MARIBA MAZORODZE
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA and MANGOTA JJ
HARARE, 25 February, 2015 and 24 February 2016

Criminal appeal

T Mpofu, for the appellant
E Makoto, for respondent

MANGOTA J: The appellant was tried and convicted of Negligently Causing Serious Bodily Harm as defined in s 90 of the Criminal Law [Codification and Reform] Act [*Chapter 9:23*]. He was sentenced to pay a fine of $350 or, in default of payment, 5 months imprisonment. In addition, he was sentenced to 5 months imprisonment all of which were suspended for 5 years on condition of future good behaviour.

The state allegations were that, on 19 December 2011 and at Holy Cross Business Centre, Churumhanzu, the appellant drove a motor vehicle with a sharp metal bar under its wheel. The tyre of the wheel burst, blowing off a stone which hit the complainant's eye. The eye got totally dislodged from its socket.

The appellant appealed against conviction and sentence. His grounds of appeal were that:

(1) the evidence which the state led did not prove that he was negligent;
(2) the state witnesses' evidence was unreliable and should not, therefore, have been believed;
(3) he took reasonable steps to ensure that harm did not occur to the complainant and other persons who were at or about the motor vehicle the wheel of which he was moving out of the hole-and

(4) the sentence which was imposed upon him was manifestly excessive and it induced a sense of shock.

The respondent's view was that the appellant was properly convicted and sentenced. It submitted that the appeal had no merit. It moved the court to dismiss it.

The circumstances under which the complainant got injured are pertinent. They should, therefore, be placed into context. The context would assist in the determination of whether or not the appellant was erroneously convicted.

The circumstances were that, on 19 December 2011, the appellant came to Holy Cross Business Centre to recover a Delta Beverage 30 tonner truck the wheel of which had sunk into loose ground. On reaching the scene, the appellant lifted the wheel with a jack. He dug out the ground underneath the wheel to create space for some stones. He laid the stones with a view to creating a compact surface under the wheel. He placed the metal frame which he had brought with him in such a way that the frame was supported by the stones below it. The frame was in slight contact with the wheel above. The frame was described as having had the shape of a ladder. He chose the side of the frame which would give good traction to the wheel on take-off. He made sure that the wheel was carried in the centre of the frame and in a straight ahead position. He left sufficient space between the wheel and the raised edges of the frame on either side. He started the motor vehicle and put it into motion. As he did so, there was a tyre burst. The burst tyre blew off a lot of dust and sandy particles some of which lodged themselves into the complainant's eye. The eye was damaged to a point of no repair. It was eventually removed from its socket.

Two questions flow from the above described set of circumstances. These are:

(a) whether or not, in recovering the motor vehicle as he did, the appellant reasonably foresaw the occurrence of harm to the complainant or to any other person(s) who was or were at the scene from where the complainant got injured- and, if he did,

(b) whether or not the appellant took reasonable precautionary steps to prevent harm from occurring.

We took the liberty to go through the court *a quo's* judgement. We noted that the trial magistrate did not address his mind to the first of the above mentioned two questions. He centred his efforts on the second question from where he made some erroneous findings on the basis of which he convicted the appellant.

The appellant submitted that it was not reasonably foreseeable that, if he recovered the motor vehicle in the manner which he did, the tyre of the motor vehicle would burst causing dust and sandy particles to be blown off and injure the complainant or any other person who was at the scene of the incident. He stated that the mishap which the complainant suffered was unfortunate. He insisted that it was a pure accident and not an act of negligence on his part. Advocate *Mpofu* who prepared his Heads of Argument stated in a convincing manner in the Heads that:

> "If we accept that the complainant is a reasonable person who refused to move away from watching the vehicle, then we cannot at his testimony go on to conclude that it was reasonably foreseeable that harm would eventuate."

The respondent stated that the appellant created a potentially dangerous situation when he recovered his employer's vehicle in the manner which he did. It said he owed a duty of care to persons who had gathered where he was recovering the vehicle. It referred us to the testimony of one Claytus Tarupiwa who allegedly warned the appellant against the manner in which he placed the metal frame with its sharp edges facing an upward position. Mr Tarupiwa, the respondent stated, told the appellant that the position of the metal frame was likely to cause a burst of the tyre.

The appellant denied that Mr Tarupiwa ever gave any warning along the lines which the latter suggested. He insisted that Mr Tarupiwa was not an expert in mechanics and his alleged warning, if any, should not have been believed.

The issue of whether or not the appellant reasonably foresaw harm occurring was compounded by the fact that the cause of the tyre burst was not established. The court *a quo*'s erroneous finding was that the manner in which the appellant laid the bricks underneath the wheel and the movement of the metal frame caused the tyre to burst.

No bricks, but stones, were laid underneath the wheel which had sunk into the loose ground. No evidence was led to show that the frame which was placed underneath the wheel ever moved from its position when the motor vehicle took off as the court *a quo* found.

The appellant stated that he had, on previous occasions, successfully employed the procedure which he adopted *in casu* to remove motor vehicles which had sunk in the soil. His assertion was not challenged. The assertion, therefore, holds.

It is common cause that the complainant got injured as a result of the tyre burst. The cause of the burst was not ascertained let alone established. A number of possible explanations were advanced for the same. Amongst such explanations were that:

(a) upon take off, the metal frame might have slided sideways or tilted under the weight of the wheel resulting in its edge coming into contact with one side of the wheel causing it to burst; or

(b) the wheel could have skidded because of the load; or

(c) the tyre could have had an internal damage; or

(d) a sharp stone could have caused the burst; or

(e) the friction between the tyre and the stones which were underneath the wheel could have caused the burst.

It cannot, by any stretch of imagination, be suggested that the appellant should have foreseen the possibility of the tyre bursting and harm occurring to the complainant in the face of the above stated possibilities and many more which we have not explored in our judgment. The appellant was, accordingly, correct when he stated that the prosecution did not prove that he was negligent when he recovered the motor vehicle in the manner which he did. One essential element of negligence was lacking in the evidence which the state led against him.

The appellant stated, as his second ground of appeal against conviction, that the state witnesses' evidence was unreliable. He submitted that the court *a quo* should not have believed them. He said the complainant was an interested person who got injured during the time that the motor vehicle was being recovered. He said the complainant should not, therefore, have been believed when he stated that no warning was given to persons who were at the scene to leave the same as he was an interested party. He submitted that Claytus Tarupiwa should not have been believed because he (Tarupiwa) was not an expert on bursting of tyres.

The respondent did not comment on the credibility of witness for the prosecution. It left that matter totally unaddressed. The appellant's criticism of the court *a quo's* proceedings on the mentioned aspect has merit.

Three witnesses testified against the appellant. These were one Stephen Dhinasi who was the complainant, one Claytus Tarupiwa who was the complainant's employer and one W. Mawere who investigated the case which related to the complainant's injury.

The court *a quo* believed the evidence of the first two witnesses for the prosecution. It did not place any weight on the investigation officer's testimony. It disbelieved the evidence of the appellant and his witnesses.

Credibility of witnesses lies in the domain of the trial court. The appeal court does not, as a matter of principle, interfere with the court *a quo's* findings in respect of credibility of witnesses. (See *Beckford* v *Beckford*, 2009 (1) ZLR 271 (S))

Beckford v *Beckford* was an appeal which was heard in the civil division of the Supreme Court. However, what was stated in the case does, in our view, have equal application to decisions of this court when it sits as an appeal court.

The case shows that there are occasions when an appeal court may interfere with the court *a quo's* reasoning on the issue of credibility of witnesses who will have testified before it. One such occasion is where, as *in casu*, the court *a quo* does not make any specific findings of fact as to the credibility of witnesses who testified before it. That is a misdirection which allows us to be at large and to re-assess the evidence of the witnesses. Our object would be to establish the witnesses' credibility or otherwise. Our views *in casu* find fortification from the following:

(a) the appellant put into issue the credibility of two, of the three, witnesses for the prosecution;

(b) the trial magistrate did not make any specific findings as to the two witnesses' credibility. All what he did was to state that he believed each of those two witnesses and that none of them did have a reason to lie against the appellant. He did not profer any cogent reasons for the belief which he entertained as regards the credibility or otherwise of those witnesses- and

(c) the respondent remained mute regarding the alleged misdirection

The complainant stated, in –chief and under cross – examination, that he reported the appellant to the police because the latter person did not visit him when he was in hospital. He said he expected the appellant to talk to him about the hospital bills and how the bills were to be settled. He stated that when the appellant failed to visit him, he thought the appellant *intentionally* caused the tyre burst as a result of which he got injured. He did not mince his words on the point that he was aggrieved by the fact that the appellant did not make a follow-up to ascertain how he was recovering from the injury which he suffered.

The complainant, it is evident, entertained the belief that the appellant intentionally caused the tyre burst and, in the process, his injury. He based his belief on the fact that the appellant did not visit him when he was in hospital. His belief was misplaced. The appellant did not have any reason to inflict upon him the injury which he suffered. The appellant only wanted to recover his employer's motor vehicle.

Claytus Tarupiwa stated that he was hit on the back with sand which was sprayed when the tyre burst. He said he sustained some wounds on his back. He said the windows of his shop were damaged by the stones which were lifted by the air from the tyre. The following discourse ensued between Mr Tarupiwa and counsel for the appellant when the latter was cross-examining him:

"X Do you know what caused the tyre to burst
- I saw it cut and I thought it was the metal we mentioned.
X Accused's defence is that he used that side to the metal because it would give him better truck (*sic*)
- This metal pinched the wheel and it burst
X The metal was made for use that way(*sic*)
- Yes, I don't dispute that but was not the right was (*sic*)".
[emphasis added]

Mr Tarupiwa started by making an assumption. He then proceeded to state as a fact what he knew was not such. He moved one gear up and gave what appeared to be expert evidence when he was not an expert.

The appellant was correct when he submitted that the two witnesses were not credible. Both of them appeared to have had a stone to grind with him. The appellant's criticism of the court a *quo's* findings as to the credibility of the two witnesses, therefore, holds.

The appellant's third ground of appeal against conviction was that he took reasonable steps to prevent harm from occurring to the complainant and other persons who were at the scene of the incident. He stated that before he put the vehicle which he was recovering into motion, he requested one Eneas Gwanetsa to warn people who were at the scene to move away from the vehicle. Mr Gwanetsa confirmed the appellant's assertions in the mentioned regard. He was the driver of the vehicle which the appellant came to recover.

The respondent submitted that the complainant and Mr Tarupiwa testified to the effect that they did not hear Mr Gwanetsa's warning to persons who were at the motor vehicle to move away from the same. It stated that, if Mr Gwanetsa had warned the people as

alleged, the two of them would have heard him issue the warning. It insisted that Mr Gwanetsa did not, therefore, warn people to move away from the vehicle before it was set into motion.

The court *a quo* accepted the position that the appellant relied on Mr Gwanetsa who was out of the motor vehicle to warn the people to move away from the vehicle. It, however, remained of the view that the appellant himself should have told the people to move away from the vehicle. It said:

> "Accused person did not take the initiative himself, as a reasonable person in this circumstance to physically check and make sure that people were out of the way. It was his duty as a reasonable member of society to take steps himself to check if the area was clear. There is no indication that accused actually took the necessary steps himself to make sure that the area was clear"

The trial magistrate took an armchair approach. Whether the warning was issued by the appellant or by Mr Gwanetsa is not the issue. What is important is that persons were told to move away from the car. It was not incumbent upon the appellant, and him alone, to have told the people to move away from the car. The warning which Mr Gwanetsa made sufficed for the purpose. The appellant cannot, under the circumstances, be said not to have taken necessary precautionary measures to avert harm occurring to the complainant and others. He, if anything, acted through the driver of the motor vehicle which he was recovering and warned people to move away from the vehicle.

The respondent's submissions which were based on the assertions of the complainant and Mr Tarupiwa on this aspect of the matter cannot hold. We have already observed that the two were not credible witnesses. No reliance can, therefore, be placed on what they said. The probabilities of the matter are that both of them heard Mr Gwanetsa warning people, themselves included, to move away from the vehicle before it was set into motion. However, as the two of them appeared to have had a stone to grind with the appellant, it is probable that they made up their minds to state that no such warning was ever issued to them and others to leave the scene. Their evidence on this aspect of the case should, therefore, have been carefully assessed and the motive on their part to lie should have been discounted with cogent reasons.

The court *a quo's* analysis of the testimony of those prosecution witnesses was, unfortunately, cursory. It did not exclude the possibility that the two of them might have

connived to lie against the appellant. The appellant's criticism in regard to the manner that the trial magistrate dealt with the two witnesses' pieces of evidence, therefore, holds.

We are satisfied, on the evidence filed of record, that the appellant was not negligent when he went about his duty of recovering his employer's vehicle. He did not reasonably foresee the possibility of harm occurring to the complainant. He took reasonable steps to prevent harm occurring to the complainant and others. The persons who gathered where he was working on the vehicle, no doubt, placed themselves in the way of harm. The appellant captured that aspect of the case in a very graphic manner when he stated in the introductory part of his Heads of Argument as follows:

> "It seems fashionable to find a scapegoat whenever harm occurs. When people cross busy thoroughfares without attending to where they are going and are knocked down by cars, the driver is blamed. In this matter, adult people gather to watch a vehicle which is stuck in the mud. When one of them gets injured, the court convicts a person who was doing his job. Nothing is said about the real culprit an adult who decides to watch a vehicle stuck in the mud. It is submitted that appellant's conviction is clearly faulty as harm was not reasonably foreseeable and as he took all necessary steps to prevent injury."

The conviction of the appellant was unsafe. It cannot, therefore, stand.

The appellant's last ground of appeal related to the sentence which was imposed upon him. He submitted that the sentence was so severe as to induce a sense of shock. He moved us to interfere with it.

The respondent conceded that the trial magistrate misdirected himself when he failed to give reasons for the sentence which he imposed. It submitted that the misdirection did not cause prejudice to the appellant as the sentence was not gross. It insisted that the sentence met the justice of the case regard being had to what favoured the appellant as measured against the fact that the complainant's eye had to be, and was actually, removed.

It is a serious misdirection which viciates the sentence part of the court *a quo*'s proceedings for the trial magistrate not to have given reasons for the sentence which he imposed. He should have justified, with reasons, the sentence which he imposed. The appellant was entitled to be informed of the reasons for the magistrate's decision.

The sentence which the court *a quo* imposed cannot stand. It cannot stand not because of the misdirection but because of the finding which we made on conviction.

The appellant was erroneously convicted and sentenced. His appeal has merits. It is, accordingly, upheld *in toto*.

CHATUKUTA J agrees …….

Gill, Godlton & Gerrans, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners