EMMANUEL MUZIVI
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA AND MUSAKWA JJ
HARARE, 3 October 2016 and 21 November 2016

Criminal appeal

N Bvekwa, for the appellant
E Mavuto, for the respondent

CHATUKUTA J: The appellant was convicted of contravening s 49 of the Criminal Law Codification and Reform Act [*Chapter 9:23*]. He was sentenced to 18 months imprisonment of which 6 months were suspended on condition of good behaviour. In addition the appellant was prohibited from driving for 12 months.

The uncontested facts of the matter are that the appellant was, at the date of the trial, employed as a Vehicle Inspection Department Officer. He was based at Nyamapanda. On 21 January 2015 and at around 8.00hrs he was driving a Nissan Hardbody truck along the Harare-Nyamapanda road heading towards Harare. On approaching the 153km peg, he hit a pedestrian who was aged 4 years old as she crossed the road from the right side of the road to the left side. He hit her with the right headlamp of his vehicle. The minor died from the injuries sustained in the accident.

The appellant was travelling at 90km/hr in an area where the speed limit was 120km/hr. The accused observed the deceased on the verge of the right side of the road before impact. The deceased landed at a distance of 6 metres from the point of impact. The appellant stopped his vehicle 60 metres from the point of impact. The skid marks before impact were recorded by the attending detail to be 18metres. There were a further 9m long skid marks after the point of impact. The appellant did not blow his horn when he saw deceased crossing the road.

The particulars of negligence were that the appellant:

(a) failed to keep a proper lookout under the circumstances;

(b) failed to stop given an accident seemed imminent;

(c) was travelling at an excessive speed under the circumstances.

(d) failed to sound his horn

(e) failed to exercise caution upon observing children at the roadside.

At the commencement of the trial, the appellant pleaded guilty to the charge. The court altered the guilty pleas after the following exchange between the appellant and the court as the court put the essential elements:

"Q- From what distance did you first observe the minor.

A- 20-30 metres

Q- The deceased was on the side of the road?

A- Yes, on the extreme right side.

Q- What action did you take?

A- When I saw the child crossing I applied brakes my skid marks were for (*sic)*about 20metres.

Q- What action did you take when you saw the children by the side of the road?

A- The children were accompanied by an adult who held her hand."

The court indicated that the appellant had raised the defence of sudden emergency, which finding was agreed to by the public prosecutor. The court postponed the matter for trial.

The appellant, upon being advised of the change of plea stated the following at p15:

> "I am not denying, I am sorry to the court, I am pleading for pardon and forgiveness, from the family of the deceased, then was a bridge, the mother was running after the minor. There were many things at play."

The matter continued on 9 April 2015. The proceedings on that date commenced with the charge being put to the appellant afresh.

The appeal against conviction is that the court erred by asking the appellant to plead afresh. It was further contended that the appellant again raised the same defence of sudden when the matter proceeded on 9 April 2015 and when the appellant submitted during the inquiry into special circumstances on whether or not the appellant should be prohibited from driving. The appellant stated that:

> "The child dashed into the road about 25 metres away. I braked and avoided falling into the bridge. There were people on the right and I avoided hurting the people who were on board my vehicle I had a police officer aboard."

There are two questions for determination. The first question is whether or the court *a quo* misdirected itself by accepting the appellant's protestation that he was not denying the charge and proceeding to put the charge to the appellant afresh and hence causing him to plead twice.

The appellant referred to s 272 (c) of the Criminal Procedure and Evidence Act [*Chapter 9:09*] in support of his proposition that the court a quo erred. Section 272 (c) provides:

> "If the court at any stage of the proceedings in terms of *section two hundred and seventy one* and before sentence is passed-
>
> (a) ……..
> (b) ……..
> (c) is not satisfied that the accused has no valid defence to the charge;
> the court shall record a plea of not guilty and require the prosecution to proceed with the trial:"

Whilst the section is peremptory that a plea of not guilty be recorded and the matter proceed to trial, that does not in my view preclude the court from proceeding in terms of s 271 of the Criminal Procedure & Evidence Act afresh. The court *a quo* duly complied with the section when it noted a possible defence to the charge. The decision was clearly not at the instance of the appellant but by a diligent trial magistrate seeking to assist an unrepresented accused. As noted earlier, the appellant voluntarily changed his mind and retendered a plea of guilty. It is recorded that upon re-tendering the plea of guilty, the trial court advised him of the import of his plea. It appears in a bid to ensure that the appellant's plea was genuine, the court a quo put the charge to the accused again. This is clearly understandable given the fact that the initial guilty plea had been tendered on 30 March 2015 and the matter was now proceeding on 9 April 2015. The conduct of the trial magistrate again exhibited a conscientious judicial officer who was aware of his responsibility to ensure that the accused understood the charge and the facts upon which the charge was premised.

Time and again trial magistrates have been criticised for not assisting unrepresented accused persons. (See *S* v *Mushayandebvu* 1992 (2) ZLR 62 (S)). which case the appellant cited in his heads of argument). The trial magistrate should be commended instead of being criticised for ensuring that no short cuts were taken to establish that the appellant's plea on 9 April 2015 was genuine. Under the circumstances, the trial magistrate would not have been

expected to go through the motions of a trial because he had earlier decided to enter a plea of not guilty where the appellant had expressed an intention to plead guilty.

The second issue is whether or not the explanation given by the appellant for having driven in the manner that he did when he hit the deceased amounts to a possible defence necessitating the alteration of the guilty plea. In support of his proposition that explanation of special circumstances was a possible defence necessitating a change of plea, the appellant referred to the case of *S* v *Chamboko* 2001 (2) ZLR 269 H. The appellant referred in particular to the court's observation at 270 E-271 B that:

> "The statements made by the appellant after he had been convicted and in relation to special circumstances *prima facie* contained the elements of a defence to the charge he was facing. It was wrong of both the prosecutor and the trial magistrate to ignore what the accused said. If the prosecutor disputed the statements he should have challenged the appellant on them. In the absence of a challenge by the prosecutor, the State is taken to have admitted what he said. Notwithstanding the plea of guilty and his admission of the essential elements of the offence, the trial magistrate should not have proceeded with the trial without acknowledging the applicant's statements and dealing with them. Even if the prosecution did not challenge the statements, if the trial magistrate had any reason to doubt them, he should have questioned the appellant himself and investigated the statements. He should have not rejected them without being satisfied that what the appellant said could not **reasonably be true**. If the trial magistrate, after challenge by the prosecutor or investigation by himself, came to the conclusion that there was no possibility of truth in the appellant's statements he should have told the appellant that he could not accept the statements: see *S* v *Glenderning* HB 67-89 and *S* v *Mapurisa* HB 95-93. If the trial magistrate considered that what the appellant said could **reasonably be true**, he should have stopped the trial and referred the matter for review so that the proceedings could be set aside and the trial commence *de novo.*" (**own emphasis.**)

Neither the trial magistrate nor the prosecutor did what was suggested in the above case. The in action of the two is understandable if all the circumstances of the case are taken into account. The appellant raised the same argument that would have possibly amounted to a defence of sudden emergency. It is the same defence that the trial magistrate had noted during the inquiry into the essential elements at the onset of the trial and which defence the appellant rejected opting to plead guilty. Could one say the persistence of the appellant in raising the same possible defence that the deceased suddenly dashed on the road should have persuaded the court *a quo* to alter the plea? I do not believe so.

The facts which are important and common cause arising from the proceedings are that:

1) visibility was good at 8 am on a wide tarred road.

2) the appellant first observed people on the right hand side when they were 50 meters away;
3) the appellant observed that the deceased was held by hand by an adult person;
4) the persons were walking on the right side of the road and more particularly off the road;
5) the appellant did not reduce his speed neither did he blow his horn
6) when the appellant first saw the child crossing he applied breaks creating skid marks that he estimated to be 20 meters but were estimated to be 14 meters according to the plan prepared by the investigating officer on the appellant's own indications.
7) the appellant stopped his vehicle 60 meters after the point of impact
8) the point of impact was before the bridge.
9) the skid marks before the accident were straight;
10) the skid marks curved after some distance from the point of impact.
11) the distance from the edge of the road to the point of impact was 7 meters.
12) the appellant was employed at the Vehicle Inspection Department as a vehicle inspector.

It is clear from the above that the appellant upon observing persons walking on the verge of the road on his right on a highway did not reduce his speed. He did not keep a lookout. Having observed the people and more particularly children he should have been on the lookout. These courts have time and again emphasised the need for motorists to be more vigilant when there are children in the vicinity. In *S* v *Ferreira* 1992 (1) ZLR 93 (S) GUBBAY CJ observed at 95 D-F:

> "There is a very definite duty upon a motorist who knows himself to be in the near vicinity of children, for they have a propensity of impulsive and sometimes irrational action. Children should not be credited with the same mature intelligence and presence of mind as grown-up people. A motorist must anticipate that a child on or just next to the road may unexpectedly decide to run across oblivious of danger. He must keep his vehicle under such control as to be able to suddenly pull-up if a child starts to cross the line of his route. He must prepare himself for such an eventuality. It has been aptly remarked that young children are "as wide as the road" and are liable to get into the way of a motorist without any overt warning. Thus greater care is demanded towards children than is necessary for the safety of adults."

This case is on all fours with the present case in *Ferreira*, (*supra*) in which the appellant had noticed two male adults and four young children standing together on the right hand verge (as in the present case). The appellant in that case was also traveling at a speed of 90 km/hr. At 96 F-G- the judge observed that:

> "It is clear to my mind that the scene confronting the appellant was such to impose upon him a duty to substantially reduce his speed of 90 km/hr, albeit that was no indication at that stage of any intention on the part of any of the children to cross the road."

At least in the above case, the appellant reduced his speed by removing off his foot from the accelerator. In the present matter the appellant admitted that he did not.

The need to exercise due care was also alluded to in *S* v *Duri* 1989 (3) ZLR 111 (SC). The accident in that case also occurred in a rural set up as in the present case. MCNALLY JA observed at 113 F-H that:

> Once Mr *Chatikobo* conceded, as he had to concede, that there was a duty to slow down, one has to ask: "Why is that duty imposed on a motorist?". The answer is: "Because animals and small children may do something unexpected, which may create danger." Slowing down is merely a preparatory step. It is a step which makes it possible to take evasive action if the need arises. A driver who fails to slow down incapacitates himself *pro tanto* from taking evasive action. That is precisely what happened here. Having made it impossible for himself to deal with what was then no doubt a sudden emergency, he cannot call in aid the doctrine of sudden emergency." (See also *Richard David Thompson* v *The State* HH 259-2010 at pp 4-7 and *Lagess Benoit Marie Joseph* v *The State* HH 291-16 at p3).

The defence of sudden emergency purportedly raised by the appellant could not in my view have been reasonably true in light of the cases alluded to and the circumstances of the present case. The reasonableness of the defence should not be considered in the abstract but in light of the circumstances of the case and the evidence before the court. In the present case the appellant was not any other motorists. He was a vehicle inspector with the Vehicle Inspection Department. He should have known better of what was expected of him under the circumstances.

The essence of the appellant's explanation, advanced on special circumstances, as to what happed did not therefore amount to a possible defence. At most it was an explanation that the appellant was faced with two evils, either to hit the deceased or to land in the bridge, either of the two evils was of his own making and he found himself in the invidious situation because he did not take the precautionary measures expected of him.

The appeal against conviction cannot therefore succeed.

Turning to the appeal against sentence, it was contended by both the appellant and the respondent that the court *a quo* did not equitably balance the mitigatory factors against the aggravatory factors. It was further contended that the finding that the appellant's conduct amount to gross negligence was flawed as it was not supported by the facts.

As observed by the trial magistrate in his reasons for sentence, the appellant did not take any precautionary action expected of drivers where there are children in the vicinity.

What constitute "gross negligence" was aptly discussed in *S* v *Chaita* 1998 (1) 213 CHINHENGO J remarked at 221 D-F:

> "REYNOLDS J in *Mtizwa*'s case *supra* explained the meanings of gross negligence and recklessness. He said at 233G-234A:
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> > '''Gross negligence' is simply a very serious or aggravated form of ordinary negligence - negligence of a high degree (see *S* v *Smith & Ors* 1973 (3) SA 21 (T)). In *Drake* v *Power* (1961) 46 MPR 91, a Canadian case cited by *Saunders Words and Phrases Legally Defined* vol 3 p 332, the expression 'gross negligence' is usefully defined as implying `conduct in which there is a marked departure from the standards by which responsible and competent drivers habitually govern themselves''.
> >
> > 'Recklessness', on the other hand, connotes not only a wilful disregard for the safety and rights of other road users but also 'cases of indifference or rashness or inadvertence in which consciousness of consequences plays no part': *S* v *van Zyl* supra at 558. Recklessness may be shown by proof of gross negligence but proof of gross negligence does not necessarily show recklessness (*R* v *Greenland* supra)."
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> (See also the criteria for determining degrees of negligence laid down by the learned judge at 235C-H)."

The degree of negligence can be inferred from the circumstances of the case. The circumstances of the present case cannot be said to be on all fours with *Lagess Benoit Marie Joseph* v *The State* (*supra*) as suggested by the respondent. In that case the appellant took evasive measures. On disagreeing with the decision of the court *a quo* on the degree of negligence, BERE J noted at p5 that the appellant in that case did not only reduce his speed. He also hooted to announce his presence.

The appellant in the present case conceded that he did not do any of the two. As alluded earlier, the appellant saw the deceased, a small child, a good fifty metres before impact and did not take any precautions. Any reasonable person upon seeing a child on the side of the road would have been more alert. It should be noted that the point of impact was in the appellant's lane. This means that the deceased dashed across the entire right lane before being struck in the left lane. All the other particulars of negligence alluded to in determining the appellant's liability are indicative of the fact that the appellant's driving went beyond the standard expected of a responsible and competent driver. The trial magistrate therefore properly assessed the appellant's degree of negligence.

The appeal against both conviction and sentence is accordingly dismissed.

MUSAKWA J agrees

Bvekwa Legal Practice, appellant's legal practitioners
National prosecuting Authority, State's legal practitioners