KARAGA NYARARAI
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAVANGIRA J.
HARARE 4 DECEMBER 2013

BEFORE MAVANGIRA J IN CHAMBERS IN TERMS OF SECTION 35 OF THE HIGH COURT ACT CHAPTER 7:06

MAVANGIRA J: The appellant was arraigned before the senior magistrate sitting at Murambinda Magistrates Court on a charge of;

> "contravening s 49(a) of the Criminal Law (Codification and Reform) Act, [*Cap* 13:14] in that on 3 January 2012 and at 160km peg along Chivhu – Nyazura road Nyararai Karanga negligently drove a UD Nissan with registration number AAZ 6939 (Horse) and AAZ 0254 (Trailer) thereby causing the death of Tanatswa Makufa by crushing her on the head with his vehicle."

He pleaded not guilty but was convicted after a trial and sentenced to US$100 or 50 days imprisonment.

The appellant now appeals against his conviction only. In summary the facts placed before the trial court were that the appellant parked his truck and trailer in front of a shop. Crates of traditional beer commonly referred to as scuds were offloaded from the truck. When he drove the truck away he crushed the child with two rear right tyres. The child died on the spot. The State alleged that he was negligent in one or more of the following particulars; failing to check underneath the vehicle before driving off, failing to keep a proper lookout in the circumstances or failing to stop or act reasonably when an accident seemed imminent.

One Simbarashe Misi gave evidence to the effect that he had left the deceased in the shop together with one Gracious, aged 6 and had blocked the entrance with crates. When he returned to the shop he did not see where the children were. After paying the driver for the

crates of beer delivered and as he was about to go he heard a "bursting" sound. He looked back and saw the deceased child lying down. He then stopped the driver who was about to reach the main road. He said that the deceased child, who was his niece, was run over by the appellant's vehicle close to the veranda of his shop and not on the road. He did not know how the deceased had left the shop where he had left her playing with Gracious. He also said that the appellant's vehicle was parked 5m from the shop and that when he stopped the appellant, the appellant was also surprised by the accident. It was also the witness' evidence that the appellant did not go round or check underneath his truck before driving off.

The respondent filed a notice in terms of section 35 of the High Court Act, Chapter 7:06 in which notice the conviction of the appellant is not supported. The submission is made that the trial court fell into error by not treating Simbarashe Misi's evidence with caution. The submission is made that as Simbarashe Misi was the deceased's uncle, and thus in a way wronged by the deceased's death, he was a witness with an interest to serve. In *State v Zimbowa* SC7/92 it was held:

> "complainant was a witness with an interest to serve, the magistrate was not only requested to approach her evidence with caution but should have sought corroboration of her evidence."

In *casu*, Simbarashe Misi's evidence was disputed by one Courage Mombe who said that when Simbarashe Misi arrived the deceased was on the veranda while Gracious was assisting the witness in sorting the crates. He said that Simbarashe did not check for the child. He just collected money and paid for the beer. He also said that he did not see any empty crates blocking the shop entrance. Courage Mombe was also an uncle to the deceased. Simbarashe Misi said that he had secured the deceased inside the shop by blocking the entrance to the shop with empty crates, presumably in order to prevent her from going outside the shop and thus keep her safe from harm's way. Courage did not see any such crates.

It is common cause that the appellant was surprised by the accident. In *State v Musariri* HH473/86, the following was said:

> "... very few if any ordinary people make it a point of checking underneath their vehicles before getting in and driving away. Nobody has any reason to expect that another person will be underneath. Naturally it would be a wise precaution to check underneath one's vehicle if it had been parked in close proximity to a heavy congregation of young children but necessarily so. It would depend on the circumstances."

In response to the appellant's grounds of appeal the learned trial magistrate stated:

> "5. Learned Senior Counsel should concede that if appellant checked the vehicle underneath and proceeded to the driver's seat without setting it in motion for minutes circumstances would have changed and would require re-checking again, since the purpose of checking is to set the vehicle in motion."

As rightly submitted by the respondent's counsel, this tends to suggest that the court *a quo* accepted that some checking was done. It furthermore considered that this was a heavy vehicle which needs to be "warmed up" upon starting it and before setting it in motion.

Respondent's counsel further cited *Cooper v Armstrong* 1939 OPD 140 at 148 cited in approval in *S A Mutual Fire & General Insurance v Venter* 1979 (3) SA 1036 (A) at 1041 (H) where the following was stated:

> "... it seems irrational to meticulously examine his reasons in the placid atmosphere of the court in the light of after acquired knowledge to hold that, had he but taken such and such a step, the accident would have been avoided and that consequently he was negligent. To do so would be to ignore the penal element in actions on delict and to punish a possible error of judgment as severely as, if not more severely than, the most callous disregard of the safety of others."

Thus on a consideration of the facts of this matter and if an armchair approach is avoided, the following circumstances would be seen to operate in favour of the appellant's innocence or at the least, the impropriety of his conviction to the extent that it is an unsafe conviction. The incident occurred at a rural business centre on a day when there were very few people around with nothing to warn the appellant of the presence of the deceased. Considering further, that the motor vehicle in the *Musariri* case had been parked in a high density suburb, the authority works in the appellant's favour for the stronger reason.

It is for these reasons that the conviction of the appellant is unsafe. The concession by the Attorney General is proper and justified.

In the result the appeal is allowed and the conviction and sentence are hereby set aside. If the appellant had paid the fine, it must be refunded to him.

HUNGWE J agrees. ……..

T. Magwaliba, appellant's legal practitioners