MICHAEL MATONHODZE
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA & MANGOTA JJ
HARARE, 16 February 2015

Criminal Appeal

I Mugwaga, for the appellant
T Mapfuwa, for the respondent

CHATUKUTA J: The appellant was convicted after contest of contravening s 49(1) of the Criminal Law Codification and Reform Act [*Chapter* 9:23] (the Code) and contravening s 52(2) of the Road Traffic Act [*Chapter* 13:11]. He was sentenced to 24 months imprisonment of which six months were suspended on condition of future good behaviour in respect of the first count. In respect of the second count, he was sentenced to six months imprisonment. He appealed against both conviction and sentence. We dismissed the appeal and gave *ex tempore* reasons for our decision. The appellant has requested written reasons. These are the reasons.

The facts of this case which are common cause are that on 11 July 2014 and at around 2330 hours, the appellant was driving a Toyota Hilux Twin cab along Highglen Road, Harare. When he approached Western Triangle bus terminus, he attempted to avoid two other vehicles (a Datsun 120 Y and a Mark II) which were in his lane. The vehicles had earlier on been involved in an accident. One Vitalis Munemo (the deceased) and the four pedestrians who were injured were near the scene of the accident. The deceased and the injured were struck by a vehicle. Soon after the accident, the deceased was found under a Mercedes Benz. He later died from the

injuries sustained in the accident. The injured persons sustained serious injuries to the arms and legs and were taken to hospital.

The appellant denied the charges. He alleged that the four pedestrians who were injured in the second count were hit by the vehicles that were involved in the first accident. He further alleged that the deceased was fatally struck by a Mercedes Benz.

The particulars of negligence which were put to the appellant were that he had been driving at an excessive speed at night without the lights to his vehicle on. It was alleged that he failed to keep his vehicle under proper control and he failed to act reasonably when the accident was eminent.

The State called the following witnesses; Moses Mahwani, John Koreka, Shepard Mutomera, Passmore Farai Cheni, Nyasha Gotora and Lazarus Murwira. Moses, John, Shepard and Passmore were the pedestrians who were injured. The four witnesses testified that they had been standing off the road at a bus stop observing the vehicles that had been involved in the first accident when the accused struck them and the deceased. The appellant had been driving at an excessive speed and did not have his lights on. The appellant was driving in the wrong lane of the road facing oncoming traffic. They were surprised when accused struck them because they had not seen the vehicle coming. They all testified that they did not observe any Mercedes Benz at the scene. They were all seriously injured and taken to hospital soon after the accident.

Moses further testified that he was standing with the deceased when the accused hit them. The deceased landed on the road. The appellant fled from the scene and only returned after the police had arrived. The witness testified that he had witnessed the earlier accident. He gave a detailed explanation of how the first accident occurred and in particular how the driver of the 120Y cut in front of the Mark II.

John testified that he was coming from work with Shepard and Passmore. When he arrived at the scene of accident, he found two other vehicles had been involved in accident. He went to the bus stop from where he observed the two vehicles which had been involved in an accident. One of the vehicles was a red Datsun 120 Y and the other vehicle was a white Mark II.

He was surprised to find himself under the appellant's vehicle. He described the appellant's vehicle as a Toyota pick-up with a black front bumper.

Passmore testified that when he first arrived at the scene, he observed that two vehicles had been involved in an accident. The drivers of the vehicles wanted to fight. He noticed the appellant's vehicle approaching. However, it was travelling at such a fast speed that it was too late for him to flee. He testified that had the lights of the vehicle been on, he would have seen it earlier and fled for his life. He further testified that after he was hit, he heard John calling out for help from under a Toyota pick-up. He could not assist him because he was also in pain.

Lazarus Murwira is the police officer who attended the scene of the accident. He testified that when he arrived at the scene, the deceased was under a Mercedes Benz. The driver of the Mercedes Benz told him that the deceased got under his vehicle after being struck by the appellant. The police officer testified that the appellant told him that he had not seen the vehicles on the road as his lights were off. When he arrived at the scene, the lights of appellant's vehicle were off. He switched them on to test if they were working. They were working. He recorded statements from the driver of the Mercedes Benz and from the appellant. He drew a sketch plan of the accident. A copy of the Accident Summary was produced into evidence by consent.

Nyasha Gotora was the deceased's mother. She testified that the accused attended the deceased's funeral. He told her that he is the one who had hit her son and apologised for causing his death. He came to her house on two different days and gave her funeral assistance. On the first day on 1 July 2013, she arrived from South Africa and found the appellant seated. He gave her US$20. He gave her US$100 on the following day. She testified that the appellant was the only driver who assisted her.

The appellant testified in his defence that he observed a Toyota Mark II parked in the road with passengers alighting. He overtook the vehicle and saw another vehicle (a Datsun 120 Y) in the middle of the road. His lights were on. He was too close to the vehicle. He applied his brakes. He failed to stop and hit the vehicle. There was another vehicle to his right, the Mercedes Benz. He stopped in front of the Mercedes Benz. Under cross examination, he testified that he did not see anyone alight from the vehicle that was stationary in his lane. He testified that

he observed that the door to the vehicle was open and he assumed people were alighting. He suggested that the deceased was struck by the Mercedes Benz. The four pedestrians who testified in court were struck by the two vehicles during the earlier accident.

He admitted that he gave funeral assistance to the deceased's family. He initially stated in his evidence-in-chief that he gave the assistance on compassionate grounds. He however changed his evidence under cross examination and explained that he was told by the police that the other persons involved in the earlier accident had also contributed towards the funeral expenses.

The trial magistrate concluded that the state witnesses were credible. He rejected the appellant's testimony. He was of the view that the accused was not a credible witness. He concluded that the appellant had caused the accident, hence the conviction.

The appellant attacked the conviction on four main grounds. The first ground was that the court had erred in accepting a splitting of charges. The charges that were preferred against the accused arose from one act of driving leading to the death of one person and the injury of the other four.

The second ground is that the court *a quo* erred in accepting irrelevant and inadmissible evidence. It was stated that the evidence of Nyasha Gotora, the deceased's mother, was only relevant in the determination of the sentence and not the conviction of the appellant.

The third ground was that the court had erred in finding that the State had proved that the appellant was negligent. It was contended that the court should have considered that the appellant had been attempting to avoid the vehicles which had been involved in the earlier accident. He had been driving with his lights on. However, there were no signs to warn other road users that it was a scene of an accident.

The fourth ground was that the court erred in making a finding that the State witnesses were credible yet their evidence was conflicting.

Regarding sentence, the appellant contended that the sentence was manifestly excessive and induced a sense of shock. The court did not take into account or give due regard to the appellant's personal circumstances. It did not consider other sentencing options such as the

imposition of a fine or community service. The court should also have considered that there was contributory negligence on the part of the other drivers involved in the earlier accident.

The State did not support the conviction. It filed a concession in terms of s 35 of the High Court Act [*Chapter* 7:06]. It submitted that the pedestrians who were injured testified that they did not observe a Mercedes Benz at the scene. This was contrary to the evidence of Lazarus Murwira who testified that he observed a Mercedes Benz at the scene. The Mercedes Benz was positioned on the sketch plan of the scene of the accident. It was further submitted that the drivers of the Datsun 120 Y, the Mark II and the Mercedes Benz should have been called to testify.

The respondent also submitted that Nyasha Gotora's evidence did not establish the appellant's liability. Her evidence that the appellant dipped his lights when he approached the scene contradicted the evidence of the other state witnesses who testified that the appellant drove with his lights completely off.

Turning to the first ground of appeal, we are of the view that the court *a quo* did not err in accepting the charges as presented. The tests to establish where there is a splitting of charges was restated in *S* v *Mabwe* 1998 (2) ZLR 178. Garwe J observed at p 179B-D that:

> "Various tests have from time to time been proposed and applied by the courts in determining whether or not there has been an improper splitting of charges. The main tests are, however, the single intent test and the same evidence test. In respect of the former, where a person commits two acts of which each, standing alone, would be criminal, but does so with a single intent, and both acts are necessary to carry out that intent, then as a general rule he ought only to be indicted for one offence because the two acts constitute one criminal transaction. In respect of the latter, if evidence requisite to prove one criminal act necessarily involves proof of another criminal act, both acts are to be considered as one transaction for the purposes of a criminal conviction - South African Criminal Law and Procedure Vol V by Lansdown and Campbell pp 228, 230."

(See *S* v *Zacharia* 2002 (1) ZLR 48, *S* v *Matimba* 1989 (3) ZLR 173 (S)

In that case, the accused was convicted of two counts of attempted murder after he had rammed a forklift into a vehicle in which there were two persons. The court held that it was proper to charge the accused of two counts of attempted murder.

In the present case, one person died as a result of the appellant's conduct and four others were injured. The requirements of s 49 of the Code are different from those of s 52(2) of the RTA. The State is required to establish under the Code that death ensued as a result of the appellant's conduct. It need not do so under s 52(2) of the RTA. The consequences of the appellant's negligent driving were equally different. In the first case, a person died. In the second case four pedestrians were injured. Each consequence falls under a different piece of legislation. It is therefore our view that it was proper to charge the appellant of two separate counts.

Regarding the second ground of appeal, irrelevant evidence is not admissible in terms of s 252 of the Criminal Procedure and Evidence Act [*Chapter* 9:07]. Irrelevant evidence is that evidence which cannot prove any point or fact in issue in the case that is being tried. Nyasha's evidence was first-hand information of the conversation between that witness and the appellant. It established that the appellant took responsibility and accepted liability for the death of the deceased. When it was put to her that the appellant denied killing the deceased, she respondent that she could not understand why the appellant would give her funeral assistance if he had not caused her son's death. Her evidence that the appellant expressed remorse for causing the death of her son was not controverted at all. Nyasha's evidence therefore corroborated the evidence of the four pedestrians that the deceased was struck by the appellant's vehicle. The evidence was also consistent with the appellant's own evidence that he is the only person who provided the bereaving family with financial assistance. This world would be a better place to live in if people who witness accidents are as generous as the appellant alleges he was to the deceased's family. Out of sheer benevolence he took his time to look up the deceased's family and be in attendance on a Monday morning to pay his condolences to the deceased's family and give them funeral assistance and return the following day with more assistance.

Nyasha's evidence that the appellant told her that he dimmed his lights should not be considered in abstract. She testified that the appellant told her that when he dimmed the lights he was attempting to commit suicide after he had caught his second wife with a boyfriend. The

dimming of lights in the middle of the night would mean that his vision would be impaired. It suited his alleged intention to commit suicide.

The respondent in its response further overlooked the evidence of the police detail that he tested the appellant's lights to see if they were working. The appellant himself provided, under cross examination, the reason why it was necessary for the police officer to test if the lights were working. He testified that people who were at the scene had told the police officer that his lights were off when he drove into the people standing at the bus stop. The appellant conceded under cross examination that the Datsun 120Y and the Mark II were close to each other. However, despite the closeness he did not see the Datsun 120Y. The only reasonable conclusion from his concession is that he did not have his lights on. Had the lights been on, he would have been able to observe the Datsun 120Y in his path. According to the police officer, the appellant admitted to him that he had not seen the accident earlier because his lights were not on.

The third ground of appeal was that there was contributory negligence by the other drivers who were at the scene. That in our view did not affect the appellant's guilty. It may have reduced his moral blameworthiness in considering sentence. The fact that the appellant drove his vehicle at night with lights off and on the wrong side of the road in our view amounts to recklessness.

The last ground of appeal against conviction was that the evidence of the witnesses was contradictory. In expanding on this ground in the heads of argument, it was submitted for the appellant that the state witnesses, except for the police officer, stated that they did not observe a Mercedes Benz at the scene. There is no basis for concluding that the witnesses and the police officers contradicted each other. The witnesses' evidence was that they did not observe a Mercedes Benz at the scene before they were struck by the appellant's vehicle. Therefore the deceased could not have been struck by a Mercedes Benz as alleged by the appellant.

There were good reasons why the court *a quo* accepted the version of the events as narrated by the State witnesses. The witnesses did not have prior knowledge of the drivers of the other vehicles. Therefore there was no basis for the witnesses to incriminate the appellant. None

was advanced by the appellant. The witnesses withstood what appears from the record to have been extensive cross examination. They did not deviate from their evidence in chief.

The same cannot be said of the appellant. There were numerous contradictions in the appellant's own evidence. The appellant confirmed in his evidence-in-chief that when he arrived at the scene, an accident having happened. He collided with a blue vehicle. This was consistent with his statement in the Accident Summary (Form 76) which was produced by consent where he stated that he collided with a blue vehicle. However he stated in his evidence in chief that he collided with a Datsun 120Y. It is not in issue that the Mercedes Benz was blue in colour. The Datsun 120 Y was red. Under cross examination, the appellant sought to avoid his statement in the Accident Summary by averring that he erroneously wrote that he hit into a blue vehicle. He however could not escape from a statement written in his own hand, duly signed by no else but himself and made soon after the accident. He conceded that the Mark II, the Mercedes Benz and the Datsun 120 Y and his vehicle were all of different shapes such that witnesses would not have been mistaken as to which one hit them. He equally conceded that he too could not have been mistaken. The evidence that he collided with a Datsun 120 Y was therefore clearly an after-thought.

Initially he wanted testified in his evidence-in-chief that he gave the deceased's family financial assistance because he was being benevolent. He however, changed his evidence under cross examination and stated that he had been directed by the police to make a contribution as the other drivers had also contributed.

He faltered in his evidence on whether or not he drove his vehicle with lights on. In one instance he testified that his lights were on and went off upon impact with the vehicle he collided with. He later altered his evidence and testified that his lights were on. He however, as alluded to earlier, confirmed the evidence of the state witnesses that members of the public told the police that his lights were off.

The appellant disputed that there was a bus stop at the scene as testified by the state witnesses. However, he made reference to the existence of the bus stop under cross examination.

