Judgment No. S.C. 51/85 Crim.
Appeal No. 169/85

EDWARD MUTUMHA v THE STATE

SUPREME COURT OF ZIMBABWE,
BECK, *JA*, GUBBAY, JA & McNALLY, JA,
HARARE, JUNE 3 & 10, 1985.

J.A Traicos, for the appellant

F.S. Chambakare, for the respondent

McNALLY, JA: The appellant was convicted of the offence of contravening Section 46(1) of the Road Traffic Act No. 48 of 1976. He was sentenced to a fine of $300, or in default of payment, 50 days' imprisonment with labour. His driving licence was cancelled and he was prohibited from, driving all classes of motor vehicles for six months. He appeals against conviction and sentence.

What happened was this. At about 10.30 pm on 29 October 1983 the appellant was driving towards the city centre and the complainant was driving in the opposite direction on the Mutare Road. Shortly before the point where Harare Drive intersects with the Mutare Road from the left (looking at events from the point of view of Harare) the two vehicles collided. Damage to the appellant's car was along the driver's side from the front to behind the driver's door. Damage to the complainant's Daihatsu 2-ton truck was not to the front. It began behind the driver's door and was not extensive.

The complainant remained at the scene and saw the policeman who arrived at the scene fairly promptly - probably 15 to 30 minutes after the accident. The appellant however did not stay. He left his car at the scene and was next heard of from

Parirenyatwa Hospital. He telephoned Sergeant Masvosva at Rhodesville Police Station sometime after 11 pm, and after the policeman at the scene had already advised Sergeant Masvosva that one of the parties had apparently absconded. He wanted to know where his car was. Sergeant Masvosva, realising that this was the missing driver, went to the hospital and saw the appellant who appeared to him to be drunk. He therefore took him to Harare Central Police Station where, at 1.25 am a breathalyser test showed a corrected blood alcohol reading of 132.

Traicos for the appellant made two submissions.

First he said that the appellant should have been believed when he said that he did his drinking after the accident and not before.

And second, he contended that there was no sufficient evidence to show that at the time of the accident his client was incapable of maintaining proper control of his vehicle.

The "hip-flask defence" as it was called in Simon Bouchet v The State, Supreme Court Judgment No. 13/85, is so patently untrue that I do not propose to analyse the evidence in detail.

It is enough to say that Sergeant Masvosva, whose evidence was believed by the magistrate, denies that the appellant ever mentioned to him that he drank brandy after the accident; the appellant himself admits that he said nothing about this to Inspector Mushipe who administered the breathalyser test, and gives a ridiculous excuse for his silence; and the three versions of his drinking which he gave in his warned and cautioned statement (dated February 1984), his defence outline, and his evidence, were not only inherently improbable and unsupported, but in important respects contradictory.

1 have no hesitation in rejecting the evidence of the appellant that he drank after the collision. I accept therefore

that some three hours after the accident his blood alcohol reading was 132 milligrams of alcohol per 100 millilitres of blood, as a result of alcohol ingested before the accident. Since the test took place some three hours after the accident there is no presumption as to the blood alcohol level at the time of the accident; and since the reading was below 150, there is no presumption that the appellant was incapable of having proper control of his vehicle. One must look at the facts of the accident itself.

This leads to the second leg of Mr Traicos' submissions.
He points out that it is only the evidence as to the location of the accident on the road which can show faulty driving, and on this point the evidence is of one interested party against another. The appellant says the accident was on his side of the road, and that the complainant was at fault. The complainant says the opposite.
The appellant should be given the benefit of the doubt.

It is an unfortunate feature of the case that the Patrol Officer who went to the scene with reasonable promptitude was wholly unable to reproduce the facts accurately in his Traffic Accident Report Book. It is quite clear that he accepted the version of the complainant. He recorded "I think 2nd party (appellant) crossed the double lanes (sic) and caused the accident". Yet on his sketch plan he showed the point of impact as being on the appellant's side of the road. He also confused the description of the parties on the sketch plan. His evidence showed considerable confusion between left and right. All in all, the magistrate was right I think to ignore his evidence completely,

We are left therefore with the evidence of the complainant and that of the appellant. The complainant gave his evidence well and was believed by the magistrate. He says the appellant came across to his side of the road and collided with his vehicle. He says he stopped his truck just past the intersection of Harare Drive

and walked back to the appellant's car. He found the appellant leaning over the bonnet of his car. One of the passengers confirmed that no-one was hurt and that they had sent for the police. The complainant did not identify himself as the other party He simply went back to his truck and waited for the police. The police came within a few minutes and took a statement from him.
By that time the appellant was nowhere to be seen.

There is no suggestion that the complainant was anything

but sober. His vehicle was damaged behind the driver's door
only, which suggests that his vehicle was struck by the other car rather than vice versa. When one sets this against the untruthful evidence of the appellant, coupled with the fact of his disappearance from the scene and his drunken state three hours later, it seems to me that the magistrate had every justification for accepting the complainant's version of the affair in preference to the appellant's.

Once it is accepted that the accident occurred as the complainant describes it, then the only reasonable conclusion on the facts of the case is that the appellant drove across the solid white line and into the complainant's vehicle because he was incapable of maintaining proper control of his own vehicle by reason of the alcohol he had consumed.

Accordingly I am satisfied that the conviction was a proper one.

As far as sentence is concerned, the fine of $300 is by no means severe given that the appellant earns a net salary of over $800 per month. The case of Mabasa (GS 133/81) involved a fine of $175 on a person earning a mere $200 a month. One must allow for the decrease in the value of money since then as well as the increase in the need for deterrent sentences for offences of this type. Nyashanu's case (SC 167/82) involved a fine of $200 for driving where no collision took place. FIELDSEND CJ remarked "it cannot

seriously be said that a fine of 20G is manifestly excessive." Finally Mr Traicos cited Mpofu's case H-3-86—84.

In that case the magistrate imposed a sentence of 150 on a man apparently already serving a sentence of two years' imprisonment.

The fine was not in issue in the review judgment. The case is not a precedent as to quantum.

The other consequences are automatic in terms of the section. I would therefore dismiss the appeal both against conviction and sentence.

BECK, JA: I agree.

GUBBAY, *JA:* I agree.

Winterton, Holmes *&* Hill, appellant's legal representatives