KENNETH DRUMMOND

AND

THE STATE

IN THE HIGH COURTOF ZIMBABWE
CHEDA AND MATHONSI JJ
BULAWAYO 16 MAY 2011 AND 19 MAY 2011

Mr N. Mazibuko for the appellant
Ms N. Ndlovu for the respondent

Criminal Appeal

MATHONSI J: The night of 22 November 2006 was a dark and stormy one with poor visibility. At about 2100hours the Appellant, a driver of 37 years clean driving experience, was driving from Harare to Masvingo when at the 198km peg he suddenly beheld a huge dark object close ahead of him. It later turned out to be a heavy army truck loaded with maize seed.

The Appellant tried to avoid ramming onto the army truck by swerving to the right and did not do a good job of it, succeeding in only hitting the rear of the trailer with the left side of his Isuzu KB truck before being confronted by a Mercedes Benz E240 motor vehicle which was travelling in the opposite direction. The Appellant managed to avoid a head on collision with the Mercedes Benz which was carrying Senator T. Mohadi, but side swiped it with the right side of his vehicle. He battled with the vehicle and its trajectory took him off the road where he managed to stop without overturning.

The Appellant, who pleaded not guilty, was tried at the Gweru Magistrates' Court on a charge of reckless driving in contravention of section 53(2) of the Road Traffic Act, [Chapter 13:11]. He was convicted of negligent driving, a permissible verdict on a charge of reckless driving and sentenced to pay a fine of $150 000-00 (local currency) or in default of payment 2 months imprisonment.

In arriving at the conclusion of the Appellant's guilt, the trial magistrate took the following path:

> "In this case can an accused person be said to have overtaken when he saw that there was oncoming traffic? In my view evidence led did not conclusively prove that. The army driver was not called to testify on how the accused tried to overtake him, on whether or not his car had reflective material or lights. His evidence was necessary. The first witness did not see whether the army truck had light or not. The attending detail did not check the lights were functioning or not, or whether the chevron was reflective or not. Accused's version that the army truck had no lights and that it had no reflective material was not rebutted, it follows that he not reckless. His conduct falls short of recklessness but qualifies as ordinary negligence. I say so because he was driving at around 100km/hr on a very dark night. He saw a hazard about 25m or 50m. His speed did not correspond with the distance he could see ahead. He thus failed to take evasive action when need arose. He was therefore negligent."

In my view such a conclusion is not supported by the evidence led. For a start, the allegations made by the state are that the Appellant tried to overtake the army truck in front of oncoming traffic as a result of which the accident occurred. The state did not disclose that there was a collision first with the rear of the army truck. According to the state, the particulars of recklessness are:

"- travelling at an excessive speed in the circumstances.
- failing to keep a proper look out
- overtaking in front of oncoming traffic.
- fail to keep vehicle under proper control.
- fail to stop or act reasonably when accident or collision seemed imminent."

The evidence led by the state does not sustain any of the above cited particulars. The police officer who attended the scene, Constable Mathe did a shoddy job indeed. Despite the fact that he obtained a statement from the Appellant at the scene, which is contained in the traffic accident book, to the effect that the army vehicle was not visible at all because it had no rear lights, no reflectors and that the tarpaulin covering the load on the trailer was tied to the base of the trailer thereby covering the chevron of the trailer, Constable Mathe did not bother to check the army truck. He testified that the army truck was not entered in the traffic accident book, he did not investigate it at all, and he did not put it on his sketch plan.

The Appellant gave evidence. He stated that he was driving at a speed of between 90-100km per hour when suddenly he saw a dark shape looming in front of him. Instinctively he swerved to the right, skidden to the left and collided with the object. As a result of that impact, his vehicle was thrown off into the right hand side of the road where there was an oncoming vehicle. He had been unaware of both the looming object (which turned out to be an unroad-worthy army vehicle) and the oncoming vehicle because the army truck had no rear lights or reflectors and it also impeded his view preventing him from seeing the lights of the oncoming vehicle.

The Appellant stated that he collided with the oncoming vehicle which was now a second collision. As a result the rear axle of his pickup truck was torn off but he did his best to keep the vehicle under control, even with one axle and he avoided rolling steering the vehicle to safety off the road.

He said that he later went to examine the army truck and noticed that it had no lights, was a 30 tonne trailer pulled by a scania horse. The trailer completely had no lights, there were no electrical cables fitted to the trailer which also did not have any visible reflectors. It was an old dull trailer loaded with maize seed and wrapped in a dark coloured tarpaulin completely covering the rear of the trailer as it was secured right down to the rear bumper.

According to the Appellant when he quizzed the army driver and his collegues why they had taken to the high way at night a clearly unroadworthy vehicle which was not visible, they apologized stating that they had intended to get to their destination before dark but failed. He had to untie the tarpaulin and lift it in order to take down the number plate of the trailer which was also covered. The tarpaulin and its lack of reflectors made the army truck invisible.

The Appellant called two witnesses who corroborated his evidence. The first one, Cuthbert Mazambani who was a prison officer at Masvingo prison was attracted to the scene as he was passing by. He confirmed that the reflectors of the army truck were covered by the tarpaulin, for one to see the reflectors, which were very dirty, one had to pull the tarpaulin up. The truck had no lights and where lights should have been located there was nothing but holes.

The Appellant's second witness, Calden Bismark who is a motor mechanic testified that the damage to the Appellant's pickup truck, which he had to recover from Mvuma Police

station, were consistent with the fact that it had collided with the army truck as well as Senator Mohadi's Mercedes Benz vehicle.

The entire evidence led on behalf of the Appellant was not rebutted at all. The issue which therefore arises is whether in the circumstances of the case, he could be said to have been negligent. I think not. It is not every wrongful act of a person which constitutes negligence. Where a person is placed in danger by the wrongful act of someone else and, in the agony of the moment, he conducts himself with the care expected of him in the circumstances. He cannot be blamed if he does not succeed.

In *S v Mauwa* 1990(1) ZLR 235(S) Korsah JA stated at 241 B that:-

> "Where a person or third party is placed in danger by the wrongful act of another, that person is not negligent if, in the agony of the moment, he exercises such care as may be reasonably expected of him in the reasonable apprehension of the danger in which he is so placed. He is not to blame if he does not do quite the right thing in the circumstances."

If it is accepted that the army vehicle was in the condition borne by the evidence, then clearly the Appellant was not expected to see it until it was too late. When he saw it what he did was reasonably expected of a human being. In fact had he not taken the evasive action which he did and manoeuvered his vehicle the way he did, as dictated by the agony of the moment, human life could have been lost. It is remarkable that no life was lost in those circumstances.

The doctrine of sudden emergency was succinctly formulated in *Chikosa v Wright* 1996(2) ZLR 607(S) at 608G:-

> "A man who, by another's want of care, finds himself in a position of imminent danger, cannot be held guilty of negligence merely because in that emergency he does not act in the best way to avoid the danger."

It is the army driver who created danger by putting an invisible vehicle on the road. There is a reason why a vehicle is required to have rear lights and reflectors at the back. It is to alert other drivers of the presence of that vehicle on the road. That danger required the Appellant to take avoiding action which led to the collision with both the army vehicle and the Mercedes Benz vehicle. The Appellant cannot be said to have been negligent.

It is astonishing to note that the state tried to create an impression that not only was the army vehicle not involved but also that it did not exist. Otherwise there would be no explanation for its exclusion from the traffic accident book and the signal failure to bring its driver to testify. It is an attempt to pull the wool over the court's eye which is as unsavoury as it is unacceptable. It is an injustice that should be condemned.

I am therefore satisfied that the state did not prove the guilt of the Appellant beyond a reasonable doubt.

Accordingly, the appeal succeeds. The conviction of the Appellant is quashed and the sentence set aside.

Cheda J agrees…….

Calderwood, Bryce Hendire and partners, appellant's legal practitioners
Criminal Division, Attorney General's Office, respondent's legal practitioners