The following were some of the exchanges that the appellant had with the prosecutor under cross examination:

"Q: How far from bus stop to where you hit the 120Y?

A: About 5-6 metres.

Q: Comment on the version that there is a designated bus stop at the scene?

A: There is no bus stop.

Q: What about the position you overtook the Mark II and the bus stop?

A: 3-4 metres.

Q: From the junction where is the bus stop?

A: If you are travelling from Machipisa the bus stop will be on your left considering whether when the Mark II was, it had slightly passed the bus stop I had already passed the bus stop.

Q: You heard witnesses say they were standing at a bus stop on the right?

A: Yes.

Q: So when you moved to the right that is when you hit the people at the bus stop?

A: I had already passed the bus stop.

Q: Where were these people?

A: One was under the Benz. The other people were outside the road.

Q: You are now admitting there is a bus stop?

A: That is in accordance with what they said. There is no bus stop."

The state agreed with the appellant that the sketch plan did not indicate that there was a bus stop, therefore the conviction could not be sustained. The State referred to the case of *S* v

Ramotale 1992 (2) ZLR 397 (S) which sets out the relevant principle that the testimony of the witnesses must be tested against the real or extrinsic evidence available. (see also *Dururu Transport (Private) Limited* v *Michelle Rutendo Mutamuko & Anor* HH 95/11)

S v *Ramotale* is clearly distinguishable from the present case. In that case, the rough diagram differed materially from the main sketch plan. The police officer who drew the plans was confused in his evidence and did not explain the discrepancy. The court was constrained to determine which of the two diagrams was correct.

In the present matter the state only produced the rough plan and is what it was, a rough plan. The police officer testified in his evidence-in-chief that there was a bus stop at the scene. The appellant did not challenge his evidence. In fact during cross examination, the police officer was asked questions which indicate that indeed there was a bus stop. He was asked:

"Q: You agree that the victims were out of the road at the bus stop?

A: Yes.

……

Q: How far were the vehicles from the bus stop?

A: 6-7 meters.

Q: Where there any tyre marks which stretched to the bus stop from the accused's car?

A: It was dark I did not manage to see.

……

Q: Where there any other pedestrians at the bus stop?

A: There were some people gathered when we arrived".

We therefore did not find the diagram to be of any value in view of the fact that the appellant conceded that there was a bus stop and hence corroborated the evidence of the state

witness as to the existence of the same. As alluded to earlier, the appellant's denial that there was a bus stop was baseless.

It is trite that an appellate court rarely interferes with the findings of the trial court on the credibility of witnesses. The appellate court would only interfere with the finding where the trial court has misdirected itself and arrived at a conclusion which cannot be supported by the facts which had been adduced in evidence. (See *Barros & Anor* v *Chimphonda* 1999 (1) ZLR 58 (S) at 62E-H to 63 D, *Hughes* v *Graniteside Holdings* SC 13/84.) In light of the foregoing, this Court has no grounds to interfere with the findings of fact and the reasons for the Regional Magistrate's decision. It indeed would have been desirable to have called the drivers of the Mercedes Benz, the Mark II and the Datsun 120Y. However, the evidence of those witnesses who testified cannot be said to have been discredited and therefore wanting. The finding by the trial court on the credibility of the state witnesses cannot be faulted.

Regarding the appeal against sentence, sentencing is a discretion of the trial court and it is only where the trial court has misdirected itself and caused substantial injustice to the appellant that the court on appeal will interfere with the sentence. (See *S* v *De Jager & Anor* 1965 (2) SA 616 (A) at 628 H to 629 A-B, *S* v *Nhumwa* SC 40/88. In arriving at the sentence, the trial magistrate adopted the two pronged approach. A perusal of the record shows that the trial magistrate carefully considered all the mitigating factors and aggravating factors. The aggravating factors that weighed heavily against the appellant were that he drove his vehicle with the lights off in the middle of the night despite the fact that the lights were working. Such conduct cannot escape from being classified as gross negligence. Had the lights been on, he surely would have observed that something was amiss and take corrective measures. He hit pedestrians who were standing off the road at a bus stop. His conduct resulted in the death of one person and the injury of four others. The appellant fled from the scene instead of assisting those people he had injured.

However should have treated the two counts as one for sentence given that both counts arose from the same act or manner of driving.

Accordingly, the sentence is set aside and substituted with the following:

"Both counts are treated as one for sentence. The appellant is sentenced to 24 months imprisonment of which 6 months is suspended on condition that the appellant is not involved in any offence relating to driving a motor vehicle negligently and/or causing the death of a person for which he is, upon conviction, sentenced to a term of imprisonment without an option of a fine."

MANGOTA J agrees ……..……..

Zimbodza and Associates, legal practitioners for the appellant
National Prosecuting Authority, legal practitioners for the respondent