

ZIMBABWE / JUDGMENT

Benefit Zimuntu v The State

[2000] ZWCHHC 1 (3 June 2000)

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COURT

Chinhoyi High Court

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1 HCC 25/25 X REF: CRB KAR 209/24 BENEFIT ZIMUNHU Versus THE STATE HIGH COURT OF ZIMBABWE MUZOFA & BACHI-MZAWAZI JJ CHINHOYI, 3 June 2025 Criminal Appeal Appellant in person G. T. Dhamusi, for the State MUZOFA J: The appellant appeals against both conviction and sentence. He was convicted after a trial for reckless driving in contravention of s53 (1) of the Road Traffic Act (Chapter 13:11) 'the Act'. After finding no special circumstances, the Court a quo then imposed the minimum mandatory sentence of two years imprisonment. In addition, his driver's licence was cancelled, he was prohibited from driving for life and an order for the endorsement of his driver's licence was made. The State did not oppose the appeal, it prayed that the appellant be found not guilty and acquitted. The concession was not properly made regard being made to the circumstances of the case. According to the State, on the 27th of January 2024 the appellant drove an unregistered 6 tonne Nissan Diesel truck at night without headlights along Chiumburukwe Road, Karoi. He was observed by a police officer who was driving in the opposite direction. The Officer duly turned and followed the appellant until he stopped him and effected arrest. The proceedings before the Court a quo The State Case The State led two witnesses to prove its case. The first witness was police officer who told the Court that as he was driving home at night, he saw a truck travelling in the opposite direction. The truck had no headlights. He observed that someone sat in the loading box with a torch illuminating the road. He turned and followed the truck. When the driver finally HCC 25/25 X REF: CRB KAR 209/24 stopped, he arrested him for driving the vehicle without lights at night. The second witness was an officer from the Vehicle Inspection Depot, 'VID' who examined the truck in June

2024. His examination established that the truck's right-hand headlights were functional on both high and low gear. The appellant denied the offence. His defence was inelegantly set out but he seemed to say when he embarked on the trip he had lights, along the way the lights became faulty and he stopped the truck. When he was arrested, he was parked along the road. Under cross examination he appeared to prevaricate from his defence outline. After considering the evidence before it, the trial Court found the appellant guilty as charged. The Court believed the police officer. It rejected the expert evidence that the right- side headlights were functional on the basis that the truck was examined after six months and it

could have been tampered with. In the main it considered that the appellant did not deny that he had faulty headlights but that he drove in order to park at a safe place. It took a dim view of the appellant's inconsistencies in his defence case. The Appeal Ad Conviction Four grounds of appeal were set out. The first two grounds impugn the Court a quo's decision to reject the expert witness' evidence in favour of the police officer's evidence. The third ground of appeal impugns the Court a quo's decision to reject the appellant's defence. The fourth ground of appeal is too general and lacks precision, it simply states that the essential elements of the offence were not proved beyond a reasonable doubt. It does not direct the Court to a specific issue that it impugns. In *State v Jack* 1990 (2) ZLR 166 (SC), a ground of appeal similarly couched was held to be invalid and the Supreme Court remarked that, "This amounts to saying he was not guilty because he was not guilty. It is meaningless. A magistrate who receives such a notice of appeal cannot know what to say in response to it ...". See also *S v McNab* 1986 (2) 280 (SC) @ 282 B, *S v Ncube* 1990 (2) ZLR 303 (SC), *Kwanai v The State*, SC 12/97. From the grounds of appeal two issues stand for determination, as follows, HCC 25/25 X REF: CRB KAR 209/24

