GASTOVE KAPATA v THE PEOPLE (1984) Z.R. 47 (S.C.)

SUPREME COURT
SILUNGWE, C.J., MUWO, J.S., BWEUPE ,A.J.S.
7TH DECEMBER 1982 AND 8TH JUNE, 1984
(S.C.Z. JUDGMENT NO. 9 OF 1984)

Flynote
Evidence - Judicial Notice - Personal knowledge - Public road - General rule.

Headnote
At the close of the trial, there was no evidence to prove that the road on which the offence was committed was a public road. The fact that the said road was a public road was a necessary element of the charge. The court took judicial notice of the road and held that it was a public road; and convicted the accused.

The accused appealed.

Held:
(i) In so far as the utilisation of personal knowledge is concerned, the general rule is that a court may, in arriving at its decision in a particular case, act on its own personal knowledge of facts of a general nature, that is notorious facts relevant to the case.
(ii) The Commissioner being a resident of Kitwe was entitled to make use of his personal knowledgeof a general matter, that is of a notorious matter, namely, that the road in question was public road to which the public had access.

Cases referred:
(1) R. v Spurge, [1961] 2 ALL E.R. 688.
(2) Daimon Lungu v The People, [1977] Z.R. 208 at 210.
(3) Reymonds v Llanelly Associated Tin-plate Co. Ltd. [1948] 1 All E.R. 140.
(4) Hubert Sankombe v The People, (1977) Z.R. 127.

For the appellant: B.B. Kaweche, of Ellis and Company.
For the respondent: R.G. Patel, Assistant Senior State Advocate.

Judgment
SILUNGWE, C.J.: delivered the judgment of the court.

The appellant was convicted by the High Court at Kitwe of causing death by dangerous driving, the allegation being that on May 23rd, 1980, at Kitwe, he caused the death of Brown Sandu by driving a Fiat truck registration No. AAD 2727, on a road, namely, Hubert Stanely Drive, at a speed or in a manner which was dangerous to the public, having regard to 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 reasonably expected to be on the said road. He was sentenced to a term of imprisonment for five years

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and an order was made for the endorsement and suspension of his driving licence a period of two years. He now appeals against the said conviction and sentence.

It is not in dispute that, on May 23rd, 1980, the appellant - a driver employed by ZAMTAN Road Services Limited at A Depot in Kitwe-was driving, unaccompanied, a Fiat truck registration number AAD 2727, along Hubert Stanely Drive which is located in Chimwemwe Township, Kitwe; and that, as he came to a bend, he failed to negotiate it and so careered off the road, flattened a wire fence and eventually came to a halt upon partially demolishing a house and thereby killing Brown Sandu, a two-and-half year old boy, who happened to be inside the house at the time. The house belonged to the deceased child's parents.

What is in dispute is whether the Fiat truck developed mechanical defect at the material time; and whether Hubert Stanely Drive was a public road. These defences were unsuccessfully canvassed at the appellant's trial by Mr Kaweche who now presents them as the sole grounds of appeal against conviction.

As to the first ground of appeal, it is trite law that, for the defence of mechanical defects to succeed, the danger must have been created by a sudden loss of control in no way attributable to any fault on the part of the driver. As Salmon, J., put it in the celebrated English case of *R. v Spurge* (1) at page 691, letter E:

> "The essence of the defence is that the danger has been created by a sudden total loss of control in no way due to any fault on the part of the driver".

Once there is evidence of a mechanical defect which the driver neither knew of nor ought to have known about, it is then for the prosecution to rebut it. However, once it is shown that the driver knew or ought to have known of the mechanical defect, as in *Daimon Lungu* v *The People* (2), he cannot avail himself of the defence, for no reasonable prudent and competent driver will knowingly drive a motor vehicle with a worn tyre, defective steering, or defective brakes.

In the present case, the defence is that there was a sudden mechanical defect, both in the steering mechanism, as well as in the braking system. After carefully considering the deference the trial court found it untenable and so rejected it for the reasons that the steering mechanism had been examined by the first prosecution witness, Inspector Mukumbuta Mufwano Wamulume shortly after the accident, and been found to be in good working order; and that, although the witness had not been able to examine the brakes "because of the damage", the tyre marks left on the road by the Fiat truck, were in themselves sufficient evidence to show that the brakes had been applied and that they were in good working order at the material time. Indeed, it seems probable that the appellant's allegation as to defective brakes was an afterthought-hired for the first time at his trial-because, when he freely gave a warn and caution

statement to the police (which statement was later admitted in evidence without any objection thereto), his only defence then, was that there had been a sudden defect in the steering mechanism.

