SIMON MICHAEL MVUTO
versus
THE STATE

HIGH COURT OF ZIMBABWE
MATHONSI AND TAKUVA JJ
BULAWAYO 14 MAY 2018 AND 17 MAY 2018

Criminal Appeal

S Chamunorwa for the appellant
T Muduma for the respondent

MATHONSI J: The appellant was charged with culpable homicide as defined in section 49 of the Criminal Law Code, [Chapter 9:23], the allegations being that on 30 September 2015 and at the 258km peg along the Bulawayo–Victoria Falls road, he had driven a Famaco haulage truck pulling two trailers, unlawfully and negligently thereby causing the death of four passengers aboard a Higer bus belonging to Extra City with which he collided. He was convicted following a full trial and sentenced to 9 months imprisonment which was suspended on condition he completes 315 hours of community service at Tshabalala Police Station in Bulawayo. In addition he was prohibited from driving for 2 years and had his driver's licence cancelled.

The appellant was aggrieved and noted an appeal against both conviction and sentence. His gripe with the conviction is that there was no evidence that he had encroached onto the lane of the oncoming bus. Quite to the contrary it is the driver of the bus who had encroached onto his lane hereby causing a collision. Regarding sentence, his view is that it is so severe it induces a sense of shock.

The facts are that on the night of 30 September 2015, the appellant was driving a haulage truck ladden with 29,8 tonnes of coal along Bulawayo-Victoria Falls road headed in the direction of Bulawayo when he collided with the Extra City omnibus driven by Owen Zembe which was proceeding in the opposite direction at the 258km peg. The two heavy vehicles had passed each

other well when the bus collided with the last trailer of the appellant's truck straight through the windscreen right at the tip of the trailer. As a result the driver of the bus lost control of the vehicle which cannoned off the road, overturned before landing on the side killing four passengers.

At the trial the matter turned on the question of which of the two vehicles had encroached onto the lane of the other. The state sought to prove that it is the appellant who encroached onto the oncoming lane and as he swerved back to his lane, his second trailer remained on the oncoming lane and was hit by the bus which was on its rightful lane. As such the state's case was that the point of impact was on the bus's lane. It led evidence from Owen Zembe and a police officer, Constable Lovemore Tibugare who is an accident evaluator based at Hwange Traffic.

Tibugare's assessment was that the appellant had encroached. He arrived at the conclusion after observing that the appellant:

(a) was coming from a curve as the road on his side was curving to the right while the bus driver was on a straight stretch. This means that the truck was pushed by the force of movement (centrifugal force) to the oncoming lane;

(b) there were skid-marks suggesting that the truck was forced to clear from the wrong lane back to its lane but not quickly enough as the last trailer remained behind colliding with the bus.

(c) there was spilt coal content of the truck which have fallen off the truck on impact and onto both lanes.

The appellant gave an explanation. According to him he had been on his own lane minding his own business and he did not encroach onto the other lane. As a result his horse and first trailer were able to cross ways with the bus without any incident. As far as he is concerned both trailers follow behind the horse and there is no way the horse and first trailer could have been on their rightful lane while the second trailer was not. His version was that the bus driver did not observe that there was a second trailer and negligently encroached which explains why the bus hit the trailer with the front windscreen and did not side-swipe it.

The appellant's story was backed up by a well-decorated expert witness, Elliot Chidhakwa, an accident consultant who retired from the police force after gaining accident evaluation experience of about 17 years. After examining the evidence and inspecting the scene Chidhakwa challenged the findings of Constable Tibugare. At page 81 of the record he disputed that the truck could have changed direction on the rear and not the front, as to avoid a collision through the horse and first trailer and achieve it through the back. He concluded:

> "Then the only after movement that caused the collision is the right ward movement of the bus."

Chidhakwa concluded that the bus encroached onto the lane of the truck where the point of impact occurred.

There can be no doubt therefore that the court *a quo* was faced with two mutually destructive expert evidence. *Mr Chamunorwa* for the appellant referred us to the case of *S* v *Janse Va Rensurg and Another* 2009 (2) SACR16 (C) in making the point that where there are two conflicting versions or two mutually destructive stories both cannot be true. One of them must be false. The following passage in that judgment is apposite:

> "In order to determine the objective truth of the one version and the falsity of the other, it is important to consider not only the credibility of the witnesses, but also the reliability of such witnesses. Evidence that is reliable should be weighed against the evidence that is found to be false and in the process measured against the probabilities. In the final analysis the court must determine whether the state has mustered the requisite threshold – in this case proof beyond a reasonable doubt."

Indeed when faced with the two mutually destructive versions of how the collision occurred, the court *a quo* did not fair well at all. It had to show how and indeed why the version of the appellant's expert was false. It did not. Instead it spent quite some time trying to discredit Chidhakwa for other reasons than the weight and logic of his expert evidence.

I must stress the point that it is how it dealt with that conflicting evidence which is a misdirection. The trial court could not show why Chidhakwa's evidence was false and why it preferred that of Tibugare. The court appeared to reject the expert evidence of the defence because the witness was not independent as he was "hired" by the appellant as if Tibugare was

independent being a police witness. It is for that reason that when it put questions to the witness (p94) it showed prejudice against him asking:

> "So you are an independent accident evaluator?"
> --
> "How are you paid?
> -----"

It then sought to justify overlooking his evidence by saying that he had gone to the scene ten months after the accident and with the defence lawyer all of which was irrelevant. In my view what mattered was whether what the witness stated made sense and raised a reasonable doubt. It would be recalled that an accused person bears no onus in a criminal trial. He does not have to convince the court that his explanation is true in order to secure an acquittal.

On the other hand, it is trite that where an accused person has given an explanation the court is not at liberty to reject it unless satisfied, not only that his explanation is improbable, but that it is beyond a reasonable doubt false. See *S* v *Mapfumo and Others* 1983 (1) ZLR 250; *R* v *Difford* 1973 AD 370 at 373. The trial court was unable to say that the explanation given by the appellant is false. It resorted to discrediting it by castigating the expert witness as a mercenary, quite unfairly in my view. Therein lies the misdirection. It occurs to me that a reasonable explanation was given by the appellant on how the accident occurred which was not shown to be false. On the strength of the law as it stands it could not be said therefore that the state had proved its case beyond a reasonable doubt. The appellant was entitled to an acquittal.

In the result, it is ordered that:

1. The appeal against conviction and sentence is hereby upheld.

2. The conviction and sentence are quashed and substituted with the verdict that the appellant is hereby found not guilty and acquitted.

Takuva J agrees……………………………………….

Calderwood, Bryce Hendrie and Partners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners