

THE STATE  
versus  
FUNGAI MICHAEL CHITEPO

HIGH COURT OF ZIMBABWE  
MAFUSIRE J  
MASVINGO, 6 February 2017

### **Criminal Review**

MAFUSIRE J: The State bungled one of the charges preferred against the accused. The trial magistrate not only missed that, but it also mishandled the sentencing options. That is what has prompted this review judgment.

The accused pleaded guilty to two counts that arose out of a single driving infraction involving a tractor. The first count was framed as driving a motor vehicle, the tractor, without a valid driver's licence. The second count was culpable homicide.

What happened was that on the fateful day the accused, an unemployed man of 39 years of age, had been drinking alcohol at a farm store from about 20:00 hours to about 02:00 hours the next day. He had come driving the tractor. It had a faulty battery. So he had parked it on a slope in readiness for a push start. When he decided it was time to go home he offered the deceased a lift. A tractor not being a passenger carrying vehicle, the deceased sat on one of the mudguards.

In order to start the tractor, the accused, who only had one arm, the left arm, switched on the ignition. He disengaged the handbrake. The tractor started to roll down the slope. It soon gathered speed. The accused engaged gear and swiftly released the clutch. The engine roared to life. But at the same time the tractor jerked forward. The deceased was thrown off the mudguard. He fell to the ground and landed in front of the huge left rear wheel. He was run over. He died on the spot. The post mortem report noted, among other things, a depressed skull and a fracture of the left arm. It said the deceased had died as a result of head injury.

The accused had no driver's licence.

The charge in respect of count one was framed as contravention of s 6[1], as read with s 6[5], of the Road Traffic Act, *Cap 13:11*, in that on 12 September 2016, at

Yottam Farm, Masvingo, [the accused] unlawfully drove an unregistered motor vehicle, a Tafe Farm Tractor, along an unnamed farm road with [*sic*] a valid driver's licence.

I caution in passing that great care and precision should always be taken and exhibited in the drafting of criminal charges and the handling of criminal matters. Criminal proceedings affect some of the fundamental human rights and freedoms enshrined in the Constitution, namely the right to liberty, and even the right to life. The word "... *with* ..." in the charge sheet, was undoubtedly a typing error. Obviously it was meant to read "... *without* ..." Yet that misprint was the bedrock of the charge. Strictly speaking, as the charge stood, there was no offence if the accused had driven a motor vehicle "... *with* ..." [i.e. whilst in possession of] a valid driver's licence.

Be that as it may, it seems the typo did not cause prejudice. Everyone, including the accused, seemed to have understood the substance of the charge, namely that the accused had driven the tractor whilst not in possession of a valid driver's licence. But ironically, that was the bane of the whole case.

The offence created by s 6[1][a] of the Road Traffic Act is directed at persons that drive motor vehicles "... *on a road* ..." without being licenced to drive the class of the motor vehicle concerned. If one is driving a motor vehicle without a licence, but not on a road, one is not contravening this section.

In terms of the Act, "*road*" is any highway, street or other road to which the public, or any section thereof, has access. *In casu*, the road in question was none of these. It was a farm road, thus a private road. Section 2 of the Act defines a "*private road*" as any road the maintenance of which neither the State nor a local authority has assumed responsibility, and which is not commonly used by the public or any section thereof.

A "*private road*" only becomes a "*road*" for the purposes of sections 51 to 55, 64, 70, 76 and 77 of the Act, as stated in paragraph [e] of the definition of "*road*" in s 2. But none of these is relevant. Thus, the court *a quo* was wrong to assume or accept, without facts, that the farm road was a "*road*" for the purposes of the offence in s 6[1].

That was not the only problem with the charge in count one.

In terms of the Road Traffic Act, the driver of a tractor does not always have to have a driver's licence. In terms of s 8 all that an employee of a farmer or miner, or a self-employed farmer or miner, as defined, needs in order to legally drive a tractor belonging to, or possessed by them, on any road for farming purposes, up to a belt of

ten kilometres of the farm or the mine boundary, is a tractor driver's permit issued in accordance with that section.

*In casu*, the State Outline said the accused resided at Plot 19 Yottam Farm. Whilst it also said the accused was not employed, it did not say he was not the owner of that plot or that farm. It did not say whose tractor it was. If he was the owner of that plot or of that farm, and thus was self-employed, and if he was also the owner of that tractor, he could legitimately have driven it, if he met the criteria laid out in s 8 of the Act.

The right to drive a tractor in circumstances prescribed by s 8 of the Act is confined to situations where the driving is for farming or mining purposes. It is perhaps presumptuous to argue that the accused who had been carousing from about 20:00 hours to about 02:00 hours of the next day, could be said to have been on about farming purposes when he had eventually decided to drive the tractor home. It is more likely he had been at the drinking place for leisure or pleasure. But had that been his dominant purpose? Might the drinking not have been merely incidental? Not unexpectedly, all these aspects were not canvassed.

Given that the court had to be convinced of the accused's guilt beyond any reasonable doubt, it was unsafe to assume, as it evidently did, that the accused was not the owner of the plot or of the farm, or that he was not the owner of the tractor, or that he did not have a tractor driver's permit that would have entitled him to drive that tractor on the farm roads.

In the circumstances, the accused' conviction on count one is hereby quashed, chiefly on account of the fact that there was no offence disclosed by the charge since the driving, and therefore the accident, occurred on a private farm road.

On count one, the accused was sentenced to a fine of \$100 or, in default, thirty days imprisonment. But because his conviction on that count has been quashed, this sentence is also set aside.

On count two, the accused was sentenced to two years imprisonment of which one year imprisonment was suspended for five years on the usual condition of good behaviour. In addition, the accused was prohibited from driving all classes of motor vehicles for life.

It is on sentencing that the court *a quo* seriously misdirected itself in a number of respects. To begin with, and going back to count one, in terms of s 6[5] of the Road

Traffic Act, a person convicted of driving a motor vehicle without a licence, in contravention of sub-section [1], is liable to a fine not exceeding level six [\$300], or to imprisonment for a period not exceeding one year, or to both such fine and such imprisonment. However, if the motor vehicle the accused was driving was a commuter omnibus or a heavy vehicle, he shall be liable to imprisonment for a period not exceeding five years and not less than six months, unless he comes within one or other of the two exceptions specified. The accused did not come within the first set of exceptions. They were irrelevant because they relate to a licensed driver, which he was not.

The second exception that enables the unlicensed driver of a commuter omnibus, or of a heavy vehicle, to escape the mandatory jail term of sub-section [5] is if they manage to show that there were special reasons why the special penalty should not be imposed.

What determines whether or not the mandatory jail term should be imposed is whether or not the motor vehicle in question was a commuter omnibus, or a heavy vehicle. What determines whether a motor vehicle is a heavy vehicle or not is its weight, and, in the case of a passenger motor vehicle – an aspect not relevant in this case – its passenger carrying capacity.

Going by the definition of “*motor vehicle*” in terms of s 2 of the Road Traffic Act, a tractor is obviously a motor vehicle. But whether it is a heavy vehicle or not depends on whether its net mass exceeds 2 300 kilogrammes. The Act says a “*heavy vehicle*” means a motor vehicle exceeding 2 300 kilogrammes net mass, but does not include a passenger motor vehicle having seating accommodation for less than 8 passengers.

This aspect was also not considered in the court *a quo*. It is not clear what then informed the sentence of \$100 fine or thirty days imprisonment. That was a misdirection. Having convicted him in count one, it was mandatory for the court to have established whether the accused was liable for the s 6[5] special penalty or not. Among other things, it was necessary to establish the weight of the tractor because if it was a heavy vehicle the penalty would have had to be relatively heavier, and conversely, relatively lighter if it was not a heavy vehicle.

However, for count one this particular misdirection is of no moment because the entire conviction has been quashed. The issue has been raised for the future.

The effective sentence in count two was one year imprisonment and a **life** ban from driving **all classes** of motor vehicles. In that kind of sentence, the obvious issues to look at on review are: 1/ was the substantive sentence of imprisonment correct? 2/ did the court assess the degree of negligence, and if it did, was its assessment correct? 3/ was the court correct in imposing a ban on driving, and if it was, was the period appropriate, and was the extension of that ban to life and to all classes of motor vehicles correct?

It is now trite that in a charge and conviction of culpable homicide arising out of a driving offence, it is essential that the trial court should first make a precise finding on the degree of negligence before assessing the appropriate sentence: see *S v Dzvatu*<sup>1</sup>; *S v Mtizwa*<sup>2</sup>; *S v Chaita & Ors*<sup>3</sup>; *S v Mapeka & Ors*<sup>4</sup>; *S v Muchairi*<sup>5</sup> and *S v Wankie*<sup>6</sup>.

*In casu*, the particulars of negligence preferred against the accused, to which he pleaded guilty, were these:

- causing or permitting a passenger to ride on a mudguard;
- failing to keep a proper lookout in the circumstances;
- fail[ure] to act reasonably when an accident seemed imminent

I must comment in passing that given the circumstances surrounding the commission of the offence, such particulars were not very informative. What loomed large as particulars of negligence was the fact that for someone who had been drinking alcohol for about six hours, to try a hill start at night, using one arm to control both the steering wheel and the gear / clutch levers, was extremely dangerous.

It appears from the record that whilst the particulars of negligence left out such crucial aspects, nevertheless the court did take them into account in considering aggravating circumstances for the purposes of sentence. The court assessed the

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<sup>1</sup> 1984 [1] ZLR 136 [H]

<sup>2</sup> 1984 [1] ZLR 230 [H]

<sup>3</sup> 1998 [1] ZLR 213 [H]

<sup>4</sup> 2001 [2] ZLR 90 [H]

<sup>5</sup> HB 41-06

<sup>6</sup> HH 831-15

accused's degree of negligence as **gross**. I shall not interfere with that assessment even though I myself might have elevated his conduct to recklessness.

The mitigating features in favour of the accused were these. He was a first offender. He pleaded guilty. The court noted that he was contrite during the proceedings. He was married and the wife was expecting. He virtually had no assets, except for some nine goats and a paltry \$12. However, a significant feature that he raised in mitigation was that "... *they*..." [presumably, he and/or his extended family] had paid three head of cattle as compensation to the relatives of the deceased and had also paid for the funeral expenses.

In addition, I would assume, and take as an aspect of mitigation, that the unfortunate death of the deceased will weigh heavily on the accused probably for the rest of his life. Above all, this unfortunate incident happened on a private farm road, not a public highway, albeit an aspect that does not help him when it comes to considering possible prohibitions from driving because of, as aforesaid, the provisions of paragraph [e] of the definition of "*road*" in s 2 of the Act.

The aggravating features in the case consisted of the reckless risk that the accused took by trying a hill start at night; with one hand; with a passenger perched precariously on the tractor's mudguard; and after both he and his passenger had been drinking alcohol for about six hours. Human life was needlessly lost. The sentence of the court, whilst taking the personal circumstances of the accused into account, must also reflect the importance that it attaches to the preservation of human life.

The approach of the courts is that persons convicted of culpable homicide arising out of a driving offence should generally be spared jail unless the degree of negligence was gross or reckless.

In *Dzvatu* above, the accused, whilst driving a military truck late at night, came out of a side road and ignored a "*Give Way*" sign. His vehicle hit a police vehicle that was travelling along the main road. Two policemen in the police vehicle died. The accused was found guilty of culpable homicide and fined \$250. On review the sentence was criticised. McNALLY J, as he then was, said<sup>7</sup>;

"To my mind, anyone who drives straight through a "*Give Way*" sign at a T-junction and hits a lighted vehicle travelling in the main road, killing two people, is *prima facie*

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<sup>7</sup> At p 138F - G

grossly negligent. When it also seems that that person is to an unspecified degree under the influence of alcohol, then that belief is confirmed. In view of the current increase in the number of tragedies on our roads, such conduct warrants a prison sentence. In principle that has always been the position – see *S v Lusenge* AD 138/81. . . . . I referred this matter to the Attorney-General and he agrees that a prison sentence and a prohibition from driving would have been appropriate.”

In *S v Mtizwa* the accused pleaded guilty to culpable homicide. He had driven onto his wrong 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. It was said, among other things, that where recklessness or gross negligence is shown, a prison sentence should be appropriate.

It was the same approach in *Chaita* and *Mapeka & Anor*, both referred to above, *In casu*, I have concurred with the degree of negligence assessed by the trial court even though, in my view, the conduct bordered on recklessness. But I consider the substantive sentence of two years imprisonment, with one year conditionally suspended, to be appropriate. Therefore it is hereby confirmed.

However, it is not clear from its reasons for sentence which particular section in the Road Traffic Act informed the court *a quo*'s decision to prohibit the accused from driving **for life** and **for all classes of motor vehicles**. From its analysis of the aggravating circumstances, it appears the court was convinced the accused had been drunk. It is also evident that the court accepted that the tractor in question was a heavy vehicle.

Undoubtedly, it must have been by virtue of s 64[3] above that the court considered, and did impose, a ban on driving, because s 49 of the Code that defines culpable homicide does not refer to any such things. On this, the court was correct.

Section 64[3] of the Road Traffic Act says:

“[3] 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].”

By virtue of the above provision, a conviction of culpable homicide, as defined by s 49 of the Code, that involves the driving of a motor vehicle, should, among other things, automatically compel the court to pay regard to the prescribed driving offences such as s 52 [negligent or dangerous driving]; s 53 [reckless driving]; and if a breathalyser test was conducted, sections 54 and 55 [driving with prohibited concentration of alcohol in blood] [driving whilst under the influence of alcohol or drugs or both].

Sub-section [1] of s 65 says a prohibition from driving *shall* extend to all classes of motor vehicles. But it does not say *for life*. And at any rate, the sub-section is subject to the whole section. Sub-section [3] gives the court the discretion to confine the prohibition to the class of motor vehicle to which the one being driven by the accused at the time of the commission of the offence belonged.

*In casu*, the record does not show whether or not the court considered s 65 at all, or if it did, whether it ever considered the issue of the discretion conferred by sub-section [3] above, and if it did, why it might have refrained from exercising it instead of opting for a life ban, and in respect of all classes of motor vehicles.

Where the vehicle concerned is a commuter omnibus or a heavy vehicle, and the accused has no previous convictions on a similar offence in the last ten years, s 54 of the Act [driving with prohibited concentration of alcohol in blood], and s 55 [driving while under the influence of alcohol or drugs or both] prescribe a prohibition from driving a commuter omnibus, or a heavy vehicle, for life.

The court *a quo* seems to have taken guidance from either or both of these two sections. That should explain the kind of prohibition that it imposed. If that is the case then it was a misdirection. To begin with, without scientific evidence, it was wrong to infer that the level of alcohol concentration in the accused's blood at the time of the accident exceeded the legal limit, or that he was under the influence of alcohol, or drugs, or both, to such an extent that he was incapable of having proper control.

Secondly, and as indicated already, it was wrong to assume that the tractor in question was a heavy vehicle when there was no such evidence, or such admission by the accused.

Thirdly, the relevant prohibitions from driving prescribed by s 54 [in particular, sub-section [4][a][ii][B]], and s 55 [in particular, sub-section [5][a][ii][B]], for first offenders, confine themselves to prohibitions in respect of commuter omnibuses or heavy vehicles, not all classes of motor vehicles. A life ban for all classes of motor vehicles is prescribed only for third time or subsequent offenders [s 54 [4][b][ii] and s 55[5][b][ii]]. This was not the case.

However, in spite of the above misdirection, it is still appropriate that some form of prohibition be imposed on the accused given the seriousness of his misconduct and the consequences that ensued. He is one who, when he comes out of jail, should not be allowed back on the road too quickly.

In accordance with the cardinal rule of criminal law that any doubt or lacuna should be exercised in favour of the accused, the tractor in question shall be treated as an ordinary motor vehicle, not a heavy motor vehicle. Furthermore, having assessed the accused's degree of negligence as gross, not recklessness, it must be s 52 of the Act [negligent or dangerous driving] that the court *a quo* ought to have sought guidance from in coming up with the appropriate prohibition from driving.

In terms of paragraph [a] of sub-section [4] of s 52, a court convicting a person of negligent or dangerous driving *may* ban him from driving for a period that it sees fit if in the last five years he has not been convicted of an offence of which dangerous driving, or negligent driving, or reckless driving of a motor vehicle on a road was an element. The issue of special circumstances does not come in. It only comes in in terms of paragraphs [b] and [c] that respectively deal with someone with previous convictions and the driving of a commuter omnibus or a heavy vehicle.

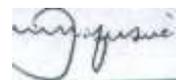
In the circumstances of this case, the accused should be prohibited from driving class four and class five motor vehicles for a period of twelve months which shall start to run upon his release from prison.

In summary therefore:

- 1 the conviction and sentence in count one are hereby set aside;
- 2 the conviction in count two is hereby confirmed;
- 3 the sentence in count two of two years imprisonment of which one year imprisonment is suspended for five years on condition that within this period the accused does not commit any offence involving negligent driving for which upon conviction he will be sentenced to imprisonment without the option of a fine, is hereby confirmed;
- 4 the prohibition from driving of all classes of motor vehicles for life is hereby set aside, and in its place substituted with a prohibition from driving class four and class five motor vehicles for a period of twelve months which shall start to run the date of the accused's release from prison.

The court *a quo* is hereby directed to recall the accused and pronounce to him the above altered verdicts and sentence.

6 February 2017



MAWADZE J agrees: \_\_\_\_\_