1. Whether or not the trial Court misdirected itself when it rejected the expert evidence in favour of the police officer's evidence.
2. Whether the appellant's defence was plausible and the trial Court must have accepted it. I deal with the issues below. Whether the dismissal of the expert evidence was a misdirection. There is no doubt that the trial Court did not accept the expert evidence that the truck's right-side headlights were functional. It surmised that the truck was examined after a long period and it could have been tampered with. It was factually correct that the truck was not examined immediately after the offence was allegedly committed. It was examined in June 2024 almost six months later. As already stated, the State did not oppose the appeal. It submitted that the Court a quo erred when it dismissed the expert witness' evidence in the absence of other expert evidence to contradict it. The evidence actually corroborated the appellant's defence. After discarding the expert evidence the Court a quo was left with the appellant's word against the single witness' evidence. The matter was reduced to a boxing ring case. Although the State relied on assault cases where the complainant only gave evidence against the accused, the point made was that the Court a quo could not make a finding on the single witness in view of the expert evidence before it. Indeed, there was no evidence of tampering before the Court. The truck was parked at the Police Station. The Court a quo could not draw an adverse inference against the appellant due to the prolonged delay in the examination of the vehicle. It would appear that the Court a quo was influenced by extraneous factors in rejecting the expert evidence which is a misdirection. It was the State that adduced the evidence and even in its closing submissions the State did not seek to reconcile its witnesses' evidence. Unfortunately, or fortunately for the appellant the expert evidence partially contradicted the first witness' evidence. The Court could not discard the expert evidence without the benefit of expert evidence to contradict it. The Court misdirected itself on the said issue. The ground of appeal succeeds. Whether the appellant's defence was plausible HCC 25/25 X REF: CRB KAR 209/24 It is now settled that a Court is

required to consider the accused's defence and if the defence is reasonable, it should be accepted. The accused's defence is only rejected where it is found to be palpably unreasonable. In his defence outline the appellant did not deny that the headlights were faulty. I set it out in full, 'I drove from GMB to town. I was going to deliver pit sand at Mudadi building. I stopped at the place as there were no people. So I stopped because the lights had gone faulty. The lights were there, I was then arrested close to ZESA. I was parked along the road besides the road.' Although inelegantly set out, for all intents and purposes the appellant indicated that the lights were faulty and he parked. From that narrative he was a responsible driver who did not intend to take any risks. However, what transpired during the trial proceedings literally gave him away. Faced by the evidence from the first witness indicating that he saw the truck being driven without headlights and on being confronted he apologised, the appellant could not sustain his defence. As correctly noted by the Court *a quo* the appellant did not dispute that the truck had no headlights. For completeness I set out the brief cross examination in full, "Q On the day you arrested me what did I say in terms of where I was heading. A Q A Q A Q A Q You said that you were going to park the vehicle home so that it shall be safe. Didn't I explain that I was going to Mudadi building opposite? You said that you were going home. I stay in Chiedza and I had a load to deliver so I did not say home. Since I was not privy where your home was, I did not seek to hear that. I told you that you were supposed to park when the lights had gone off and not beyond that. I could not park the vehicle where it would pose danger to other road users. That's why I drove the vehicle to a safe place as a trained person. I am also a driver. It's not reasonable for one to drive for kilometers without lights you should have just pulled off the road in the vicinity. I would agree with you to some extent but would one park at a depression junction or curve? (underlining for emphasis) HCC 25/25 X REF: CRB KAR 209/24 A Q A Q A It is not safe but you drove many straight stretches from where you had come from as per your word. There were stretches of the road and you could have safely parked safely. When we met and the time given in the state outline is not correct. You found us in the curve and we were trying to run away from you as we always have offences with you. We had started our car after seeing the Dispol. The time was the time I have said. It was around to 8pm when we met and we tried to reason with you when other police officers came in, it was at 2200 hours when the escort came. I maintain the time its 2200 hours. In any case it was driving the hours of darkness." During cross examination the appellant did not at any point put it to the witness that the headlights were lit whether both of them or the right side. He did not even dispute the evidence that there was someone in the loading box who illuminated the road using a torch. The appellant actually confirmed that there was someone with a torch in the loading box as he drove the truck. His issues on cross examination were about where he was going and why he could not stop and park anywhere. The appellant had forgotten his defence outline, which to my mind was a lie and lies have short legs they cannot be easily sustained for long. It is the duty of every judicial officer to closely analyze the facts and see through some veils thrown by accused persons. The appellant forgot that he had said he parked when the lights became faulty. He was not consistent in his defence. His inconsistency destroyed his credibility and in a way corroborated the State case. Even if he was self-actor,

