

FABIAN ELISON
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE AND BERE JJ
HARARE, 21 March 2013 and 13 September 2017

Criminal appeal

I. Murambatsvina, for the appellant
Mrs S. Fero, for the respondent

BERE J: The appellant was arraigned before the court sitting at Harare Magistrate's Court for contravening s 52 (2) (a) of the Road Traffic Act [*Chapter 13:11*]-negligent driving. After a trial the appellant was convicted and sentenced to pay a fine of US\$300-00, in default of payment to serve one month imprisonment.

Dissatisfied by this conviction and sentence, the appellant approached this Court appealing against both.

In his appeal against conviction, the appellant raised six grounds of appeal, *viz*:

"1. The trial court erred in putting the onus of proof on the accused to show that he could have seen the complainant earlier.

2. The Court misdirected itself in finding that the accused failed to stop because he was travelling at an excessive speed in the circumstance when accused demonstrated he could not have stopped regardless of the condition of the surface of the road.

3. The trial court erred and misdirected itself in convicting the accused in light of the questionable conduct of the investigations *vis* selection of witness and preference of charges against accused instead of complainant.

4. The trial court erred and misdirected itself in convicting accused in the absence of a positive finding that accused person's defence was false. The court further misdirected itself in relying on experience and intuition rather than fact in determining accused person's speed to have been excessive.

5. The court *a quo* erred in finding that accused failed to stop or act reasonably.

6. The court erred and misdirected itself in casting a duty upon the accused to pull up without hitting the complainant (*sic*)”

I propose to deal with the appeal against sentence only in the event of this appeal being dismissed.

This appeal was opposed by the respondent, whose Ms *Fero*, expressed the view that even if the complainant was wrong, his conduct could not have absolved the appellant in the circumstances of this case.

Counsel for the respondent’s reasoning was largely guided by the views expressed by TREGOLD C.J. in the case of *R v Rabinowitz*¹ where the learned Judge of Appeal put his findings in the following:

“The negligence of the complainant may have been equal to, or greater than, that of the appellant and may have contributed in a large measure to the accident, but, on this charge, the sole issue is whether or not the appellant himself was negligent and this seems to us to have been clear.²”

With respect the remarks by the learned Judge of Appeal cannot be regarded as “an all size fits all” principle. Such a principle of law could not possibly have been made in a vacuum. The learned Judge was dealing with the specific facts as provided in the case that was before the Court. Unfortunately these facts were not provided in the case quoted by the respondent’s counsel. I want to imagine that remarks made would certainly not apply in a situation where the complainant with his/ her eyes wide open plunges himself or herself into an intersection against a red robot like what seems to have happened in the case under appeal. Were the views expressed by TREGOLD JA to be blindly accepted it would create a mockery to the very basic principles of our criminal law, and in particular the need to have the State prove its case beyond a reasonable doubt. I will deal with this in detail when I consider the facts and evidence in this case.

The other case relied upon by the respondent’s counsel in persuading this court to dismiss the appellant’s appeal is the case of *S v Moodley*. The ratio enunciated in that case was based on the need for motorists to exercise extreme caution when they see children close to the road. In the headnote CANEY J refined the position of the law as follows:

¹ 1957 (1) SA 113 (SR)

² 1957 (1) SA 113 (SR) at pp 113-14

“It is the duty of a motorist approaching a group of children close to the side of the road, not only to slow down and pay special attention to them but also to deviate his course in order to give the children as wide a berth as is reasonable in the circumstances”³

See also the case of *S v Duri*.⁴

It occurs to me that this case may have been referred to out of context. The case under appeal did not involve children. The case under appeal involved the driving conduct of two adults whose direction of travel was controlled by traffic lights.

The case which the court *a quo* dealt with had to be determined on the basis of who between the appellant and the complainant had the traffic lights green in their favour.

The evidence suggests that two conflicting versions emerged. The complainant and his witnesses testified to the effect that it was the appellant who drove his Nissan Blue Bird motor vehicle against a red robot. On the other hand, the appellant and his sole witness testified that it was in fact the complainant who drove his Navara double cab motor vehicle against a red robot as he tried to cross the main Mutare highway from a side road, Stephen road.

In my view, the issue as to who between the two drivers drove against a red robot had to be resolved one way or the other by the court *a quo*. It could not have been left hanging because it was critical in providing a pointer as to who between the complainant and the appellant was negligent. In its judgment, the court *a quo* dealt with the issue in the following way:

“The court has already indicated that the State of the robots at the time of the accident were in dispute and the court cannot justifiably accept one version and reject the other. In that regard, the particulars of negligence relating to the accused proceeding against a red robot should be decided in accused’s favour, as it is trite where doubt exists. As to a particular event, that doubt should be decided in favour of the accused.” (my underlining).

This specific finding on its own, in my view, meant that the court *a quo* did accept that the complainant, who was coming from a feeder road, and without warning shot his motor vehicle against a red robot as testified by the appellant and his witness Rhino Diogo whose evidence appears to have been well given and from a vantage position. The record of proceedings will show that the appellant’s witness, indeed gave his evidence very well. Even the cross-examination by the prosecutor of this witness suggests that the State had also accepted that the traffic lights must have been green in favour of the appellant. This explains

³ 1966 (1) SA 248 (W)

⁴ 1989 (1) ZLR 111 (SC)

why the emphasis in the witness's cross-examination shifted from driving against a red robot to who between the appellant and complainant entered the intersection first.

Even the cross-examination of the appellant by the prosecutor again demonstrated that the prosecutor had bought into the idea that the complainant drove against a red robot. This explains questions put to the appellant by the prosecutor as follows:

“Q. You agree with me that the fact that the robot is green on your side does not necessarily mean you can proceed into the intersection?

Q. Do you agree that at times robots give contradicting reports on both sides?

Q. Now that complainant says the robot was green in his favour and you say it was green in your favour but complainant was the first to enter the intersection, who had the right of way”⁵

The appellant's case in the lower court was simply that as he was enjoying his right of way along the main Mutare Road, with the robot green in his favour, the complainant who was coming from a feeder road approaching on the complainant's left side, without any warning plunged his motor vehicle right into the intersection and that when he did so, the traffic lights were red against him.

The evidence which was accepted in the lower court, suggests that on seeing this, the appellant braked his motor vehicle and swerved. Both the complainant and the appellant's witnesses confirmed this. I think it is overstressing the whole concept of the duty of care in traffic accidents to expect that a motorist whose path of travel is suddenly and wrongfully obstructed must still act to always prevent the accident. At times it is not that easy. I could not agree more with KOSAH JA when he stated in *S v Mauwa*⁶ that:

“Where a person or third party is placed in danger by the wrongful act of another, that person is not negligent if, in the agony of the moment, he exercises such care as may be reasonably expected of him in the reasonable apprehension of the danger in which he is so placed. He is not to blame if he does not do quite the right thing in the circumstances”.

In the later civil case of *Chikosa v Wright*⁷ the same Judge of Appeal, KOSAH JA put it even more eloquently as follows:

“The doctrine of sudden emergency has been formulated thus:

‘A man who, by another's want of care finds himself in a position of imminent danger, cannot be held guilty of negligence merely because in that emergency he does not act in the best way to avoid the danger’”.

The circumstances of the case under appeal is strikingly similar to the Lesotho case of

⁵ Record pps 63, 65 & 66

⁶ 1990 (1) ZLR 235 (S) at p 241 B

⁷ 1996 (2) ZLR 607 (S) at 608 G.

*Thamana Kheoane v Rex*⁸ (a case referred to me by appellant’s counsel) where the court held as follows:

“...In such cases, it is always the vehicle on the main road which has right of way and the vehicle attempting to enter a main road from a side road must wait until the main road is clear and safe to enter before actually entering. That is the rule of the road. There is a *prima facie* case of careless or reckless driving against the driver who enters main road and is involved in a collision in these circumstances. The speed of the vehicle already using the main road and the way in which it is being driven is not usually relevant because the side road driver must in any case wait until the main road is clear before commencing his entrance and turn into the main road. If he does not observe this requirement then clearly he is to blame for a subsequent collision.

I am surprised that the police chose to prosecute the appellant rather than the complainant in this case and I consider that they were mistaken. The appellant had the right of way and the trial magistrate should have so held”.

Although in the Lesotho case the court was dealing with vehicles involved where there were no traffic lights, the reasoning articulated therein would neatly fit into the instant case, particularly if one accepts the findings of the lower court that the appellant’s evidence that the robot was green in his favour was credible.

In conclusion, and in the circumstances of this case the appellant could not have been pronounced to have been negligent. He was placed in sudden emergency situation by the offending conduct of the complainant who clearly drove from a feeder road against a red robot leading to the accident.

The conviction is accordingly quashed and the sentence imposed is set aside.

HUNGWE J agrees

I. Murambasvina, appellant’s legal practitioners
National Prosecuting Authority, respondent’s legal practitioners

⁸ [1987] LSCA 50.