CHAMUNORWA MACHIMBIDZOFA
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU& CHIKOWERO JJ
HARARE, 18 & 25 September 2023

Criminal Trial

*T K*Bvekwa, for the appellant
C Muchemwa, for the respondent

CHIKOWERO J:

1. This is an appeal from the judgment from the Magistrates Court convicting the appellant of culpable homicide as defined in S 49(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The sentence imposed was 5 years imprisonment of which I year was suspended on the usual condition of good behaviour. The appellant was also prohibited from driving for 5 years and his drivers licence cancelled. The sentence has also been challenged on appeal.
2. The appellant was employed by Tynwald High School, Harare, as a driver. On 14 October 2022 he was driving the school's bus along the Rusape- Nyanga road. Aboard were 45 passengers made up of school children and 2 teachers. They were on a trip to Nyanga. The journey had commenced in Harare. Around 6 pm, an accident occurred. It claimed the lives of 6 children and a teacher. Having found that the appellant was reckless in his manner of driving, hence the accident and the resultant deaths, the trial Court convicted him of culpable homicide and imposed the sentence that we have already adverted to.
3. The Court found that the appellant travelled at an excessive speed in the circumstances, that he failed to keep a proper lookout of the road ahead, that he failed to keep the bus under control and that he failed to stop or act reasonably when the accident seemed imminent.
4. It rejected his defence that the brakes had suddenly failed as he tried to reduce speed behind a slow moving Honda fit, that he therefore moved to the right lane to overtake

that vehicle but, that the bus was hit at the rear by logs carried by an oncoming truck. His explanation was that the logs were secured across the truck and that the contact with the logs occurred as appellant had reverted to his lane but could not move further to the left of the road lest the bus would fall down the slope. As it turned out the impact of the logs on the bus compounded by the malfunctioning brakes (which disabled him from reducing speed) resulted in the bus plunging down the 5 metres . Slope anyway. The trial Court found all this to be manifestly false.

5. We think that the learned magistrate was right. We agree that there was overwhelming evidence of reckless driving on the part of the appellant.
6. The Court did not misdirect itself in finding that the appellant was travelling at an excessive speed at the material time. Two firewood vendors testified for the state. They were conducting their trade by the side of the road just before the accident scene. They were shocked by the excessive speed at which the bus was travelling. They wondered whether the driver would be able to negotiate the sharp curve ahead of him. As if on cue, both stood up. No sooner had they done so when they heard a booming sound in the direction taken by the bus. Thence they rushed but before reaching the scene of the accident they heard school children screaming for help. The driver had indeed failed to negotiate the curve. The bus had veered off the road and plunged down the slope, which was on the left side of the road.
7. Although both conceded that they were not drivers the Court accepted the vendors' testimony that the appellant drove at an excessive speed. The duo assessed the speed of the bus against that of other motorists when approaching the sharp curve hence their direct evidence that the bus was being driven at an excessive speed as it passed them and headed towards the sharp curve. The vendors were indeed independent witnesses. They had no interest in the matter. They corroborated each other. Their testimony in respect of not only the speed of the bus but the falsity of the appellant's defence that there was a Honda Fit which he overtook and the truck carrying logs was corroborated by Gladys Gadzikwa. Gadzikwa, a teacher at Tynwald High School, was a passenger in the bus. She occupied a seat behind the driver (appellant). She was a licenced driver. She testified that the appellant was speeding and that her sixth sense told her that the appellant would fail to negotiate the sharp curve ahead. This was so because he did not reduce speed. Indeed, what she feared became reality. These three witnesses were found

to be credible. We record also that the Court was impressed with the demeanour of Gadzikwa. It said so. We are unable to say the assessment of the credibility of these three witnesses defies reason and common sense. Accordingly, we cannot interfere with the finding of fact made pursuant to such assessment. See *S* v *Mlambo* 1994 (2) ZLR 410(S) and *S* v *Soko Sc* 118/92.

8. Further, the investigating officer and the expert from the Vehicle Inspection Department independently concluded that the appellant was speeding at time of the accident. They laid out the basis therefor. So did the accident evaluator who testified for the state. All these witnesses were believed. We have not been persuaded to disagree with the learned magistrate's assessment in this respect.
9. The appellant himself could not tell the Court the speed at which he was travelling. He said the speedometer was not functional yet claimed, in the same breath, that he was travelling at 30 kilometres per hour. The trial Court, after wondering how the appellant could testify to this speed when he was saying the speedometer was not functional, concluded that the appellant was out rightly lying that he was travelling at 30 kilometres per hour. It accepted evidence placed before it by the prosecution, the basis of which resonated with the circumstances of the matter as a whole.
10. The appellant openly admitted that he did not see the danger warning signs. These related to the sharp curve ahead. The Court found that he was thus not keeping a proper look out. This finding has not been appealed.
11. The court's finding that the brakes were not defective is unimpeachable. The expert evidence of the official from the Vehicle Inspection Department was not controverted by other expert evidence. The official examined the bus the day after the accident had occurred, tested the brakes, found them to be functional, and rendered his report. The same was produced as an exhibit. He was categoric that the fact that the brakes had been dislodged could not and did not affect his ability to test them. We have already indicated that no other expert contradicted him. The appellant's own accident evaluator who did not even test the brakes (because he had no such expertise) conceded that he could not dispute the evidence of the Vehicle Inspection Department official. This was despite the fact that the defence witness had averred in his report (merely on the basis of what he was told by the appellant and his own lay person's visual perception of the damaged bus) that the accident was a result of the defective nature of the bus. We add that the

school's mechanic testified that he had undertaken an overhaul of the braking system of the bus and had test driven it in the presence of the appellant a day before the fateful trip was undertaken. He was found to have corroborated the other expert testimony that there was nothing wrong with the braking system, thus disproving the appellant's defence that the accident was partly caused by the failure of the braking system.

12. Having found that the defence was beyond reasonable doubt false, the Court was on firm ground in finding that having raced through danger warning signs, which he did not even notice, the appellant disabled himself from stopping or acting reasonably when the accident seemed imminent. That he failed to keep the vehicle under proper control was evidenced by the vehicle veering off the road at the sharp curve and plunging down the slope. This was a one vehicle accident. No other conclusion than that the appellant was reckless in his manner of driving was possible under the circumstances.
13. The appeal against the conviction is unmeritorious.
14. We turn to the appeal against the sentence.
15. It too is without merit.
16. The appellant is in error in contending that the court sentenced without making a precise finding on the degree of negligence. The reasons for sentence clearly demonstrate that the Court found that the appellant was reckless in his manner of driving. The court referred to *S* v *Chitepo* HMA 03/17 where Mafusire J said:

> " 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."

In setting out its finding on the degree of negligence the Court said:

> " *In casu*, accused recklessly drove at an excessive speed in an area full of curves and he did not pay attention to road signs. The whole purpose of reducing speed was to enable the bus to negotiate the curve and to stop suddenly if need be"

If this is not a clear finding of recklessness as the degree of negligence then nothing else will be. Although the Court did not use the phrase " reckless driving" in convicting the appellant there can be no doubt that, in making the findings of fact on which the conviction rested, it was satisfied that the appellant was reckless in his manner of driving. It could not be anything but recklessness for a holder of a defensive driving certificate in particular (the appellant was such) to drive a school bus at an excessive speed in an area full of curves without even caring to look out for road signs. He had 45 passengers on board, 2 of whom were teachers with the

rest being school children. He failed to advert to the consequences of his driving conduct and to take reasonable steps to prevent such harm from occurring. That is reckless driving.

17. The appellant is also in error in challenging the finding that there were no special circumstances. What he had placed before the Court, contending that it constituted special circumstances, was his defence. A defence which had been rejected as manifestly false could not again be brought in, through the back door, as a special circumstance. Accordingly, since there were no special circumstances, the Court correctly prohibited the appellant from driving. It also follows that the cancellation of the appellant's drivers licence cannot be faulted.
18. The court justified the imposition of the custodial sentence in these words:

> "According to section 49 a person convicted of culpable homicide shall be liable to imprisonment for life or any definite period of imprisonment or a fine up to level 14 or both. A fine or community service as suggested by defence counsel will send a negative message to the society and would-be offenders. Moreover members of the public will lose confidence in the courts and administration of justice. There is an increase in road accidents in the district hence there is [need to] curb them by passing stiffer penalties. A custodial sentence is normally imposed in cases where the driver has been reckless or grossly negligent. A custodial sentence is appropriate in this case because there is need for road users especially public vehicle drivers to drive with care and value the importance of human life."

19. These are good reasons for settling for the stiff sentence imposed *a quo*. It must not be forgotten that six school children and their teacher perished all because of the appellant's recklessness while driving on a public road. Those pupils' potential contribution to national development was lost. Many families, including the school community, were undoubtedly plunged into mourning. Their teacher, a useful citizen of this country, had his life cut short at the prime age of 37 years. We think that the saying that life begins at 40 years means that it is usually at that age that a person's life begins to take shape pursuant to the investment made into that person. The deceased were all denied that opportunity.
20. Sentencing is in the discretion of a trial court. Although the custodial sentence imposed in this case appears to us to be stiff, the circumstances of the matter are such that we are unable to view it as being disturbingly inappropriate. Hence, we cannot interfere. See *S* v *Ramushu & Ors* S 25/93.
21. The accident occurred on 14 October 2022. The trial commenced on 19 January 2023. The appellant was convicted and sentenced on 26 April 2023. The bail proceedings are

part of the record. The appellant, represented by Mr Bvekwa, appeared before the same magistrate who presided over the trial in an application for bail pending trial. This was on his initial court appearance. The application for bail pending trial was dismissed, with the appellant being remanded to what was supposed to be his trial date, 17 November 2022. We think that it was a result of human error on the part of the bail court that it did not record the date of applicant's initial court appearance. What we know is that the date fell somewhere between 14 October 2022 and 17 November 2022.

22. The appellant complains that the court misdirected itself in not considering the period that he endured pre-trial incarceration in its assessment of sentence. We are prepared to give the appellant the benefit of the doubt by proceeding on the basis that the pre-trial incarceration spanned from the middle of October 2022 to 19 January 2023, when the trial started. This means that the appellant underwent pre-trial incarceration for four months. Considering the need to gather expert evidence for purposes of the trial, we do not agree with Mr Bvekwa that the four month period is an unduly long stint such as should have had the effect of a marked reduction in the sentence. It is true that the learned magistrate appears not to have considered the pre-trial incarceration in assessing a suitable sentence. To that extent he misdirected himself because that fact had been placed before him in mitigation. However, we take the view that the misdirection did not result in a gross miscarriage of justice. We think that the sentiments of MAKARAU JP (as she then was) in *S* v *Kwenda & Anor* HH 37/10 apply to the present matter with equal force. There, at p 3 of the cyclostyled judgement, the court said:

> "It is not every misdirection that will entitle an appeal court to interfere with the discretion of the trial court. Only an improper or unreasonable exercise of discretion will be considered as a misdirection that calls for the appeal court to exercise fresh discretion in the matter."

23. Consequently, the trial court's failure to consider the appellant's pre-trial incarceration in assessing sentence does not move us to interfere with its exercise of discretion.

24. Finally, we think it academic to discuss the merit or otherwise of the last ground on which the sentence was attacked. Nothing turns on it. The ground of appeal reads:

> "The court *a quo* erred in assessing sentence when it found that there was no difference between culpable homicide arising out of a motor vehicle accident and that which arises out of other means when the principles that given (sic) the crimes are clearly different."

25. This ground demonstrates an attempt to draw the court into addressing that which is nothing more than argumentative on the part of the appellant. The court sentenced him

on the basis of principles applicable to culpable homicide cases arising out of a road traffic accident where the offender would have been found to have driven a public service vehicle in a reckless manner. It applied those principles to the facts of the matter before it and, having made allowance for the mitigation, imposed a sentence which we have found to be merited. In any event, what is here attacked is not a finding but a line of reasoning. It was a view which the Court expressed in passing. It did not inform the assessment of an appropriate sentence

26. In the result, **IT IS ORDERED THAT**:

The appeal be and is dismissed in its entirety.

CHIKOWERO J:……..

ZHOU J:…….. I agree

Bvekwa Legal Practice, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners