

THE STATE
versus
CHAITA THOMPSON

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 23 July 2011

CRIMINAL REVIEW

BHUNU J: On 5 November 2010 the accused was driving a Toyota Hiace mini bus commonly referred to as a Combi along the Harare – Bulawayo Road towards Bulawayo. Such vehicles are notoriously used as public service motor vehicle for hire or reward.

At the 136 kilometer peg he overtook a haulage truck pulling two trailers in front of oncoming traffic. As a result he abruptly moved back to the left sideswiping with the haulage truck. He then swerved to the right thereby colliding with an oncoming Toyota Canter motor vehicle.

As a result of the collision the Toyota canter was extensively damaged, two passengers died on the spot and a third died at hospital.

The accused admitted being negligent in the following material respects which led to catastrophic results:

1. overtook across double prohibition lanes,
2. traveled at an excessive speed under the circumstances,
3. failed to stop or act reasonably when an accident appeared imminent, and
4. overtook in front of oncoming motor vehicle.

Clearly the accused's manner of driving constituted reckless driving in contravention of s 53 of the Road Traffic Act [*Cap 13:11*]. The accused having caused the death of 3 people in the course of driving recklessly he ought to have been charged under the Road Traffic Act and not the Criminal Law (Codification and Reform) Act.

Fortunately the law maker had foreseen the possibility of such accused persons escaping the stiff penalties of the Road Traffic Act through inadvertence and made appropriate safeguards.

Section 64 requires that a person convicted of a criminal offence arising from the driving of a motor vehicle be sentenced as if he had been convicted under that Act regardless of the law under which he might have been charged and convicted. The section provides as follows:

“64 Prohibition from driving on conviction of certain offence

- (1)
- (2)
- (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).”

Section 64 (3) of the Road Traffic Act therefore renders the accused liable to the prescribed minimum mandatory penalties s 53 which provides for minimum mandatory penalties for culpable homicide arising from the driving of a motor vehicle provides as follows:

“53 Reckless driving

- (1) In subsection (4)-

“similar offence” means an offence in terms of subsection (2) involving the driving of a motor vehicle or 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;

“special circumstances” means special circumstances surrounding the commission of the offence concerned, but does not include special circumstances peculiar to the offender.

- (2) A person who drives a vehicle on a road recklessly shall be guilty of an offence and liable-
 - (a) subject to section *eighty-eight A*, where the vehicle concerned was a commuter omnibus or a heavy vehicle, to imprisonment for a period not exceeding fifteen years and not less than two years; or
 - (b) in any other case, to a fine not exceeding level or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment.
- (3) A person charged with an offence in terms of subsection (2) may be found guilty of an offence in terms of section *fifty-one* or *fifty-two*, if such are the facts proved.
- (4) Subject to Part IX, a court which convicts a person of an offence in terms of subsection (1) involving the driving of a motor vehicle shall-
 - (a) if the person has not previously been convicted of a similar offence within a period of ten years immediately preceding the date of such first-mentioned conviction-
 - (i) in the case of a first-mentioned conviction which does not relate to the driving of a commuter omnibus or a heavy vehicle, prohibit the person from driving for a period of not less than six months; or
 - (ii) in the case of a first-mentioned conviction which does relate to the driving of a commuter omnibus or a heavy vehicle, prohibit the person driving-
 - A. a motor vehicle other than a commuter omnibus or a heavy vehicle for a period of not less than six months; and
 - B. a commuter omnibus or a heavy vehicle during his lifetime; or
 - (b) if the person has previously been convicted of a similar offence within the period referred to in paragraph (a)-
 - (i) in the case of a second conviction-

- A. which does not relate to the driving of a commuter omnibus or a heavy vehicle, prohibit the person from driving for a period of not less than twelve months; or
- B. which does relate to the driving of a commuter omnibus or a heavy vehicle, prohibit the person from driving-
 - I. a motor vehicle other than a commuter omnibus or a heavy vehicle for a period of not less than twelve months; and
 - II. a commuter omnibus or a heavy vehicle during his lifetime; or
 - a. in the case of a third or subsequent conviction, prohibit the person from driving during his lifetime.

And shall, if the person is the holder of a licence, cancel the licence in respect of motor vehicles of the class to which such prohibition from driving extends:

Provided that such court may decline to prohibit the person from driving if it-

- (a) considers that there are special circumstances in the case which justify the court in so declining; and
- (b) endorses the special circumstances referred to in paragraph (a) on the record of the case when passing sentence.

One can never over-emphasise the need for magistrates to read and understand the law pertaining to sentence before passing sentence particularly in serious offences involving the loss of life. In this case it is clear that the trial magistrate did not carry out the necessary research before passing sentence. He therefore passed an incompetent sentence oblivious of the mandatory statutory provisions.

Failure to observe mandatory statutory provisions amount to a serious misdirection warranting interference on review.

It is accordingly ordered:

1. that the sentence imposed by the trial magistrate be and is hereby quashed and set aside.
2. That the matter be and is hereby remitted to the trial court for resentencing in terms of the mandatory statutory provisions.

CHATUKUTA J agrees