

THE STATE
versus
JAMES SILAS

HIGH COURT OF ZIMBABWE
MUTEVEDZI & MUNGWARI JJ
HARARE, 23 November 2022

Criminal Review

MUTEVEDZI J: The record of proceedings in this case was placed before me accompanied by a minute from the scrutinising regional magistrate at Harare. The accused was charged with the offence of culpable homicide in contravention of s 49 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was convicted on his own plea of guilty and sentenced as follows:

“6 months imprisonment wholly suspended for 5 years on condition the accused does not within that period commit any offence involving negligent driving and for which he will be sentenced to imprisonment without the option of a fine.”

The regional magistrate indicated that he did not have any issues with the conviction because he believed it was in accordance with real and substantial justice. I am of the view that the charge was irregular although not to the extent of vitiating the conviction. I will demonstrate that below. Regarding the above sentence the regional magistrate observed that:

1. The trial magistrate did not conduct the mandatory inquiry to establish the degree of negligence. See *S v Mitchel* SC 101/84; *S v Chaita and Others* 1998(1) ZLR 213 and *S v Makanza* HB 197/17
2. The trial magistrate did not invoke the mandatory provisions of s 64(3) of the Road Traffic Act [*Chapter 13:11*] for purposes of imposing additional punishment of prohibition from driving and cancellation of driver’s licence in light of the fact that the motor vehicle involved *in casu* is a heavy vehicle. See *S v Chaita (supra)*; *S v Mununuri Goto and Another* HB 88/15 and *S v Sibanda and Another* HB 97/15

There is no gainsaying that the observations by the regional magistrate are accurate and pertinent. The issues which he points out are mandatory and any omissions to observe them go to the root of the appropriateness of the sentence imposed. In sentencing an offender for the offence of culpable homicide, the degree of the offender’s negligence is a key variant. The loss of human life, no matter the circumstances must not be treated lightly. The accused

admitted that he was travelling at an excessive speed in the circumstances. He was driving a haulage truck at night. Sentencing him to 6 months imprisonment which was wholly suspended amounts to trivialising the death of the victim of his negligence. This court has noted that magistrates resort to imposing sentences, some of which border on meaninglessness in cases where human life has been lost. My view is that such skewed sentencing regimes stem from a lack of appreciation of the offence of culpable homicide especially that species which arises from road traffic offences.

Culpable homicide is not a road traffic offence. That realisation must be elementary because the offence is not created by the Road Traffic Act. Rather, it is provided for under s 49 of the Criminal Law Code. There is no difference for instance between a culpable homicide charge arising from a motor vehicle accident and one arising from an assault. In both instances, the offence is the negligent killing of another human being. The degree of negligence and other attendant mitigating and aggravating factors only come in to aid in the determination of the sentence to be imposed. The fact that the offence involves the negligent killing of another human being cannot be wished away by the fact that the instrument used to achieve that is a motor vehicle. Given the carnage being witnessed on Zimbabwean roads I will be forgiven for arguing that the car is as lethal a weapon as any other.

Much as the regional magistrate observed that the conviction was not questionable, I observe that the manner in which the charge was framed left a lot to be desired. It was couched as follows:

“In that on 5 May 2020 at 2030 hours and at 39 km peg along Harare-Bulawayo road, the accused James Silas negligently drove his freightliner truck(goods vehicle) registration number AEV 5509 weighing 29,900 kg and hit a pedestrian Paul Zvegutai who later died upon admission.”

The particulars of negligence were then listed. The above charge is wrong. It is wrong because it is not different from a charge of negligent driving where two cars collided and no one was injured. The prominence which is given in the charge is that the accused person drove negligently yet that is not what anchors a charge of culpable homicide. I am vindicated in taking that view by the condition of suspension of the sentence of imprisonment stipulated in the sentence. It is that the accused must not within the period stated ‘*drive negligently.*’ That he caused the death of a human being is clearly relegated to the back of the magistrate’s mind. Even supposing that the magistrate wanted to ensure that the accused is not involved in delinquent driving in future, mentioning negligent driving only is too narrow to cover the

essentials of bad driving. The Road Traffic Act speaks to all manner of bad driving such as driving without due care and attention, negligent driving, reckless driving, driving under the influence of a drug or alcohol etc. When a court specifies that an accused must not be involved in driving negligently only, it restricts the bringing into effect of the suspended sentence where there is a violation. An accused may escape if he drives without due care and attention for instance. In addition, restricting the condition to driving appears to permit the accused to walk free in instances where he would have, within the material period, cause the death of another human being by any other form of negligence apart from bad driving. For instance if through an assault the accused caused death, the stated condition would not apply. The sentence must as of necessity target deterring the accused from negligently causing the death of others. Like already said, the instruments through which he can do that are not relevant. I mention these issues just to make the point that magistrates must be alive to why they are suspending a punishment where they deem it necessary. Those processes are not mechanical. There must be a process value analysis in every step of the sentencing equation. I have already demonstrated that the offence has nothing to do with driving. It has everything to do with the negligent killing of another human being. The driving part must only come into play when describing the negligence. Section 49 which creates the offence of culpable homicide is crafted as follows:

49 Culpable homicide

“Any person who causes the death of another person-

- a) Negligently failing to realise that death may result from his or her conduct or
- b) Realising that death may result from his or her conduct and negligently failing to guard against that possibility

Shall be guilty of culpable homicide and liable to imprisonment for life or any definite period of imprisonment or a fine up to or exceeding level 14 or both.”

From the above it is clear that in a charge of culpable homicide, the state must prove that the accused:

- a) caused the death of another human being
- b) by failing to be aware that his or her conduct may result in death or
- c) where he or she perceives that death may result from his or her conduct by negligently failing to guard against that possibility occurring

Every charge of culpable homicide must inevitably commence from the premises that an accused person caused the death of another by failing to notice that death may result from him/her doing or omitting to do a, b, c, or d. Needless to mention, there is a difference between negligence and intention. Whilst intention refers to a state of mind negligence conversely refers to the absence of a state of mind. Prosecution must therefore strive to prove not that the accused intended to cause the death, but that because he engaged in conduct that was negligent another person died. As s 49 (b) would show, the Code has created a new form of negligence in culpable homicide cases which however would not be the subject of this judgment. What is important is that judicial officers must understand that culpable homicide cannot be trivialised simply because it arises from negligence on the road. The sentences which are stipulated in the Code serve to illustrate the seriousness of the offence of culpable homicide. Those sentences do not discriminate between culpable homicides arising from traffic or assault cases. Admittedly, authorities have set guidelines on sentencing of such offenders. In those guidelines heavy reliance has been placed on the provisions of the Road Traffic Act. It is also important to note that the jurisprudence on sentencing of culpable homicide offenders of whatever form was built at a time when the offence was still a common law crime. Its codification brought with it a circumscribed regime where punishments as steep as life imprisonment or a fine up to level fourteen can be imposed on a convicted person. Although it is difficult to imagine the circumstances which would call for imposition of life imprisonment, the point remains that the legislature viewed the offence as one of the most serious ones in our criminal law. In fact it only reemphasises the point I made earlier about the sanctity of human life. That brings a realisation upon everyone that it may be time that the seniority of magistrates who preside over culpable homicide offences must be reconsidered. That reconsideration must start with unbundling cases of culpable homicide from the traffic court which deals with routine traffic violations at bigger stations such as Harare and Bulawayo Magistrates' Court. That administrative step would be critical in that it will disabuse judicial officers from the thinking that the death of human beings in whatever circumstances can be routine.

Given the inelegance with which the charge was drawn I was tempted to set aside the conviction of the accused on that basis. I noted however that in canvassing the essential elements of the offence, the magistrate fully covered the deficiencies in the charge sheet. The accused admitted that he caused the death of the deceased through his acts of negligent driving. The deficiencies in the charge would therefore be one of those that were envisaged

by the legislature in ss 202 (3) and 203 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. In essence those sections provide that a defective charge may be cured by relevant evidence adduced at the trial. The failure to correct the charge before judgment cannot affect the validity of the conviction. See also the case of *Dzvairo and Others v The State* 2006 (1) ZLR 49.

The irregularities noted in relation to the sentence are however inexcusable. No amount of patching up can cure them. The sentence inevitably cannot stand. It has to be set aside. In the circumstances it is ordered that:

1. The sentence imposed on the accused Silas James on CRB No. NTN 269/22 be and is hereby set aside
2. The matter is remitted to the trial magistrate for her to recall the accused for sentencing anew
3. The trial magistrate is directed to pay attention to the issues discussed in the judgment in sentencing the accused
4. The registrar of this court is directed to ensure that a copy of this judgment is availed to the Chief Magistrate's office.

MUNGWARI J Agrees