TAPIWA MANTIZIBA

vs

THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE J & MAFUSIRE J.
MASVINGO, 27 March & 31st July, 2019

Criminal Appeal

Mr M. Mureri for the appellant
Mr T. Chikwati for the state

MAWADZE J: At the hearing of the appeal the appellant withdrew the appeal in respect of conviction and indicated that the appeal was now in respect of the sentence only. Indeed, the appellant's Damascean moment is well found as the evidence against the appellant is simply overwhelming. Our task in this matter is now to simply assess the appropriate sentence in the circumstances. Put differently the question is whether the court *a quo* imposed a proper sentence in this matter.

The appellant was convicted and sentenced by the Senior Magistrate sitting at Bikita of culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*] arising from a road traffic accident. While it may have been proper to charge the appellant with two counts of culpable homicide as two people perished in the accident this issue should not detain us as ultimately any reasonable court would treat both counts as one for purposes of sentence as the two deaths arose from one act of bad driving conduct.

The 31-year-old appellant who resides at No. 80 McGhie, Rhodene, Masvingo is employed by Econet Wireless based in Masvingo as a Business Solution and Platinum Services Manager. He is a family man with a very young family of two children aged 3 years and 6 years.

The deceased persons are Garikayi Mnangagwa then aged 31 years and Ignatius Jaja then aged 32 years.

The facts of this matter are as follows;

On 21 March 2018 at around 17.00 hrs the appellant was driving a Toyota Hilux registration number AEK 6268 along the Mutare – Masvingo road due west towards Masvingo. The appellant who is a holder of a driver's licence in classes 4 and 5 had three passengers. At the 212 km peg near Rozva bridge the appellant overtook another motor vehicle. The appellant did so in front of an oncoming unregistered motor cycle driven by Garikayi Mnangagwa who was carrying a passenger Ignatius Jaja. As a result, of this overtaking error a side swipe occurred between the appellant's motor vehicle and the now deceased's motor cycle.

Due to the impact Garikayi Mnangagwa sustained a traumatic amputation of the right leg at the hip joint and died on the spot. Ignatius Jaja sustained a fractured right arm and head injuries. Ignatius Jaja passed on on admission at Silveira Mission Hospital. The cause of death of both deceased persons was haemorrhagic shock arising from the injuries they sustained during the accident.

Apparently the appellant was not injured. However, the appellant's motor vehicle sustained damages on the right headlamp, right front fender and on the driver's door. The now deceased's motor cycle was extensively damaged.

The particulars of negligence now not in issue are that the appellant overtook in front of an oncoming motor cycle, was travelling at an excessive speed in the circumstances and failed to stop or to act reasonably when the accident seemed imminent.

The appellant who is a first offender was sentenced to 12 months imprisonment and prohibited from driving any class of motor vehicles for a period of 24 months.

The grounds of appeal in respect of sentence which are rather poorly drafted are couched as follows;

"7. *In re sentence*

The learned Magistrate erred and thus misdirected herself in imposing a sentence which induces a sense of shock and outrage due to its severity.

8. *The court sentenced the appellant who was driving a private service vehicle to 12 months imprisonment; a sentence to be imposed to a driver of a commuter omnibus or a heavy vehicle and in that regard erred* (sic)

9. *The court erred for sentencing the appellant to a 12 months imprisonment a period which is below 24 months which is harsh under the circumstances* (sic)

10. *The court a quo erred by prohibiting the appellant from diving for 24 months which is harsh under the circumstances.*

11. *The court erred in not seriously considering all mitigatory factors placed before her whose cumulative effect was a fine or community service namely*;

    (i) he is a first offender
    (ii) married with two minor children
    (iii) gainfully employed by Econet Wireless as a Business Solution and Platinum Service Manager
    (iv) *they contributed towards funeral and the company offered scholarship to the deceased's children from grade 1 up to tertiary education* (sic)

WHEREFORE the appellant prays that both his conviction and sentence be set aside and his appeal be upheld." (sic)

The court *a quo* in assessing sentence properly considered the appellant's degree of negligence as a decisive factor. The appellant's degree of negligence was or is indeed informed by the particulars of negligence, being overtaking in front of an oncoming motor cycle, travelling at an excessive speed in the circumstances and failing to stop or to act reasonably when the accident was imminent. The court *a quo* found the appellant's degree of negligence to be reckless and that two lives were lost.

The narrow issue before this court is whether the court a quo misdirected itself either in considering relevant factors as regards mitigatory or aggravating factors or in its assessment of a proper sentence.

The court *a quo* indeed considered the mitigatory factors in this case. These include *inter alia*;

(a) the personal circumstances of the appellant which I have already alluded to
(b) the fact that the appellant contributed towards the funeral expenses of the now deceased one Ignatius Jaja in the sum of $300 and paid a further $1 400 to the deceased's family towards their upkeep. However, it has not been disputed that a similar offer was made to the now deceased Garikayi Mnangagwa's family but was not accepted as it is alleged that the family members wanted to first consult the

President of the Republic of Zimbabwe – Mr Mnangagwa and that thereafter no feedback was given.

(c) the appellant's employers Econet Wireless are said to have offered scholarships to the deceased's children from Grade 1 up to tertiary education level inclusive of the full school account and also to provide a monthly allowance. In addition to that the now deceased Ignatius Jaja's widow was offered employment as a general hand by Econet Wireless. We however note that all these gestures while appreciated and are indeed mitigatory factors were not being made by the appellant himself but his employer

(d) the appellant also bemoaned that the driver's licence is critical to his employment as his job entails a lot of travelling

In addition to the above *Mr Mureri* in his submissions stated that the trial Magistrate was swayed by emotions rather than the facts of the matter and he made reference to the case of *S* v *Harrington* 1988 (2) ZLR 344. Further *Mr Mureri* sought to argue that the now deceased Garikayi Mnangagwa was also negligent in that he drove too close to the centre of the road albeit in his lane of travel, may have been unlicensed and that both deceased persons did not have helmets. *Mr Mureri* submitted that the appellants' degree of negligence is ordinary and that a fine of $500 would be appropriate more so as he alleged that the now deceased persons may well have been drunk. Lastly he urged this court to set aside the order of prohibition from driving.

It is without doubt that this was a horrific accident. This is borne out of the injuries sustained by the now deceased persons and the damages to the motor cycle. In my view it matters not whether the now deceased Garikayi Mnangagwa was licenced or not or whether the now deceased persons were wearing helmets. There is also nothing to suggest that the drunkenness of the now deceased persons as alleged by *Mr Mureri* caused this accident. The proximate cause of this fatal accident was solely the appellant's bad driving conduct of overtaking in front of the oncoming motor cycle. It is the appellant who failed to exercise the degree of care and skill a reasonable man (*diligens paterfamilias*) would have exercised in this case. The appellant's driving conduct is judged on the basis of an objective test or a reasonable man's test. See *The State* v *Richard Muchairi* HB 41/06.

As already said before imposing a sentence in cases of this nature the degree of negligence of the accused person is a paramount factor see *S* v *Mapeka & Anor*. 2001 (2) ZLR

90 (H). The question to be answered is whether the degree of negligence is ordinary or gross (recklessness). This informs the nature of the sentence to be imposed, that is whether custodial or non-custodial see *S* v *Mandwe* 1993 (2) ZLR 233 (S); *S* v *Chirisa* 1989 (2) ZLR 102 (S) ; *Tawanda Mandava* v *State* SC 180/96.

The appellant in this case decided to overtake another motor vehicle in front of an oncoming motor cycle in broad day light and on a straight stretch of the road. Such bad driving conduct amounts to total disregard of other road users and is completely averse to road rules. I have no doubt therefore that the appellant's degree of negligence is gross or amounts to recklessness. Worse still this gross negligence led to the loss of two lives. The appellant and other drivers of like mind should indeed be reminded of the sanctity of human life. The words of SMITH J in *Clayden Mandeya* v *State* HH 180-99 at page 3 of the cyclostyled judgment in which he quoted SQUIRES J in *S* v *Dhlovu* G-S-357-81 are apposite.

Given the appellant's degree of negligence I do not see how the appellant can escape a custodial sentence. In the case of *Michael Nyamandi* v The State SC 137/98 SANDURA JA in dismissing an appeal against a custodial sentence of 12 months quoted with approval RAMSBOTTOM JA in *R* v *Bredell* 1960 (3) SA 558 A at 560 G – H in which the learned Judge of Appeal said;

> "*the time has come when it is the duty of judicial officers to exercise greater severity in passing sentence in cases of negligent use of motor vehicles. A motor car is a most dangerous instrument if negligently handled, and it may be that the only way to remind drivers of their duty to use proper care is for magistrates and judges to make more frequent use of the deterrent effect of prison sentences*" (at page 7 of the cyclostyled judgment).

Indeed, I am alive to the fact that a sentence of imprisonment is undoubtedly a severe and rigorous form of punishment and that it should only be imposed as a last resort and only when the justice of the case so demands.

I am not persuaded that the court *a quo* misdirected itself in this case in imposing a custodial sentence. While the period of 12 months imprisonment is clearly excessive a custodial sentence is unavoidable. *In casu* the trial court should have imposed the minimum effective prison term in order to do justice to both the appellant and the interests of society.

In conclusion, I am satisfied that the court *a quo* did not misdirect itself in imposing an effective custodial sentence. I cannot do more than to refer to the wise words of GUBBAY

ACJ (as he then was) in the case of *S* v *Ruzario* 1990 (1) ZLR 389 in which the then Acting Chief Justice in dismissing an appeal against a custodial sentence said;

> "*I am satisfied that the trial court was not only entitled, but obliged, in the proper exercise of its judicial function, to punish him severely by sentencing him to imprisonment ----------. His degree of culpability or blameworthiness was high. Moreover, his conduct had calamitous consequences resulting in death of three persons*."

Given the mitigatory factors in this case already alluded to I am inclined to reduce the sentence imposed by the court *a quo* to ensure that appellant is visited with the minimum effective prison term. I find no good cause to interfere with the order of prohibition from driving imposed by the court *a quo*.

In the result it is ordered as follows;

1. The appeal in respect of sentence be and is hereby dismissed in relation to an effective custodial sentence.
2. The appeal against the prohibition order from driving any classes of motor vehicles for a period of 24 months be and is hereby dismissed.
3. The sentence of 12 months imposed by the court *a quo* be and is hereby set aside and substituted with the following;

   "*8 months imprisonment of which 3 months imprisonment is suspended for 5 years on condition the appellant does not within that period commit any offence in which the negligent cause of death of another arising from a road traffic accident is an element and for which the appellant is sentenced to a term of imprisonment without the option of a fine.*

   Effective term: 5 months imprisonment."

Mafusire J. agrees …….

Matutu and Mureri, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners