HB 118/17
HC 1068/17
X REF 995/15

ASPHER MADZIYIRE

And

MR SHORTGAME in his capacity as the Presiding Magistrate of Court 3 Gweru Magistrates' Court, Gweru

And

NATIONAL PROSECUTING AUTHORITY

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO, 18 MAY 2017

Unopposed Application

S. Chamunorwa for applicant
K. Ndlovu for 1st & 2nd respondents

BERE J: The applicant appeared at Gweru Magistrates' Court charged with the crime of contravening section 49 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] to which he pleaded not guilty.

At the close of the state case the applicant made an application for his discharge in terms of section 198 (3) of the Criminal Procedure and Evidence Act[1]. The application was opposed by the State and the learned magistrate found in favour of the State by dismissing the application.

Aggrieved by what he thought was an uninformed stance taken by the presiding magistrate, the applicant filed this application for review to this court seeking to upset the decision of the lower court.

1. Chapter 9:23

The dictates of section 193 (3) of the Criminal Procedure and Evidence Act[2] are to the following effect:

> "(3) If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge, or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty." (my emphasis)

It is now accepted in this jurisdiction that the section has been interpreted to mean that the court must grant such an application;

> "(1) if there is no evidence to prove an essential element of the offence;
>
> (2) if there is no evidence which a reasonable court, acting carefully might convict;
>
> (1) if the evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely rely on it".
>
> See *Attorney-General* v *Makamba*[3]

It is with this basic accepted legal position that I must now look at the case which was presented to the lower court to ascertain whether or not this review application is sustainable or not.

Basically the state case was that on the 1st day of April 2014 the applicant was driving his motor vehicle along Harare-Bulawayo road heading towards Bulawayo and at or near the 284 km peg opposite the main gate of Dabuka Rail Station, he hit a cyclist who was cycling in the same direction with the applicant. The cyclist died on the spot due to multiple fractures and head injury.

As to the specific elements of negligence it was the prosecution case that the accused did any one or more of the following;

2. Chapter 9:07

3. 2005 (2) ZLR 54 (S) at p 55

"(a) the applicant was travelling at an excessive speed under the circumstances;
(b) the applicant failed to stop or act reasonably when a collision or accident seemed imminent, and
(c) that the applicant failed to keep a proper look out under the circumstances."

In response the applicant denied the allegations and stated that he was not raveling at an excessive speed as alleged or at all. The applicant further alleged that in his own assessment the accident was caused by the deceased who without any signal made a sudden change of course of his cycling and entered the road when it was not safe to do so.

It was further stated by the applicant that the accident was caused by the deceased who failed to keep a proper lookout for vehicles using the road. In conclusion the applicant stated that in the circumstances he did all he was reasonably expected to do to avoid the accident when it seemed imminent, including applying breaks and swerving the vehicle to the right.

During the hearing it became common cause that the deceased's homestead was a few metres away from the scene of accident and that in order to get there the deceased was expected to cycle across the road to turn to the right side of the road as one faces Bulawayo.

It was also common cause that other than the applicant there was no any other eye witness to this accident. It was only the applicant who was privy to the circumstances leading to the accident.

In proving its case, the state relied on the evidence of two police officers, *viz,* Vengesai Lovemore stationed at Gweru Traffic who was the detail who first attended the scene of the accident and whom the court found to have had 4 years experience in traffic duties, and Taguma Kufakwepasi, an accident evaluator of 17 years experience. The third witness Felix Mudzingaidzwa is a Vehicle Inspector who by training is a mechanic. The most significant part of this witness's evidence was his confirmation that the foot breaks of the applicant's motor vehicle were fully functional at the time that he examined the applicant's vehicle. The witness also noted that the applicant's motor vehicle had been damaged more to its frontal side which in my view, when looked at objectively would be consistent with the avoiding action alluded to by

the applicant in his defence outline. Other than these two observations nothing much turns on his evidence in advancing the state case.

A simple reading of the two police officers' evidence shows beyond doubt that it substantially confirmed the story told by the applicant in his defence outline and their evidence runs at tangent with the elements of negligence in the State summary.

The most that came out of the two police officers' evidence was confirmation that the applicant was not travelling at an excessive speed at the time of the accident. The two could not by any stretch of imagination have been able to controvert the applicant's defence outline that he was travelling at 100km per hour in a 120km per hour zone. This is simply because they were not at the scene when the accident occurred.

Vengesai Lovemore was forthright in his assessment of the possible cause of the accident when he postulated that the deceased who intended to turn right to his homestead must have done so without checking the road behind him, again something consistent with the applicant's defence outline[4]. In concluding his testimony the witness reasoned as follows:

> "The cyclist was negligent by failing to have a proper lookout in the circumstances by turning right without checking."[5]

Taguma Kufakwepasi did not mince his words in reaffirming the deceased's negligence when he concluded his testimony by saying that:

> "I noted that the now deceased's homestead was about 100m from where he was knocked down. The deceased should have checked his rear and he did not check when turning right that there was traffic from his right."

