

THE STATE
versus
TENDAI VONO

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 6 June 2016

Criminal Review

MAFUSIRE J: The accused pleaded guilty to culpable homicide. He was duly convicted. The trial court sentenced him to a fine of \$200 or, in default, three months imprisonment.

Culpable homicide is governed by s 49 of the Criminal Law [Codification and Reform] Act, *Chapter 9: 23* [*“the Code”*]. The prescribed penalty is imprisonment for any period up to life, or a fine up to, or exceeding level fourteen [i.e. US\$5 000], or both.

On scrutiny, the regional magistrate felt the sentence was too lenient. Whilst ruling out an effective custodial sentence, his view was that not only did the fine have to have been higher, but also that it should have been coupled with a wholly suspended prison term.

The circumstances of the offence were these. The accused was driving from Hwedza to Harare. He was on a strip tarred road, 2.6m wide. The tarmac was bordered with gravel edges. At the 119 km peg his vehicle collided head-on with a commuter omnibus [*“the kombi”*] that was travelling in the opposite direction. It was carrying fifteen passengers. One died. Eleven others were injured. Both vehicles were extensively damaged.

The accident was entirely the accused’s fault. The particulars of negligence which were canvassed as essential elements were: a failure to share a strip road; excessive speed; failure to stop or to act reasonably and failure to keep a proper look-out.

The regional magistrate relied on the sketch plan. The point of impact was the accused’s wrong side of the road, outside the gravel verge. From this, the regional magistrate argued that the accused not only failed to keep to the left, but also that he literally crossed over to the lane of oncoming traffic.

The regional magistrate also noted that no contributory negligence was being imputed to the kombi driver; that the extensive damage to the accused’s vehicle demonstrated

excessive speed, especially given that it was a strip road and that, apart from causing the death of one passenger, eleven others from the kombi had been injured.

The trial magistrate justified his sentence by saying that the degree of negligence was ordinary; that the injuries suffered by the eleven commuters were not serious; that the accused had helped with funeral expenses; that since he earned only \$500 [per month] and had been undergoing physiotherapy every week, a fine in excess of \$200 would have been harsh and would not have reflected the mitigating features of the offence.

In *S v John* 2013 [2] ZLR 154 [H] I said it is not every wrong decision by the inferior court that warrants interference by the superior court. Sentencing is very much a matter of discretion by the sentencing court. Only in situations of demonstrable impropriety in the exercise of that discretion does the superior court intervene. What may be an appropriate sentence in any given case is ultimately a value judgment by the sentencing court. Equally true, what may be an improper exercise of judicial discretion by the sentencing court is also a value judgment by the scrutinizing or reviewing court.

In this matter, I find myself in agreement with the regional magistrate. A fine of \$200 was so lenient as to trivialise the offence and the circumstances surrounding its commission. The charge sheet said the accused failed to share the strip road with on-coming traffic. But the sketch map showed he did worse. He crossed the tarmac and went over to the gravel verge on the opposite side. That is where the accident happened.

The accused had no business being on that part of the road. His explanation for his being there is suspicious. In his statement to the police he claimed the kombi driver took time to give him way. Sensing danger he swerved his vehicle to the opposite side to avoid a head-on collision. But, as it happened, he did not avoid the collision. He caused it. His negligence cost someone his or her life.

The accused's driver's licence was five years old at the time. *Prima facie* that was reasonable experience. The accident happened at 16:10 hours. It was in the month of September. Nothing was said about the weather conditions. But September is generally a dry and sunny period. The accused first saw the kombi when it was still some 139m away. That should have been ample time to take avoiding action. But it was only at 64m that he took some action. It turned out to be very wrong and fatal action.

The trial court should have been more circumspect. Why was the accused being so slow to react? Of course, his state of sobriety was never investigated. So intoxication was not a factor. But his actions remained inexplicable and suspicious, especially given that he could

not in the least estimate the speed at which he was driving. But given the distances depicted on the sketch plan, and given the extensive damages to both vehicles, it seems one or other or both of them was travelling too fast. The kombi driver approximated his speed at 40 km per hour. Generally, that is slow. It was in the country side. So that leaves the accused as the culprit as far as speed was concerned.

In *S v Mtizwa* 1984 [1] ZLR 230 [H] the accused pleaded guilty to culpable homicide. He had driven onto his incorrect side of the road. He struck and killed a motor cyclist. He could not explain why he had been on the incorrect side of the road, or why he had not seen the motor cyclist at any time before the accident. He was fined \$200. On review, the sentence was criticised for being disturbingly lenient. It was said an appropriate sentence would have been one of imprisonment and a prohibition from driving.

In the present matter, I consider that the trial magistrate exercised his sentencing discretion improperly. Among other things, he shied away from a more realistic fine of about \$500 arguing that it would impoverish the accused person who was earning the same amount per month. But, as the regional magistrate argued, the accused could have simply been given time to pay.

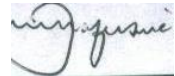
The regional magistrate felt a heavier fine, coupled with a wholly suspended prison term, would have been more appropriate. I agree. Unfortunately, he did not suggest a figure or the period.

Section 49 of the Code, in prescribing for culpable homicide a period of imprisonment of up to life, and a fine of up to \$5 000, or more, was reposing considerable discretion in the sentencing court. In my view, that is as it should always be, rather than leave it to the Legislature to impose mandatory sentences. In arriving at an appropriate sentence the sentencing court is guided by the circumstances of the case. Sentencing should not be an armchair approach or a knee-jerk reaction. The sentence should fit the offence, the offender and the interests of society. If a manifestly inappropriate sentence is imposed in any given situation, the system is self-correcting. The review court is at large to interfere.

The sentence in this case was too lenient. It calls for interference. It is hereby set aside. It is substituted by a fine of \$500, or, in default, 5 months' imprisonment. In addition, the accused is sentenced to five months' imprisonment which is wholly suspended for five years on condition that during that period the accused is not convicted of an offence involving negligent driving for which he is sentenced to a term of imprisonment without the option of a fine.

The trial magistrate is hereby directed to recall the accused person for the purposes of imposing the appropriate sentence above.

6 June 2016

A handwritten signature in black ink, appearing to read 'M. J. Mwayera', written on a light-colored rectangular background.

MWAYERA J: I agree