HEADMAN PHIRI
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA & MUSAKWA JJ
HARARE, 15 May 2017

Criminal Appeal

N. Mahori, for the appellant
T. Mapfuwa, for respondent

MUSAKWA J: We dismissed the appeal that was noted against conviction and sentence. A request has been made for the reasons. What is really required is the written judgment, as *ex tempore* reasons were given at the hearing.

The appellant was convicted of contravening s 49 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was ordered to pay a fine of $200 or in default to undergo 3 months' imprisonment. In addition, 2 months' imprisonment was wholly suspended for 5 years on condition of good behaviour. The appellant was also prohibited from driving class 2 vehicles for 2 years.

Out of the three grounds of appeal against conviction the only viable one is that the trial court erred in dismissing the appellant's explanation for the accident, which explanation was corroborated by state witnesses. The sentence imposed is attacked as being manifestly excessive as to induce a sense of shock. In addition it is contended that the trial court erred in ordering a prohibition from driving when there were special circumstances against such prohibition.

The facts of the matter are relatively straightforward. The deceased was aged nine years. On 4 November 2015 at around 3.30 p.m. the appellant was driving an Isuzu tipper truck along Oatlands Road coming from Lake Chivero direction. The deceased disembarked from a commuter omnibus and from behind ran to cross the road. Before the deceased finished crossing the road, he was struck by the truck that the appellant was driving. The deceased fell on the left side of the road. The appellant stopped the vehicle and went to

ascertain the deceased's condition. A passing motorist assisted to convey the deceased to hospital. The deceased was initially taken to Suburban Clinic from where he was transferred to Parirenyatwa Hospital where he succumbed to the injuries he had sustained.

The particulars of negligence were given as follows-

a) Failing to keep a proper lookout.
b) Failing to exercise a high degree of care called for from a driver upon seeing children on or near a road.
c) Failing to stop or act reasonably when a collision seemed imminent.
d) Travelling at an excessive speed under the circumstances.

Having been so charged with culpable homicide, the appellant's defence was that he did not see where the deceased came from. Thus the deceased just emerged from behind a commuter omnibus. The appellant just saw the deceased in front of him. When the appellant applied brakes, the motor vehicle could not come to an immediate stop as it was laden with ten cubic metres of gravel. He denied that he was speeding.

From the testimony of an eye witness, after the deceased disembarked from a commuter omnibus, she ran across the road without checking. There was also a tuck shop within the vicinity. According to the witness, the appellant was not speeding.

According to the Police officer who attended the scene of accident, the road had no markings. However, the road could accommodate two vehicles going in opposite directions. There was a minor crack on the left head lamp of the truck. From indications made, the point of impact was on the left side of the road, close to the edge. The deceased fell on the gravel on the left side of the road. The truck the appellant had been driving was found about 1-2 km away along the same road.

The appellant's version was that as he came from a corner (actually a curve), he saw a commuter omnibus that was parked on the opposite side of the road and facing towards him. As he was passing the commuter omnibus he saw an image appear and he applied brakes. The image that he saw was that of the nine year old deceased who was running. The vehicle did not stop as it was carrying a heavy load of gravel. The deceased was struck by the left corner lamp of the vehicle. The appellant stopped in order to render assistance. The deceased did not sustain any visible injuries.

The appellant also confirmed that close to the scene of accident and to the right was a tuck shop. As to what prevented him from initially observing the deceased, he attributed this

to the parked commuter omnibus and another obstruction that he did not specify. He claimed to have been travelling at about 40 kilometres per hour. He conceded during cross-examination that he accelerated in order to maintain his speed. He also conceded that the vicinity of the accident was a residential area.

Mr *Mahori* submitted that if the appellant slowed down as he approached the commuter omnibus, it cannot be said that he was speeding. The import of this submission was that the appellant was not negligent. He referred to the cases of *S v Ball* 1993 (2) ZLR 384 and *S v Bussman* SC-2-96. He further submitted that had the vehicle not been heavily laden the appellant could have been able to bring it to a stop without hitting the deceased. He also criticised the state for failing to avail the relevant accident evaluation report.

On the other hand, Mr *Mapfuwa* submitted that the appellant should have sufficiently reduced speed to enable him to avoid the accident. He pointed out that the appellant did not sound the horn and there were no brake marks which suggested that the appellant had not braked. Concerning the prohibition from driving, Mr *Mapfuwa* cited s 52 (4) (c) which he submitted was instructive.

Negligence arising from acting in a particular way is defined in s 16 (1) (a) of the Code as follows-

> "Where negligence is an element of any crime—
>
> (*a*) constituted by the performance of an act, the test is objective and consists of the inquiry whether the accused person's performance of that act was blameworthy in that—
>
> (i) a reasonable person in the same circumstances as the accused would not have performed that act;
>
> or
>
> (ii) the accused failed to perform the act with the care and skill with which a reasonable person in the same circumstances would have performed that act;
>
> whichever inquiry is appropriate to the crime in question;"

The case of *S v Hall supra* involved a twelve year old child who was knocked down by the appellant's motor vehicle. It was accepted that the deceased child had observed the oncoming motor vehicle and at the last moment he suddenly ran in front of the motor vehicle. Having been convicted by the Magistrates' court the appellant appealed to the Supreme Court.

In setting aside the conviction the Supreme Court noted that in such cases the age of the child is a determining factor. The age of the deceased and the fact that he had been aware of the oncoming motor vehicle were held to be decisive factors in favour of the appellant. Under the circumstances, it was not necessary for the appellant to hoot as the deceased was aware of the oncoming vehicle.

The other dicta from this case is firstly, slowing down considerably and moving to the centre or far side of the road can ensure that in the event of a child suddenly dashing across the road, one will be able to avoid an accident. Secondly, hooting and flashing the lights are other precautionary measures.

In the case of *Moyra Dawn Bussman v S supra* which again resulted in an overturning of the conviction, the appellant had observed some children on both sides of the road. The ages of the children ranged between seven and eight years. The appellant hooted three times and slowed down. The deceased child ran across the road. When the appellant was about to pass the deceased again ran across the road and was struck by the vehicle's left front indicator lamp. The Supreme Court accepted that the absence of brake marks corroborated the appellant's claim that she was not speeding.

It was also held that courts have emphasised that a special duty of care is owed by a motorist who is in the vicinity of children. However, such duty is not absolute as negligence has to be proved in each case. In upholding the appeal it was held that it could not be said that the appellant had not taken all precautionary measures save to bring the motor vehicle to a complete standstill before she struck the deceased.

It can be noted that the facts of the cases I have discussed are different from the present appeal. What are of importance are the principles enunciated therein. Coming to the present case, I now proceed to deal with the particulars of negligence.

Failing to keep a proper lookout

The trial court accepted the evidence of state witnesses to the effect that there were no obstructions. The appellant's explanation was that he only saw the deceased in front of him. The trial court was correct to conclude that the appellant was not keeping a proper lookout. It is inconceivable that the appellant drove with such care and skill as a reasonable person in the same circumstances would have done. I say so because if the appellant was keeping a proper lookout he should have been able to observe the deceased. This is evidenced by the fact that

the deceased was struck by the left lamp when he had almost crossed the road. That is why he fell on the gravel verge on the left side of the road.

Failing to exercise a high degree of care called for from a driver upon seeing children on or near a road

The trial court relied on the dicta in *S v Ferreira* 1992 (1) ZLR 93 in which GUBBAY CJ at 95 had this to say-

> "There is a very definite duty upon a motorist who knows himself to be in the near vicinity of young children, for they have a propensity for 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."

Whilst the above observations are relevant to driving situations where children are in the vicinity, one cannot say that was the situation in the present case. In the first place there is no evidence of any other children within the vicinity. The deceased alighted from the commuter omnibus and rushed across the road without checking whether it was safe to do so.

Despite what appears to be a misapplication of the principles set out in *S v Ferreira supra* the case is still relevant on account of other factors in the matter at hand. This is discussed under the last head.

Failing to stop or act reasonably when a collision seemed imminent

Considering that the scene of accident was a built up area, the appellant did not take adequate precautions to safeguard against an accident. The objective factors that entailed such precautions were the presence of a tuck shop and the commuter omnibus that was parked on the opposite side of the road. The appellant did not sound the hooter when he approached the commuter omnibus.

Therefor even if there were children in the vicinity, the evidence does not show that the appellant took adequate precautions to ensure that he could safely pass the stationary commuter omnibus.

Travelling at an excessive speed under the circumstances

The sole eye witness stated that the appellant was not speeding. The appellant claimed that he was travelling at about 40 km per hour. There was no reduction in speed. On the

contrary, the appellant accelerated in order to maintain his speed. Relative to the circumstances, it means that the appellant was speeding. That was evidenced by the failure of the truck to come to a stop before it struck the deceased. That the truck could not come to an immediate stop because of the heavy load is an indication that the appellant should have further reduced speed. As was held in *S v Ferreira* **supra** the appellant should have realised that the braking power of the vehicle would be adversely affected by its heavy load.

Sentence

The penalty for negligent or dangerous driving involving a commuter omnibus or heavy vehicle is a fine not exceeding level ten ($700) or imprisonment not exceeding one year or both. A fine of $200 that was imposed cannot be said to be manifestly excessive. In his heads of argument, the appellant did not canvass in what way the trial court improperly exercised its sentencing discretion.

As regards prohibition form driving, s 64 (3) of the Road Traffic Act [*Chapter 13:11*] provides that-

> "If, on convicting a person of murder, attempted murder, culpable homicide, assault or any similar offence by or in connection with the driving of a motor vehicle, the court considers—
> (*a*) that the convicted person would have been convicted of an offence in terms of this Act involving the driving or attempted driving of a motor vehicle if he had been charged with such an offence instead of the offence at common law; and
> (*b*) that, if the convicted person had been convicted of the offence in terms of this Act referred to in paragraph
> (*a*), the court would have been required to prohibit him from driving and additionally, or alternatively, would have been required to cancel his licence;
> the court shall, when sentencing him for the offence at common law—
> (i) prohibit him from driving for a period that is no shorter than the period of prohibition that would have been ordered had he been convicted of the offence in terms of this Act referred to in paragraph (*a*); and
> (ii) cancel his licence, if the court would have cancelled his licence on convicting him of the offence in terms of this Act referred to in paragraph (*a*)."

We agree with the reasoning of the trial court that if the accused person had been charged under the Act, the appropriate charge would have been contravening s 52 (2) (a) (negligent or dangerous driving). In that respect s 52 (4) of the Act provides that-

> "Subject to Part IX, a court convicting a person of an offence in terms of subsection (1) involving the driving of a motor vehicle—
> (*a*) may, subject to paragraph (*c*), if the person has not previously been convicted of such an offence or of an offence, whether in terms of a law of Zimbabwe or any other law, of which the dangerous, negligent or reckless driving of a motor vehicle on a road is an element within a period of five years immediately preceding the date of such first-mentioned conviction, prohibit the person from driving for such period as such court thinks fit;
> (*b*) shall, subject to paragraph (*c*), if the person has previously been convicted of an offence referred to in paragraph (*a*) within the period referred to in that paragraph, prohibit the person

from driving for such period as such court thinks fit and, if the person is the holder of a licence, cancel the licence in respect of motor vehicles of the class to which such prohibition from driving extends;
(*c*) in the case of an offence involving the driving of a commuter omnibus or a heavy vehicle, shall prohibit the person from driving for a period of not less than two years:
Provided that the court may decline to prohibit the person from driving in terms of paragraph (*b*) or (*c*) if it—
(*a*) considers that there are special circumstances in the case which justify the court in so declining; and
(*b*) endorses the special circumstances referred to in paragraph (*a*) on the record of the case when passing sentence."

Ordinarily, a court determining sentence in a case of culpable homicide arising from driving a motor vehicle should consider the degree of negligence that was exhibited by the accused person. In this respect see *S v Mtizwa* 1984 (1) ZLR 230. It is thus noted that the trial court did not make such a finding in the present case. However, that does not appear to be a determining factor for purposes of a consideration of prohibition from driving. This is because s 52 (4) is silent on that aspect.

In *S v Mbewe and Others* 1988 (1) ZLR 7 (HC) it was held that that special circumstances are extraordinary factors arising from the commission of the offence or peculiar to the offender. The same case is also authority for the proposition that a distinction has to be made between mitigating factors and special circumstances. Thus in the same case it was held that the good character of an accused, particular hardship or contrition arising from a plea of guilty cannot constitute special circumstances.

In the present case it was submitted before the trial court that the appellant had had a good driving record for twenty two years. It was also submitted that he solely survived from driving. The other submission was that this was a case of ordinary negligence. On the authority of *S v Mbewe and Others supra*, the trial court in my view correctly held that there were no special circumstances in favour of the appellant.

It was for these reasons that we dismissed the appeal.

CHATUKUTA J agrees……

Machinga & Partners, appellant's legal practitioners
National Prosecuting Authority, legal practitioners for the state