THE STATE
versus
TAPIWA ALFRED LATIMU

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 26 February 2025

Review Judgment

MUSITHU J: This record of proceedings was placed before me following a scrutiny of the proceedings of the trial court by the learned regional magistrate. Having scrutinised the proceedings, the learned regional magistrate was of the view that the charge preferred against the accused person was not the proper one, having considered the circumstances of the matter. The accused person was charged and convicted on his own plea of guilty for contravening s 52(2) of the Road Traffic Act[1] (the Act), that is negligent driving. The learned regional magistrate was of the view that the admitted facts disclosed a more serious charge of contravening s 53 (2) of the Act, that is reckless driving, which called for a stiffer penalty.

The brief background facts of the matter were as follows. The accused person was arraigned before the Murewa Magistrates Court for contravening s 52 (2) of the Road Traffic Act, that is 'negligent driving'. It was the State's case that on 1 September 2024, the accused person, a male adult aged 41, while driving a private vehicle namely a Toyota Corolla with registration number AEM 8338, caused an accident in which one Innocent Ali, who was the only passenger in a private vehicle, a Honda Fit, was seriously injured.

It was alleged that on the said day, the accused person was driving his vehicle along the Harare-Nyamapanda Road due west towards Harare with four passengers on board. On approaching the 40 km peg along the said road, the accused person tried to overtake another vehicle. While in the process of overtaking the said vehicle, he saw an oncoming vehicle, being the Honda Fit, with one passenger on board. The accused person veered to the far-right side of the road where he hit the Honda Fit on the driver's side. The driver of the Honda Fit sustained serious injuries.

[1] [*Chapter 13:11*]

It was the State's case that the accused person was negligent in one or more of the following respects;

(a) Failure to stop or act reasonably when the accident seemed imminent.

(b) Failure to have a proper lookout of the road ahead.

(c) Excessive speed in the circumstances.

The accused person was convicted on his own plea of guilty and consequently sentenced to pay a fine of $300 in default of payment 3 months imprisonment. In addition, the accused person was ordered to surrender his driver's licence within 7 working days for endorsement.

The learned regional magistrate was of the view that the accused person's degree of negligence could not be rated as 'ordinary' under the circumstances. In a minute dated 23 October 2024, the regional magistrate raised a query with the trial magistrate on why he proceeded with a lesser charge when the facts presented explicitly pointed to a more serious charge. The query was couched as follows:

> "Having regard to all the circumstances was the accused person properly charged. Can we say accused's negligence was just ordinary?"

The trial magistrate promptly responded to the query in a letter dated 24 October 2024. The letter reads in part as follows:

> "…In my view the charge was proper and the reason(s) are as follows.
> The essential elements of the charge are as follows.
> Driving a motor vehicle negligently in the road. Negligence refers to the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do or the doing of something which a reasonable and prudent man would not do
> ***S v Domu HMA 35/23.***
>
> The proved facts are as follows, offender was overtaking (on an area where road markings allow overtaking). In the course of overtaking he faced an oncoming vehicle and he swerved to the far right in a bid to avoid collision. His explanation for swerving to the right instead of swerving to the left is alluded to the facts that the car he overtook increased speed so swerving to left lane was impossible
> Explanation is attached on page 4 & 5 of the record of proceedings. With this the trial magistrate is fortified that the charge is appropriate.
> Further, the trial magistrate refers to a case ***S v Nicholas Mumpande HB 108/22*** where a similar issue was raised, however in that case the proved facts are that the offender was opposing a one way, i.e., on the incorrect side of the road. In my view the circumstances are comparable"

The learned regional magistrate did not agree with the views of the trial magistrate. In his referral letter accompanying the record, the learned regional magistrate observed that from a reading of the Traffic accident book (TAB) filed of record, the accident took place at a straight

stretch of the road. The accused person did not suggest in his version of events that he did not see the oncoming traffic. According to the version of the first party, who was the driver of the Honda Fit, the accused person was overtaking other cars when the accident occurred. There was no explanation as to why the accused person failed to slow down and return to his lane after realising that the car that he wanted to overtake had increased its speed. There was also no explanation as to why he chose to move to the extreme right of oncoming traffic. The learned regional magistrate further observed that the accused person's overall conduct showed that he failed to act reasonably when the accident seemed imminent. It was also clear from the accused person's version that he was driving at an excessive speed. He tried to overtake the car in front of him and did so in the face of oncoming traffic.

The observations of the learned regional magistrate were spot on and apposite. There is nothing to add or subtract. The circumstances of the case and the way the accident occurred clearly point to reckless driving. It is also clear that the accused person was speeding at the material time. Had he been more careful and observant, he would have reduced speed and returned to his lane the moment he realised that the vehicle he wanted to overtake had increased its speed. His failure to return to his lane and choosing to drive on the extreme right side of the lane of oncoming traffic showed reckless conduct. The accused person should have been charged of reckless driving in terms of s 53(2) of the Act. Reckless driving denotes driving in a manner that deliberately or intentionally exposes others to danger. Negligent driving on the other hand denotes driving in a manner that does not reflect the standard of care expected of a road user under similar circumstances.

A conviction on a charge of reckless driving attracts a stiffer sentence as compared to a conviction on a charge of negligent driving. In terms of s 53(2)(b) of the Act, a conviction on a charge of reckless driving attracts a fine not exceeding level twelve or imprisonment for a period not exceeding ten years or to both such fine and such imprisonment. A conviction on a charge of negligent driving on the other hand attracts a fine not exceeding level seven or imprisonment for a period not exceeding six months or both such fine and such imprisonment.

The circumstances of this case bring to the fore the different roles of the players in whose hands the administration of the criminal justice system is reposed. How should the trial court as the trier of facts deal with a scenario where the State preferred a lesser charge in circumstances where a more serious charge was appropriate? In *S v Nicholas Mumpande* HB 108/22, DUBE-BANDA J was faced with a similar scenario where he was required to review proceedings in which a regional magistrate made similar observations as in *casu*, after a charge

of negligent driving was preferred instead of the more serious charge of reckless driving. The learned judge made the following pertinent remarks:

> "The Regional Magistrate seems to suggest that the trial magistrate should have insisted on the correct charge, which answers to the facts of the case. Prof. G. Feltoe in the *Magistrates' Handbook* (Revised August 2021) p. 156-157 opined as follows on this issue:
>
> > The general rule is that the prosecutor is *dominus litis* and has the prerogative to prefer charges against X. See: *S v Sabawu & Anor.* 1999 (2) ZLR 314 (H). However, this rule is not absolute. In the case of *S v Thebe* 2006 (1) ZLR 208 (H) the judge pointed out that while the prosecutor was *dominus litis,* this rule is not absolute. The trial court, as a trier of facts whose main object is to do justice between man and man, therefore has inherent powers to ensure that suitable charges are preferred against those who appear before it. It is, therefore, within its powers to prevent the State from proceeding on a lesser charge where justice clearly requires a more serious one.
> >
> > It is not in the interests of justice that a person should be charged with a lesser offence when the admitted facts show that she/she is guilty of a more serious charge. In such an event, the trial court should at least query why X is being charged only with the less serious charge. Thus if the State allegations clearly suggest that X has committed the crime of assault with intent to do grievous bodily harm but the State has brought only a charge of common assault against X, the magistrate should question the prosecutor on why the lesser charge has been preferred. Similarly, the magistrate should query why a person has only been charged with contravening section 45(1) of the Road Traffic Act [*Chapter 13:11*] if the evidence discloses a contravention of section 46(1) of this Act. *S v Chidoda & Anor.* 1988(1) ZLR 299 (H). (My emphasis)."

I associate myself with the views of the learned judge. The State is the *dominus litis* in criminal prosecutions and it enjoys wide discretion in the preference of charges and prosecution of criminal cases. Section 260 of the Constitution entrenches the independence of the Prosecutor General's office. Be that as it may, the fight against crime and the successful prosecution of cases is a collective responsibility which requires the active participation of key stakeholders such as the Police, the community at large and the judiciary, just to mention a few. These stakeholders must complement each other in the fight against crime to foster public confidence in the administration of justice and the rule of law. Public confidence in the administration of justice would be eroded if the Police and the State fail to prefer criminal charges that are proportionate to the crime committed.

As correctly observed by Prof G. Feltoe in the dictum above, the trial court is also obliged to query why a less serious charge was preferred. After all, it is the trial court that must pronounce a verdict which will determine the level of penalty that an accused person must contend with. The trial court should not endorse a process that is palpably wrong, for in doing so the court will be lending itself to injustice and lawlessness, which is the antithesis of what the rule of law commands.

The learned trial magistrate had already taken a position regarding the propriety of the charges, as is clear from the letters that I reproduced above. It was the view of the learned trial magistrate that the charge preferred by the State was appropriate and unimpeachable. In the court's view, the position adopted by the learned trial magistrate was not entirely correct for reasons highlighted above. This court does not therefore consider that these proceedings were in accordance with real and substantial. For that reason, the court will decline to certify the proceedings as having been in accordance with real and substantial justice and accordingly withhold its certificate.

MUSITHU J: …….

MUNANGATI-MANONGWA J: …… **Agrees**