ROBIN SMITH
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & MAVANGIRA JJ
HARARE, 11 July 2013

Criminal Appeal

R Harvey, for the appellant
S Fero, for the respondent

HUNGWE J: The appellant appeals against his conviction for negligent driving in contravention of s 52 (2) of the Road Traffic Act [*Cap 13:11*].

The following facts were common cause. The appellant, on the day in question, drove due east along Natal Road, Avondale, Harare. He then turned right into Bath Road and continued down that road but after a short distance he decided to go back to Natal road and executed a "U"-turn. Upon getting to the "T"- junction into Natal road, he turned left to go west along Natal road. The complainant, who was driving due west along Natal Road realised the appellant's manoeuvres too late. He hit into the rear end of the appellant's motor vehicle. There is a "give-way" sign facing Bath Road controlling traffic entering into Natal Road. The accident occurred in broad daylight when visibility was good.

The appellant raised six grounds of appeal. These are that the magistrate erred in one or more of the following ways:

1. In finding the appellant guilty of negligent driving;
2. In finding that the appellant was the cause of the accident;
3. In finding that the appellant failed to give way to on-coming traffic and failed to keep a proper look-out;
4. In finding that it mattered not the distance the appellant had travelled up Natal Road;

5. In failing to find that the collision was caused by the complainant in that :-
    a. he failed to keep a proper look-out;
    b. he failed to take action and care to avoid an accident that was imminent;
    c. he ought to have adjusted his speed and adjusted his driving upon approaching the junction and particularly when he saw the appellant entering or about to enter into Natal Road and that he should not have accelerated and accordingly was travelling at a speed that was excessive in the circumstances.
    d. that in all probability the complainant was distracted or not paying sufficient attention and thus failed to reasonably to anticipate that the appellant would turn into Natal Road;
6. In failing to find that the appellant's contention that he had travelled sufficiently up Natal road so as not to have been the cause of the accident or be negligent and that there was no evidence to the contrary.

In his judgment the learned trial magistrate preferred the evidence given by the complainant to that given by the appellant. His assessment of where the probabilities in the matter lay cannot reasonably be faulted if regard is had to the evidence on the record. The learned trial magistrate believed the complainant who testified that he saw the appellant drive towards him from the opposite direction on Natal Road. The appellant turned right into Bath Road. The appellant then drove down that road before he made a "U"-turn to come back towards Natal Road. On approaching the "give way" controlled "T"-junction of these two roads, the appellant did not stop but proceeded to execute a left turn and drive on.

The complainant applied brakes to avoid the imminent accident whilst at the same time he swerved slightly to his right. There was an on-coming vehicle which hindered a full swing to the right. As a result he collided with the rear right side of the complainant's motor vehicle.

On these findings, the court *a quo* convicted the appellant.

In my view, the appellant's grounds of appeal are a serialised version of a single ground of appeal. This ground of appeal amounts to the following: the court *a quo* erred in finding that the appellant failed to give way to the complainant when he entered back into

Natal Road in the face of a "give way" sign on Bath Road. This in summary captures the thrust of the attack on the complainant's conviction. Put differently, one may ask the hypothetical question: was the appellant negligent in executing a manoeuvre involving a right turn; a "U"-turn; and proceeding without giving way to traffic enjoying the right of precedence?

In **R v Oldfield 1969 (2) RLR 233** the court stated that the inquiry was whether a reasonable man in the particular circumstances in which the appellant was placed ought to have foreseen as a reasonable possibility that "there might be persons in or adjacent to the road who might be endangered by his driving."

In his judgment the trial magistrate noted that the appellant noticed the complainant's presence on Natal Road but decided to get into that road as he thought that he had enough time to proceed without incident. Herein lies the decisive aspect in the case. In my view, by executing such a manoeuvre the appellant took a chance that was fraught with high risk. He was controlled by a "give-way" sign. The fact that he decided to proceed in spite of the fact that he had noticed the complainant on the road on his right speaks to his poor judgment. Not only did he flout the admonition in the rules of the road to give precedence to traffic approaching from the right, he drove against a clear sign which enjoined him to give precedence to traffic on Natal Road. He was expected to defer to traffic on this major road. He did not. Ordinarily drivers expect other drivers to obey these simple rules of the road. He did not. I am unable to accept Mr *Harvey's* contention regarding the complainant's duty to avoid this accident. He did all he could. He cannot be blamed for it but the appellant must be blamed.

In my view, and, by any test the appellant acted negligently in executing a manoeuvre which was eminently fraught with danger. Whatever his reasons for it, he ought to have been more careful, considering that he was re-entering a major road as signified by the presence of a "give way" sign. He ignored the warning to his detriment. He was properly convicted. I find no merit in the several grounds raised on appeal.

The appeal therefore is dismissed in its entirety.

MAVANGIRA J agrees.

Granger & Harvey, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners