HB 386/17
HCAR 1135/17
CRB LPN 76-7/17

THE STATE

Versus

TAFARA NYANDORO

And

EPHRAIM NKOSILATHI PHIRI

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 18 JANUARY 2018

Review Judgment

TAKUVA J: Both accused persons appeared before a magistrate at Lupane charged with the crime of contravening section 49 of the Criminal Law (Codification and Reform) Act Chapter 9:23 "Culpable Homicide". The specific allegations being that "on 21 November 2016 and at the 60km peg along Bulawayo – Victoria Falls road Tafara Nyandoro and Ephraim Phiri, one or both of them negligently drove private motor vehicles namely a Toyota Noah registration number ACR 3141 and a Mazda Titan truck registration number ADE 8407 respectively with the lighter Toyota Noah vehicle weighing 1200kg net towing the heavier Mazda Titan truck vehicle weighing 2000kg net resulting in a road traffic accident that is to say they lost control of their vehicles which overturned resulting in the death of Future Ncube due to injuries sustained from the accident and failed to guard against that possibility".

The facts are that on 21 November 2016 at approximately 0015 hours accused 1 was towing a Mazda Titan weighing 2000kg, using a Toyota Noah weighing 1200kg to Bulawayo. There were 14 passengers in the Toyota Noah and 3 in the Mazda Titan truck. Along the way while negotiating a steep descent, the towed Mazda gained momentum and pushed the Toyota Noah to the right lane. As a result both drivers lost control of the vehicles which overturned killing Future Ncube, a male juvenile aged 15 who was aboard the Toyota Noah. The rest of the passengers were injured. After a post mortem examination the pathologist concluded that the cause of death was "Traumatic shock and severe head trauma due to road traffic accident".

The state alleged that both accused persons were negligent in the following particulars;

"1. Failing to observe statutory provision, section 69(i)(b) of the Road Traffic (Construction Equipment and Use) Regulations SI 129/2015" the net mass of the motor vehicle being towed exceeds the net mass of the towing motor vehicle."
2. Travelling at a speed which was excessive under the circumstances.
3. Failing to keep vehicles under proper control."

The two pleaded guilty, were convicted as charged and sentenced to pay a fine of US$300,00 or in default of payment 6 months imprisonment. In addition 6 months imprisonment was suspended for 5 years on conditions of good behaviour. Both accused were prohibited from driving all classes of motor vehicles for 12 months. After sentence accused 2 complained to the Senior Regional Magistrate Western Division that he had not tendered a plea of guilty at all before the trial magistrate. He cited intimidation and undue pressure exerted on him by the trial magistrate to admit to the charge.

The complaint was referred to the scrutinizing Regional Magistrate Hwange who after going through the record of proceedings raised a query with the trial magistrate in the following terms:

> "Attached is a criminal record of proceedings which you dealt with on the 4th of April 2017 involving two accused persons cited above. One of the accused Ephraim N. Phiri lodged a complaint in Bulawayo with respect to the manner in which you handled this case. The complaint was lodged at the office of the Senior Regional Magistrate, Western Division, Mr Utahwashe and the latter directed the matter to my office on the basis that I scrutinize cases from your court.
>
> I went through Ephraim N. Phiri's complaint as reflected on the papers that I have attached. He contends that from the onset, even during investigation, he never admitted to the charge. His letter of complaint is self-explanatory. I have, for your convenience attached the accused's papers of complaint. That is;
>
> 1. Letter of complaint
> 2. Defence outline which he alleges you read in court and rejected
> 3. The attending detail's affidavit
> 4. His extra curial statement
> 5. His version regarding the accident as captured in the traffic accident book (TAB).

Was the accused's plea of guilty as reflected in your record a genuine admission of the charge, in view of his protestations that he was denying the charge.

May I have your response as soon as possible."

The trial court's response was as follows:

"…

When Ephraim Nkosilathi Phiri appeared before me jointly with his co-accused Tafara Nyandoro, what I remember is that accused did not understand the charge levelled against him in clear terms. I then explained to the accused that the basis of the charge was that the two vehicles which were towing each other were combined into one by the tow bar making them co-drivers in the respective combined vehicles. The blunder and conduct of one vehicle affected the other hence the imputation of liability between the two drivers. The accused persons consensually agreed to the towing of the vehicles which were out of proportion to each other in mass and were also laden with passengers. I felt the court was duty bound to explain the charge to the accused in terms of Sec271(2)(b) of the CPEA. Accused satisfied the court that he now finally understood the charge and pleaded guilty to the charge with the resultant recording of the plea. I do not remember any time when accused tendered the alleged defence outline and also no such defence outline was filed of record. For avoidance of doubt the State could also confirm this fact.

Accused did not at any stage deny the charge. Even accused's warned and cautioned statement attached to this record confirms the accused's position where accused states that "I admit to the charge leveled against me … I applied brakes but the brake pedal was very hard and the vehicle could not stop."

It would seem accused's complaint came as an afterthought contrary to the claim that he pleaded not guilty *ab initio*. If this came as an afterthought, the appropriate course of action available to the accused was an appeal against both conviction and sentence instead of raising a false complaint.

In my view the proceedings were conducted above board hence accused was duly convicted and properly sentenced.

I greatly appreciate any guidance incidental to the manner in which the proceedings were conducted." (my emphasis)

Upon receipt of the above response, the learned Regional Magistrate referred the record of proceedings to the Registrar of this court for it to be placed before a judge on review. In his

comments the Regional magistrate outlined the broad facts and attached documents submitted by accused 2, Ephraim Nkosilathi Phiri. As regards the key issue, the Regional Magistrate proceeded thus;

> "3. The core of my query to the trial magistrate was whether the pleas proffered by the accused persons were satisfactorily genuine as envisaged by section 271(2)(b) of the Criminal Procedure and Evidence Act CAP 9:07, if regard is had to accused 2's documented and consistent protestation denying the charge.
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> In his response (attached), the trial magistrate is of the view that his explanation of the charge was well understood by both accused and their pleas were genuine.
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> 4. It is my considered view that this matter be reviewed not in the context of a complainant, but in the context of whether there was a procedural irregularity to proceed with pleas when accused persons were denying or when their pleas were not satisfactorily genuine.
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> It is my considered view that the trial magistrate's effort to explain how culpability is imputed on both accused was a red flag to proceed to trial.
>
> 5 It is also my considered view that after a genuine and whole hearted plea accused cannot turn around and say I never admitted to the charge.
>
> 6 The record of proceedings superbly gives an impression that the two accused were genuinely admitting without an iota of denial. It will be noted that accused 2's warned and cautioned statement reflects that he was raising a defence of sudden emergency.
>
> Out of interest though, the contents of the record of proceedings, with respect to Accused 2 Ephraim Nkosilathi Phiri are inconsistent with his version regarding the accident as captured in the traffic accident book as well as his warned and cautioned statement, which in my view, are statements of denial giving credence to his complaint".

The issue is whether or not the proceedings following the guilty pleas were properly conducted. The correct procedure is set out in section 271(2)(3) of the Criminal Procedure and Evidence Act.

Section 271(2) states:

"Where a person arraigned before a Magistrates' Court on any charge pleads guilty to the offence charged or to any other offence of which he might be found guilty on that charge and the prosecutor accepts that plea –

(a) …
(b) the court shall, if it is of the opinion that the offence merits any punishment referred to in subparagraph (i) or (ii) of paragraph (a) or if requested thereto by the prosecutor –
    (i) explain the charge and the essential elements of the offence to the accused and to that end require the prosecutor to state, in so far as the acts or omissions the charge is based; and
    (ii) inquire from the accused whether he understands the charge and the essential elements of the offence and whether his plea of guilty is a admission of the elements of the offence and of the acts or omissions stated in the charge or by the prosecutor;
    and may, if satisfied that the accused understands the charge and the essential elements of the offence and that he admits the elements of the offence and the acts or omissions on which the charge is based as stated in the charge or by the prosecutor, convict the accused of the offence to which he has pleaded guilty on his plea of guilty and impose any competent sentence or deal with the accused otherwise in accordance with the law;

    …
(3) Where a magistrate proceeds in terms of paragraph (b) of subsection (2) –
    (a) the explanation of the charge and the essential elements of the offence; and
    (b) any statement of the acts or omissions on which the charge is based referred to in subparagraph (i) of that paragraph; and
    (c) the reply by the accused to the inquiry referred to in subparagraph (ii) of that paragraph; and
    (d) any statement made to the court by the accused in connection with the offence to which he has pleaded guilty; shall be recorded." (my emphasis)

I take the view that the trial magistrate in using s271(2)(b) and (3) adopted a slap-dash approach for the following reasons;

Firstly, the magistrate in his response says initially the accused did not "understand the charge levelled against him clearly" and he then explained the basis of the charge which according to him is the legal common law concept of "joint wrongdoers". After that explanation, he claims the accused then said he understood the charge and proceeded to plead guilty to that

charge. What I find fundamentally flawed and a breach of s271(3) of the Code is that the so-called explanation and the accused's reply thereto does not appear *ex facie* the record of proceedings. This violates subsection (3) of s271 which makes it mandatory that the explanation of the charge and any statement made to the court by the accused in connection with the offence to which he has pleaded shall be recorded. See *S* v *Phiri* HB-62-93; *S* v *Dube & Anor* 1988 (2) ZLR 385 (S); *S* v *Mazanyane* HB-102-95.

In casu, that explanation was not recorded in clear violation of the provisions cited *supra*. This in my view is an irregularity that vitiates the proceedings.

Secondly, while putting the essential elements of the charge, the magistrate singularly and wrongly in my view focused on the accused's failure to observe the provision of SI 129/2015 regarding the relative weight of the 2 vehicles. The court completely ignored other particulars of negligence namely that the state had alleged that the two were negligent in that they drove their motor vehicles "at a speed which was excessive under the circumstances" and "failing to keep vehicles under proper control". These particulars of negligence relied upon by the State as the basis of the charge were neither put nor admitted. Despite the court's obsession with the fact that the accident was caused by the disproportionate mass of the vehicles, the facts as outlined by the State do not support this conclusion in that they show that the accident occurred at a straight down hill stretch and was caused by excessive speed of the two drivers.

Thirdly, the legal validity of the magistrate's explanation of the charge is doubtful in that section 69(1) of the Road Traffic (Construction, Equipment and Use) Regulations, 2015 Statutory Instrument 129 of 2015 regulates only the conduct of a driver of a motor vehicle towing another vehicle and not the other way round. It states:

> "69 (1) No person shall drive on any road a motor vehicle towing another motor vehicle –
>
> (a) …
> (b) If the net mass of the motor vehicle being towed exceeds the net mass of the towing motor vehicle –
> (c) …

(d) …" (my emphasis)

Such conduct by the driver of the towing vehicle is criminalised in section 87 of SI 129 of 2015. In the absence of proof of a conspiracy, it is difficult to support the magistrate's explanation that the two vehicles towing each other were "combined into one by the tow bar making them co-drivers in the respective combined vehicles."

The court *a quo* made an assumption which is not only legally untenable but is also not consistent with the laws of physics.

For these reasons, the proceedings conducted by the trial court in this matter are irregular.

Accordingly, I make the following order:

(a) The convictions in respect of the two accused persons are hereby quashed.
(b) The resultant sentences are hereby set aside.
(c) The matter is remitted to the Magistrate's Court for a trial *de novo* before a different magistrate.

Makonese J …… I agree