NORMAN BVEKWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 15 September 2021

Chamber application for leave to appeal to the Supreme Court against dismissal of appeal by High Court.

CHITAPI J: The background to his application is that the applicant was convicted by the Magistrate sitting at Harare on a charge of negligent driving as defined in s 52(2) of the Road Traffic Act, [*Chapter 13:11*]. On 9 March 2018, the applicant was sentenced to pay a fine of $400.00 in default of payment 4 months imprisonment. The applicant was not satisfied with his conviction and sentence. He noted an appeal against both conviction and sentence to this court as he was entitled to. The applicant's appeal was dismissed in its entirety by judgment of the appeal court delivered on 19 October 2020, referenced HH651/20. Although the appeal court had written a fully dressed judgment only, the operative part of the judgment to the effect that "the appeal be and is dismissed in its entirety was read out". The parties requiring the full judgment would obtain it from the Registrar upon payment as determined in the rules of court. The disadvantage of the process of handing down judgment by reading out only the operative part or order will become relevant in considering the applicants justification for making this chamber application.

Section 41A(1) of the High Court Act, [*Chapter 7.06*] provides that

> "in any case where a person desires to apply to a judge of the High court for leave to appeal such application shall be submitted to the Registrar of the High Court within such period and in such manner and form as may be prescribed by rules of court"

Rule 44(2) provides for the right of a person convicted by the High Court in a criminal trial, to appeal to the Supreme Court in circumstances set in paragraphs (a) – (e) thereof. I do not intend to individually list them out because the circumstances are not an issue in this

application. The same right of appeal granted in s 44(2) is however extended to a person whose appeal has been dismissed by the High Court in circumstances set out in subsection (4) of s 44 which provided as follows:-

> "44(4) any person convicted and sentenced in a criminal trial by an inferior court or tribunal who is dissatisfied with the judgement of the High Court on an appeal against such conviction or sentence or with the judgement of the High Court on a review, other than a review pursuant to section 57 of the Magistrate Court Act [Chapter 7.10] shall have the same right of appeal to the Supreme Court as is conferred by subsection (2) on any person convicted on a trial by the High Court.

Therefore, from a rationalization of the provisions of ss 41A, 44(2) and 44(4), it can simply be reasoned that as far as the right of noting an appeal to the Supreme Court is concerned, the convict who has been convicted and sentenced by the High Court on a criminal trial, is in the same position as the convict who was convicted and sentenced by an inferior court or tribunal who has appealed to the High Court and has had the appeal dismissed by the High Court on appeal or vice versa. Subsection (2) to s 44 provides circumstances in which the convict can directly appeal to the Supreme Court and circumstances where the convict must have first obtained leave to appeal to the Supreme before noting the appeal.

A person who has been convicted and sentenced by the High Court on trial and intends to note appeal to the Supreme Court against the conviction and or sentence must follow procedures set out in Order 34 of the High Court Rules, 1971. Rule 262 of Order 34 provided the default position which required that the convict who intends to appeal should immediately after sentence make an oral application for leave to appeal. It should be feasible for the convict to make the application because in a trial situation, the full judgment and reasons for sentence are read out into the record. The convict is expected to follow the judgment and reasons for sentence and be able to note areas of his discontent and what he considers are areas that ground an appeal.

By contrast, the application of r 262 is not feasible in circumstances of the dismissal of an appeal from the Magistrates because court invariably, unless the appeal court has given extempore reasons which may be adequate for a convict to make out possible grounds of appeal, the appeal court normally reads out the order. Even where a full judgment has been prepared, the appeal court will read out the operative part of the judgment dismissing the appeal or upholding it. Reasons for judgment will then be available for upliftment upon payment of the requisite fees charged in terms of the rules. The convict must obviously acquaint with the

reasons for judgment before deciding on whether to note appeal or not. The same convict must at the same time decide whether to apply for leave to appeal or not.

Failure to orally apply for leave to appeal immediately upon the dismissal of the appeal, a position whose feasibility I have commented upon, the convict is given a window of twelve days from the date of sentence to make a written application from the date of sentence or dismissal of appeal as the case may be in terms of r 263 for leave to appeal. The rule provides that such application should show special circumstances why the application for leave was not made in terms of r 262. The convict must attach a copy of the proposed grounds of appeal and should outline the reasons why the convict contends that leave to appeal should be granted. As l understand it, the convict should motivate the proposed grounds of appeal and persuade the judge that the convict's proposed appeal has prospects of success.

In this application, the applicant as l have already indicated only obtained the reasons for judgment later because the appeal court only read out the operative part of the judgment. The applicant in this application contends that because the reasons for judgment could only be accessed after the order dismissing the appeal had been issued, he could not make an oral application for leave to appeal immediately. After he averred that the operative failure to immediately obtain the full judgment ammoniated to a special circumstance entitling the applicant to file a written application for leave to appeal. As an aside, l respectfully observe that the default position presented by an application of r 262 to circumstances of an appeal to the Supreme Court from the decision of an appeal from the High Court's decision on appeal from the inferior court in criminal matters needs to be relooked at. I have set out the challenges which face the convict where the reasons for judgment are not read out to the convict. The failure to do so does not place the applicant for leave to appeal in a position where he or she can make meaningful submission in an oral application for leave to appeal.

Having determined that the application merits the judge's consideration because of the special circumstances that reasons for judgment were not given to the applicant when judgment was handed down, I proceed to deal with the application in detail.

It is convenient at this stage to list applicants proposed grounds of appeal. They are five grounds of appeal against conviction and one ground of appeal against sentence. They are listed as;

> "1. The court *a quo* erred in making a finding that the appellant was negligent when the evidence on record showed that in fact it was the complainant who was negligent.

2. The court *a quo* erred in finding as it did that the appellant encroached into the lane of the complainant when the evidence on record showed that the vehicles collided in the middle of the road.
3. The court *a quo* erred when it made a finding that there was corroboration when the evidence on record does not show that the evidence of the witnesses and the real evidence corroborate.
4. The court *a quo* misdirected itself in finding as it did that the appellant did not act reasonably yet under the circumstances of being dazzled by the complainant he could not act in any other manner.
5. The court *a quo* erred when it made a finding as it did that the defence of sudden emergency was not available to the appellant when it deed the complainant created an emergency by dazzling him in a curve.

SENTENCE

6. The court *a quo* misdirected itself by sentencing the appellant to the maximum penalty yet it had made a finding that the negligence was not of a gross nature."

The test for determining whether or not leave to appeal should be granted is well set out in decided cases. It is well settled that leave to appeal will be granted where the applicant demonstrates that he or she has a reasonable prospect of success on appeal. The test is not whether the applicant has an arguable case see *S* v *Mutasa* 1988 (2) ZLR 4(S). In other words however the test may be formulated, the real test in my view is whether or not there is a reasonable prospect that another court considering the facts and circumstances of the case subject matter of appeal, may come to a different conclusion than that which the court whose discussion is subject of appeal reached. See *Munyaradzi Kereke* v *Maramwidze and Prosecutor General* SC581/20.

The facts of the case were summarised in the appeal court judgment. The applicant and the complainant were driving from opposite directions along Enterprise Road, Harare on 20 May, 2021 in the late evening around 2330 hours. The applicant was driving his Chevrolet Blazer vehicle and the complainant a Nissan Sylphy. At a point along the road, the vehicles collided as they by passed each other. The issue for determination was "who was to blame for the vehicle collision and whether the person drove negligently". It was common cause that the collision occurred as the appellant drove out of a curve and the complainant was about to enter the same curve. Both vehicles sustained extreme frontal damages. The complainant suffered fractures on both legs and was hospitalised for 14 days. The applicant's condition was not interrogated.

The appeal court noted that the trial court had made a finding that the applicant was the cause of the accident in that he lost control of his vehicle and encroached onto the complainant's lane of travel thereby resulting in the two vehicles colliding. It was noted that

at the place of collision, there is a single lane for vehicles either way. The applicant was charged with having been negligent in one or more or all of the following particulars:-

> "1. Failing to keep vehicle under proper control
> 2. failing to stop or act reasonably when a collision seemed imminent.
> 3. travelling at an excessive speed under the circumstances.
> 4. travelling on the wrong side of the road."

I turn to the first ground of appeal. It is too generalised. It cannot be answered because it is not clear and concise. It does not specify the evidence nor the nature of the evidence which the applicant seeks to rely upon to prove to the appeal court that it was the complainant and not the applicant who drove negligently. Where the ground of appeal relied upon is not clear and concise, the appeal court will declare such ground of appeal to be invalid and therefore null and void. See *S* v *Chimaiwache* SC18/13 and cases therein cited. Whilst, the ultimate decision as to whether a particular ground of appeal is valid or invalid is the province of the appeal court, I believe that l can express an opinion on the question and from decided case law, it is almost a certainty that the ground of appeal will not pass. See *S* v *Ncube* 1990 (2) ZLR 303(S) at 304 C-E where it is stated:-

> "I do not consider that such general grounds of appeal as "the conviction is against the weight of evidence" or "the evidence does not support the conviction" or "the conviction is wrong in law" are a compliance with the rule. It follows that where the only ground of appeal given in the notice is a vague one of this description, the notice of appeal must be considered to be bad. The effect would be the same as if no notice of appeal was failed ..."

It follows upon the above direction that the first ground of appeal herein inasmuch as it simply alleges generally that the trial court erred in making a finding of negligence against the applicant, yet it was the complainant who was negligent is not only bad in law but is certainly invalid.

