HB 192-17
HCA 60-16
XREF KWEKWE 334-16

AUSTIN SIBANDA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAKONESE AND MOYO JJ
BULAWAYO 5 JUNE 2017 AND 6 JULY 2017

Criminal Appeal

Appellant in person
K Ndlovu for the respondent

MOYO J: The appellant in this matter was convicted by the magistrate sitting at Kwekwe for negligent driving in contravention of section 52 (2) (a) of the Road Traffic Act [Chapter 13:11]. He was sentenced to pay a fine of $50-00 or in default of payment 20 days imprisonment. Dissatisfied with his conviction and sentence, he then approached this court. At the hearing of this appeal we dismissed it and stated that detailed reasons would follow. Here are the reasons.

In his notice of appeal the appellant raises a point that the learned magistrate erred in not taking into account the peremptory provisions of section 200 of the Criminal Procedure and Evidence Act [Chapter 9:07].

The rest of the grounds of appeal are to the effect that the court *a quo* erred in finding the appellant guilty of negligent driving when the sum total of the evidence that was before the court did not point to guilt on the appellant's part.

Ad sentence, the appellant avers that he had been offered a lesser deposit fine by the police and therefore when the learned magistrate gave him a higher penalty he/she departed unjustifiably from the fine as set by the police.

I will start with section 200 of the Criminal Procedure and Evidence Act which provides thus:

"Summing up"

> "After all the evidence has been adduced, the prosecutor shall be entitled to address the court, or each of the accused if more than one, shall be entitled by himself or his legal

> practitioners, to address the court and if, in his address, the accused or legal practitioners raises any matter of law, the prosecutor shall be entitled to reply, but only on the matter of law raised."

The appellant avers that the learned magistrate breached the peremptory provisions of section 200 and therefore this court should quash the conviction on that basis.

To start with, it should be pointed out that the prosecutor and the accused are entitled to address the court at the close of the trial. An entitlement includes an assertion by the one who is so entitled. The appellant, who is a legal practitioner by profession and who does not therefore fall into the category of ignorant persons, never asserted this entitlement according to his own submissions. Had appellant sought to assert this right by claiming the right to address the court, it would have been better although we would still do not hold the view that failure to address the court at the close of the trial would vitiate the proceedings.

The prosecutor's handbook by J. Reid Rowland 3rd Edition provides at page 135, that:

> "It is the prosecution's right to decide whether or not to address the court. The magistrate cannot deprive him of this right by making a remark such as "I do not wish to hear your address "Mr Prosecutor." It would be necessary to find what the magistrate means by such a remark. The remark could mean that the magistrate is quite satisfied of the accused's guilt and feels that there is nothing the prosecution could usefully say. On the other hand, the magistrate may mean that he had already decided to acquit. In this situation, if the prosecutor considers that the magistrate has reached the wrong conclusion and has reasons to put forward for convicting the accused, he should insist on his right to address (emphasis mine). If there is any argument about that right, the prosecutor must refer the magistrate to the provisions of the Act."

I emphasise that although the prosecutor's handbook is addressing matters related to the prosecutor, the mere fact that his is an entitlement, it means that both the prosecutor and accused are enjoined to claim it and insist on it, referring the court to the Criminal Procedure and Act. Appellant did not seek to assert his rights by claiming from the court his entitlement to address it in closing submissions.

Again, in the Magistrate's Handbook by professor G. Feltoe page 53 thereof it is stated that" where the parties wish to exercise their right to address, the prosecutor must address first and then the accused or his lawyer will address."

This in essence means that the right to address the court at the close of the trial is elective on the part of the prosecutor and the accused. This would mean therefore that since it is elective, and the court can proceed to write its judgment without it where the parties have elected not to exercise it, the proceedings resulting from a trial where an accused was not granted the chance to address the court, cannot therefore be flawed. Even if it could be classified as an irregularity on the part of the court, it is that kind of irregularity that would not vitiate the entire proceedings.

Refer to this case of *S* v *Naidoo* 1962 (4) SA 348 on whether the conviction itself was competent. In essence it means that even if it were to be classified as an irregularity, it is not so gross as to go to the root of the matter with the result that the proceedings are therefore fatally flawed.

The facts of this matter are that the appellant drove his Mazda B2200 motor vehicle registration number AAX 7330 due north along Railway Avenue in Kwekwe on 6 December 2016. At the same time, Cobert Hlanganiso drove a Subaru Legacy registration number registration ADJ 3456 along the same road but in the opposite direction. On approaching Kwekwe Polytechnic College along the said road accused turned right in front of the oncoming Subaru legacy driven by Cobert Hlanganiso and thereby resulting in an accident.

The particulars of the appellant's negligence were given as travelling at an excessive speed in the circumstances.

- Turning in front of oncoming traffic.
- failing to keep a proper look out
- failing to stop or act reasonably when an accident seemed imminent

The appellant in his own statement to the police which he tendered as his defence outline at paragraph 9 thereof states thus:

> "When I reached Kwekwe Technical College gate, I saw lights of an oncoming vehicle emerging from a curve in the opposite direction. That curve is about 130 meters from the gate. When that vehicle emerged from that curve I was already at the gate and engaged to turn into the college, and I was indicating to turn into the college."

He goes on in paragraph 10 to state thus:

> "That vehicle was far enough to allow me to turn safely if driving regulations were followed and all drivers were driving normally. It was at night and the only way of judging a safe distance to turn was the oncoming vehicle lights."

From the appellants own statement (defence outline) it is as clear as day that he was indeed negligent. The appellant submits that the magistrate did not assess carefully the issues of credibility as well as the identity of the drivers on the day in question as he insists that a difference person was driving but in my view the crux of the matter is whether or not in the circumstances appellant was negligent. The appellant was definitely negligent in that when turning right, one has to give way to oncoming vehicles, and where one fails to do so by his own admission, he would have abdicated this duty of care and he would have fallen below the standard of a reasonable driver. In his defence outline paragraph 9 the appellant states there in that when he reached Kwekwe Technical College gates he saw the lights of an oncoming motor vehicle. This in essence means before he even turned, he had been warned by the other motor vehicle's lights that there was an oncoming vehicle. He then says because the curve is about 130 metres from the gate and since he was already at the gate and engaged to turn, as well as that he was indicating, he decided to turn. He then says the other vehicle was far enough to allow him to turn. He then decided to turn in the face of an oncoming motor vehicle, whose presence he was already aware of. He nonetheless says that he was not negligent as he had ensured that it was safe to do so by estimating the other vehicle's distance using the beam of lights. I believe this in its own is not only negligent but very dangerous. This was night time, meaning that visibility was obviously not at the best, he is warned by lights that a motor vehicle is coming, he decides to turn nonetheless as he has convinced himself through the motor vehicle's beam of lights that he will be able to turn before the motor vehicle gets to where he turns. His belief is somewhat proven wrong as that motor vehicle collides with his, for if his belief had been correct and if indeed it had been safe to turn, there would have been no collision.

He dwells much on the excessive speed by the other driver. The other driver's actions are not relevant to the culpability of the appellant. Refer to the case of *Kukwa Kumire* v *The State* SC 23/89.

However, the excessive speed by the other driver, (for argument's sake) would not have resulted in the accident. It was his conduct of leaving his lane and turning in front of oncoming traffic that resulted in an accident. His motor vehicle is the one that was on the wrong side of the road, where it should not have been. I actually hold the view that the appellant fell short of the standard of a reasonable driver in that;

- he saw that there was an oncoming motor vehicle through a beam of light.

- this area was at a curve.

- he decided to estimate the distance of that motor vehicle and calculate if he would be able to turn before it got to him using its lights at night, which on its own I find to be a very dangerous manner of driving.

I say so because it was at night and it is inappropriate for a driver to try and gauge the distance of another motor vehicle using its lights. What would have been reasonable in the circumstances would be to wait for that motor vehicle to pass before turning after ensuring that the road was indeed clear and there was no other motor vehicle that his turning intentions could interfere with.

Appellant was thus clearly negligent. There is therefore no basis upon which this court should interfere with the conviction.

Appellant is also at qualms with the sentence that he was given. It is however trite that sentencing is the province of the trial court and the appellant does not state that the magistrate misdirected himself in giving him the sentence that he did, neither does he allege that the sentence is unduly harsh and excessive, he simply does not want the sentence as the one that had been imposed by the police was lesser. However, this court takes judicial notice of the fact that there is a limit to which the police can accept deposit fines (the monetary aspects thereof). It therefore follows that the limitation on the police on the monetary levels they can accept as deposit fines has no bearing at all on the monetary levels as prescribed by the relevant penal provision of the relevant Act. The court is not duty bound to follow the proposed deposit fine by the police but it is at large to assess and come up with the appropriate sentence in terms of the

statute. The sentence is in terms of the penal provision of the statute. There is no misdirection in its imposition.

It is for these reasons that the appeal was dismissed entirely as it is devoid of merit.

Makonese J agrees…….

National prosecuting Authority, respondent's legal practitioners