that if the convicted person would have been convicted of the offence in terms of this Act referred to in paragraph (a) the court would have been required to prohibit him from driving and additionally or alternatively, would have been required to cancel his licence; the court shall, when sentencing him for the offence at common law—

(i) prohibit him from driving for a period that is not shorter than the period of prohibition that would have been ordered had he been convicted of the offence in terms of this Act referred to in paragraph (a); and
(ii) cancel his licence, if the court would have cancelled his licence on convicting him of the offence in terms of this Act referred to in paragraph (a)."

This court has stated in the past in *S* v *Chaita and Others* 1998 (1) ZLR 213 (H) and more recently in *S* v *Zembe* HH 252/15 that when deciding the appropriate sentence on a conviction of culpable homicide arising out of a traffic accident the court should always have regard to the provisions of s64(3) and make a finding on the degree of negligence involved and failure to do so constitutes a misdirection. This is so in order to decide whether, in addition to the penalty imposed, the convicted person should also be prohibited from driving and/or his licence cancelled. Where the court finds that the degree of negligence was gross it must prohibit the convicted person from driving and/or cancel his licence. The prohibition and cancellation are part of the penalty to be imposed by the court.

At 218 D – G in *S* v *Chaita and Others, supra*, CHINHENGO J made these remarks which I associate with:

> "The question which necessarily and crisply arises here is whether it is a requirement under s64(3) of the Act that the court, on convicting a person of culpable homicide, should expressly apply its mind to the question of which of the statutory motoring offences the circumstances of the common law offence disclose. In *S* v *Duri* 1989 (3) ZLR 111(S) the court did not have to deal with this question squarely as in that case the lower court had indeed considered that if the convicted person had not been guilty of culpable homicide he would have been guilty of negligent driving. But the following statement by McNALLY JA at 115C –D is instructive:
>
> > 'The whole basis of the case against the appellant was that he drove negligently. Particulars of negligence were alleged and were found. His guilt in relation to culpable homicide was based squarely on that finding of negligent driving. He could not have been found guilty of culpable homicide unless he was first found guilty of negligent driving. The court therefore must have found, and did find, that he was guilty of negligent driving. Therefore it must have considered, and did consider, that the convicted person would have been convicted of an offence in terms of the Act involving the driving or attempted driving of a motor vehicle if he had been charged with such an offence instead of the offence at common law (s55 (3) (a)) [now s64 (3) (a)] of Act 48 of 1976 [now chapter 13:11].'
>
> What, in my view, were not addressed in *Duri's* case (because they did not arise for decision) are two questions:

(a) Whether the magistrate is required in every case of culpable homicide to have regard to s64 (3) of the Act; and
(b) whether the magistrate must establish, in every case, the degree of negligence involved. The answer to these questions can only be in the affirmative."

It is clear that for purposes of a conviction for culpable homicide negligence is the lowest conduct that is required to establish the commission of the offence. For purposes of sentence it is its various levels which should be established at the plea stage or during the trial in order to determine the sentence.

The authorities I have cited above illustrate that where an accused person is convicted of culpable homicide in breach of the common law which, in our jurisdiction, has been codified in the Criminal Law Code [Chapter 9:23], that person would have been convicted of negligent driving in breach of s 52 of the Road Traffic Act. For that reason, s64 (3) requires the court to consider prohibiting that person from driving. As s52 (4) (c) makes it mandatory for the court convicting a person for negligently driving a commuter omnibus to prohibit the convicted person from driving for a period of at least two years, it was proper for the court *a quo* to inquire into the existence or otherwise of special circumstances as would entitle the court to avoid the mandatory prohibition.

It is the appellant who was off the mark when he derided the court in his grounds for appeal for inquiring into the existence of special circumstances. There was nothing wrong with that inquiry as the court was required by law to conduct it. Having found no special circumstances, I agree that the use of headphones by the deceased is not one, the court properly imposed the mandatory prohibition.

As I have already said, the misdirection exists only in the failure to consider community service as an alternative to imprisonment, the court *a quo* having settled for an effective nine months term of imprisonment. Regrettably it is a misdirection which has become very frequent even though this court has for so long set guidelines that magistrates should follow in assessing sentence in those circumstances. It has been repeated in a line of cases, stretching over two decades that when the sentencer settled for an effective prison term of twenty-four months or less, he or she is required to inquire into the suitability of community service; *S* v *Mabhena* 1996 (1) ZLR 134 (H) 140 E; *S* v *Chireyi and Others* 2011 (1) ZLR 254 (H) 260D.

The point has also been made that if the sentencer concludes, following such inquiry, that community service is inappropriate, but that an effective term of imprisonment should be imposed, the sentencer should give proper reasons for doing so: *S* v *Antonio and Others* 1998 (2) ZLR 64 (H); *S* v *Chinzenze and Others* 1998 (1) ZLR 470 (H); *S* v *Silume* HB 12/16.

This is a case where the court *a quo* should have suspended the prison term of nine months on condition the appellant performed community service. He is a first offender who pleaded guilty. He was visibly contrite and remorseful he having contributed to the funeral expenses of the deceased. He is polygamist with four children.

Mr *Charamba* who appeared for the appellant submitted that the appellant was in custody from 25 March 2013 when he was sentenced until 29 April 2013 when he was released on bail. It means that he has served a total of 34 days in prison. In my view that atones for his infractions given that he should have performed community service.

In the result, it is ordered that:

1. The appeal against sentence only succeeds.
2. The sentence of the court *a quo* is hereby set aside and in its place is substituted the following sentence:

> "9 months imprisonment of which 8 months imprisonment is suspended for 3 years on condition the accused person does not, during that period commit any offence involving the negligent driving of a motor vehicle on a road for which, upon conviction, he is sentenced to a term of imprisonment without the option of a fine.
>
> In addition the accused person is prohibited from driving public service vehicles for a period of 2 years."

3. As the appellant was in custody for more than one month after conviction, he has served his sentence and is therefore entitled to his immediate release.

Mutendi and Shumba C/o Dube-Tachiona & Tsvangirai, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners

Moyo J agrees……