THE STATE
versus
VITER MAKUMBE

HIGH COURT OF ZIMBABWE
HUNGWE AND MAVANGIRA JJ
HARARE, 25 September 2012 And 13 February 2013

Criminal Appeal

Ms S Njerere, for the appellant
Mr E Nyazamba, for the respondent

MAVANGIRA J: This is an appeal that was noted out of time. An application for condonation of late filing of the appeal was not opposed by the respondent. Condonation was granted.

The appellant appeals against the sentence that was imposed on him by the court *a quo.* He was convicted on his own plea on a charge of negligent driving in contravention of s 52(20) of the Road Traffic Act, [*Cap 13:11*] (the Act). The facts are that the appellant who was driving a Mazda B1800 in a northerly direction along Rekayi Tangwena Road, failed to stop at the intersection with Coventry Road. The traffic lights were red against him. His failure to stop resulted in a collision with another motor vehicle which was travelling east along Coventry Road.

The appellant was sentenced to 9 months imprisonment of which 3 months imprisonment was suspended on the usual and appropriate condition of future good conduct. In addition the appellant was prohibited from driving class 2 motor vehicles for a period of 6 months.

The respondent has indicated that it does not oppose the appeal. Section 52(2) of the Act stipulates that a person who drives a vehicle on a road negligently shall be guilty of an offence and liable, where the vehicle concerned is not a commuter omnibus or a heavy vehicle, to a fine not exceeding level 7 or to imprisonment for period not exceeding 6 months or to both such fine and such imprisonment

While appeal courts are reluctant or slow to interfere with a trial court's sentencing discretion, they will readily do so in circumstances where the sentence imposed is disturbingly inappropriate or the sentencing discretion has been exercised capriciously or upon the wrong principles. *S* v *Ncube & Anor* 1983 (2) ZLR 1; *S* v *Gono* 2000 (2) ZLR 63.

In *casu* as the appellant was convicted of a statutory offence, the trial court ought to have been guided in its assessment of an appropriate sentence by the penalty provisions of the contravened Act. The sentence imposed by the trial court does not fall within the range of sentences stipulated by the relevant provision of the Act. As the appellant was not driving a heavy vehicle or a commuter omnibus, even if imprisonment might have been found to be appropriate, he ought not to have been sentenced to a period of imprisonment that exceeds 6 months. In *S* v *Harington* 1988 (2) ZLR 344 at 359F DUMBUTSHENA CJ stated:

> "The Legislature prescribed a sentence of twenty-five years' imprisonment as a maximum penalty for contravening s 3 of the Official Secrets Act. It is the ceiling of a range of sentences which a court may impose for a contravention of the section."

At 359H he also stated:

> "Fairness and justice exclude a passionate approach to sentencing. Courts should also, when assessing sentence, avoid insensitivity to one side or an exaggerated sense of the wrong done to society."

He proceeded at 360c:

> "Fairness does not exclude the element of mercy and it does not also exclude a robust approach to sentencing."

DUMBUTSHENA CJ further stated at 361H that what had gone wrong in that case was that the leaned Judge President in the court below had pitched his sights too high and scanned sights far beyond the ambit of s 3. In *casu* the learned trial magistrate passed an incompetent sentence. She erred and the sentence must and therefore will for that reason be set aside.

In her reasons for sentence the learned trial magistrate said that she attached "little weight to the (appellant's) plea of guilty which is not a sign of contrition but rather had no other option but to so plead because the negligence was so gross and glaring." In *S* v *Sidat* 1997 (1) ZLR 487 (S) McNally JA said at 493B:

> "... a plea of guilty must be recognised for what it is – a valuable contribution towards the effective and efficient administration of justice. It must be made clear to offenders that a plea of guilty, while not absolving them, is something which will be rewarded. Otherwise, again, why plead guilty?"

Further, in *S* v *Mpofu (2)* 1985 (1) ZLR 285 Reynolds j stated at 291F – 292A:

> "... What a plea of guilty does accomplish, though, is to contribute to the smooth and efficient administration of the system of criminal justice. ... But in the first respect mentioned the plea merits recognition and credit to an extent. It is a fact that a significant portion of offenders, although knowing full well that they are guilty of a crime charged, still hotly protest their innocence. It is by no means uncommon for such persons to attack the *bona fides* and veracity of the most honest and impartial of witnesses, to prolong trials extensively and unnecessarily, to concoct specious and spurious defences, and generally to cause a considerable waste of public time and money. This is against public interest. I believe that it is more for this reason than any other, such as the so called automatic right based on a supposed declaration of contrition, that the courts generally allow an offender some mitigation of sentence if he pleads guilty. In this way such an offender is encouraged to adopt the more honest and laudable procedure of making a clean breast of his culpability, and of facing up to the consequences of his misconduct."

In *casu* the trial magistrate appears to have unduly minimised the value of or the weight to be attached to the appellant's plea of guilty. This led to a miscarriage of justice, more so when viewed in light of her imposing a sentence that is not only outside but also in excess of the permissible maximum in matters where imprisonment is found to be appropriate. It is also trite that where a penalty provision provides for either a fine or imprisonment or both, as in this case, the court ought to be satisfied that a fine will not meet the justice of the case before it considers the custodial option as well as the length thereof. In the instant matter the relevant section stipulates a fine not exceeding level 7. The concession and proposal by the respondent's counsel that the sentence be set aside and that it be substituted with a fine of US$200 thus finds favour with this court for it is important for courts to guard against excessive devotion to the cause of deterrence as may so obscure other relevant considerations as to lead to a punishment which is disparate to the offender's deserts: See *S* v *Gorogodo* 1988 (2) ZLR 378 (SC) at 382H – 383A. It appears that the trial magistrate gave excessive devotion to the need for the court to "register its displeasure by imposing stiffer penalties and in the process further proceeded to not only impose an unduly harsh sentence but also went on to irregularly "outshoot" the applicable and pertinent penalty provision.

Regarding the prohibition from driving, whilst the appellant was involved in an accident whilst driving a class 4 motor vehicle, the trial court prohibited him from driving class 2 motor vehicles. This was a misdirection as such a prohibition has no basis at law. The

prohibition, if appropriate, had to relate to the class of vehicle that the appellant was driving at the time of the accident. It did not. Furthermore, the as the appellant is a first offender paragraph (a) of subsection (4) of section 52 is applicable. It provides as follows:

> "(4) Subject to Part IX, a court convicting a person of an offence in terms of subs (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; (emphasis added).

Whilst the section by the use of the word "may" gives discretion to the court to decide whether or not to prohibit the convicted person from driving, it appears to me that the court must exercise the discretion judiciously and the manner of exercise of that discretion can only be discernible from the reasons given therefor. In *casu* there is no recording of the specific reasons why the trial magistrate decided to exercise her discretion in the manner in which she did.

A fine is a permissible penalty in terms of the Act as already stated above. In *S* v *Kadonzvo* 1990 (1) ZLR 186 (SC) a fine was found to be appropriate on a conviction for reckless driving in circumstances where the appellant who was driving an omnibus carrying passengers failed to yield to a vehicle approaching from the opposite direction on a narrow bridge. The omnibus collided with the oncoming vehicle and ran off the bridge into the river below. Eleven persons were injured, two of them seriously. In *casu* a fine would have met the justice of the case.

As rightly submitted by the State, the offence as well as the conviction of the appellant occurred in 2008 and whatever the message was intended to get to the appellant has been received by now. I do not however, agree with the appellant's counsel's submission that the sentence of the court *a quo* be substituted with a level 2 fine. A sentence of US$10 in the circumstances of this case would in my view make a mockery of justice. The State's submission that an appropriate sentence would be a level 5 fine appears to be nearer a more realistic assessment.

In the result and for the above reasons the sentence of the court *a quo* is hereby set aside and is substituted with the following:

"The accused is sentenced to US$200 or 3 months imprisonment."

HUNGWE J agrees.