

THE STATE
versus
SHUPIKAYI MACHEMBO

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 16 JANUARY 2008

Criminal Review

KUDYA J: This matter was referred for review by the scrutinizing regional magistrate who on the facts of the case was unhappy with the propriety of the conviction.

The accused person was charged with the offence of culpable homicide. He pleaded guilty and after the essential elements of the offence were canvassed, he was duly convicted and sentenced to pay a fine of \$1 million or in default of payment 20 days imprisonment and in addition was ordered to surrender his drivers' licence for endorsement.

The facts were that on 24 May 2007, at 10 pm, the accused person who was driving a lorry carrying 8 passengers along the Harare /Mutare road towards Macheke was stopped at a police road block manned by three police officers who were using a beacon light. He was arrested for driving the vehicle which had no tail lights and ordered to drive to the police station. He however did not drive towards the police station resulting in the three giving chase and stopping him after he had traveled for three kilometers. He was asked to alight from the lorry but he refused. He then drove off towards Macheke.

The three police officers contacted Macheke police who manned a road block to stop the accused person. When he arrived at this road block, his path of travel was blocked by a police car and he was requested to stop. He defied the orders, circumvented the police car and drove on.

One of the police officers fired two warning shots into the air but the accused person did not stop. The police officer then fired at the vehicle and hit and killed one of the 8 passengers. The accused then stopped.

It was on the basis of these facts that the accused person was charged with culpable homicide. It was alleged that by failing to obey the order to stop, he acted negligently and that this negligence caused the death of one of his passengers.

The essential elements were put to him in the following manner:

Q. Are the facts correct

A. Yes

Q. Do you admit that on 24 May 2007 and at the 107, 5 kilometer peg along the Harare Mutare road you drove a Volvo lorry registration number AAF 8825?

A. Yes

Q. Do you admit that you drove negligently in that you failed to stop after you were ordered to do so?

A. Yes

Q. Admit that as a result of your actions you caused the death of Samson Doubt

A. Yes

Q. Any lawful right

A. No.

Q. Any defence to offer

A. None

Verdict: Guilty as pleaded.

The scrutinizing magistrate questioned why the accused was charged and convicted of culpable homicide when death arose as a result of the shot that was fired by the policeman. Instead the accused should have been charged with contravening section 43 of the Road Traffic Act [*Chapter 13:11*], which deals with failure to obey police instructions, the scrutinizing magistrate opines.

The trial magistrate relied on two cases to found conviction. These were *R v Mhlongo* 1948 (1) SA 1109 (T) and *Brandon V Osborne Garret and Co* [1924] 1 K.B. 548.

The learned scrutinizing regional magistrate believed that the local case of *S v Majarira* HH 88/2003 did not support the conviction.

The issue that confronts me is to determine whether on the facts, the accused person was negligent and if so whether death was reasonably foreseeable.

In *Mhlongo's* case, *supra*, the accused person drove a heavy military vehicle behind a slow moving car. He attempted to overtake it just as it was turning across his path and the two collided. The military vehicle was thrown off its course and the accused swerved to his left to avoid a culvert and hit and killed a pedestrian who was walking off the road some 120 yards from the point of collision. He was convicted of culpable homicide and sentenced to 12 months imprisonment. On appeal to the Transvaal Provincial Division, the conviction and sentence were confirmed. At page 1118-9 ROPER J stated that:

“*Rex v Meiring* (1927 AD 41) establishes, however, that there is no difference between the two aspects of liability for negligence. In criminal cases stronger proof is required than in civil cases, but the test of liability is the same. The question, therefore, is whether the death of the deceased was the result of the negligence of the appellant either alone or in combination with that of Basson. If the deceased had been walking beside the roadway at the scene of collision and if, in consequence of the collision and the appellants’ resulting loss of control, the lorry had run off the roadway and knocked him down at that spot, I think there would have been no doubt that his death was a direct result of the collision which had been brought about or contributed to by the appellant’s negligence. Does it make any difference that he was run down approximately 60 yards further down the road? I am unable to see that it does.”

It seems to me that ROPER J applied the two pronged test, that is, whether the accused was negligent and if he was whether death was a direct result of that negligence.

The trial magistrate indicated that he also relied on the *Brandon* case, *supra*. With respect, the facts that he cites in his minute are incorrect. The facts in the *Brandon* case are as follows: husband and wife sued the defendant for injuries sustained when a skylight in the roof of the shop was broken due to the negligence of contractors repairing the roof and a portion of the glass fell and struck the husband whose wife who was close by reasonably believing her husband was in danger tried to pull him from the spot, strained her leg and thereafter suffered from recurrent thrombosis. Both succeeded on the basis that their respective injuries were the natural and probable consequence of the contractors’ negligence.

The *Majarira* case, *supra*, involved a woman who was left in charge of a two year old girl who left some hot water in a bucket in the bathroom into which the child fell and died. She was convicted on her plea of guilty of culpable homicide. CHINHENGO J, with the concurrence of MUNGWIRA J, set aside the conviction on the basis that the facts in that case did not establish negligence. At page 6 of the cyclostyled judgment the learned judge stated that:

“The concept of negligence in culpable homicide has two components- the issue of foresight that death would be a consequence of the conduct in question because his blameworthiness arises from a failure to foresee the death in circumstances where the reasonable man would have foreseen it. The second component requires an assessment of what should have been done in order to safeguard against that death occurring. To arrive at the conclusion that the accused negligently caused the death it must be determined what steps should reasonably have been taken to prevent the death and whether the accused in fact took those steps because it is the accused’s failure to take those reasonable steps which determines that the accused was negligent in bringing about the death.”

The principles that emerge from these three cases are that conviction for culpable homicide is founded firstly on proof of negligent conduct and secondly on foreseeability of death arising from that conduct. The concept of foreseeability is expressed at times as the natural and probable consequence or as the direct result of the act of commission or omission that the accused fails to guard against which results in death.

In *casu*, it seems to me that the accused person took a deliberate and conscious act to disobey the police that night. His actions in failing to stop were grossly negligent. In this instance the greater misdeed incorporates the lesser. The accused was therefore negligent in that he created a dangerous situation by driving off from the road block instead of stopping as directed by the police.

The state case in my view flounders on the aspect of the foreseeability of death arising from his failure to obey the instruction to stop. It was at night. The facts are silent on whether he was aware that the police who stopped him for the third time before the shooting were armed. In any event the reasonable man would not expect an armed policeman to shoot at a moving lorry with passengers at the back in a bid to stop the driver. The death of the deceased was thus caused by the policeman and not by the

accused's manner of driving. It is accepted that by driving away from the roadblock he created a dangerous situation but the death which ensued was not reasonably foreseeable. It was neither the direct result nor the natural and probable consequence of his failure to obey the police instruction to stop.

I agree with the learned regional magistrate that the conviction for culpable homicide was wrong. The accused should have been charged with the contravention of section 43 of the Road Traffic Act, *supra*. It remains the unfettered prerogative of the Attorney-General to charge him with that offence, if he so wishes.

In my view, the conviction and sentence cannot stand. They are both set aside. It is further ordered that the accused be refunded the fine that he paid.

Makarau JP agrees.