JANUARY GRINGO NAKALONGA v THE PEOPLE (1981) Z.R. 252 (S.C.)

SUPREME COURT
BRUCE-LYLE, AG. D.C.J., MUWO, AG. J.S. AND CULLINAN, J.S.
4TH NOVEMBER AND 4TH DECEMBER, 1980
(S.C.Z. JUDGMENT NO. 34 Of 1980)

Flynote

Roads and Road Traffic - Negligence - Failure to observe Highway Code - Whether negligent.
Roads and Road, Traffic - Negligence - Degree of care - Test applicable.
Roads and Road Traffic - Causing death by dangerous driving - Whether driving need be the sole cause of accident for commission of offence.
Sentence - Fine - Imposition of fine instead of a custodial Sentence - Amount.
Roads and Road Traffic - Driving licence - Cancellation and disqualification, or suspension - To be regarded as part of total sentence - Effect of amount of fine or period of custodial sentence on period of disqualification or suspension to take effect beyond expiration of custodial sentence.

Headnote

The appellant was convicted of causing death by dangerous driving. The appellant, a driver in the Defence Forces, was driving a Magirus

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Deutz truck in an easterly direction along the Great East Road. When approaching a junction on the left with a side road a motor vehicle behind which the appellant was driving suddenly slowed down and without any previous indication turned left. In order to avoid a collision with the vehicle the appellant was forced to swerve to his right; in doing so he collided with a vehicle driven by the deceased approaching from westerly direction, which vehicle at the time was in turn overtaking another vehicle also approaching from that direction in the same lane. The learned counsel for the appellant contended that the appellant was forced to swerve into the opposing lane as a result of the negligence of the driver of the vehicle in front in suddenly braking and turning to the left without previous indicating and that thereafter the driver of the approaching vehicle was negligent in attempting to overtake.

The learned trial Judge concluded that the appellant had driven too close to the vehicle in front that the appellant's driving was dangerous to the public. On appeal:

Held:

(i) Braking and turning without previous indication is a form of negligence which is all too common.
(ii) The appellant's failure to observe the Highway Code made his standard of driving clearly fall below the objective standard of the reasonably prudent driver.
(iii) 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.

(iv) The law is clear that the offence of causing death by dangerous driving is committed even though the deceased by his own conduct contributed to his death so long as the accused's manner of driving was a substantial cause of the accident.

(v) When a court decides not to impose a custodial sentence but instead to impose a fine and to order imprisonment in default of payment, then the fine imposed should not be of an amount the effect of which will be to send the offender to prison; a court must take into account the ability of the offender to pay the fine.

(vi) The fine imposed and the suspension of the licence ordered are all parts of the total punishment.

Legislation referred to:

Roads and Road Traffic Act, Cap. 766, ss. 199, 257 (5).

Cases referred to:

(1) Grant v Sum Shipping Co. Ltd [1948] A.C. 549.
(2) R. v Hennigan [1971] All E.R. 133.

(3) Chanda v The People (1975) Z.R. 131.
(4) Director of Public Prosecutions v Chilombo (1975) Z.R. 248.
(5) Wasamunu v The People (1978) Z.R. 143.
(6) R. v Gosney, [1971] 3 All E.R. 220.
(7) R. v Evans, [1962] 3 All E.R.1086.
(8) Mullan v The People (1971) Z.R. 110.
(9) Matongo v The People (1974) Z.R. 164.
(10) The People v Kalyombwe (1978) Z.R. 293.
(11) Mwelwa v The People (1975) Z.R. 166.

For the appellant: G.T. Moruthane (Miss) Assistant Senior Legal Aid Counsel.
For the respondent: L.S. Mwaba (Esq.,) State Advocate.

Judgment

CULLINAN, J.S.: delivered the judgment of the court.

The appellant was convicted of causing death by dangerous driving.

The collision in which the deceased met his death took place in the afternoon of 26th March, 1979, near Lusaka. The appellant, a driver in the Defence Forces, was driving a Magirus Deutz truck in an easterly direction along the Great East Road away from Lusaka. When approaching a junction on the left with a side road leading to Kaunda Square, a motor vehicle behind which the appellant was driving suddenly slowed down and without any previous indication turned left.

A passenger in the appellant's vehicle testified that the appellant in order to avoid a collision with the vehicle in front was forced to swerve to his right: in doing so he collided with a vehicle driven by the deceased approaching from a westerly direction, which vehicle at the time was in turn

overtaking another vehicle also approaching from that direction in the same lane. This version of the accident was repeated by the applicant in an unsworn statement.

The evidence establishes that the collision took place in the right lane of the road as one proceeds in an easterly direction. The learned Assistant Senior Legal Aid Counsel Miss Moruthane submits however that the appellant was forced to swerve into the opposing lane as a result of the negligence of the driver of the vehicle in front in suddenly braking and turning to the left without previous indication, and that thereafter the driver of the approaching vehicle was negligent in attempting to overtake. In the House of Lords case *Grant v Sun Shipping Co. Ltd* (1) at p. 567 Lord du Paroq observed:

> "I am far from saying that everyone is entitled to assume in all circumstances, that other persons will be careful. On the contrary, a prudent man will guard against the possible negligence of others when experience shows such negligence to be common."

In the present case we are satisfied that the sudden braking and turning, without previous indication, of the leading vehicle was a form of negligence which is all too common. Indeed the following extract from para. 38 of the Highway Code caters for any such negligence:

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> "38. Leave enough space between you and the vehicle in front so that you can pull up safely if it slows down or stops suddenly . "

In view of the provisions of section 257 (5) of the Roads and Road Traffic Act, failure to observe the Highway Code is of course no more than evidential in its effect in these proceedings. In failing to observe the Code, however, that is to say, in driving at such a speed and at such a distance from the vehicle in front that the appellant was unable to safely slow down or stop but was forced to swerve across the centre line of the road, his standard of driving clearly fell below the objective standard of the reasonably prudent driver. The negligence of the driver of the vehicle in front was therefore no more than contributory.

As to the approaching vehicle the learned trial judge observed that in two statements made to the police the appellant had made reference to only one vehicle approaching from the west and on the issue of credibility rejected the evidence that such vehicle was overtaking another. In the view we take of this case, there is no necessity to consider whether such finding was justified. Even accepting the appellant's version, the alleged negligence of the approaching driver could again be no more than contributory.

As to contributory negligence, Lord Parker, C.J., in delivering the judgment of the Court of Appeal in the case of *R. v Hennigan* (2) at p. 135 observed that:

> ". . . there is of course nothing in s.1 of the Road Traffic Act, 1960 (similar to section 199 of our Act) which requires the manner of driving to be a substantial cause, or a major cause, or any other description of cause, of the accident. So long as the dangerous driving is a cause and something more than de minimis, the statute operates: . . . Although the word

(substantial) does not appear in the statute, it is clearly a convenient word to use to indicate to the jury that it must be something more than de minimis."

Those dicta were approved by this Court in the case of *Chanda v The People* (3) at p. 135, *Chilombo v The People* (4) at p. 250 and again *Wasamunu v The People* (5) at p.13. In the case of *Chilombo* (4) in particular, the court (per Baron, D.C.J.) had occasion to consider (at p. 250) the aspect of contributory negligence in the following terms:

"Mr Tampi submits that this indicates that the learned judge regarded contributory negligence as a defence to the charge. Such a view would not of course be correct; the law is clear that the offence of causing death by dangerous driving is committed even though the deceased by his own conduct contributed to his death so long as the accused's manner of driving was a substantial cause of the accident; and the word "substantial" is used here in the sense of something more than de minimis (*R. v Hennigan* (2))."

In the present case it cannot be said that in swerving into the lane of the oncoming vehicle the appellant's driving was merely a minimal contributory factor in the accident.

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The learned trial judge having concluded that the appellant had driven too close to the vehicle in front, then proceeded to consider whether the appellant's driving was dangerous to the public. The following extract appears in his judgment:

"In my humble opinion to drive a truck ten to fifteen metres behind another vehicle resulting in failing to control it leading to swerving when the vehicle in front turns is certainly dangerous. The accused was therefore at fault."

The learned trial Judge thereafter considered the authorities of *R v Gosney* (6) at p. 224 and *R v Evans* (7) at p. 1088 on the aspect of the degree of care or rather fault involved in dangerous driving. He then observed:

"In my opinion to drive a Magirus truck at a distance of ten to fifteen metres behind another vehicle resulting in failing to control it leading into smashing of a Toyota Crown Station wagon beyond repair, clearly amounts to fault; even if the accused was momentarily inattentive or doing his incompetent best. On the evidence before me I have no difficulty in coming to the conclusion that the accused's driving fell below the standard of a competent and careful driver. Accordingly, I hold that on the 26th March, 1979 the accused drove a motor vehicle registration number AD 1252 along Great East Road at Kaunda Square turnoff, a public road, in a manner dangerous to the public having regard to all the circumstances of the case".

While we certainly agree with the learned trial Judge's conclusion as applied to the facts of this case, it seems to us with great respect that he did not apply the appropriate test in the matter. That test is to be found in the judgment of this Court in the case of *Chanda* (3), to which case indeed the learned trial Judge had occasion to refer on an altogether different point. The relevant dicta (per

Baron, D.C.J., at pp. 134/135) are as follows:

> "For driving to be dangerous it does not have to be reckless. I considered this question in *Mullan v The People* (8) where I said (at page 180) 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 forseeable in the ordinary course.' This Court accepts this as a correct statement of the law".

We agree with the learned trial Judge, as we have said, that the appellant's driving fell short of the objective standard of the reasonably prudent driver. Thereafter the question arose as to whether such driving resulted in actual or potential danger of injury to other persons which

was reasonably forseeable in the ordinary course. The facts speak for themselves: it is self-evident that actual and forseeable danger resulted. We are satisfied therefore that had the learned trial Judge applied the appropriate test in the matter, he would inevitably have convicted the appellant. The appeal against conviction is accordingly dismissed.

The learned trial Judge imposed a fine of K500 and directed that in default of payment of the fine the appellant should serve imprisonment for 12 months. He also suspended the appellant's driving licence for a period of 18 months, ordering that the particulars of the conviction and suspension be endorsed on the driving licence. Miss Moruthane submits that both the fine and the period of imprisonment in default of payment are excessive. With regard to such imprisonment, we observe incidentally that the provisions of section 28 (1) of the Penal Code, which apply to a fine imposed under "any written law", permit a maximum term of no more than 9 months' imprisonment.

Section 199 of the Roads and Road Traffic Act provides for a maximum punishment of a fine of K1,000 or imprisonment for a term of five years, or both such fine and imprisonment. The learned trial Judge took into consideration that the appellant was a first offender. He attributed the accident to no more than impatience on the part of the appellant in driving too close to the vehicle in front. He certainly did not find that the appellant had driven recklessly or with wilful disregard for the safety of others: no doubt for that reason he did not impose a custodial sentence - see the case of *Matongo v The People* (9) at p. 165 (per Doyle, C.J.). When a court decides not to impose a custodial sentence but instead to impose a fine and to order imprisonment in default of payment, then the fine imposed should not be of an amount the effect of which will be to send the offender to prison: a court must take into account the ability of the offender to pay the fine - see for example the case of *The People v Kalyombe* (10) before Silungwe, C.J. The learned counsel for the appellant in the court below informed the learned trial Judge that the appellant was a "signal officer". He is in fact a private soldier. We have made inquiry in the matter and have ascertained that the appellant's salary is some K83 per month. These matters were not before the learned trial Judge so that we consider that this Court is at large in the matter of sentence. Were it not for the

fact that the appellant was fortunate enough to obtain an advance of funds from his employers, the Defence Forces, so as to pay the fine, it seems he would have gone to prison. He is at present repaying the advance from his salary by instalments. As this Court observed in *Mwelwa v The People* (11) at pp. 172/174 the fine imposed and the suspension of the licence ordered are all parts of the total punishment. We note that the appellant has not suffered loss of employment due to the suspension of his driving licence, as might be the case with a civilian. n all the circumstances the appeal against sentence is allowed. The fine imposed and the order of imprisonment made by the court below are set aside and a fine of K200 is substituted. As the fine has been paid there can now be no order of imprisonment

in default of payment. The orders of suspension and endorsement of the appellant's driving licence are undisturbed.

Appeal against sentence allowed
