PARDON MUSARURWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
TAGU AND MUREMBA JJ
HARARE, 7 November 2013

Criminal Appeal

R J Gumbo, for the applicant
T Mapfuwa, for the respondent

TAGU J: The appellant was on his own plea of guilty convicted by a Bindura Magistrate for contravening s 53 (2) of the Road Traffic Act [*Cap* 13.11] (Reckless Driving). He was sentenced to 3 years imprisonment of which 1 year imprisonment was suspended on the usual condition of good behaviour. He was prohibited from driving for a period of 2 years and his driver's licence was cancelled. The facts were that on the 3rd April the appellant was driving a public service vehicle, a Toyota Hiace combi with passengers along the Harare - Bindura road. At the 39 km peg he tried to overtake two VIP Mercedes Benz vehicles that were turning right forcing them to apply emergency brakes. No one was injured. However, in his notice of appeal the appellant stated that in fact there were four vehicles in front of him and he could not see that the last vehicle in the line was indicating to turn right.

Aggrieved by the sentence imposed on him by the court *a quo* he noted an appeal against sentence only. His full grounds of appeal are as follows:-

> "1. The court misdirected itself by holding that there were no special circumstances in this matter.
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> 1.1 It was not disputed that there was a sudden emergency which forced appellant to move to the right thereby being forced to overtake dangerously.
>
> 1.2 Appellant managed to prevent an accident from occurring.
>
> 1.3 There were four vehicles in front of him and he could not see that the last vehicle in the line was indicating to turn right.

1.4 There is no sign from the road to indicate that there is a right turn. The turn gives access to a school and a compound nearby but there are no signs to show this.

1.5 What the appellant did was what any other reasonable driver would have done in the circumstances. The investigating officer confirmed that what appellant did was not out of the ordinary, but it's a common occurrence.

1.6 No damage to property occurred neither was any one injured.

2. The court misdirected itself by imposing a custodial sentence in a case in which a non custodial sentence would have met the justice of the case.

2.1 The court failed to take into account the mitigatory features of the case, but over emphasised the aggravating features of general application to public transport drivers and not the appellant.

2.2 The court failed to appreciate the general practice that there has to be individualization in sentencing and that the court had to punish appellant for the offence he had committed and not what other drivers committed.

2.3 The court over emphasized deterrence without due consideration to trends in sentencing requiring to seek reformation as the primary consideration in contemporary sentencing.

2.4 The court never gave any meaningful weight to the fact that appellant was a first offender who had pleaded guilty. No effort was done to explain the benefit appellant got as a result of the fact that he was a first offender who pleaded guilty in accordance with recommendations of superior courts.

3. The court misdirected itself by cancelling the licence of the appellant, on a first offence where no accident occurred and no property was damaged.

4. The sentence is too harsh and induces a sense of shock and does not meet the interests of the offender, those of the administration of justice and the interests of the community.

5. Wherefore appellant prays for the setting aside of the sentence of the court *a quo* and replacing it with a non- custodial sentence."

The respondent opposed the appeal.

The respondent submitted among other things that what the appellant submitted does not amount to special circumstances. The appellant admitted overtaking two Mercedes Benz vehicles which were turning to the right. He admitted failing to keep a proper lookout and

was driving at an excessive speed. He cannot claim that there was sudden emergency. The respondent argued that what amounts to special circumstances were stated in State v Chisiwa 1981 ZLR 666 at 671. It was further argued that the court *a quo* carefully balanced the mitigatory and aggravating factors of this case and passed a sentence that suited the offence and the offender. The appellant was driving a public service vehicle and endangered the lives of the public. It was further argued that in terms of s 53 (4) (a) (ii) A and B prohibition is twofold. Firstly it is for a period of not less than 6 months for a motor vehicle other than a commuter omnibus or a heavy vehicle and secondly it is for life for driving a commuter omnibus or a heavy vehicle. The respondent proposed that the prohibition order be deleted and substituted with the following order-

> "1. The appellant is prohibited from driving a motor vehicle other than a commuter omnibus or heavy vehicle for 6 months.
> 2. The appellant is further prohibited from driving a commuter omnibus or heavy vehicle during his life time."

The authority for such a prayer is found in the case of State v Fortune Mudzimu HB 102 /04.In his heads of argument the appellant submitted that the interpretation of special circumstances in the Road Traffic Act is defective since the phrase was afforded a narrow or restrictive definition. He argued that it must include those reasons "arising either out of the commission of the offence or peculiar to the offender as long as they are out of the ordinary…" see State v Ndlovu 1983 (2) ZLR 140 (HC), S.V Chisiwa 1981 ZLR 666, State v Telecel Zimbabwe HC 55 /06 and State v Theckins & Constant (Private) Limited and Anor HC 195/89.

Section 53 (1) of the Road Traffic Act [*Cap* 13.11] defines special circumstances in clear and unambiguous terms as follows:-

> "Special circumstances mean special circumstances surrounding the commission of the offence concerned, but does not include special circumstances peculiar to the offender.'"

In my view where a statute or the legislature in its wisdom has decided to define and limit the meaning of any terms there is no justification to move out of the intended meaning and then decide to craft our own meaning that suits us but that is not provided for in law.

In casu the Trial Magistrate was correct to interpret the law as he did. A perusal of the record shows that there was nothing out of the ordinary in the manner the appellant drove the

vehicle. If his explanation is accepted then he was travelling at an excessive speed and was following too close to the vehicle ahead of him without leaving the required berth between his vehicle and the one ahead of him regard being had to the speed he was travelling at. He cannot be said to be the one who avoided an accident from occurring. The other drivers are the ones who had to apply emergency brakes and returned to their lane to avoid a collision. One cannot avoid a collision with a vehicle ahead and then proceed to overtake four vehicles in a convoy. The appellant was properly convicted of reckless driving and the conviction is confirmed.

Coming to the issue of sentence s 53 (2) (a) of the Road Traffic Act says-

> "A person who drives a vehicle on a road recklessly shall be guilty of an offence and liable-
>
> "(a) subject to s eighty-eight A, where the vehicle concerned was a commuter omnibus or a heavy vehicle, to imprisonment for a period not exceeding fifteen years and not less than two years…" section 53 (4) (a)(ii) (b) provides that the convicted person shall be prohibited from driving a commuter omnibus or a heavy vehicle for life. In respect of smaller vehicles the prohibition is for 6 months if the convicted person is a first offender.

In casu the sentence imposed by the court *a quo* is proper and will not be interfered with. However it is the order for prohibition from driving which is not competent at law that warrants interference with. The order that the accused person is prohibited from driving for a period of 2 years is hereby set aside and substituted with the following orders:

> "1. The appellant is prohibited from driving a motor vehicle other than a commuter omnibus or heavy vehicle for 6 months.
>
> 2. The appellant is further prohibited from driving a commuter omnibus or a heavy vehicle during his life time."

The appeal is dismissed.

MUREMB J. Agrees……

Gumbo And Associates, legal practitioners for the appellant.
Attorney –General's Office, legal practitioners for the respondent.