DAWN MATSHITSHE
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 25 March 2014 & 9 August 2017

Criminal Appeal

S. Simango, for the appellant
E Mavuto, for the respondent

BERE J: The appellant was tried and convicted of the offence of contravening s 52 (2) of the Road Traffic Act, [*Chapter 13:11*] upon his conviction the appellant was sentenced to pay a fine of $200 and had his driver's licence endorsed.

Aggrieved by both the conviction and sentence the appellant lodged this appeal.

The grounds of appeal against conviction are simply that the learned magistrate erred in his assessment of evidence that brought about the conviction of the appellant.

It was argued that there was no justification at all for the trial court to religiously accept the evidence of complainant and reject the evidence of the appellant when in fact the version given by the appellant was reasonably possible and substantially supported by the evidence of the investigating officer.

It was also argued by the appellant that the Investigating officer had poorly conducted his investigations and that the appellant should have been given the benefit of doubt as a result of same.

As regards sentence the argument was that the learned magistrate has erred dismally by failing to consider special circumstances as demanded by the Road Traffic Act [*Chapter 13:11*].

The State has indicated that it does not support the conviction and proceeded to file the appropriate notice in terms of s 35 of the High Court Act [*Chapter 7:06*]. We are more than satisfied that the position taken by the State was well made. We take this view because of the following.

It is clear from the record of proceedings and the judgment of the court a quo that the court was dealing primarily with the evidence of the two drivers *viz*, the complainant and the appellant. The judgment of the court a quo does not explain why the court felt more inclined to accept the complainant's story at the expense of the appellant's story which sounded reasonably possible.

Precedent is awash with decisions from this jurisdiction which condemn convictions based on what has been referred to as "the boxing match approach" to prosecution. In this regard l fill more inclined to refer to the wise words of MCNALLY JA in the case of *Esther Mafika* v *The State* [1]when he remarked as follows:

> "The first defect lies in the prosecution and investigation. It is very noticeable in this type of case that the prosecution tends to throw two opposing parties before the magistrate like two boxers in a ring. A trial is not a boxing match. A magistrate should not be asked to make decisions purely on credibility or "performance in the ring". A prosecutor should always look for support for his witness, either in the form of circumstantial or documentary evidence, or in the form of testimony from another, preferably impartial witness……
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> The truth may be somewhere between their versions. The difficulty is to determine exactly where it lies. In such a case an experienced investigating officer will seek, and an experienced prosecutor will demand corroborative support for his case."

The instant case was determined on the basis of the competing evidence given by the complainant and the appellant. At the end of the testimony, the court *a quo* merely decided to accept the evidence of the complainant and rejected the appellant's evidence without just cause.

The State alleged that on the day of the accident the complainant and the appellant were driving their two motor vehicles along Suffolk Road going in the opposite direction and that when they approached a curve along the same road they had a head on collision.

The appellant's explanation was that when he approached the curve, the complainant's motor vehicle was travelling in his lane and as he tried to avoid it a collision occurred. There was no any other evidence other than the competing versions of the two witnesses who sought to blame one another for the accident.

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1. [1] Judgment no. SC 20/86 pp 3 and 4 of the cyclostyled judgment.

To compound the situation, when the investigating officer attended the scene he failed to identify the possible point of impact. When the investigating officer was asked to comment on the evidence of the appellant that it was in fact the complainant's vehicle which was an offending one, she conceded that it was possible.

Despite the porous nature of the State case, the court *a quo* went on to convict the appellant on speculative probabilities which were not even part of the State case.

By any stretch of imagination this was a poor conviction and it should not be allowed to stand.

Consequently the conviction is set aside.

Given that the conviction was uncalled for, so must the sentence be set aside and there is no reason to deal with the reasons for that sentence.

To this extent the appeal succeeds.

HUNGWE J agrees ……

Nyikadzino, Simango & Associates, appellant's legal practitioner
National Prosecuting Authority, respondent's legal practitioners