FLUCKSON MWANDILA v THE PEOPLE (1979) Z.R. 174 (S.C.)

SUPREME COURT
GARDNER, A.G D.C.J., BRUCE-LYLE , J.S AND CULLINAN, AG. J.S.
23RD JANUARY AND 17TH MAY, 1979
S.C.Z. JUDGMENT NO. 13 OF 1979

Flynote
Criminal law and procedure - Charges - Duplicity - Effect of.
Criminal law and procedure - Charges - Procedure for laying charges under Penal Code and other Acts.
Criminal law and procedure - Charges - Irregularity in charges - Power of appellate court.

Headnote
The appellant was convicted on three counts of causing death by dangerous driving and was sentenced to eighteen months' imprisonment with hard labour on each count, to run concurrently. The information against the appellant contained five counts of causing death by dangerous driving, in each of which it was alleged that, on the same occasion, he caused the death of five different persons. Counsel for the defence raised an objection to the form of the charge in that, as the deaths of all five persons mentioned were caused by one single act, it was oppressive to charge the appellant with a number of separate counts. The trial Commissioner considered that he was bound by the decision of the Court of

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Appeal in which it was held that where an accused was charged and convicted with causing the death of two persons by dangerous driving and both deaths were laid in one count, the count would be defective.

Held:

(i) The law relating to duplicity of charges is intended to avoid subjecting an accused person to an unfair trial and to enable him to know the case against him, so that he may in future plead *autrefois* convict or acquit.

(ii) Under s. 36 of the Penal Code it is mandatory for separate charges to be laid where several acts are done in execution of one criminal purpose. However that section only refers to charges brought under the Penal Code but not those brought under any other Act.

(iii) If a person is charged under the Penal Code with an offence relating to one act which causes harm to a number of victims, there must be a separate charge in respect of each victim, but for charges brought under any other Act, the practice set out in para. 48 of Archbold that the offence charged in one count may relate to more than one victim is permissible.

(iv) In order to maintain uniformity of practice it is better that a similar practice of charging in separate counts in the case of charges laid under Acts other than the Penal Code be followed.

(v) The over-riding consideration is that there must be no injustice to an accused person by

embarrassing him with the form of charge. However unless a substantial miscarriage of justice has been occasioned by an irregularity in the form of the charge an appellate court has no power to allow an appeal on the grounds of such irregularity.

Cases referred to:

(1) Moston Simunkombwe v The People C.A.Z. Judgment No. 29 Of 1970.
(2) R v Harris, [1969] 2 All E.R. 599.
(3) Chanda v The People (1975) Z.R. 131.
(4) Matongo v The People (1974) Z.R. 164.

Legislation referred to:

Penal Code, Cap. 146, ss. 2, 36.
Criminal Procedure Code, Cap. 160, s. 353.

For the appellant: N.R. Fernando and S.S. Phiri, Gib Chigaga & Co.
For the respondent: S. Ponnambalam, Assistant Senior, State Advocate.

Judgment

GARDNER, AG. D.C.J.: delivered the judgment of the court.

The appellant was convicted on three counts of causing death by dangerous driving and was sentenced to eighteen months' imprisonment with hard labour on each count, to run concurrently. The information

against the appellant contained five counts of causing death by dangerous driving, in each of which it was alleged that, on the same occasion, he caused the death of five different persons. In the event the prosecution failed to prove the identity of the deceaseds in counts three and four and the appellant was convicted of causing death by dangerous driving of the persons named in counts one, two and five.

Defence counsel at the trial raised an objection to the form of the charge in that, as the deaths of all five persons mentioned were caused by one single act, it was oppressive to charge the appellant with a number of separate counts. The learned trial Commissioner, whilst agreeing with the defence submission, considered that he was bound by a decision of this court in *Moston Simukombwe vThe People* (1). In that case Doyle, C.J, giving the judgment of the court, said that, where an accused was charged and convicted with causing the death of two persons by dangerous driving and both deaths were laid in one count, clearly the count was defective. There was no satisfactory evidence of identification in respect of one of the dead persons. The Court of Appeal treated the charge as dealing with the death of only one man and went on to say:

> "It is fortunate for the State that by reason of their careless prosecution, they in erect enabled a valid conviction on an in formation on its face irregular for duplicity."

Our attention was drawn to the cases referred to in *Archbold Criminal Pleading, Evidence and Practice*, 39th Edn, paras 45 to 48. The learned authors, in dealing with the question of duplicity,

point out in para. 45 (i) that an indictment must not be double and that no one count of the indictment should charge the appellant with having committed two or more separate offences. A number of cases are cited which indicate that the courts have sometimes attributed the wrong meaning to the word "duplicity", and, in particular, counsel for the appellant referred to the case of *R v Harris* (2), in which the accused was charged with buggery of a young boy and indecent assault on the same boy in respect of one and the same incident and the Court of Appeal said:

> "It does not seem to this court right or desirable that one and the same incident should be made the subject matter of distinct charges so that hereafter it may appear to those not familiar with the circumstances that two entirely separate offences were committed."

The cause however is not applicable to the present case. It concerns - a multiplicity of charges relating to the same action of the accused; it does not refer to one offence relating to a number of victims. The whole of the law relating to duplicity is intended to avoid subjecting an accused person to an unfair trial, so that he may know exactly what case he has to answer, and so that he may in the future plead autrefois convict or acquit. It has been frequently said by the Court of Appeal in England, and by this court, that it is oppressive to an accused person - and onerous to the courts - to include too many counts in one indictment; but the question of a charge being bad for duplicity and the question of oppression are two different issues.

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At para. 48 of Archbold, which deals with r. 7 of the Indictment Rules 1971 (the particulars of which do not concern us here), it is stated that only one offence can be charged in one count, though that offence may have more than one victim or target or object. We respectfully agree with that statement of the practice as it should be applied in this country in default of specific legislation to the contrary. There is however such legislation in s. 36 of the Penal Code which reads as follows:

> "36. With respect to cases where one act constitutes several crimes or where several acts are done in execution of one criminal purpose, the following provisions shall have effect, that is to say:
>
> (a) Not applicable.
>
> (b) If a person by one act assaults, harms or kills several persons or in any manner causes injury to several persons or things, he shall on conviction be punished in respect of each person so assaulted, harmed or killed or each person or thing injured; in such case the court shall order a separate punishment in respect of each person assaulted, harmed or killed or in respect of each person or thing injured. If the court orders imprisonment, the order may be for concurrent or consecutive terms of imprisonment: . . ."

This section is mandatory and in our view it is procedurally impossible to order a separate punishmen respect of each person assaulted, etcetera, unless separate charges are laid. We note that s. 2 of the Penal Code provides as follows:

> "2. Except as hereinafter expressly provided, nothing in this Code shall affect -

> (a) the liability, trial or punishment of a person for an offence against the common law or against any other law in force in Zambia other than this Code; or . . .

We construe this section as meaning that s. 36 refers to charges brought under the Penal Code but not to charges brought under any other Act, for example, as in this case, the Roads and Road Traffic Act. It follows therefore that if a person is charged under the Penal Code with an offence relating to one act which causes harm to a number of victims there must be a separate charge in respect of each victim, but in the case of charges brought under any other Act the practice set out in para. 48 of Archbold, that one offence charged in one count may have more than one victim or target or object, is at least permissible. However for the sake of uniformity it would be better that a similar practice of charging in separate counts in the case of charges laid under Acts other than the Penal Code be followed. The over-riding consideration is that there must be no injustice to an accused person by embarrassing him with the form of charge; but it should also be borne in mind that s. 353 of the Criminal Procedure Code provides as follows:

> "353. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction

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> shall be reserved or altered on appeal or revision on any ground whatsoever unless any matter raised in such ground has, in the opinion of the appellate court, in fact occasioned a substantial miscarriage of justice:
> Provided that, in determining whether any such matter has occasioned a substantial miscarriage of justice, the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceeding."

This section is mandatory and unless a substantial miscarriage of justice has been occasioned by an irregularity in the form of charge an appeal court has no power to allow an appeal on the grounds of such irregularity.

In dealing with the remarks made by the Court of Appeal in the *Simunkombwe* case (1) we observe that, although the form of charge was strongly criticised, the court did not quash the conviction on the ground that the charge was bad for duplicity, nor did it apply the proviso; the court dealt with the charge as it stood and, because there was insufficient evidence of the death of one of the alleged deceased, proceeded to deal with the charge as it related to the other deceased by dismissing the appeal. That case therefore did not set out the procedure to be followed as a matter of law, but indicated only that the court criticised the practice of charging more than one victim of one offence in one count. In effect therefore the court indicated the desirability of charging separate deaths in separate counts, which coincides with our view.

Counsel for the appellant commented that it was oppressive to charge separate counts for each victim of one offence. We have already pointed out that this procedure is mandatory in Penal Code cases; in other cases where the same procedure is adopted we can not agree that, as a general rule, a number of such counts would be oppressive. While we respectfully agree with the Court of Appeal in *R. v Harris* (2) that to charge an accused with buggery and indecent assault in respect of the same incident is not right or desirable, we cannot, with respect, agree that the reason for this is that it may

appear to those not familiar with the circumstances that two entirely separate offences were committed. In our view it is the duty of any future trial court, when considering the previous convictions of a convicted person, to ascertain the details of such convictions so that the court will not be misled as to the number of offences which have been committed.

We will now deal with the merits of the appeal.

The prosecution evidence was to the effect that PW7 was driving 40 his Vauxhall car on the Great East Road in the direction of Lusaka in the vicinity of the Barn Motel. PW8 was his passenger and he was being followed by his friends in a Mini Cooper which was being driven by one Rick Shipanuka (the deceased mentioned in the first count) whose passengers included Joel Saidi (the deceased mentioned in the fifth count) and three persons, one of whom was identified as the deceased mentioned in the second count. The time was shortly after midnight and, as he was approaching a curve in the road, he saw a large vehicle

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which had its full headlights on, approaching from the opposite direction coming out of the curve. He stated that he dipped his lights as a signal to the oncoming truck but the driver of the truck did not respond. He then saw that the truck was coming into his lane and, although he swerved to his left, it hit his car on the right fender and along the right hand side of the car. After this he heard a bang at a distance behind him, there was a collision and he found himself trapped in his seat. In cross examination he said that, when the oncoming truck came out of the curve, it was straddling the white line in the middle of the road and thereafter it had come to strike his car in his lane. He denied that his friends in the Mini Cooper behind had been attempting to overtake him as they approached the curve in the road but conceded that he could not be positive about this. PW8, the passenger in PW7's car confirmed the evidence of PW7 that the oncoming truck did not dip its lights in respose to PW7's flashing of his own lights and he saw the oncoming truck coming into their lane straight at their car. He confirmed that PW7 had swerved further to the left but that the truck still came and collided with the side of their car.

PW11, a police inspector, said that he visited the scene on the night the accident took place where he found three vehicles - a Vauxhall car which alas on the left hand side of the road facing Lusaka with damage on its light hand side from the headlamp to tail, a Mini Cooper, which was sixty-three feet behind on the left hand side of the road facing Lusaka and had its roof ripped of and body shattered, and a GMC truck which was four hundred and twenty feet from the road on the left side facing Lusaka with the front wheels of the truck having rolled a further one hundred feet from the truck. He made a sketch plan, which was produced to the court, and said that he established the two points of impact where the truck collided with the other two cars by broken glass, which was strewn all over the place, as well as by deep scratch marks on the tarmac. The first scratch mark in respect of the Vauxhall started some feet from the middle line on its correct side to where the vehicle was resting, and the scratch mark in respect of the Mini Cooper started a few feet from the middle line on its correct side to where it was resting. The sketch plan also produced did not show the deep scratch marks to which he had referred but depicted skid marks caused by the truck as it came out of the curve onto its wrong side of the road and careered off the road for four hundred and twenty feet. The s ketch plan also indicated by words two "points of impact". There was also evidence

from PW5, a police constable, who went to the scene of the accident in the early hours of the morning; he confirmed the position of the vehicles and their condition. He had also taken photographs the following morning but observed no skid marks or brake marks. One of the photographs indicated that the greatest concentration of broken glass was on the left hand side of the road facing Lusaka.

The prosecution established that the deceased persons referred to in counts one, two and five had died as a result of the accident.

The appellant gave evidence on oath that he was travelling to Malawi in a large truck with a heavy load of copper and that, before

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he reached a curve in the road, he saw two oncoming cars coming out of the curve in the straight stretch of road on which he was travelling. He denied that it was he who was emerging from the curve. He said that one of the cars started to overtake the one in front and came onto his side of the road. He was travelling at thirty-five kilometres per hour and, although he applied his emergency brakes and attempted to swerve further to his left, he collided with the overtaking car and thereafter lost control of the truck. He was not aware that he had collided with two cars.

The learned trial Commissioner commented that there was no direct evidence that the collision took place in any particular lane and in resolving the issue, he bore in mind that it was the appellant who had emerged from the curve and not the converse. He said that he was satisfied that the collision with the Vauxhall was in that vehicle's own lane and he accepted the evidence of PW11 as to what he observed at the scene and his evidence relating to the sketch plan. From the evidence of the police officers he was satisfied that the truck first collided with the Vauxhall and then with the Mini Cooper some sixty-three feet behind in its correct lane. From the direction of the skid marks out of the curve, the distance ploughed by the truck in the bush, the damage to the Vauxhall and the complete destruction of the Mini Cooper he concluded that the appellant was driving at an excessive speed as he came out of the curve and that is why he failed to take the curve in his own lane.

Mr Fernando for the appellant argued that there were a number of discrepancies in the evidence of the prosecution witnesses; that the sketch plan prepared by PW11 was totally inadequate and that the witness's evidence differed from the contents of the sketch plan; that PW5 gave evidence which differed from that of PW11 and that PW11 had drawn conclusions which he was not entitled to draw. Counsel further argued that there were discrepancies in the evidence of PW7 as to his position on the road when the accident occurred; there was no expert evidence to support the learned trial Commissioner's findings that because the truck had ploughed a long distance off the road it must have been travelling at an excessive speed.

The discrepancies of PWs7 and 8 complained of by Mr Fernando related to their evidence as to whether the occupants of both cars had been at a drinking party that evening and as to the knowledge by PWs7 and 8 of the identity of the passengers picked up by the driver of the Mini Cooper. The learned trial Commissioner considered the evidence of PWs7 and 8 and although he

did not consider in detail the discrepancies relating to whether or not any of the parties had been drinking that evening and as to whether PWs7 and 8 knew the passengers who were picked up by the driver of the Mini Cooper,; he found as a fact that the collision occurred nearer to the centre of the road than the place stated by PWs7 and 8. However, as he was so entitled, he took note of this discrepancy but accepted their evidence as to which side of the road the collision occurred. In our view, such discrepancies as there were could not have affected the learned trial Commissioner's assessment of the credit of these two prosecution witnesses.

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With regard to the evidence of PW11 however we are bound to agree with Mr Fernando that the sketch plan produced by PW11 was quite inadequate. As we said in the case of *Chanda v The People* (3):

> "Once again we draw the attention of those responsible for the investigation of traffic accidents to the importance of conducting a 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, 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 contra-distinction to the evidence of the parties and other witness; 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."

We also commented that it was improper for a police officer to mark on a sketch "the point of impact" because it is the duty of the witness 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.

The criticism of the oral evidence of PW11 however does not have so much validity. Although PW5 said he saw no skid marks or scratch marks his evidence in this regard was as follows:

> "I observed no skid marks or brake marks on the road."

As an observant police officer one would have expected this witness to have seen such marks if there were any, however his evidence is certainly not enough to contradict the evidence of PW11 who categorically stated that the marks were there. Part of the evidence of PW11 was supported by photographs indicating that the accident took place before the Vauxhall and Mini Cooper entered the curve in the road and that the greatest concentration of broken glass was on the left hand side of the road facing Lusaka. In our view, despite the absence of full details on the sketch plan and despite the fact that PW5 did not confirm all the evidence of PW11, the learned trial Commissioner was entitled to accept the oral evidence of PW11 as to what he saw at the scene. Although it was improper for PW11 to mark on the sketch plan the words "point of impact" it was not improper of the learned trial Commissioner to arrive at the same conclusion and to adopt the conclusion of PW11 as to the points of impact having regard to the evidence available to him. Taking into

consideration the positions of the two motor cars after the collision and haying regard to the damage done to them, the learned trial Commissioner did not misdirect himself in finding that the appellant had in fact collided with both cars and that the second car had not been attempting to overtake at the time of the collision. Despite the criticisms of the evidence, these conclusions were, in our view, properly drawn.

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> We turn now to the question of whether it was correct to find that at the time of the accident the appellant was driven dangerously. As Mr Fernando has jointed out, there was no expert evidence as to how far a truck heavily laden with copper could travel after a collision, even had it been travelling at a moderate speed, and thereore the distances indicated are no reliable guide in assessing the speed of the truck. However, from the evidence properly accepted by the learned trial Commissioner, it is clear that the truck failed to negotiate the curve from which it was emerging when it collided with the two cars. No explanation has been given by the appellant for his failure to negotiate the curve - apart from a simple denial and a statement that the accident occurred on his own side of the road. This denial was properly not accepted by the trial Commissioner. In these circumstances it was proper for the learned trial Commissioner to come to the only reasonable conclusion that the appellant failed to take the curve in his own lane because of the speed at which he was travelling. In the event, whatever the speed of the appellant's vehicle, it was evidently excessive in the circumstances, and we agree with the learned trial Commissioner's conclusion that the appellant's driving fell far short of the standard expected from a responsible prudent driver and that in the circumstances it was therefore dangerous driving.

The appeal against conviction is dismissed.

The appellant was sentenced to eighteen months' imprisonment with hard labour on counts one, two and five, the sentences to run concurrently; his driving licence was suspended for two years.

Prior to sentencing the appellant the learned trial Commissioner said:

> "I do not think that the accused in this case deliberately intended to drive with wilful disregard but in these cases even the slightest mistake can cause serious results."

In the case of *Matonga v The People* (4) this court pointed out that, before a custodial sentence is justified in a case of causing death by dangerous driving, there should be recklessness or a wilful disregard for the safety of other users. We agree with the learned trial Commissioner that in this case the appellant's driving was not reckless and was not in wilful disregard of others. We therefore propose to allow the appeal against sentence.

The appeal against sentence is allowed; the sentences of eighteen months' imprisonment with hard labour on counts one, two and five are set aside and in their place we substitute concurrent fines of K500 on each count with five months' concurrent simple imprisonment in default. As the appellant has already been in prison for five months and ten days he has already satisfied the terms of this order. The suspension of the driving licence for two years with effect from the 5th April, 1978 will

stand.

Appeal against conviction dismissed
and that against sentence allowed