he could not have failed to cross examine the first witness on the important issue of lights. From the appellant's version of what transpired it was unclear what transpired. Was he parked when the first witness arrested him? Was he driving looking for a safe place to park? Was he driving trying to escape from the Dispol since they had issues with the Police? His narrative changed at every turn. Lack of consistency in the evidence discredits the probative value of evidence. Finally, even under cross examination by the State he said he realized that his left side lights were not functioning but he continued since he could see clearly. In such circumstances the Court a quo cannot be faulted for rejecting his defence as palpably false and not worth believing. The last ground of appeal has no merit. Whether the appeal must succeed HCC 25/25 X REF: CRB KAR 209/24 The overarching determination is whether the appeal must be allowed in its totality in view of the expert evidence. The Court must consider whether there was evidence against the appellant. This is a time-honoured approach which is followed in our jurisdiction, see for instance *Mapfoche v The State* SC 84/21. Even in the presence of the expert evidence the appellant is still liable. The report from VID did not exonerate the appellant from liability completely. The report stated the position at the time of examination and not what transpired on the road. Even if the appellant travelled at night with a truck lit on one side, he is still culpable. The report indicated that the truck was unregistered, it had no indicators at all. Despite upholding the first ground of appeal, the evidence before the Court a quo was adequate to convict the appellant. This is within the contemplation of Section 38 of the High Court Act [Chapter 7:06] which provides, ' (3) If any point raised is decided in favour of the appellant and it consists of a misdirection by the trial court or tribunal of itself on a question of law or a question of fact or a question of mixed law and fact, the High Court shall dismiss the appeal if it is satisfied that the evidence which has to be considered has not been substantially affected by the misdirection and that the conviction is justified having regard to the evidence.' The import of that section is to give the appeal Court a wide discretion in the assessment of an appeal. The appeal Court is not only confined to the grounds of appeal but to the overarching question whether the conviction is justified from the totality of the evidence. In this case the totality of the evidence shows that the appellant was not parked when he was arrested. He confirmed during this during the trial proceedings. On the 25th of February 2025 I issued a detailed review minute in which I noted that the appellant's conduct to drive at night with one set of headlights cannot be said to be reckless driving. Recklessness was defined in *S v Mtizwa* 1984 (1) ZLR 230 as '... not only a wilful disregard for the safety and rights of other road users but also cases of indifference or rashness or inadvertence in which consciousness of consequences plays no part'. See also *R v Phillipson* 1957 (1) SA 114 (SR), *Mutambara & Anor v The State* HH 190/23. The State must prove a conscious risk with a wanton disregard for other road users. Thus drivers who drive against traffic at high speed are usually convicted of reckless driving, see *S v Munyaradzi Rende* HH 329/24, *Mutambara* (supra). HCC 25/25 X REF: CRB KAR 209/24 The acceptable facts of this case are that the appellant drove the truck at night. When the first witness observed him he was not parked, he was driving. He was stopped by the first witness. The dispute on whether both headlights were not lit is resolvable by the VID report that only one side was functional and the

