

**IN THE HIGH COURT OF ZAMBIA**  
**HOLDEN AT LUSAKA**  
*(Criminal Jurisdiction)*

**HP/226/2010**

BETWEEN:

**THE PEOPLE**  
**AND**  
**PAULO PUPILO**

*Before the Hon. Mr. Justice Dr. P. Matibini, SC, this 3<sup>rd</sup> day of October, 2012.*

*For the People: Ms. F. Nyirenda, State Advocate, Director of Public Prosecutions Chambers.*

*For the Defence: Mr. E. S. Silwamba, SC and L. Linyama of Messrs Eric Silwamba and Company.*

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**RULING**

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***Cases referred to:***

1. *R v Silverlock [1894] 2 Q.B. 766.*
2. *Baker v Market Harborough Industrial Co-op Society Limited [1953] 1 W.L.R. 1472.*
3. *Day v R (1958) R and N 393.*
4. *Practice Note [1962] 1 ALL E.R. 448.*
5. *The People v Japau (1967) Z.R. 95.*
6. *Moonga v The People (1969) Z.R. 63.*
7. *Mullon v The People (1971) S.J. 278 (unreported).*
8. *Lubinda v The People (1973) Z.R. 43.*
9. *Chanda v The People (1975) Z.R. 131.*
10. *Chapita v The People (1976) Z.R. 195.*

11. *Kabwe Transport Company Limited v Press Transport (1975) Limited (1984) Z.R. 43.*
12. *Banda v The People (1977) Z.R. 169.*
13. *The People v Makowela and Another (1979) Z.R. 290.*
14. *Kapembwa v Maimbolwa and Another (1981) Z.R. 127.*
15. *Regina v Galbraith [1981] 1 W.L.R. 1039.*
16. *Chileya v The People (1981) Z.R. 33.*
17. *Litana v Chimba and Another (1987) Z.R. 26.*
18. *Mutale and Another v The People (1995-1997) Z.R. 227.*
19. *Murono v The People (2004) Z.R. 207.*
20. *The People v Champako (2010) VI 1, Z.R. 25.*

**Legislation referred to:**

1. *The Road Traffic Act Number 11 of 2002. ss. 22, 148, and 166.*
2. *Criminal Procedure Code, cap 88, ss. 206 and 291(1).*

The accused, is charged with two counts of causing death by dangerous driving, contrary to section 161 (1) of the Road Traffic Act Number 11 of 2002. The particulars of the first count are that the accused, on 24<sup>th</sup> February, 2010, in Siavonga District, did cause the death of Matani Chisenga by driving a motor vehicle, namely, Land Rover, registration number ABL 1071, on a public road in a manner which was dangerous to the public having regard to all the circumstances of the case, including the nature, condition and the use of the traffic which was actually at the time or might have been expected on the said road.

The particulars of the second count are that on the same day; 24<sup>th</sup> February, 2010, the accused did cause the death of Olivivour Siachisendu by driving the same motor vehicle on the same road, in a manner which was dangerous to the public having regard to all the circumstances of the case, including the nature, condition, and the use of the road and the amount of traffic which

was actually at the time or which might have been expected to be on the said road.

The accused pleaded not guilty. As a result, I ordered that the matter proceed to trial. During the trial, the prosecution called a total of seven prosecution witnesses. These included: five civilian witnesses; one expert witness; a motor vehicle examiner, and a police officer who was assigned to investigate the matter. The first witness of the prosecution was Theresa Mbewe. For convenience, I will continue to refer to her as PW1. PW1 is a business woman who resides in Mitchwell Blacksoil compound in Siavonga District. PW1 recalled that on 24<sup>th</sup> February, 2010, she was involved in a programme of evangelizing, with fellow women folk in Manyepa Village. The group was accompanied by the accused; a father in the Catholic Church. PW1 and her women folk were driven to Manyepa village by the accused. The journey to Manyepa Village started at around 13:00 hours. As the group was journeying, and approached the area between Kariba Store and Bendele area, PW1, heard a loud report from one of the wheels. Immediately thereafter the vehicle, veered off the road into the bush, before the accused succeeded to steer the vehicle back onto the main road. In the process, PW1 found herself jettisoned from the vehicle. According to PW1, the vehicle was neither moving slowly nor fast.

The second witness was Noria Mulenga. I will continue to refer to her as PW2. PW 2 resides at Bakasa Village. PW2 recalled that on 24<sup>th</sup> February, 2010, she was notified that the accused would be evangelizing in Manyepa Village. When PW2 received that information, she requested for a lift from the accused. The accused acceded to her request. And PW2 recalls that she boarded the vehicle around 13 hours on the same day, 24<sup>th</sup> February, 2010. PW2 also recalls that, when they got to Micho area, more women boarded on the vehicle. Three of those women were from Namomba area. And one was

from Chalokwa area. All in all, they were about fourteen passengers on the vehicle.

PW2 also recalls that when they reached Kariba Store, and as they were approaching Bendele area, they were involved in an accident. PW2 could not recall how the accident happened. PW2 just found herself on the ground. And the vehicle was lying on its side. PW2 testified that the vehicle was being driven properly.

The third witness was Mary Muzovu Chilindi. And I will continue to refer to her as PW3. PW3 is a business woman and lives in Micho area, in Siavonga. PW3 also recalled that on 24<sup>th</sup> February, 2010, she went out with her friends as was the tradition, to evangelize. They started the journey around 13:00 hours. The vehicle that transported them was driven by the accused. PW3 recalls that after they had passed Kariba store, and were approaching Bendele area, she heard a metallic sound and the vehicle swerved twice. After it swerved, PW3 together with her fellow passengers were thrown on the ground. PW3 also testified that the vehicle was moving at a normal speed.

The fourth witness was Bertha Mwape. I will continue to refer to her as PW4. PW4 is also a business woman. She resides at Micho Compound in Siavonga. PW4 recalls that on 24<sup>th</sup> February, 2010, she received a call from Siavonga District Hospital, informing her that her cousin; Matani Chisenga had been involved in an accident. When PW4 arrived at the ward where Matani Chisenga was admitted, she was informed by the Doctor that her cousin had sustained serious injuries, and required to be evacuated urgently to the University Teaching Hospital (UTH). However, as PW4 was waiting for her cousin to be evacuated, she passed on.

The fifth prosecution witness was Mikita Simanyegu. I will continue to refer to her as PW5. PW5 is a peasant farmer who resides at Siachizandu Village, in Siavonga. PW5 recalled that on 24<sup>th</sup> February, 2010, she requested for a lift from the accused. PW5 recalls that during the journey, the vehicle almost overturned, and the passengers were thrown off the vehicle unto the side of the road. After PW5 was thrown off the vehicle, she became unconscious. And only recovered her consciousness at Siavonga hospital. She also testified that she was accompanied by her daughter; Olivioir Siachisandu. Olivioir was twelve years old. After PW5 regained her consciousness, and was discharged from the hospital, she was informed that her son by the name of Cojak had died in the course of the same accident.

The sixth prosecution witness was Martin Lombe Mumba. And I will continue to refer to him as PW6. PW6 is a Motor Vehicle Examiner, with the Road Traffic Safety Agency (RTSA). PW6 is a member of the Chartered Institute of Logistics and Transport. PW6 recalls that on 24<sup>th</sup> February, 2010, he was assigned to inspect a motor vehicle at Siavonga Police Station that had been involved in an accident. The motor vehicle in question was a Land Rover 110, registration number ABL 1071. In the course of the inspection, PW6 observed that the vehicle had a punctured tyre on the rear right side of the vehicle. PW6 also inspected the scene of the accident. And came to the conclusion that the motor vehicle was overspeeding, because according to his experience, when a vehicle is doing a speed of about 65 KM per hour, it is unlikely that it could overturn.

Further, he testified that when a vehicle is doing a speed of 80 KM per hour or more; has a puncture; and a driver suddenly applies breaks; it is likely that the driver will lose control of the vehicle. And the vehicle would overturn. PW6 also further testified that a contributing factor to the overturning of the vehicle is the load on the vehicle. The normal load on a Land Rover 110 is eight passengers; two in front and six at the back. In this

case, the vehicle had fourteen passengers on board. Thus PW6 opined that the vehicle was overloaded. And since it was overloaded, it overturned.

The seventh witness was Donald Mubiana. And I will continue to refer to him as PW7. PW 7 is an Inspector in the Traffic Division of the Zambia Police Service. He is based at Siavonga Police Station. PW7 recalled that on 24<sup>th</sup> February, 2010, he was on duty, and was stationed at the Police check point at Micho in Siavonga. In the course of his duties, he was informed of the accident that had taken place around Bendele Area. When he arrived at the scene of the accident, he found that all the victims of the fatal accident had been rushed to the hospital for treatment, save for Kojack Siachisandu who died on the spot. Near the scene of the accident, PW7 observed skid marks and the fact that the Land Rover 110 had fallen on its side on the tarmac. He proceeded to draw a sketch plan of the scene of the accident, in the presence of the accused. After drawing the sketch plan, he together with the accused drove the vehicle to the police station. After leaving the vehicle at the police station, he rushed to the hospital to record statements from the victims who were able to. Whilst in the ward, one of the victims of the accident, Jamani Chisanga died.

PW7 returned to the police station and decided to lodge the accused in the cells. The following day, PW6 came to examine the vehicle. After examining the vehicle, he decided to charge the accused of the offence of causing death by dangerous driving contrary to section 161 of the Road Traffic Act Number 11 of 2002. Under warn and caution, the accused denied the charge. And eventually was released on Police Bond.

At the close of the prosecution case, Mr. Silwamba, SC, submitted that the accused had no case to answer. Further, he indicated to me that he would file written submissions to that effect. Ms. F. Nyirenda, State Advocate, in the

Director of Public Prosecutions Chambers, similarly intimated that she would file into Court a written response.

Mr. Silwamba SC, observed in the submissions that the prosecution called seven witnesses, in aid of its case. He recited the evidence of the witnesses. However, Mr. Silwamba's SC submissions are focused primarily on PW6's testimony; a motor vehicle examiner with RTSA. Mr. Silwamba, SC observed that on 24<sup>th</sup> February, 2010, PW6 received telephone call from Inspector Mubiana requesting him to examine a motor vehicle. On inspecting the vehicle, PW6 discovered that the vehicle had a punctured tyre. PW 6 also inspected the scene of the accident. After inspecting the scene of the accident, PW6 reached the conclusion that at the material time, the accused was overspeeding.

During the testimony of PW6, Mr. Silwamba, SC, recalled, that PW6 testified that according to his experience, a vehicle travelling at a speed of 65 kilometres per hour cannot overturn when brakes are applied. PW6 opined then that the vehicle may have overturned because: the accused applied the brakes suddenly; the vehicle was overloaded having carried fourteen passengers; and one of the tyres had a slow puncture. PW6, Mr. Silwamba, SC, submitted, attributed the slow puncture to either a weak valve, or a sharp object piercing the tyre.

Mr. Silwamba, SC, also submitted that under the pain of cross-examination, PW6 failed to show that he has qualifications in speed dynamics. Mr. Silwamba, SC, contends that the only credentials PW6 was able to show is that he is a solo officer at the Kariba branch of the RTSA, where he performs a multiple of roles. He also noted in particular that PW6 failed during the trial to produce a gazette notice to prove that he is a duly certified vehicle examiner as required by the provisions of section 22 of the Road Traffic Act No. 11 of 2002. Section 22 enacts that .

*“22 If in any proceedings under this Act any question arises whether a motor vehicle or trailer does or does not comply with any provision of this Act, or any regulation made under it, a certificate purporting to be signed by any person appointed by Gazette Notice, by the Agency, to act as a vehicle examiner for the purposes of this Act, that such person has examined the vehicle or trailer and as to the result of the person’s examination shall be admissible in evidence and shall be prima facie evidence of any fact or opinion stated therein relating to the matter in question without calling as a witness the person who purports to have signed such certificate.*

*Provided that any person against whom the evidence of such certificate is sought to be used shall have the right to object to the admissibility of such certificate as evidence unless the person who purports to have signed it is called as a witness.”*

Mr. Silwamba, SC, submitted that when PW6 was questioned about his statutory role, he responded that the Road Traffic Act has inconsistencies. Mr. Silwamba, SC, argued that PW6 failed to show that he possesses the requisite experience or knowledge to appreciate the factors that need to be taken into account when examining a motor vehicle after a road traffic accident. This failure, Mr. Silwamba, SC, argued is compounded by the fact that he failed to produce the Gazettee Notice before Court as required by law.

After inspecting the vehicle and the scene of the accident, Mr Silwamba, SC noted that PW6 prepared a report which was admitted in evidence, and marked as P1. Mr. Silwamba, SC, argued that during cross-examination, PW6 conceded that he had back dated the report; found debris consisting of shattered glass at the scene of the accident; neglected to refer to the debris in the report; and also failed to take any measurements at the scene of the accident.

Furthermore, Mr. Silwamba, SC, submitted that PW6 did not determine the ages of the passengers, as well as their weight. Mr. Silwamba, SC, argued that the failure to reflect the matters referred to above in the report was a



major oversight on his part. Mr. Silwamba, SC, pointed out that the provision restricting the number of passengers in a motor vehicle, and mode of calculating the number of passengers is governed by section 166 of the Road Traffic Act, in the following terms:

*“166 (1) No person shall use or cause or permit to be used on a road any motor vehicle in which the number of occupants including the driver exceeds the seating capacity of such motor vehicle as determined in such manner and by such method as may be prescribed.*

*(2) In determining the number of occupants in any such motor vehicle, children under the apparent age of four years shall not be counted and two children of over the apparent age of eight years but under the apparent age of eight years shall be counted as one occupant.*

*(3) Any person who contravenes the provisions of subsection (1) commits an offence”.*

Mr. Silwamba, SC, also argued that there were a number of irregularities in the manner in which PW1 went about his task of assessing the probable cause of the accident. Mr. Silwamba, SC, observed that PW6 was ignorant about: the formula used in calculating the number of passengers; the gross vehicular mass of the vehicle; the size of the tyre; and did not use any measuring devices at the scene of the accident.

As regards PW7, Mr. Silwamba, SC, noted that PW7 is an Inspector of Traffic. And he is based at Siavonga Police Station. After the accident, Mr. Silwamba SC, noted that PW7 drew a sketch map which was admitted in evidence, and marked as P2. During cross-examination, PW7 conceded that the sketch map did not refer to the debris found at the scene of the accident; and he did not complete the Traffic Accident Report Form. He also noted that PW7 failed to produce the punctured tyre before the Court.

After making the preceding observations, Mr. Silwamba, SC, proceeded to apply the law to the facts of this matter. He observed that the accused is

alleged to have committed an offence contrary to the provisions of section 161 (1) of the Road Traffic Act Number 11 of 2002. Section 161 (1) enacts that:

*“161 (1) Any person who causes the death of another person by the driving of a motor vehicle on the road recklessly or at a speed, or manner which is dangerous to the public, having regard to all the circumstances of the case including the nature, condition, and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be, expected to be, on the road commits, an offence, and shall be liable on conviction, to a fine not exceeding thirty thousand penalty units or to imprisonment for a period not exceeding five years or to both.”*

Mr. Silwamba, SC, submitted that it is trite law that the burden of proof in criminal matters lies on the prosecution. And the threshold in discharging the evidential burden, is proof beyond reasonable doubt. Be that as it may, Mr. Silwamba, SC, submitted that in the context of an application of a no case to answer, the onus is on the defence to show that that the prosecution has not established a *prima facie* case against the accused. On the facts of this case Mr. Silwamba, SC, contends that the prosecution witnesses have by their own testimony absolved the accused from any criminal liability, because they testified that the accused drove the vehicle with circumspection.

Mr. Silwamba, SC, pressed that for a person to be convicted of the offence of causing death by dangerous driving, it must be clearly shown that the accused placed himself and other road users in foreseeable danger. In this case, Mr. Silwamba SC, contends that, the prosecution has failed at this stage of the proceedingsto prove this requirement.

In aid of the preceeding submission, Mr. Silwamba, SC, drew my attention to the case of *Chanda v The People (1975) Z.R. 131*. In the *Chanda case (supra)* it was observed that:

*“For driving to be dangerous it does not have to be reckless, I considered this question in Mullan v The People (1971) S.J. 2178 where I said at page 91 that:*

*“(1) driving which falls short of the objective standard of the reasonably prudent driver is either dangerous driving or careless driving, depending on whether or not danger to the public results;*

*(2) For the purposes of the foregoing proposition, danger means actual or potential danger of injury to other persons which is reasonably foreseeable in the ordinary course. The Court accepts this as a correct statement of the law.”*

Mr. Silwamba, SC, argued that there is no evidence to show in this case that the accused person drove the vehicle in manner that fell short of the standard of a reasonable person; save of course for the controverted contention by the prosecution that he drove the vehicle in a fast manner. Mr. Silwamba, SC, argued that, this assertion is not supported by any evidence, because the actual speed limit on the road was not established.

Mr. Silwamba, SC, went on to submit that both PW6, and PW7, testified that neither the RTSA, nor the Local Authority; Siavonga District Council, have determined and erected road traffic signs depicting speed limits on the road. Mr. Silwamba SC, argued that the jurisdiction to determine the traffic speed limit and erect road traffic signs lies with the Minister of Transport and Communication, pursuant to the provisions of section 148 of the Road Traffic Act No. 11 of 2002. Section 148 is in the following terms:

*“148 (1) the general speed limit:-*

- (a) In respect of every public road or section thereof situated within the area of a local authority;*
- (b) In respect of every public road or section thereof situated out side the area of a local authority; or*
- (c) In respect of every freeway; shall be as prescribed by the Minister, on the recommendation of the Agency.*

*(2) An appropriate road traffic sign, set by the agency, may be displayed on any public road indicating a speed limit other than the general speed limit which under subsection (1) applies in respect of that road: provided that such other speed limits shall not be higher than the speed limits prescribed under paragraph (c) of subsection (1).*

*(3) The Minister may, after consultation with the Agency in respect of any particular class of vehicle prescribe a speed limit which is lower or higher than the general speed limit prescribed under paragraph (b) or (c) of subsection (1).*

*(4) No person shall drive a vehicle on a public road at a speed in excess of*

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*(a) The speed limit which under subsection (1) applies in respect of that road:*

*(b) The speed limit indicated under subsection (2) by an appropriate road traffic sign set by the Agency, in respect of that road; or*

*(c) The speed limit prescribed by the Minister, in consultation with the Agency, under subsection (3) in respect of the class of vehicle concerned.”*

In light of the preceding provisions, Mr. Silwamba, SC, contends that it is only the RTSA that has jurisdiction to mount speed limits or road traffic signs. Mr. Silwamba, SC, further contends that in the absence of the Agency determining the speed limit, it is not open for any other person to do so. Mr. Silwamba, SC, further contends that whenever the speed of a motor vehicle is in issue, it is mandatory for the prosecution to adduce expert evidence. A failure to do so, Mr. Silwamba, SC, submits is fatal. Mr. Silwamba, SC, contends that in this case the knowledge of PW6 and PW7 fell below the required level of expertise because the witnesses are not experts in speed dynamics. Furthermore, Mr. Silwamba, SC, argued that PW6 is not a gazetted motor vehicle examiner. Consequently, he is not an expert.

Mr. Silwamba, SC, submitted that his various contentions outlined above are reinforced by the case of *Litana v Chimba and Another (1987) Z.R. 26*, where it was observed as follows:

*“Mr. Mwanachongo on behalf of the State, whilst conceding that there was misdirection by the learned trial commissioner, has maintained that the finding that the appellant was driving at an excessive speed was correct because even the speed of forty to forty-five miles per hour was excessive as indicated by the fact that one of the children received an injury to the skull*

*as a result of which the brains were extruded. There was no attendance on behalf of the respondent at the trial, and therefore no cross-examination of the appellant. There was no expert evidence as to the estimated speed of the appellant having regard to the damage to the vehicles and the injuries to the occupants. And in the absence of such evidence, it was not competent for the trial Court to come to the conclusion that the speed of the appellant's vehicle was excessive. The injury to the dead child may well have occurred had the vehicle collided with an object at a much lesser speed. In the event, we are bound to agree with Mr. Chitabo that there was nothing in the evidence to indicate that the appellant was driving at excessive speed. We do not consider that a speed of forty to forty-five miles per hour at night on a main road is necessarily excessive, nor do we agree that there is any principle of law that a motorist, when driving at night must drive at such a speed that he may be able to avoid a lorry reversing across the road in front of him without warning."*

Mr. Silwamba, SC, maintained that PW6 and PW7 lack the requisite expertise. And therefore, little or no weight should be attached to their flawed, and incomplete conclusions. In this respect, Mr. Silwamba relied on the case of *R v Silverlock [1894] 2 Q.B. 766* dealing with handwriting experts. Although the case deals with evidence of opinion, I would not really say it is a case in point. Mr. Silwamba, SC also maintained that the collective testimony of PW1 to PW5, confirms that the accused drove the vehicle carefully and at a modest speed; up to the time there was a report from one of the tyres. Mr. Silwamba, SC, contends further that even PW6 confirmed that the tyre punctured. And that was the probable cause of the accident. Furthermore, Mr. Silwamba, SC, contends that the motor vehicle in issue was in a serviceable condition, and the tyres were not worn out.

Granted the circumstances outlined above, Mr. Silwamba, SC, contends that the accused had raised a special defence which should lead me to find in his favour that he has no case to answer. In aid of this argument, Mr. Silwamba, SC, drew my attention to the case of *Chipita v The People (1976) Z.R. 195*, where it was held that:

*“on the other hand, had the evidence been that the spare was punctured, this must surely have been most conclusive in favour of the appellant, and equally if the evidence had been that there was no spare on the vehicle, it would have been strong evidence in his favour.”*

In addition, Mr. Silwamba, SC, drew my attention to the case of *Mutale and Another v The People (1995-1997) Z.R. 227*, in which it was held that:

*“Where two or more inferences are possible, it has always been a cardinal principle of criminal law that the Court will adopt one that is more favourable to an accused if there is nothing to exclude that inference. Where there are lingering doubts, the Court is required to resolve such doubts in favour of the accused.”*

Mr. Silwamba, SC, argued that there is no evidence to counter the accused’s contention that the accident was caused by the puncture of the tyre. Mr. Silwamba, SC, further contends that the failure to produce in evidence the tyre that punctured, as well as to call witnesses who towed the vehicle, is fatal to the prosecution case. In support of the preceding contention, Mr. Silwamba, SC, again drew my attention to the case of *Chapita v The People (supra)*, where the following observation was made:

*“There were two misdirection’s here. First, this approach misplaces the onus in that it suggests it was for the appellant to support his explanation whereas in fact it was for the prosecution to negative the possibility that it might be true. Secondly, the learned trial judge failed to draw the proper inference or indeed any inference from the silence of the Traffic Inspector’s report as to the presence and condition of a spare tyre; the absence of this crucial evidence should have been construed in favour of the appellant. We are satisfied that had the learned judge adopted the correct approach as to the onus and drawn the proper inferences from the evidence he must inevitably have been in doubt.*

*Mr. Lwatula on behalf of the State very properly indicated that he could not support this conviction because one did not know what evidence would have been given by the witnesses who towed the vehicle from the scene of the accident had they been called. It was certainly the duty to the prosecution to call them. The appeal must be allowed, and the conviction and sentence set aside.”*

Mr. Silwamba, SC, contends that the approach adopted by the investigating officers, and the manner the evidence was presented fell short of the required standard. He pointed out that both PW6's and PW7's evidence did not refer to the debris and the broken glass at the scene of the accident. And both witnesses PW6 and PW7 did not take any measurements at the scene of the accident. Mr. Silwamba, SC, argued that it was the duty of these two witnesses; to reconstruct the scene of the accident with precision; a task they lamentably failed to do.

Mr. Silwamba, SC, maintained that he is reinforced in making this submission by the case of *Chanda v The People (1975) Z.R. 131*, where the following observation was made:

*"We are bound to say that, in so many cases of this kind, the evidence was poorly prepared and poorly presented. Once again we draw the attention of those responsible for the investigation of traffic accidents to the importance of conducting careful examination of the scene of the accident, of taking the most careful measurements, and of the collection of the evidence such as skid marks, or other kinds of tyre marks on the road, the precise position of broken glass and dried mud droppings, the positions of the vehicles after the accident, the nature and location of the damage to the vehicles, and so on. Evidence of this kind is what is commonly termed "real" evidence in contradistinction to the evidence of the parties, and other witnesses; almost invariably there will be conflicts of evidence as to how the vehicles were being driven before an accident, what was the precise point of impact, and how the vehicles behaved after the accident, and it is frequently possible to resolve such conflicts by proper inferences drawn from the "real" evidence at the scene."*

Mr. Silwamba, SC, contends that PW7 had so many versions of the sketch plan explaining how the accident happened, that doubt is raised as to how the sketch plan was prepared. Again, Mr. Silwamba, SC, drew my attention to the case of *Chanda v The People 1975 Z.R. 131* to reinforce his submission when it was observed:

*“On the question of broken glass however, Mr. Fernando’s comments have force: he points out that it is impossible for the broken glass to be lying on one spot, and that it was the duty of the police officer to depict the whole area over which the broken glass was spread. We endorse this submission, particularly since the legend “broken glass” was followed by the legend “point of impact,” which is clearly an inadmissible conclusion of the police officer, the witnesses duty is to record his observation, and it is for the Court to decide on the evidence before it the precise position of the point of impact.”*

Mr. Silwamba contends that the investigations in this matter were characterized by gross dereliction of duty by both PW6 and PW7. Mr. Silwamba, SC, Highlighted the following matters to support his contention. PW6 testified that the vehicle was over loaded, yet he did not determine: the weights of the passengers; gross vehicular mass of the vehicle; and how many children were on the vehicle: Further, he observed that even the motor vehicle in question was not viewed by the Court to ascertain its loading capacity. However, I do not accept the argument that the fact that PW7 does not know how to drive a motor vehicle seriously disadvantaged him in investigating the accident. Further, in my opinion I do not think that mere driving skill equips any driver of a motor vehicle with knowledge to understand *“the dynamics as the cause of road traffic accidents”*, as suggested by Mr. Silwamba, SC. Be that as it may, Mr. Silwamba, SC drew my attention to the case of *Kapembwa v Maimbalwa and Another (1981) Z.R. 127*, where it was observed as follows:

*“The defence called one witness, Inspector Wiseman Kolonga of the Zambia Police, who said that he went to the scene of the accident at 20:00 hours and found the Army vehicle was off the road and the vanning belonging to the plaintiff was on the road. He observed broken glass almost on the centre of the road but he did not say on which side of the centre line, the glass was found. He reasoned that this was the point of impact. This witness said that he had prepared a sketch plan and was prepared to produce it in Court, but Mr. Mwanawasa for the plaintiff objected that it had not been disclosed on discovery. The Court upheld the objection and the sketch plan was never produced to the Court. We should mention here that, as we have said many*



*times, in the past, where a case concerns a motor vehicle all possible material evidence should be put before the Court”.*

Mr. Silwamba, SC, also drew my attention to the case of *Kabwe Transport Company Limited v Press Transport (1975) Limited (1984) Z.R. 43*, where it was observed of follows:

*“Mr. Jearey also criticized the nature of the sketch plans which were submitted to the Court. In this respect we would draw the attention of the parties to comments that we made in the case of Chanda v The People [supra] in which we said as follows:*

*“ii The “real” evidence (i.e. skid or other tyre marks, the position of broken glass and dried mud and dropping the position of the vehicles after the accident, the nature and location of damage to the vehicles after the accident, the nature and location of damage to the vehicles and so on, will frequently enable the Court to resolve conflicts between the evidence of eye witnesses, and should carefully be observed and recorded by the police officer who examines the scene.”*

*In this case, the sketch plans did indicate the information required. However, some of the measurements were not included in the original sketch plan made at the scene of the accident but were inserted later. We do not think that this failure affects the results of this appeal. However, we agree with Baron D.C.J that it is of the utmost importance that all details and measurements should be inserted in a sketch plan at the time of viewing the scene of the accident. The learned trial judge, in his judgment, made it quite clear that he was doubtful whether the opinion of the plaintiff’s third witness, albeit that he was the most immediate witness after the accident was reliable.”*

Mr. Silwamba, SC, submitted that the incidents of dereliction of duty in this case should lead me to making a finding in favour of the accused at this stage of the proceedings. To support this submission, he referred me to the case of *Chileya v The People (1981) Z.R, 33*, where Gardner Ag D.C.J. observed that:

*“Dereliction of duty in failing to make a test which could conclusively prove one way or another the claims of the contending parties would result in a presumption albeit rebuttable one in favor of the applicant (accused).”*

Mr. Silwamba, SC, also referred me to the case of *Banda (K) v The People (1977) Z.R. 169*, where Baron D.C.J. observed that:

*“The first question is whether the failure to obtain evidence was a dereliction of duty on the part of the police which prejudiced the accused when evidence has not been obtained in circumstances where there was a duty to do so\_\_\_ and a fortiori when it was obtained and not laid before the Court and possible prejudice has resulted, then an assumption favourable to the accused must be made.”*

Further, Mr. Silwamba SC, drew my attention to the case of *Lubinda v The People (1973) Z.R. 43*, where it was held that:

*“In a proper case and on proper direction it is open to any Court to find that they believe witnesses and do not believe other witnesses. In this case we are faced by the fact that the whole evidence for the defence has been seriously prejudiced by a dereliction of duty on the part of the investigating officers. Had an investigation on the alibi taken place it might have been in favour of the appellants. We do not consider that the evidence given for the prosecution was such that it was so overwhelming as to offset the prejudice which might have arisen from the dereliction of duty. We must therefore allow this appeal and quash the conviction and sentence.”*

Mr. Silwamba, SC, maintains that the prosecution has not discharged its burden. Referring to the case of *Moonga v The People (1969) Z.R. 63*, Mr. Silwamba SC, submitted that it is always the duty of the prosecution to prove all the ingredients of an offence. Mr. Silwamba, SC, argued that this is an ideal case in which the accused should be found with no case to answer. Mr. Siwamba, SC, recalled that in the case of *The People v Japau (1967) Z.R. 95*. Evans, J, observed as follows:

*“A submission of no case to answer may be properly be held:*

*(a) If an essential element of the alleged offence has not been proved; and*

*(b) When the prosecution evidence has been so discredited by cross-examination, or is so manifestly unreliable that no reasonable tribunal could safely convict on it.”*

Further, Mr. Silwamba, SC, brought to my attention the case of *the People v Makowela and Another* (1979) Z.R. 290, where Muwo, J, made the following observation:

*“I do not wish to make this ruling appear like a final judgment. The subject so essentially empirical as submission of “no case to answer” the dividing line between the question of “no case to answer,” and a case which is proved beyond reasonable doubt is sometimes scarcely discernable. Nevertheless the list of reported decisions show that there is distinction to be made between a case which requires an answer from the accused person and a case which is proved beyond reasonable doubt, and in every trial in which there has been a plea of not guilty a Court must decide whether there is sufficient evidence to justify calling upon the accused for his defence.”*

Muwo J went on to observe as follows:

*“Section 206 of the Criminal Procedure Code provides that if at the close of the evidence in support of the charge it appears to the Court that a case is not made out against the accused person sufficiently to require him to make a defence, the Court shall dismiss the case and shall forthwith acquit him.”*

Muwo, J, in the course of delivering the judgment in the *Makowela* case (*supra*), referred to the case of *Day v Regina* (1958) R and N 393 and the observation of Spenser - Wilkson C.J., that the words “a case is made out sufficiently to require him (i.e. the accused, to make a defence,” cannot be equated with “a case sufficient to warrant conviction,” and that if the Crown (State) has made out a *prima facie* case the Court is entitled to call the accused to make a defence.

Ultimately, Mr. Silwamba, SC, contends that the prosecution witnesses have not demonstrated that the accused person drove in a manner that was dangerous. And further that the inconsistencies in the evidence of PW6, and PW7, should result in the acquittal of the accused person.

On 13<sup>th</sup> December, 2010, Ms. F. Nyirenda, filed written submissions on behalf of the People. Similarly, Ms. Nyirenda recited the testimony of PW1 to PW5. As regards PW6, Ms. Nyirenda submitted that PW6 is a motor vehicle examiner who examined the vehicle when the accident occurred. PW6 has been working as a motor examiner for two years. And has an advanced Diploma in Transport and Logistics from the Zambia Institute of Management Studies (ZANIM). During the course of those studies, Ms Nyirenda pointed out that PW6 testified that he did a course that covered "*Assembly Engineering*" and "*Speed Dynamics*". PW6 also confirmed, Ms Nyirenda noted, that he was not appointed by Gazette Notice as a Motor Examiner. Notwithstanding, PW6 testified that he is a station Manager with RSTA. And his responsibilities include conducting motor vehicle examinations. Ms. Nyirenda therefore maintains that PW6 is an expert in his field. And implored me to attach weight to his evidence.

Ms Nyirenda also submitted that PW6 testified that the vehicle in question, a Land Rover 110, has capacity to carry eight passengers. And was overloaded when the accident occurred. PW6 further testified that due to the overloading, and the imbalance caused by the slow puncture, the vehicle overturned after the accused applied brakes suddenly. Ms Nyirenda submitted that PW6 reached the conclusion that the vehicle had a slow puncture after examining the marks that were impressed on the road.

Furthermore, Ms. Nyirenda submitted that during cross-examination, PW6 testified that there is a road traffic sign near the scene of the accident which prescribes a speed limit of 50 KM per hour. And PW6 confirmed that the RSTA has not in the recent past erected any road traffic signs. The last road traffic signs were erected sometime in 2004, by the Road Development Agency (RDA) in conjunction with the Siavonga District Council. The erection of the road traffic signs preceded the coming into the force of the Road Traffic Act Number 11 of 2002. Ms. Nyirenda noted that the last prosecution witness; PW7 was Inspector Mubiana from Siavonga Police Station. Ms. Nyirenda submitted that PW7 testified that he received a report of a motor vehicle accident along the Siavonga/Lusaka road. PW7 testified that when he went to the scene of the accident, he found that the victims had already been taken to the hospital, including the body of the deceased child; Cojaki Siamusandu.

Ms Nyirenda pointed out that PW7 also testified that he drew a sketch plan for the scene of the accident. The sketch plan was however not drawn to scale. And he observed skid marks on the road. The skid marks covered a distance of about 100 meters. PW7 counted about 112 footsteps from the point where the skid marks started to where the vehicle rested on its side after it overturned.

Lastly, Ms. Nyirenda submitted that PW7 testified that he warned and cautioned the accused the day after the accident. The accused denied the charge of causing death by dangerous driving. He also denied that at the material time, the vehicle in question was travelling at a speed of 100 KM/h. Ms. Nyirenda argued that from all the evidence of the prosecution witnesses, the State has succeeded to establish a *prima facie* case of causing death by

dangerous driving contrary to section 161 (1) of the Road Traffic act Number 11 of 2002. To recapitulate, Ms. Nyirenda submitted that section 161 enacts that:

*“Any person who causes the death of another person by the driving of a motor vehicle on the road recklessly, or at a speed, or manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which is actually at the time or which might reasonably be expected to be, on the road commits an offence.”*

Ms. Nyirenda argued that from the preceding provision for one to be guilty of the offence of causing death by dangerous driving, a vehicle should have been driven recklessly, or at speed or in a manner which is dangerous to the public. Ms. Nyirenda contends that from the prosecution’s witnesses; particularly PW6 and PW7, it is clear that the accused person was over speeding, considering especially the prescribed speed limit at the scene of the accident. Ms. Nyirenda also maintains that the road traffic sign at the scene of the accident prescribed a speed limit of 50KM/h. Thus, Ms. Nyirenda contends that the accused was at the material time driving at a speed of 100Km/h; double the prescribed speed limit. To augment her contention, Ms. Nyirenda referred to the case of *Chanda v The People (1975) Z.R. 121*, where it was observed that:

*“For driving to be dangerous it does not have to be reckless.... driving which falls short of the objective standard of the reasonable prudent driver is either dangerous or careless driving depending on whether or not danger to the public results... for the foregoing proposition, danger means actual danger or potential danger of injury to other persons which is reasonably foreseeable in the ordinary course.”*

Ms. Nyirenda contends that the manner in which the accused was driving was actually dangerous as testified by PW6, because of the length of skid

marks on the road. Further, Ms Nyirenda contends that the warn and caution statement to which the accused did not object to its production in evidence, confirms that the accident occurred because the accused was driving at a speed in excess of 65 KM/h.

Furthermore, Ms. Nyirenda contends that in the warn and caution statement, the accused informed the police that he was driving at a speed of K 100Km/h. Yet the speed limit is 50Km/h. Ms. Nyirenda also contends that the sketch plan shows that the accused was driving at high speed. Ms. Nyirenda maintains that if he was not driving at high speed, the vehicle would not have overturned. And the skid marks would not have been that long. Ms. Nyirenda pressed that the accident occurred because the vehicle was over speeding; the vehicle lost balance due to overloading, coupled with a slow puncture.

As regards PW7, Ms Nyirenda argued that although PW7 does not know how to drive a vehicle, his evidence was lucid as revealed by the sketch map, and his report. Ms. Nyirenda therefore urged me to find the accused with a case to answer, and put him on his defence.

I am indebted to counsel for the spited arguments and submissions rendered in this matter. I now have to rule upon the defence submission that the accused has no case to answer. The law relating to *“no case to answer”* is found in section 206 of the Criminal Procedure Code. It is expressed in these words:

*“206 if, at the close of the evidence in support of the charge, it appears to the Court a case is not made out against the accused person sufficiently to require him to make a defence, the Court shall dismiss the case, and shall forthwith acquit him.”*

The effect of a kindred provision [to section 206 above] has been a subject of judicial interpretation in the past. In the case of *Day v Regina (1958) R and N 731*, Spencer - Wilkison, C.J. drew a distinction between a case which has been proved beyond all reasonable doubt and a case which requires an answer. Spencer - Wilkison C.J; observed at page 737 that if at the close of the prosecution or after hearing any evidence for the defence, the Court considers that the evidence against the accused is not sufficient to put him on his trial, the Court shall forthwith order him to be discharged. Spencer - Wilkison, C.J; explained that in his opinion a case sufficient to put a person on his trial after a preliminary inquiry, and a case sufficient to require an accused person to make a defence are as nearly possible the same. And in both cases, they fall short of evidence which is beyond a reasonable doubt that the accused is guilty. Spencer - Wilkison, C.J; rejected an argument from the bar that before a magistrate can act under the section [section 204], he must feel himself in a position to convict then and there. He observed that what there must be is what is commonly called a *prima facie* case, or what in some other procedures is referred to, "*grounds for presuming the accused has committed the offence.*"

In sum, the distinction between a case which has been proved beyond all reasonable doubt, and a case which requires an answer is no doubt a fine one. But it still exists. Thus Spencer Wilkison C.J. concluded that the words "*a case is made out sufficiently to require him to make a defence*" cannot be equated "*with a case sufficient to warrant a conviction.*" Provided the State has made out a *prima facie* case, the Court is entitled to call upon the accused to enter his defence.

Conversely, if at the close of the evidence in support of the charge it appears to the Court that a case is not made out against the accused person sufficiently to require him to make a defence, the Court shall dismiss the



case, and shall forthwith acquit him (see dicta by Muwo, J, in *The People v Makowela and Another* (1979) Z.R. 290 at p. 291 and Lisimba, J, in *The People v Champako* (2010) Vol.1 Z.R. 25 at p. 27).

In the case of *Murono v The People* (2004) Z.R. 207, in a judgment delivered by Munthali Ag, JS, the Supreme Court held that section 206 should be read together with section 291(1) of the Criminal Procedure Code. Section 291 enacts that:

*“291(1) when the evidence of the witnesses for the prosecution has been concluded, and the statement of evidence (if any) of the accused person before the committing Court has been given in evidence, the Court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit record a finding.”*

Munthali Ag, JS, explained in the *Murono* case (supra) at page 213, that the finding that a judge has to record under section 291(1) is the same as that under section 206. Thus section 206 relates to trials before Subordinate Courts, while section 291 relates to trials in the High Court. A judge in the High Court on considering that there is no evidence that the accused or anyone of several accused committed the offence must acquit the accused. The finding, Munthali Ag JS, noted, must show that there is no evidence that the accused committed the offence followed by an order acquitting the accused. Munthali Ag JS went on to point out that unlike at common law, the application of sections 206 and 291 (1) do not depend on the defence making a no case to answer submission. The Court can of its own motion consider whether a *prima facie* case has been made out. Both sections are mandatory. If the accused person is convicted as a result of an error of the trial Court in thinking that there is a *prima facie* case, the conviction cannot stand. It must be quashed.

A practical question that however arises is simply this: What is the test to be applied to determine whether or not there is “no case to answer”. The answer is to be found in the case of *The People v Japau* (1967) Z.R. 95. In the *Japau* case (*supra*), Evans, J, observed at page 96, that the test to apply is well known, and was succinctly stated by Lord Parker C.J. in the Practice Note published in [1962] 1 ALL E.R. 446. In the Practice Note, Lord Parker observed that those who sat in the Divisional Court had the distinct impression that justices were been persuaded all too often to uphold a submission of no case. In the result, the Queen’s Bench Division thought that as matter of practice, justices should be guided by the following considerations. A submission that there is no case to answer may properly be made and upheld:

- a) When there has been no evidence to prove an essential element in the alleged offence; and
- b) When the evidence adduced by the prosecution has been so discredited as a result of cross-examination, or is so manifestly unreliable that no reasonable tribunal could safely convict on it.

Thus, Lord Parker C.J, observed that apart from these two situations referred to above, a tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If however, Lord Parker, C.J; went on, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit, but on whether the evidence is such that a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer.

In the case of *Regina v Galbraith* [1981] 1W.L.R. 1039, the Court of Appeal discussed the approach judges should take when there is a submission of no case to answer. Lord Lane, CJ, guidance at page 1043 D, was stated in these words: If there is no evidence that the crime has been committed, by the defendant there is no difficulty. The judge will of course stop the case. The difficulty arises where there is some evidence, but it is of a tenuous character, for example because of inherent weaknesses or vagueness or because it is inconsistent with other evidence.

Lord Lane, C.J. continued: where the judge comes to the conclusion that the prosecution evidence taken at its highest is such a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made to stop the case. Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of the witnesses reliability or other matters which are generally speaking within the possible view of the facts, there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.

Lane C.J., opined that the second of the two schools of thought is to be preferred. That is, a judge should stop a case only if there is no evidence upon which a jury properly directed could properly convict. (See *Murono v The People* (2004) Z.R. 207, at 212 per Munthali Ag, JS). It is instructive to note that in Zambia we do not have the jury system. Questions of fact and law are decided by the judge. Whether submission of no case is made or not, it is incumbent on the Court of its own motion to make a determination whether a *prima facie* case against the accused is made out. (See *Murono v The People* (*supra*) at 212 per Munthali Ag. JS).

This case concerns a road traffic accident in which unfortunately two deaths ensued. In order to render a meaningful ruling upon the defence submission that the accused has no case to answer, it is necessary to consider a line of Zambian cases that have dealt with motor vehicle accidents. The *locus classicus*, is the case of *Chanda v The People (1975) Z.R. 131*. In this case, the appellant was convicted of causing death by dangerous driving. It was alleged that at about 7pm on the 29<sup>th</sup> July, 1974, while driving a saloon car from Kafue Township to Lusaka, he collided with a motor vehicle travelling in the opposite direction. And that as a result of that collision a pillion passenger on the motor cycle received injuries from which she died. In delivering the judgment of the Supreme Court Baron D.C.J made the following instructive observations at pages 132 - 133:

*"We are bound to say that as in so many cases of this kind, the evidence was poorly prepared and poorly presented. Once again we draw the attention of those responsible for the investigation of traffic accidents to the importance of conducting careful examination of the scene of an accident, of taking the most careful measurements and of the collection of evidence such as skid marks or other kinds of tyre marks on the road and the precise position of broken glass and dried mud droppings, the positions of the vehicles after the accident, the nature and location of the damage to the vehicles and so on. Evidence of this kind is what is commonly termed the real evidence in the case in contradistinction to the evidence of the parties and other witnesses almost invariably there will be conflicts of evidence as to how the vehicles were being driven and how the vehicles behaved after the accident and it is frequently possible to resolve such conflicts by proper inferences drawn from the real evidence at the scene."*

In the course of the judgment, Baron D.C.J; considered what constitutes dangerous driving. He recalled that in *Mullun v The People (1971) S.J.Z 78*, he observed at page 91 as follows:

*"For driving to be dangerous it does not have to be reckless driving which falls short of the objective standard of the reasonably prudent driver is either*

*dangerous driving or careless driving depending on whether or not danger to the public results. For purposes of this proposition danger means actual or potential danger of injury other persons which is reasonably foreseeable in the ordinary course."*

The second case to be considered in the line of these cases is the case of *Chapita v The People (1976) Z.R. 195*. The appellant was convicted of causing death by dangerous driving. The only issue was whether the appellant's driving was dangerous. The facts of the case were that during the evening prior to the accident, the appellant who was driving a land rover became conscious of the fact that he was tired and pulled to the side of the road, and slept for some hours. At about 04:00 hours the following morning, he started off again and the evidence was that after driving for about a mile, the vehicle started swerving from side to side; careered off hit a tree and overturned; there was no evidence of excessive speed during the short distance that the vehicle travelled prior to the accident. In a judgment delivered by Baron D.C.J, the Supreme Court observed as follows at pages 196 - 197:

*"When the matter came to trial the prosecution witnesses were cross-examined on the basis that the swerving from side to side was caused by a puncture. It is settled law that where a special defence of this kind is raised and there is evidence on the point fit to be left to the jury, the onus is on the prosecution to negative that defence."*

Baron, D.C.J; went on to observe at page 197 that:

*"There was certainly evidence fit to be left to jury in the present case. The prosecution witnesses spoke of the appellant driving fast prior to his having slept, but there was no suggestion of excessive speed during the short distance that the vehicle travelled prior to the accident and indeed the learned trial judge did not so find. He found simply that the swerving from side to side was a dangerous manner of driving, but an explanation was offered and in the circumstances in which it was offered it was for the State to negative the possibility that it was true."*

The point about the *Chapita case (supra)* is that: where as special defence is raised such as the swerving having been caused by a puncture and there is evidence on the point to be left to a jury, the onus is on the prosecution to negative the possibility that it might be true.

The third case to be considered is the case of *Kapembwa v Maimbolwa (1981) Z.R. 127*. This was an appeal against a judgment of the High Court dismissing his claim for damages for negligence against the defendants. The claim was based on a motor accident in which his vane vanette was so badly damaged that it had to be sold as a write off. During the trial, a sketch plan was never produced on objection by counsel for the plaintiff that it had not been disclosed on discovery. In a judgment delivered by Gardner JS, the Supreme Court observed at page 131 as follows:

*“We should mention here that as we have said many times in the past, when a case concerns a motor accident all possible material evidence should be put before the Court...”*

The fourth case that will be considered in the line of cases is the case of *Kabwe Transport Company Limited v Press Transport (1975) Limited (1984) Z.R. 43*. During this appeal, two specific issues were raised. Namely;

- (a) Whether evidence of previous criminal proceedings could be admissible in civil proceedings; and
- (b) Whether it was proper for a sketch plan produced in Court to contain data which the original sketch plan prepared at the scene of the accident did not contain.

The facts in the *Kabwe Transport Company Limited case (supra)* were that the plaintiff’s driver was driving an articulated vehicle consisting of one mechanical horse and three trailers. In the opposite direction, the defendant’s driver was driving a truck towing a trailer behind it. There was a collision as a result of which two persons in the plaintiff’s vehicle were killed.

But two persons in the defendants vehicle survived. The trial judge found that there was not sufficient evidence for him to decide which of the two drivers was to blame. Thus in accordance with the recommendations laid down in the case of *Baker v Market Harborough Industrial Co-op Society Limited* [1953] 1 W.L.R. 1472, he found that he had no alternative but to find that both the plaintiff's driver and defendant's driver were equally to blame for the accident. He awarded fifty percent damages on each side.

In argument, counsel for the respondent criticized the nature of the sketch plans which were submitted to the Court. In response, Gardner JS who delivered the judgment of the Supreme Court observed as follows at page 45:

*"In this case the sketch plans did indicate the information required. However, some of the measurements were not included in the original sketch plan made at the scene of the accident but were inserted later. We do not think that this failure affects the results of this appeal. However, we agree with Baron D.C.J. statement quoted above in Chanda v The People (supra)] that all details and measurements should be inserted in a sketch plan at the time of viewing the scene of the accident."*

The last case to be considered in the line of cases is the case of *Litana v Chimba and Another* (1987) Z.R. 26. In the *Litana* case (supra), the plaintiff appealed against a judgment of the High Court concerning a claim for damages arising out of a motor accident in which two young children of the appellant aged one and half and three and half were killed. The trial Commissioner found that the appellant must have been driving fast because he was unable to stop or swerve ground the vehicle which he collided. In delivering the judgment of the Supreme Court Garner JS observed at page 27 as follows:

*"There was no attendance on behalf of the respondent at the trial and therefore no cross-examination of the appellant. There was no expert evidence as to the estimated speed of the appellant having regard to the damage of the vehicles and the injuries to the occupants and in the absence of such evidence, it was not competent for the trial Court to come to a*

*conclusion that the speed of the appellant's vehicle was excessive. The injury to the dead children may well have occurred had the vehicle collided with an object of a much lesser period."*

The following propositions may therefore be distilled from the line of road traffic accidents cases considered above. First, for driving to be considered as dangerous, it does not have to be reckless. Dangerous driving is that driving which falls short of the objective standard of the reasonably prudent driver. Thus in this context danger means actual or potential danger of injury to other persons which is reasonably foreseeable in the ordinary course. Second, it is crucial for those responsible for the investigation of road traffic accidents to ensure that they conduct the investigations with utmost circumspection. They should in particular ensure that they collect and collate the real evidence carefully. Real evidence includes, of course, evidence of skid marks and related marks impressed on the road. In addition, investigators should also ensure that where appropriate, the precise position of broken glass and other pieces and species of real evidence, such as dried mud droppings are carefully marked. In a word, when a case concerns a road traffic accident all possible material evidence should be placed before the Court. Third, it is of utmost importance that in the drawing and presentation of sketch plans all details and measurements of the scene of the accident must be inserted in a sketch plan at the time of viewing the scene of the accident. Fourth, it is not competent for a trial Court to come to a conclusion that the speed of a vehicle was excessive without the aid of expert evidence. Lastly, it is settled law that where a special defence is raised that an accident was due to tyre puncture, and there is evidence on the point to be left to the jury, the onus is not on the person raising the defence to support it with an explanation. Rather, the onus is on the prosecution to negative the defence.



There is another dimension to the submissions that requires consideration. And it is the various evidential propositions that were brought to my attention. The first proposition is drawn from the observation of Skinner C.J in *Moonga v The People (1969) Z.R. 63* at page 65 that the prosecution has the burden of proving all the ingredients of an offence. The second proposition is from the case of *Lubinda v The People (1973) Z.R. 42*. In the *Lubinda* case (supra), Doyle C.J. observed at page 45 that in a proper case and on a proper direction, it is open to any Court to find that it believes witnesses and does not believe other witnesses.

The third proposition is from the case of *Banda (K) v The People (1977) Z.R. 169*. In the *Banda (K)* case, in a judgment delivered by Baron D.C.J; the Supreme Court observed at page 174, that if the evidence, without the technical evidence which the investigation authorities should normally provide is sufficient to support a conviction although there is an apparent dereliction of duty that is of no avail to the defence. The fourth proposition is from the case of *Chileya v The People (1981) Z.R. 33*. And is based on the observation of Gardner Ag D.C.J. at page 34 that dereliction of duty in failing to make a test which could conclusively prove one way or another the claims of the contending parties would result in a presumption albeit a rebuttable one in a favour of the applicant. The last proposition referred to in the course of the submissions was stated in the case of *Mutale and Another v The People (1995 - 1997) Z.R. 227*, as follows by Ngulube C.J. in judgment delivered on behalf of the Supreme Court at page 230:

*“Where two or more inferences are possible, it has always been a cardinal principle of criminal law that the Court will adopt the one that is more favourable to an accused if there is nothing to exclude that inference.”*

In this case, it is common ground that the accused is charged with two counts of causing death by dangerous driving contrary to section 161 (1) of

the Road Traffic Act Number 11 of 2002. What is in dispute however is whether or not at the material date the accused was driving the Land Rover registration number ABL 1071 in a manner which was dangerous to the public. I warn myself at the outset that what the prosecution is required to show at this stage of the proceedings, and in answer to the no case to answer submission, is that a case has been made out to require him to make a defence, or put simply to show that a *prima facie* case has been established against the accused. This standard or requirement is of course contradistinguished with proof beyond reasonable doubt.

It is also instructive to note from the outset that according to PW1 to PW5, who were all passengers on the vehicle testified individually and collectively that the accused was not driving at excessive speed. They also testified that the overturning of the vehicle was preceded by a puncture of a tyre. The evidence of PW1 to PW5 was not shaken or discredited during cross examination.

Conversely, Ms Nyirenda argued in her submissions that it is clear from the testimony of PW6 and PW7, that the accused was overspeeding bearing in mind the prescribed limit of 50KM per hour at the scene of the accident. I reject his submission for two reasons. First, PW6 and PW7 were not eye-witnesses. Second, on the authority of *Mutale and Another v The People* (supra), I am unable to adopt an inference against the accused when there is abundant and uncontested testimony by PW1 to PW5 that expressly excludes such inference. I therefore find that on the material date, the accused was not driving at excessive speed. In this regard, I also accept that submission by Mr. Silwamba, SC, that there is no evidence to show in this case that the accused person drove the vehicle in question in a manner that fell short of a reasonable person as explained by Baron D.C.J. in the case of *Mulon v The People* (supra).

It is also noteworthy that during cross-examination PW6 confirmed the following:

- a) that he back dated his report;
- b) the report did not contain details about what was observed at the scene of the accident;
- c) did not take any photographs at the scene of the accident;
- d) did not take any measurement at the scene of the accident;
- e) relied on ocular perception or judgment to estimate the probable speed the vehicle was travelling;
- f) did not apply any scientific method to estimate the speed of the vehicle. Yet confirmed in re-examination that there are devices to measure speed;
- g) did not gather the ages of the children who were on the vehicle;
- h) did not ascertain the ages of the passengers in order to ascertain their weight. Yet confirmed in re-examination that there is a formula employed to calculate weight of the passengers;
- i) did not ascertain the weight of the vehicle;
- j) did not reflect the tyre puncture in the report;
- k) did not inspect the tyres after the accident; and
- l) has not seen any road traffic sign from Siavonga Township up to the point of the accident.

Similarly, PW7 during cross-examination confirmed the following matters:

- a) the sketch plan was not drawn to scale; Mrs. Nyirenda acknowledged this fact in her submission;
- b) the position of the broken glass was not indicated on the sketch plan and confirmed during re-examination that it was an oversight; and
- c) did not complete the Road Traffic Accident Report; form 127;

In view of the foregoing, I accept the submission by Mr. Silwamba SC, that the approach adopted by PW6 and PW7 in investigating the accident fell short of the required standard. It was the duty of PW6 and PW7 to reconstruct the scene of the accident with precision through PW6's report and PW7's sketch plan. Overall, the evidence of the prosecution in this matter was poorly prepared and poorly presented.

Thus PW6 and PW7, first, failed to prove that on the material date the accused drove the vehicle in question in a manner that is dangerous to the public; an essential element of section 161(1) of the Road Traffic Act Number 11 of 2002. I therefore accept the submission by Mr. Silwamba SC, that for a person to be convicted of the offence of causing death by dangerous driving, it must be clearly, shown that the accused placed himself and other road users in foreseeable danger. Ms. Nyirenda also acknowledged in her submissions that in terms of section 161 of the Road Traffic Act Number 11 of 2002 for one to be guilty of the offence of causing death by dangerous driving, a vehicle should have been driven recklessly or in a manner which is dangerous to the public. Second, the prosecution evidence of PW6 and PW7 has been so discredited by cross-examination and was so manifestly unreliable that no reasonable tribunal could safely convict on it. Thus I rule that the accused has no case to answer. And I accordingly acquit him. Leave to appeal is granted.

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**Dr. P. Matibini, SC**  
**HIGH COURT JUDGE**