The second ground of appeal is in my view much the same as the first ground of appeal for lack of clarity. The applicant attacks the Magistrate's finding that the appellant encroached onto the complainant's lane of travel. The applicant then avers that this finding was wrong because "the record showed that the vehicles collided in the middle of the road". To allege that "the record" shows or proves a fact is vague and lacks clarity. The ground of appeal does not refer to the alleged, evidence on record" that showed that the vehicles collided in the middle of the road".

The criticism on the invalidity of the second ground of appeal aside, the trial court as indeed the appeal court dealt at length with the issue of the point of impact. A finding on the location or identification of the point of impact is a factual finding. It is trite that the appeal court will ordinarily accept factual findings made by a trial court unless the appellant demonstrates that a mistake was made. In *S* v *Hadebe and Ors* 1977(2) SACR 641 (SCA) at 645 (e-f) it is stated as follows;

> "Before considering these submissions it would be as well to recall yet again that there are well established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the record of evidence shows that to be clearly wrong"

In the case of *S* v *Naidoo and Ors* 2003 (i) SACR 347 (SCA*)* at para 76, it is stated as follows;

> "In the final analysis a court of appeal does not overturn a trial courts findings of fact, unless they are shown to be vitiated by material misdirection or are shown by the evidence to be wrong"

The above principles quoted from cases decided in a sister jurisdiction of South Africa apply to the jurisdiction of Zimbabwe on determination of appeals. The principles are discussed in depth by HUNGWE J (as he then was) in the case of *Lawrence Mashonganyika* v *State* HH131/1. In the case of *Gomana* v *S,* SC320/20, UCHENA JA stated at p7 of the cyclostyled judgment.

> "It is trite that an appellate court will only interfere with factual findings of a lower court when it is alleged and proved that the finding was issued at irrationally. See *Hama* v *NRZ* 1996(1) ZLR (1) 664 at 676".

The evidence which the trial court found proved and as captured in the appeal judgment was that of Khosa, an independent witness who was driving behind the complainant in the same direction and also of the police officer. The court placed reliance, quite correctly, on the evidence on the ground as opposed to evidence of the impressions of the police officer and Khosa. The appeal court noted that the physical evidence obtained at the scene was the best evidence and in this regard was guided by the decisions of *S* v *Ramotale* 1992(2) ZLR 397 (5); *S* v *Toms* 1993(2) ZLR 388(S*)* and *Taurayi Maurukira* v *S* HH 29/15. The appeal court relying on the decision in *S* v *Lawrence and Anor* 1989(1) ZLR 29 (SC) noted that it would be guided by all the evidence on record and any inconsistencies, contradictions and imperfections in the state evidence would not be of great moment unless they went to the root of the appeal.

It was a finding of the trial and appeal courts that the corrections of the sketch plan of the scene was not put into issue. What the applicant put into issue was the interpretation of what the diagram showed in relation to the point of impact. It was the trial courts observation and conclusion upon an analysis of the point of impact as shown on the sketch plan that it was located in the complainant's lane of travel. The court noted that even though the policeman and the witness Khosa indicated the point of impact as a different one from where the debris lay, the two points of impact were both on the complainants side of the road. The court noted that the applicant did not dispute the presence of debris on the complainant's lane of travel. It was found that the applicant had not been able to explain the absence of debris on his lane of travel if the collision had occurred on that lane. It was also noted that the applicant did not indicate his perceived point of impact to the police, hence its absence on the sketch plan. This left only two possible points of impact both on the complainants' lane of travel.

On p 4 of the cyclostyled appeal judgement, it is stated as follows:-

> "There is what appears to be a small "x" in between the vehicles. It is this which appellant argues is the point of impact. It has no foundation in the diagram itself. It is in the complainant's lane. It is not in the appellants lane as claimed by him. The key to the diagram has one "x" and "x2" and no additional smaller "x".

The Magistrate was correct to find that the possible point of impact was in the complainant's lane. See *S* v *Kwadira* 1982(1) ZLR 229(S). I have also analyzed the sketch plan. It does reflect what the appeal and trial courts noted on the possible points of impact and their being wholly on the complainants have of travel. There is not in my views the slightest of chances that the Supreme Court would fault the findings on the possible point of impact and how the point of impact proved that the applicant encroached onto the complainant's lane of travel. In that regard, the finding that the applicant drove negligently presents itself objectively on the facts as unassailable.

The third ground of appeal is again not clear and is too generalised to be meaningless. The applicant avers that the court erred in making a finding that the evidence of witnesses corroborated the evidence on the ground. The couching of a ground of appeal in this fashion is embarrassing and must be so to the would be appellant. For the ground to be meaningful, the applicant ought to have referred to that evidence of a witness vis-à-vis the ground evidence and alleged the non-corroborative nature of the two pieces of evidence. The ground of appeal simply raises the question "which evidence does not corroborate which evidence". This being, the ground of appeal is not as couched, susceptible to an answer. I accordingly determine that

there would be no likelihood of any prospect of success based on this ground of appeal, if l may generously call it so, because l otherwise do not find it to be valid, I say so guardedly because a declaration to that effect and its striking it off would be the function of the appeal court.

The fourth ground of appeal faults the judgment on appeal on the bases that the court erred in making a finding that the applicant did not act reasonably in the face of being dazzled by the lights of the complainant's vehicles. In this regards, it was noted in the appeal judgment on page 5 of the cyclostyled judgment as follows;

> "even if the trial court had found that the appellant had been momentarily `dazzled by complainants headlights, he would still be negligent. He did not stop. He did not slow down. He did not say he did anything to avoid an imminent collision. He did not move away from the source of that light. My view is that the Magistrates finding that appellant was negligent in failing to stop or to act reasonably when a collision was imminent is beyond reproach. Ms *Kachidza* properly referred us to authority highlighting the duties of a driver who is dazzled. See *S* v *Ruzaro* 1990(1) ZLR 359 (S); *S* v *Mandwe* 1993 (2) ZLR 233(S)"

I am unable to find fault in the above analysis and indeed l entertain the belief that there are no prospects of success of this ground of appeal succeeding. In my view it is not sufficient for a driver who relies on a defence that he was dazzled by another drivers motor vehicle lights to allege that fact as a sudden emergency and end there. There must also be a sudden reaction to avoid a collision on the part of the dazzled driver. Whether that avoiding actions succeeds in averting the accident is a separate issue from the need on the part of the dazzled drive to take action to try and avert the accident. The applicant's defence remained a mere allegation of a sudden emergency presenting itself. The sudden reaction to the sudden emergency was not pleaded nor expounded in evidence. Had it been pleaded, then the onus would have been on the state to disprove beyond a reasonable doubt, the reasonableness of the action taken by the applicant or whether he took the action pleaded at all, to avert the accident. The court was therefore entitled to conclude that the applicant did not take any avoiding action. It was also entitled to hold that the applicant drove at an excessive speed under the circumstanced judging from, inter alia the extent of damage to the motor vehicles. I do not perceive any prospects of success of this ground of appeal.

In the fifth ground of appeal, the applicant averred that the trial court erred in not making a finding that the flashed lights of the complainant's motor vehicle dazzled the applicant and created a sudden emergency. The ground of appeal is covered in the fourth

ground of appeal and is similarly answered by the position taken in regard to the fourth ground. There are no prospects of the ground of appeal succeeding.

Lastly, the applicant intends to appeal against sentence on one ground of appeal. He contends that he should not have been sentenced to pay the maximum fine because his negligence was not gross. Again, l do not see merit in this ground of appeal. Sentencing is in the discretion of the court. The principles of sentencing have been described as a triad reached upon a consideration cumulatively of the offence, the offender and the interests of society.

Punishment must serve a purpose. It must result in a sting upon the offender. The offender who is sentenced to pay a fine must experience a dent on his pocket. This is why the person of the offender is an important consideration. The applicant is a senior legal practitioner who surely cannot complain that $400-00 constitutes a significant dip in his pocket. Therefore the imposition of the maximum penalty is not only informed by the level of negligence of the offender but upon a consideration cumulatively of all factors proper to consider in assessing sentence and coming up with a sentence considered to be fair to the accused whilst protecting societal interests. In my view there was no misdirection committed in assessing sentence and l hold that the applicant has no prospects of success against sentence.

Before l conclude this judgment, l need to comment on an issue which now appears to have been cured by the new High Court Rules S.I 202/2021. This application has been determined in terms of the repeated High Court Rules, 1971 because s 109 of the new rules, provides that matters already commenced before the new rules are deemed to have been commenced under the equivalent rule. This application pertains to an appeal which seeks to impugn the judgment of this court sitting as a court of appeal and yet, the application is determined by one judge who may not even have sat on the panel of judges who determined the appeal. It places the judge in an invidious position of expressing an opinion against the appeal judgment. It is gratifying to note that under r 94(9) of the new rules, in applications for leave to appeal, if two or more judges sat in the matter for which leave to appeal is sought, then the leave to appeal application is heard by those judges if they are available. If they cannot all be available, then by implication one of them can then hear the application. I accept that l may be wrong on what the position is if those judges are not available. I therefore express my view only. The material point l make is that the unsatisfactory position which l decreed has been cured.

The above point having been expressed as an aside and being an *obiter dictum*, l determine this application as follows;

DISPOSITION

It be and is hereby ordered that the application for leave to appeal against both conviction and sentence in case No CRB HRE P 11178/17; Ref CA189/18 (judgment HH657/20) be and is hereby dismissed.

Manase and Manase Legal Practitioners, applicant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners