JACOB MUGOVA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & MUSHORE JJ
HARARE, 13 September 2016 & 08 February 2017

Criminal Appeal

T Halimani, for the appellant
I Muchini, for the respondent

MUSHORE J: The appellant was convicted by the Magistrates Court of Culpable Homicide in terms of s 49 of the Criminal Law (Codification and Reformation Act [*Chapter 9:23]*. He was sentenced to 12 months imprisonment. In addition his driver's licence was endorsed with the particulars of the offence. The appellant was employed with the Masvingo Municipality as a driver at the time that the offence was committed. On the day in question the appellant ran over and killed a female infant who was only two months old. The events leading up to this tragedy were that the appellant was driving a GWM pick-up truck together with his colleagues, conducting a raid of illegal vendors. The vendors were ignoring council regulations by vending illegally on the verge of the road in an area not allowed for vending by the municipality of Masvingo. The appellant and company descended on the vendors who fled in opposite directions. They then loaded the vehicle with vendors goods which they had confiscated, where after the appellant got behind the wheel and " in a bid to fix the vendors', drove directly into crowd, causing the mother of the deceased to jump out of his path in shock, leaving her infant child on the tarmac. The appellant ran the infant over and she died on the spot. The crowd was incensed by the appellant's actions and what had occurred to such an extent that the crowd set fire to the vehicle being driven by the appellant. The weather conditions on that day as described by the State were that it was broad daylight and visibility was clear. In his defence case the appellant accepted that he ran over the infant, but he pleaded that because of the chaos and confusion which ensued after he and his colleagues

had arrived at the scene, he could not reasonably have foreseen the possibility of death occurring as a result of his actions. He said that it was only when he heard people shouting that he had realised that something terrible had occurred. He insisted that he was driving slowly and that after the accident he got out of the vehicle and having gone around the vehicle saw the infant dead by his left rear wheel. In his defence outline, he denied culpability alleging that the deceased's mother had dropped her infant onto the tarmac, and that she died as a result of the fall. However at the end of the trial, the court *a quo* convicted him of culpable homicide.

It appears that by the time that the he lodged the appeal the appellant had reconciled himself with correctness of the conviction because he is appealing against sentence only. He asks that the sentence of imprisonment be set aside and substituted with either a community service sentence, or a fine or both. The basis of his appeal is that he alleges that because he could not have reasonably foreseen that his actions would cause the death of the infant, his moral blameworthiness was low. He is also of the belief that the court *a quo* failed to take into account and consider what he describes as being 'overwhelming' mitigatory circumstances. The appellant submits that if these features in mitigation had been properly considered, they would affirm that he is a proper candidate for a community service sentence and that therefore the entire 12 months imprisonment should be suspended on condition that the appellant performs community service or pays a fine. In short the appellant is objecting to the fact that the court did not consider alternative forms of sentence when it sentenced him.

We have reviewed the witness testimony. All the State witnesses described the events in a similar fashion. SINIKWE CHIRUNGU (the deceased infant's mother) testified that the appellant drove right at her and in such a way that she had to jump out of harm's way in shock. Tragically she did not manage to rescue her infant who was wrapped in a blanket and lying down and sleeping on the tarmac beside her prior to the accident. She recounted the harrowing incident with grief and regret that she had not thought of rescuing her infant; blaming the shock of seeing appellant's vehicle driving directly to her. The accident evaluator blamed the incident entirely on the actions of the appellant and he was convinced that if the appellant had been keeping a proper lookout, the accident would not have occurred. The third witness for the State was a woman who was at the scene purchasing tomatoes from the vendors. She said in her evidence that her attention was drawn to the appellant when she heard people shouting that the council vehicle was coming crushing tomatoes. Her reaction

was to hastily get out of the way. She describes the scene in a rather gruesome way, describing how the vehicle's wheel made contact with the infant.

When the appellant testified, he glibly accepted that his visibility of what lay ahead was not impaired. His evidence under cross-examination went a follows:-

"Cross-examination Jacob Mugova r pages 37-38

Q. How long have you been a driver?
A. 30 years
Q. A driver has to exercise extreme caution when driving through the public and children?
A. Yes, I agree.
Q. The area we talk of is usually densely populated?
A. Yes
Q. There is a big possibility that children and people criss-cross each other?
A. Yes
Q. What was your speed?
A. 5km/hr
Q. When you arrived people were running all over?
A. Yes
Q. So you were to exercise extreme caution?
A. Yes.
Q. Your visibility was also impaired by people running all over?
A. I could see what was in front.
Q. So if you could see was there any reason to shout that there was a baby?
A. Well there was a reason
Q. The reason was because you could not see hence people shouted?
A. Well I could see.
Q. Where was the child?
A. Well by the side of the vehicle.
Q. What did you do with the child?
A. Well I lifted the child and placed it on the ground

……..."

From the appellant's narration, there is no question that he saw the scene which lay ahead very clearly prior to the accident in contradiction of his defence outline where he had described that, but for the melee, the death of the infant would not have occurred. So despite the appellant's insistence that he drove slowly, the issue of speed does little to distance him from culpability. The fact remains that whether he drove fast or slowly, his actions were still reckless and focused. He knew the consequence of driving in or into that area. He was keenly aware that there were bound to be children and people criss-crossing each other. He was alive to the fact that the area was densely populated but he drove into the area regardless of the

consequences of his actions. It is little wonder that the State averred that he intended to 'fix the illegal vendors.

In *S* v *Tapera & Ors* 2012 (2) ZLR 246 (H), HUNGWE J expounded the following:-

> "On a charge of culpable homicide, foreseeability is an essential element to be considered in deciding whether a causal connection exists between the unlawful act or omission and the death of the victim. Foreseeability of risk of bodily injury, as opposed to risk of death, is not sufficient. The test of foreseeability in the crime of culpable homicide is, however, an objective one and it is sufficient for legal responsibility to arise that the accused ought to have foreseen some risk of death".

In the instant matter, the appellant's moral blameworthiness is extremely high. Although the appellant has submitted to us that the court *a quo* failed to take his personal mitigatory circumstances into consideration, we find no evidence of such an omission on the part of the court *a quo*. In any event, such matters cannot be taken in isolation of the offence itself and its circumstances and also the interests of the public and society as a whole.

Although the effect of a crime may be taken into account in assessing a sentence, the most important factor in crimes involving *culpa* remains the moral blameworthiness of the offender. See *S* v *Goodson* 1976 (2) P.H. H 169 (R). In the present matter the likelihood of harm occurring, given the appellant's direct actions and his failure to exercise both good judgment and restraint, was highly probable. He ought never to have, even remotely, contemplated driving into the space that the illegal vendors were occupying and advertising their wares. The appellant proceeded to drive into an area which he was aware had people and children criss-crossing each other at any given time. After the accident, the crowd reacted by becoming so incensed by the appellant's conduct that they took matters into their own hands to vent their anger and burned the appellant's vehicle to a shell. The facts as they occurred in the present matter invite a deterrent and retributive type of sentence.

In *R* v *Karg* 1961 (1) SA 231, SCHREINER JA reminds as that there are instances, such as in the present matter, where the purpose of a deterrent and retributive sentence must be brought to bear. At p 236 [A-B] he said-

> "The element, historically important, is by no means absent from the modern approach. It is not wrong that the moral indignation of interested persons and the community at large should receive some recognition in the sentences that the court imposes, and it is not irrelevant to bear in mind if the sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment."

In *R* v *Bredell* 1960 (3) SA 558 (A) RAMSBOTTOM JA said:-

> "In order to remind drivers of their duty to use proper care …. It may be that the time has come when it is the duty of judicial officers to exercise greater severity in passing sentence in cases for the negligent use of motor vehicles"

See also *R* v *Barnado* 1969 (3) SA 552 (A).

In the light of the foregoing, it is our considered view that to contemplate a fine or community services under such circumstances would be a gross miscarriage of justice and indeed trivialise the crime which occurred. The sentence imposed by the trial court was manifestly lenient, considering the degree of the appellant's culpability and taking into account that the offence itself carries with it a life sentence on the upper end of the sentencing guideline's spectrum.

We see no reason to interfere with the sentence imposed *a quo*. In fact and in our view, we are surprised that the appellant got off lightly with an endorsement of his licence, where it would have been appropriate to cancel his licence and prohibit him from getting behind the wheel for a period of time.

Accordingly we rule as follows:

"Appeal Dismissed"

Wintertons, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioner