CAISON CHIGWADA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & WAMAMBO JJ
HARARE, 7 June & 14 November 2018

Criminal Appeal

W. Mharapara, for the appellant
W. Badalane, for the respondent

HUNGWE J: The appellant pleaded guilty to a charge of culpable homicide as defined in s 49 (1) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. He was after conviction, sentenced to 24 months imprisonment of which 9 months was suspended on condition of future good behaviour. In addition he was prohibited from driving for two years.

At his trial in the court *a quo*, the appellant was not legally represented. He now appeals against both conviction and sentence through the assistance of counsel.

The grounds of appeal allege that:

(a) the court *a quo* misdirected itself by failing to fully explain the essential elements of the offence;

(b) the court *a quo* erred and misdirected itself by failing to find that the appellant was not the proximate cause of the accident;

(c) the court *a quo* misdirected itself by failing to alter the plea of guilty to not guilty when the appellant averred that he had not seen the continuous white line.

Where an accused pleads guilty at a trial and later decides to appeal the outcome of those proceedings, the practice of this court is to treat such an appeal as an application for a change of plea after conviction. In *S* v *Mudzingwa* 1999 (2) ZLR 225 (HC) this court held that an appeal where there has been a plea of guilty will only be entertained where, from the words used by the accused in pleading to the charge it is demonstrated that the accused was raising some defence which could legitimately be raised to the charge. In urging us to entertain the present appeal, it was prayed by counsel for the appellant that in asserting that he only saw the continuous white line as he was going back to his lane, the appellant was raising the defence

of not having encroached into the continuous white line. Clearly Mr *Mharapara* in our view misconstrued the *ratio* stated in the case he referred us to. The appellant in that case raised a defence of a claim of right on a charge of theft. That he had not noticed the continuous white line cannot, in the circumstances of this case, amount to an answer which raises some defence to the charge of culpable homicide arising from a road traffic accident. On a charge of culpable homicide a conceivable defence may be a claim that he had kept the bus under such control as any reasonable driver in the circumstances would have. A denial of an essential element of negligence may give rise to an inference that the accused might be raising a possible defence. He may well have disputed a failure to observe the standard expected of the reasonable driver in the circumstances. The appellant never made any such intimation. Consequently, this is not a matter which ought to have been entertained as an appeal.

A perusal of the record shows that the appellant, a bus driver, overtook a pick-up truck in which the now deceased were passengers. He saw an oncoming vehicle and prematurely swung back to his correct lane thereby causing the truck he had just overtaken to hit into his bus or at least narrowly miss hitting into it. This is what caused the overturning of the truck leading to the death of the deceased in the process. These facts were put to him. He confirmed the correctness of the facts. He was asked if he admitted that he was, by his negligent manner of driving, the proximate cause of the death of the two who were in the truck. He admitted this fact. The manner in which the essential elements were put clearly steered away from the use of legal jargon thereby ensuring the elucidation of the required answers without seeking to trap an unrepresented accused. This, in our view is to be commended on the part of the trial court.

In these circumstances we do not see how, even for a self-actor, it could be said that his plea was not genuine.

The appellant admitted overtaking on a blind rise. That is why, upon coming face to face with an oncoming motor vehicle he had to swing back into his correct lane. This action only served to demonstrate the risk he had taken in straddling a continuous white line at a blind rise. The inevitable happened. The danger which the prohibition line warned him against precipitated. He was careless by executing an overtaking procedure when he could not see the road ahead due to a blind rise. It was unclear and therefore dangerous for him to travel on the lane of incoming vehicles. Clearly, he was not aware whether he could safely execute the manoeuvre without endangering other road users. He gambled with the safety of other road users. He cannot at this stage claim that his bus did not hit the truck. It is irrelevant as the facts as admitted clearly establish negligence.

The appellant against conviction is therefore dismissed.

As for the appeal against sentence we do not think that an effective, 15 months imprisonment for a public service bus driver who drove in the manner appellant did is out of line with decided cases. In any event the trial court took into account all the factors that it was entitled to consider when assessing sentence. The trial court balanced the mitigatory features of the case against the aggravating ones. There is no allegation of any misdirection or that the court acted on a wrong principle.

Consequently we find that the appellant has not shown that there is a basis for this court to interfere with the sentence.

The appeal is therefore dismissed in its entirety.

WAMAMBO J: agrees ……

Mtombeni, Mukwesha Muzawazi & Associates, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners