BRUNO SIMABISI v THE PEOPLE 1992 S.J. (S.C.)

SUPREME COURT
SILUNGWE, C.J., GARDNER AND SAKALA, JJ.S.
S.C.Z. JUDGMENT NO. 11 OF 1992

Flynote
Causing death by dangerous driving - When driver knows his vehicle is defective - Care expected of a prudent driver

Headnote
The appellant was driving a bus for purpose of delivering money to the Bank. He was accompanied by a bus conductor and three police constables. When he approached an inter-section with Independence Avenue, at which there was a stop sign, he failed to stop, and a vehicle driven by the deceased collided with the bus resulting in the death of the deceased.

Held:
(i) A driver who knows or should know that the tyres of his vehicle are so defective that a skid may occur is at fault in the event of an accident

For the Appellant: S.K. Munthali Senior Legal Aid .
For the Respondent: J.M. Mwanachongo Assistant Senior State Advocate.

Judgment
GARDNER, J.S.: delivered the judgment of the court.

The appellant was convicted of causing death by dangerous driving. The particulars of the charge were that he on the 16th February 1983 at Luanshya caused the death of Patricia Poll, by driving a Fiat Bus Registration No. 1636 in a manner dangerous to the public.

The facts of the case were that the appellant drove the bus for purpose of delivering money to the Bank. He was accompanied by a bus conductor and three police constables. When he approached an inter- section with Independence Avenue, at which there was a stop sign, he failed to stop, and a vehicle driven by the deceased collided with the bus resulting in the death of the deceased.

There was evidence that shortly before the accident it had started to rain, but not heavily, and that the appellant was driving at a normal speed.

There was further evidence from PW5, a police motor vehicle inspector, that after the accident, he tested the braking system of the bus and found it to be in good working order. He said that, on braking, the bus would stop within five metres in normal circumstances. When questioned in cross examination he said that in wet conditions the water would run out of the tread marks on the tyres. No skid marks could be seen because the road was wet. The point of impact was five metres from the stop sign.

The appellant gave evidence that the bus was not his usual vehicle and that as it was due for service he had refused to drive it. He said that despite this he was ordered to drive. He maintained that on approaching the stop sign he changed gear and applied his brakes but, in his own words, "the brakes could no hold the wheels from wheeling." In cross examination he said that he though "the cause of the accident was due to defective tyres even at the time we were driving these vehicles the tyres were defective." He said also that the rains were the cause of the accident.

The learned trial judge found that the brakes and the tyres were in good condition and

rejected the contention of the appellant that he had failed to stop because of the slippery road. He found that the failure to stop in total disregard of the stop sign was dangerous driving and convicted the appellant accordingly.

Mr. Munthali for the appellant argued that PWs 1,2, & 3 who were passengers in the bus had all said that the appellant was driving slowly and that, although one police witness, who observed the accident from a distance of one hundred metres, had said that the appellant drove through the stop sign swiftly, there was no justification for the learned trial judge to accept only the evidence of that witness.

We agree that there appears to have been no adequate reason to reject the evidence of the prosecution witness who said that the appellant was driving normally, but, in the event, the speed of the driving was not relevant to the conviction. The learned trial judge himself said that, even without accepting that the appellant drove swiftly, the failure to stop at the stop sign was the reason for conviction.

Mr. Munthali further argued that the learned trial judge failed to deal properly with the defence that the appellant skidded through no fault of his own. He pointed out that PW5, the vehicle inspector, had, according to the record, said in cross-examination that it is not possible to brake when it is wet. In this respect the relevant part of the record reads as follows:

Q: You have said that for a distance of about 50km the braking distance is about 5m
A: You have to change from the top gear and the vehicle will reduce speed and meanwhile the vehicle is still performing and it will stop.
Q: is the 5m applicable when it is wet?
A: if the tread marks on the tyres are in good condition the water will run out on the tread marks.
Q: How were the tyres?
A: They were in good condition.
Q: You have said it is not possible to brake when it is wet?
A: It is not possible. "

From this it would appear that the witness contradicted himself. First he said that even on a wet road the brakes would work and bring the vehicle to a halt within five metres because the tread marks would expel the water and give the tyres the necessary traction to stop the vehicle, then in the sentence referred to by counsel, he said that it is not possible to brake when it is wet, in our view the latter evidence must have referred to what would happen if the tyres were not in good condition.

It is noted that in the same part of his evidence, when this witness was asked about the condition of the tyres, the record indicated that his reply was "They were in condition." The learned trial judge in his judgment referred to the evidence of this witness in the following terms:

> "PW5, carried out this inspection and examination of the bus in the presence of the accused. He did not complain of defective tyres or brakes which were according to PW5 in perfect order. He only complained of the slippery of the road due to rain. In court he has not been able to say what actually caused the bus fail to stop. I accept PW5's evidence that the tyres and brakes were in good working order."

In the ordinary way we would accept a judge's setting out of particular evidence as curing any defect in the record. Thus, where the record in this case did not indicate what was the condition of the tyres we could accept that the learned trial judge supplied the missing word when he said that the evidence of the witness was that the tyres were in perfect condition. However, the learned trial judge misdirected himself on fact and was wrong when in the same passage of his judgment he said that PW5 carried out the inspection in the presence of the appellant. The witness specifically stated that he asked the engineer of the United Bus Company of Zambia to test drive the bus because the appellant was in the police station. It follows that, in the same passage of the judgement, it was wrong to say that the appellant did not complain about the tyres; he was not present with PW5 when the inspection of the vehicle took place and his failure to complain about the tyres to PW5 should not have been held against him. In view of these misdirections it would not be appropriate to remedy the defect in the record as to the condition of the tyres by looking to the same passage of the judgment to ascertain what the learned trial judge thought was said. The evidence of PW5 that it is not possible to brake when it is wet followed immediately after the inadequate evidence about the condition of the tyres and presumably related to the possiblility of braking with tyres in the

condition found by the witness. This, after all, must have been the reason why the question was put to the witness. The learned trial judge's reference to the tyres being in perfect condition and in good working order was not supported by the evidence.

The learned trial judge gave no reason for rejecting the appellant's evidence that the defective tyres of the vehicle caused the vehicle to skid, and no reason for preferring what he thought was the evidence that the tyres were in good condition. The result of a skid would be consistent with the evidence of PW8 who said he saw the vehicle enter Independence Avenue swiftly, and would not be inconsistent with the evidence of the passengers that the appellant was driving normally. In the circumstances the appellant's evidence that the vehicle skidded should have been accepted in the absence of evidence to the contrary. Once it is accepted that there was a skid there is a special defence and the onus is on the prosecution to establish that the skid was due to the fault of the appellant. In view of our findings in relation to the evidence about the condition of the tyres it is apparent that the skid was caused by the condition of the tyres on the vehicle and the appellant agreed that this was so.

At law a driver who knows or should know that the tyres of his vehicle are so defective that a skid may occur is at fault in the event of an accident. Although the appellant objected to driving the vehicle, in this case his objection was not specifically related to the condition of the tyres but to the fact that the vehcile was due for service. He should have inspected the tyres of the vehicle and having found that they were defective he should have ponted out the specific defect to his supervisors. Had they still insisted on his driving he should have driven so cautiously no skid could possibly occur. The appellant by failing to drive with the caution that the circumstances demanded did not exercise the care expected of a prudent driver, and consequently, his driving was dangerous. Such dengerous driving caused the death of the deceased and the appellant was guilty of the offence as charged.

The appeal against the conviction is dismissed.
Appeal dismissed

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