Appeal No. 71/2014

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:

KAJIRO MUZUNGU **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram : **Phiri, Wanki and Malila, JJS**
On 2nd September, 2014 and 26th March, 2020

For the Appellant: **Mr. A. Msoni of Messrs J.B. Sakala and Company**

For the Respondent: **Mr. C. Bako Senior State Advocate.**

JUDGMENT

PHIRI, JS, delivered the Judgment of the Court.

Cases referred to:

1. Lubendae vs The People (1983) ZR 54
2. John Mpande v The People (1977) ZR 440
3. R v Larrin (1943) 2 ALL ER 217
4. Andrews vs Director of Public Prosecutions (1937) 2 ALL ER 552
5. Bernard Chisha vs The People (1980) ZR 36
6. R v Doss (1918) Cr App. Rep 158

7. Chanda vs The People (1973) ZR 139
8. Andrew vs The DPP (1957) 2 ALL ER 522 and 566
9. The People vs Kalulu (1972) ZR 126
10. Kambarange Mpundu Kaunda vs The People (1992/1995) ZR 215

Legislation referred to:

1. The Penal Code, Cap 87, Section199
2. Section 122 of the Juveniles Act Cap 53 of the Laws of Zambia, as amended by Act No. 3 of 2011

When we heard this appeal, Wanki JS, was part of the court. He has since retired and passed on. This is therefore the majority decision.

This is an appeal against the judgment of I.C.T. Chali J. delivered on the 21st of February, 2011 at Solwezi High Court. By that judgment, the Appellant was convicted on three counts of the offence of Manslaughter contrary to **Section 199 of the Penal Code, Chapter 87 of the Laws of Zambia**. The particulars of the offence in the said three counts were that the Appellant, on the 30th April, 2010 at Mufumbwe, in the Mufumbwe District unlawfully caused the death of the three persons named in each count. The Appellant was

sentenced to 10 years imprisonment with hard labour on each count, to run concurrently. This appeal is against conviction and sentence. The Prosecution's case was anchored on the evidence from 10 witnesses, seven of whom were eye witnesses.

Their collective evidence established the following brief facts. There was a procession of about 50 people walking along the main public road; ie the Solwezi - Zambezi road, while celebrating their political party's triumph in a Parliamentary by-election that had just taken place in their local constituency. The Appellant was a well-known person in the area and he was also known to the eye witnesses as a political participant. At the time the celebratory procession was taking place, the Appellant was driving his car along the Solwezi – Zambezi public road.

According to the eye witnesses, the Appellant drove his motor vehicle recklessly and at high speed with its head lights at full beam. He repeatedly swerved the car from the left to the right in the same direction the crowd was headed until he ploughed into them, instantly knocking down a number of people two of whom died on the spot while the third one died three days later at Mukinge Mission

Hospital where he was admitted. No one in the crowd was armed with any weapon and none of them attacked the Appellant's car. The witnesses also stated that at the time of the collision, the results of the by-election had not yet been announced.

According to the Appellant's evidence, he had been on a campaign trail and was driving back when he spotted a crowd of about 40-50 people singing and chanting political songs as they walked along the Solwezi – Zambezi road early in the morning at about 05:00hours.

Although he did not notice any one of them dressed in a particular political party regalia, he concluded from their chanting that they were from a rival political party. As he reached a point about 10 meters from them, he observed that they were not giving him way to pass. He therefore, concluded that the crowd was hostile to him and that his life was in danger. He flashed his lights and hooted once but the people did not give him way. He therefore decided to save himself by driving through them. He did not know the number of people his car knocked down, but thought they were about five (5); two on the right side of the road and another three on

the left side. He did not stop but drove away from the scene to escape any possible attack.

According to the Appellant, he did not intend to kill anyone. He was just scared for his life as he thought that he had seen that some of the people in the crowd were armed with machetes and others were holding hands to block the road. He denied that he drove in a zig-zag manner but stated that he was just looking for a way out of the crowd and he did not drive to the Police station to report the incident because he feared that the crowd would catch up with him there. He conceded that there were some villages along the road at the scene and that his motor vehicle was in a good mechanical condition.

The learned trial Judge reviewed the motor vehicle examiner's report and the scene's sketch plan which were admitted in the evidence and concluded that the Appellant's motor vehicle was in good mechanical condition and that the Appellant blinded the people in the crowd when he put his headlights on and that he drove in a zig-zag manner as shown by the five spots of blood stains on two opposing sides of the road in both lanes 1 metre apart, and the positioning of broken glass at the centre of the two lanes. The learned

trial Judge concluded that the people in the crowd were neither armed nor violent, and that the Appellant acted in an unlawful manner when he drove his car in a reckless and grossly negligent manner. The learned trial Judge discounted the Appellant's suggestion that the killing was accidental and relied on the decision in the case of **Lubendae vs The People**[1] in which it was held that:

> **"An event occurs by accident if it is a consequence which is in fact unintended, unforeseen or such that a person of ordinary prudence would not have taken precautions to prevent its occurrence..."**

The learned trial Judge also took counsel in the Supreme Court decision in the case of **John Mpande v The people**[2] which quoted, with approval, the dictum of Humphrey J, in the English case of **R-v- Larrin**[3] to the effect that:

> **"where the act which a person is engaged in is unlawful, then if at the same time it is a dangerous act, that is, an act which is likely to injure another person, and quite inadvertently the doer of the act causes the death of that other person by that act, then he is guilty of Manslaughter."**

The learned trial Judge also cited the House of Lords in the case of **Andrews v Director of Public Prosecutions**[4] which stated thus:

> **"The principle to be observed is that the cases of Manslaughter in driving motor cars are but substances of a general rule applicable to all charges of homicide by negligence. Simple lack of care such as will constitute civil liability is not enough. For the purpose of the Criminal Law there are degrees of negligence and a very high degree of negligence is required to be proved before the felony is established.**

Probably of all the epithets that can be applied "reckless" most clearly covers the case. It is difficult to visualize a case of death caused by "reckless" driving in the connotation of that term in ordinary speech, which would not justify a conviction for Manslaughter, but it is probably not all-embracing, for "reckless" suggests an indifference to risk, whereas the accused may have appreciated the risk, and intended to avoid it and yet shown in the means adopted to avoid the risk such a high degree of negligence as would justify a conviction"

The learned trial Judge rejected the suggestion made on behalf of the Appellant to the effect that the danger he faced to his life in those circumstances was such that it was reasonable for him to take the action that he did despite the danger to those people. The learned trial Judge concluded that the Appellant's conduct was very bad and indifferent to the risk of causing death when he drove through the group of fifty or so people; that he ought to have appreciated the risk and, therefore, he should have avoided the crowd, if indeed it was actually on the road; that when he concluded that the crowd was hostile as he approached them, he should not have driven on, but he should have maneuvered his motor vehicle and driven back. On the basis of this reasoning, the learned trial Judge found as a fact that the Appellant's conduct showed reckless disregard for the consequences of his actions, which conduct fell far below the standard of care expected of a reasonable person. The learned trial

Judge, found the Prosecution's evidence to be credible, free of concoction and devoid of false implication; and he convicted the Appellant on all three counts as charged.

In this appeal, the Appellant canvased four (4) grounds before us.

The first ground was that the court below erred in law when it did not warn itself of the danger of convicting on uncorroborated evidence of PW3, 4, 5, 6 and 7 who were witnesses with an interest to serve and also children. The second ground was that the learned trial court misdirected itself on a point of law and fact when it held that the Appellant was reckless and grossly negligent without considering the danger of the life of the Appellant in the circumstances of the case. The third ground was that the learned trial court misdirected itself when it convicted the Appellant on three counts of Manslaughter when there was no specific evidence in respect of the three persons who were alleged to have died. The fourth and last ground was that the sentence meted out by the court below was excessive or too severe in the circumstances of the case.

In support of the first ground, Mr. Msoni submitted that considering that PW3, 4, 5 and 6 were all aged 15 years at the time of trial, the learned trial Judge should have conducted a voire dire rather than expressing satisfaction from merely observing them and concluding that the said young persons could testify on oath. In support of this submission, the case of **Bernard Chisha vs The People** [5] was cited. There we held that as a matter of law the sworn evidence of a child in criminal cases does not require corroboration, but that the court should warn itself that there is a risk in acting on the uncorroborated evidence of young boys and girls. Mr. Msoni also cited the English case of **R v Doss**[6] on the treatment of evidence of children. Considering that the position regarding juvenile witnesses in our jurisdiction is well settled under the Juveniles Act Chapter 53 and in the many decided cases by this court, we see no need to repeat the text quoted from the English case on the treatment of Juvenile witnesses, suffice to state that a child who is aged 14 years and above can give evidence on oath.

It was further submitted that some of the child witnesses were related to one of the deceased persons, yet the court below did not

warn itself before relying on the evidence of suspect witnesses in the face of contradictory evidence and different versions of what transpired at the scene of crime.

In support of the second ground of appeal, Mr. Msoni argued that there was no evidence of recklessness or gross negligence that was adducted before the trial court, and the absence of evidence to establish the true scenario of events that took place on the material day raised doubts in the Appellant's favour. It was suggested that the points of impact were not properly established by the witnesses and the investigating officer failed to take any of the witnesses to the scene of the accident in order to ascertain the circumstances that led to the death of each of the deceased.

In support of this argument. Mr. Msoni cited the case of **Chanda vs The People**[7] where it was held that real evidence (i.e. skid or other tyre marks, the position of broken glass and dried mud droppings etc) will frequently enable the court to resolve conflicts between the evidence of eye witnesses and should be carefully observed and recorded by the Police officer who examined the scene. In further support of this proposition, the English case of **Andrew vs**

The DPP [8] was cited. Also cited was the case of **The People vs Kalulu**[9] where it was held that to render a person guilty of manslaughter the negligence must be a direct and immediate cause of death and must show such disregard for the life and safety of others as to amount to crime against the state, the word "reckless" must nearly describe the necessary degree of negligence.

According to the learned Counsel, the Appellant's evidence established that he tried to exercise caution by hooting and flicking lights in order to ask for a way to pass through the crowd which had covered most of the road; and that the Appellant feared for his life in an environment of electoral violence where he had previously been attacked.

It was submitted that the law permits a person in circumstances where his life is in danger to take reasonable cause of action to protect himself. For this position, the case of **Kambarange Mpundu Kaunda vs The People**[10] was cited. In that case, this court observed as follows:

> **"In our view, the situation of the Appellant was that it was reasonable after the blows delivered to the car and after seeing the two groups continue to advance towards him despite the warning shots that were fired, to be in fear of his life and the lives of his friends, ... In the**

circumstances it was reasonable for him to lower his aim with intent to frighten the oncoming People by sound of bullets despite the danger to those people of doing so."

It was argued that the apprehension or fear by the Appellant in the present case was very real, and this should have been a proper case in which the lower court should have substituted the charge of Manslaughter with that of causing death by dangerous driving, if the trial court was convinced that the Appellant drove dangerously.

In support of ground 3, it was submitted that the record shows that there were only 2 persons who testified regarding the identification of the dead persons; these were PW1 and PW2 and there was no one who testified on the identity of the 3rd deceased person. Mr. Msoni argued that the mere mention that a 'person' was killed is not sufficient proof of a charge of Manslaughter which has particulars of individual persons.

In support of ground 4 regarding the sentence, it was submitted that the learned trial Judge acknowledged that there was political violence in the area and yet he imposed a stiffer penalty on the Appellant using extraneous considerations by finding that the Appellant was a contributing factor to the perpetration of violence in

Mufumbwe, when the record of the appeal did not show any evidence of violence occasioned by the Appellant who was in fact a victim of political violence. It was argued that this was a proper case where this court should consider reducing the charge from Manslaughter to causing death by dangerous driving and set the custodial sentence aside.

Mr. Bako, on behalf of the People, supported the Appellant's conviction and sentence and substantially echoed the trial court's findings of fact and the authorities cited in the judgment. He submitted that the lower court was on firm ground to convict the Appellant for Manslaughter and award him the custodial sentence after discounting his self-defence as a defence in the circumstances of this case.

We have carefully considered the evidence on record, the judgment appealed against and the submissions and arguments by the learned Counsel on both sides. The issue that decides this appeal is really whether the Appellant, taking into account all the circumstances prevailing at the time, drove his car so dangerously or recklessly that this collision with, and the killing of the three

deceased persons took the case out of the realm of the offence of causing death by dangerous driving , into Manslaughter. Of course, while addressing this issue, the learned Counsel for the Appellant raised a number of other collateral issues surrounding the facts of this case. We find it unnecessary to deal with these.

In ground one the argument is that evidence of PW3, 4, 5, 6 and 7 needed corroboration or a warning of the danger of convicting on uncorroborated evidence; and that the lower court should have conducted a voire dire test before allowing them to testify.

We do not agree with this submission for three reasons. Firstly, PW7 was aged 29 years and therefore not a juvenile. PW7 was an eye witness who was also injured during the collision. Secondly, under **Section 122 of the Juveniles Act Cap 53 of the Laws of Zambia, as amended by Act No. 3 of 2011**, a 15 year old child can give evidence on oath without the need for an assessment through a voire dire. It is only a child who is below the age of 14 years who needs to be assessed as to whether he/she is possessed of sufficient intelligence to justify the reception of that child's evidence on oath, and whether he/she understands the duty of speaking the truth.

Thirdly, the nature of the undisputed facts of this case is such that there is absolutely no question to the fact that the Appellant caused the collision in which the deceased persons were killed. The Appellant in his own evidence on the record testified that he was most concerned about his fear of possible danger to his life. He flicked his lights as he ploughed through the crowd as he escaped the scene and run over an unknown number of people in the process. On whether he drove in a zig-zag manner, his explanation was that he was trying to find a way through the crowd. This evidence was in concert with the evidence given by the eye witnesses. The Appellant simply did not care. In any event, the learned trial Judge analysed the eye-witness evidence with great caution and gave reasons why he believed their evidence as being truthful, credible, free from concoction and without false implication. In our considered view, this cautious approach by the learned trial Judge was sufficient to negate the need for corroboration or warning, as we know it, in relation to the evidence of PW3,4,5 and 6 as witnesses with a possible interest of their own. We find no merit in the first ground of appeal.

Regarding the second ground, the Appellant's own evidence was in full support of the Prosecution's evidence which supported the trial courts finding of the fact that the Appellant drove his motor vehicle through the crowd without due care of the consequences or danger of causing injuries to any of the people. This is what provided the basis for the learned trial Judge to conclude that he was reckless and grossly negligent. We do not find any basis upon which we can interfere with that finding of fact. We therefore find no merit in the second ground of appeal.

With regard to the third ground of the appeal, we do not agree with the argument presented on behalf of the Appellant to the effect that there was no specific evidence in respect of the three persons who were killed. The record clearly shows that there was documentary evidence in form of the names; the post-mortem reports; the sketch plan of the scene with all the details observed; and the formal Police evidence as well as the motor vehicle examiner's report from PW9 and PW8 respectively. The trial court had before it sufficient evidence from which to conclude that the three persons named in the information died from injuries sustained in the collision

caused by the Appellant. In any case, the Appellant did not object to the production of all this evidence during the trial. We find no merit in the third ground of appeal.

With regard to the fourth and final ground of appeal, it is well settled in a plethora of authorities that we can only interfere with a sentence awarded by a trial court if same comes to us with a sense of shock in the peculiar circumstances of each case.

In the present case the Appellant was awarded 10 years imprisonment for each of the three counts, to run consecutively. He was a first offender.

The circumstances of the present case were, to say the least, very depressing indeed. The severity of the Appellant's recklessness in the manner he deliberately chose to plough through the crowd that was on the public road at the particular time is shown in the manner he deliberately drove from side to side while blinding the pedestrians. The consequences of this recklessness is shown by the evidence of the collision, the points of impact on both sides of the road and the resulting deaths of the victims as well as the hitting of others who survived with horrific injuries. There was no evidence before the

lower court to suggest that anyone of the pedestrians was armed with any offensive weapon or that the car was hit by any object as found in the **Kambarage** case. The Appellant's own evidence was that the manner the crowd was singing opposition political party songs suggested to him that they could attack him. Clearly, there was no reasonable apprehension of danger. This was gross recklessness on his part. In these circumstances and considering that the offence of Manslaughter carries a maximum penalty of life imprisonment, we do not consider the consecutive sentences of 10 years imprisonment on each count as coming to us with a sense of shock. We are therefore unable to interfere with it. The net result is that this appeal fails and we dismiss it.

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G.S. Phiri

SUPREME COURT JUDGE

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M. Malila

SUPREME COURT JUDGE