appellant's evidence during the trial proceedings. The appellant's conduct cannot be said to be a wanton disregard of other road users he had one set of lights on, at least other road users could see that there was a motor vehicle. His conduct was negligent. I therefore abide by the findings in the review minute as referred earlier. The appeal against conviction partially succeeds to that extent. Ad Sentence The appeal against sentence has no merit. The sentence shall be interfered with on account of the verdict that has been altered. I shall briefly address the grounds of appeal against sentence for completeness to substantiate my finding. The first ground of appeal is that s53 (2) of the Act does not provide for a minimum mandatory sentence. The ground of appeal is premised on a misconception of the law. The penalty provision is very clear. It provides for a minimum sentence of two years imprisonment where there are no special circumstances and a maximum sentence of fifteen years. Each case will depend on its circumstances. The second ground of appeal is a ground for review that the Court a quo did not adequately explain what constitutes special circumstances. Indeed, the Court must explain what constitutes special circumstances to the accused. The explanation must be such that an ordinary person fully appreciates what these are. The test therefore is objective. In a plethora of cases Courts have delved into what constitutes adequate explanation. The explanation must be recorded S v Mule & Anor HH328/20. The Court must explain early in the proceedings of the complexities of the matter and the minimum sentence S v Dube & Anor 1988 (2) ZLR 385 at 391F-393G. The Court must unpack the term special circumstances / or factors peculiar to the accused or offence with reference to examples where possible and advise the accused that he can lead evidence S v Manase HH 110-15, S v Mule (supra). The State must be given an opportunity to respond S v Kambuzuma HH175-15. HCC 25/25 X REF: CRB KAR 209/24 In this case the Court a quo substantially complied with the requirements. It explained what constitutes special circumstances and even gave examples that these are circumstances where the appellant could have found himself between a hard rock and a hard surface. He had no option but drive in those culpable circumstances. The record of proceedings shows an adequate explanation. There is no merit in the appeal against sentence. Since the charge has been altered to negligent driving the sentence must be reconsidered. There is no need to refer the matter back to the Court a quo since all the information was recorded. The degree of negligence was on the high side. From the time the appellant embarked on the mission impossible he was committing an offence(s). He confessed to this during the trial. He drove an unregistered vehicle, it had no lights (headlights and indicators) and he drove at night. The purpose of lights especially at night is not for the driver only, it is also for other road users to see the vehicle and its size. In this case there was limited illumination which posed a risk to other road users. Our roads have become death traps, every driver therefore has a duty to guard against creating conditions that exacerbate road accidents. An imprisonment term wholly suspended on condition of performance of community service would be appropriate. The Court a quo canvassed the special circumstances on prohibition from driving. He said he could not park at GMB since it was a hot spot for crime. This was not disputed by the State. The Court a quo's reasoning to prohibit the appellant from driving for life was that he continued with the journey without headlights at all. Since on appeal the

finding is that he proceeded with the left side of the headlights lit his conduct was not reckless but negligent. That at GMB where he noticed the fault he could not park therefore constitutes a special circumstance. The licence shall be cancelled and the appellant prohibited from driving for a defined period of time. The appellant's conduct shows that he has no regard for road traffic laws. What transpired on the day was a series for violations of the law. His conduct must be nipped in the bud.

Disposition

The appellant has successfully proved that the Court a quo misdirected itself by rejecting the VID report which partially corroborated his case. Despite that, the evidence borne of the record established that the appellant drove negligently. The first witness established that the appellant was driving and the second witness established the appellant HCC 25/25 X REF: CRB KAR 209/24 drove a faulty unregistered vehicle. In the whole, the appeal against conviction partially succeeds. It follows that the sentence must be altered in view of the Court's finding. The appellant spent about three months in prison. No accident resulted from his driving. That must be taken into consideration. Accordingly, the following order is made. Verdict The appeal partially succeeds the verdict is set aside and substituted with the following, 'Guilty of negligent driving in contravention of s52 (2) (a) of the Road Traffic Act [Chapter 13:11]. Sentence 10 months imprisonment of which 3 months imprisonment is suspended on condition within that period the accused does not commit an offence involving negligent driving of a motor vehicle of which upon conviction he is sentenced to imprisonment without the option of a fine. The remaining 7 months imprisonment is wholly suspended on condition of performance of community service. In addition, the accused is prohibited from driving class 2 motor vehicles for 12 months from the date of this order. Bachi – Mzawazi J Agrees National Prosecuting Authority, the respondent's legal practitioners

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Prepared on 27 October 2026 · Esheria