When this witness was being cross-examined by the applicant's counsel the following are the exchanges that were recorded;

4. Record p 36

5. Record p 37

"Q Any proof that accused was travelling at an excessive speed?
A No. There were skid marks visible when visited the scene (*sic)*"[6]

When the learned magistrate sought clarification by evidently dissenting into the arena the following questions and answers were recorded;

"Q what steps were made by the accused to avoid the accident?
A the accused swerved to the right and he could not avoid ad hit the cyclist by the front fender and he said that there was oncoming traffic *(sic)*
Q Did accused applied some breaks? *(sic)*
A Yes, attending detail said there was skid marks (*sic).*

When the applicant's counsel was invited to deal with any issues arising from the questions put by the magistrate to the witness the following exchanges emerged;

"Q Is there any evidence that deceased did not enter, encroach and turn into accused's lane?
A No
Q The skid marks described to you, what conclusions? (*sic*)
A At time of impact accused was breaking the motor vehicle trying to bring it to a halt. Normal breaking does not bring about skid marks."[7]

Faced with this kind of evidence it was inevitable in my view that the applicant would have been tempted to apply for his discharge at the close of the state case. It is amazing how the 1st respondent shot down that application.

In his ruling the 1st respondent went into speculative drive by delving into circumstantial evidence whose factual justifications were not even laid down in the evidence placed before him. Guilt by circumstantial evidence is not just grounded in air. Such a finding is never meant to be a subject of speculation and conjecture. It must be well anchored on specific proven facts supported by the evidence led in court. In my view, there was nothing in the proceedings that justified the invoking of the principle or doctrine of circumstantial evidence.

6. Record p 32

7. Record pp 43-44

The cumulative effect of the evidence led by the state spoke to and demanded the discharge of the applicant at the close of the state case. It was irregular and procedurally wrong for the magistrate to start manufacturing inferences whose factual basis were not supported by the evidence presented before him.

With all due deference, it occurs to me that the court *a quo's* assessment of the unhelpful evidence presented to it by the State was clouded by the court's apparent misconception of the law that because the deceased had been knocked to death by the applicant's motor vehicle, then the applicant had a duty to prove his innocence. The proper position as I understand it is that whilst a motorist is expected to exercise extreme caution on the road, the pedestrians and cyclists particularly adult ones equally owe a reciprocal duty of care, rational and reasonable conduct to motorists.

See *S* v *Duri*[8] and *S* v *Ball*[9]. See also *Motor Law*[10]

The patently wrong approach adopted by the 1st respondent in this case reminds me of the remarks made by their Lordships (per GUBBAY CJ and SANDURA JA (as he then was);

> "that the wording of s 198 (3) of the Criminal Procedure and Evidence Act make it clear that where, at the end of the State case, there is no evidence upon which a reasonable court might convict, the court has no discretion: it must discharge the accused. The court may not exercise its discretion against the accused if it has reason to suppose that the inadequate State evidence might be bolstered by the defence evidence. The evidence in this case was purely circumstantial and was not evidence upon which a reasonable man might draw the inference suggested by the State. The appellant should have been discharged at that stage of the trial."[11]

8. 1989 (3) ZLR 111 (SC)
9. 1993 (2) ZLR 384 (SC)
10. Volume I, by Cooper published by Juta at p 442
11. *S* v *Kachipare* 1998 (2) ZLR 271 (S) at G-H

In my assessment of this review matter I am fully aware of the position taken by this Court and the Supreme Court that it is generally undesirable for a superior court to intervene in unterminated proceedings in the lower court except in cases where grave injustice might occur. See *Elizabeth Shava* v *Primrose Magomere N.O. and National Prosecuting Authority*[12]; *Dombodzuku & Anor* v *Sithole NO & Anor*[13] and *The A-G* vs *Makamba*[14].

The view that I hold is that this case is one of those rare cases screaming for the intervention of this Court mid-stream otherwise the applicant will be subjected to unnecessary harassment by the lower court if this matter were to be allowed to continue in the manner preferred by the 1st respondent. There will clearly be a miscarriage of justice which goes against the well established and rich principle of our law that the accused person has no onus thrust upon him to prove his innocence.

Before concluding this matter I note that both respondents despite having been duly served with this application chose to remain aloof and not oppose it. It was probably a well informed decision or their realization that it would have been a futile exercise to try to defend the indefensible.

Their inaction has persuaded me not to impose an order for costs against them.

In conclusion, it is ordered as follows:

1. That the decision of the 1st respondent in the matter under CRB GWP 256/17 be and is hereby set aside.

12. HB-100-17
13. 2004 (2) ZLR 242
14. *Supra*

2. That the application be and is hereby granted and the accused person is found not guilty and acquitted.

Calderwood, Bryce Hendrie & Partners, applicant's legal practitioners
The National Prosecuting Authority, 1st and 2nd respondents' legal practitioners