The trial court cannot, in our view, be faulted on any of the findings referred to above as those findings were amply supported by the evidence on record. The appellant cannot, therefore, avail himself of his double edged defence of sudden mechanical defect and so his appeal based on this ground is unsuccessful.

We are satisfied, as the trial court found, that the cause of the fatal accident was due to the appellant's excessive speed, at the material time, which led to the appellant's loss of control of the motor vehicle and the deceased's demise. His testimony that he had been doing 25-30 Km. per hour could not reasonably be true and was, therefore properly rejected since it is inconceivable that a motor vehicle travelling at 25-30 Km. per hour could have so gone out of control as to leave behind tyre marks of the type testified to in this case; jump over a trench, as the trial court found flatten a wire fence of one house and then partially demolish the house of the deceased's parents, and cover a distance of 67.4 metres after having left the road. Clearly, the ingredients of dangerous driving were satisfied.

The second ground of appeal is that there was no evidence at the trial to prove that Hubert Stanely Drive was a public road. There is merit in this submission as the prosecution did not expressly adduce evidence to that effect. The trial court found this to be the position but, after referring to a passage in Wilkinson on Road Traffic Offences, took judicial notice of the road and held that it was a public road. The following passage appears in its judgment:

> "The road in question, although the state was silent on this issue, is a highway and is named Hubert Stanely Drive. The defence does not dispute that the accused drove on Hubert Stanely Drive... Wilkinson on Road Traffic Offences, 8th edition says: "Road means any highway and any other road to which the public has access and includes bridges over which a road passes'. It is common knowledge that this Hubert Stanely Drive is a highway and is permanently dedicated for the use by the public."

The question that we must now address ourselves to is one whether the trial court was entitled to take judicial notice of the road in question and to hold that it was a public road.

It is trite law that judicial notice is the cognisance taken by the court itself of certain matters which are so notorious, or clearly so established, that the need to adduce evidence of their existence is deemed unnecessary. This is simply a common sense device by which the court's time and the litigant's expenses are saved. It is important, however, that, in taking judicial notice of (notorious) facts, courts should proceed with caution. Thus, if there is room for doubt as to whether a fact is truly notorious, judicial notice should not be taken of it.

Insofar as the utilisation of personal knowledge is concerned, the general rule is that a judge may, in arriving at his decision in a particular case, act on his personal knowledge of facts of a general nature, that is, notorious facts relevant to the case.

In *Reynolds v Llanelly Associated Tin - Plate Company Limited* (3) the Court of Appeal in England held that, although the County Court Judge was entitled, within limits, to take into account his own knowledge of general conditions in the neighbourhood, he had gone too far in making use of his personal knowledge of the prospects of a workman of a particular age and skill. Lord Greene, M.R. said at page 142, letter F:

> "The practice of county court judges of supplementing evidence by having recourse to their own local knowledge and experience has been criticised, praised as most beneficial, objected to, and encouraged in different decisions."

In answering the question as to what extent a judge may use his personal knowledge of general matters, we said in *Hubert Sankombe v The People* (4) at page 129, line 36:

> "The extent to which a judge may use his personal knowledge of general matters has not been clearly defined. As Cross on Evidence, 4th edition, puts it at page 141 - within reasonable and proper limits a judge may make use of his personal knowledge of general matters . . . no formula has yet been evolved for describing those limits."

There can be no doubt that, in the instant case, the learned Commissioner of the High Court was entitled to use his knowledge of general matters relevant to the case. The question is: can it be said that in so doing he exceeded his "reasonable and proper limits"? We do not think so. The learned Commissioner being himself a resident of Kitwe and familiar with the environment there, was entitled to make use of his personal knowledge of a general matter, that is, of a notorious matter, namely, that Hubert Stanely Drive-a road situated in the local authority township of Chimwemwe-was a public road to which the public had access. Accordingly, we are satisfied that the learned Commissioner did not exceed his reasonable and proper limits in the matter. For the reasons given, this ground of appeal also fails.

In the final analysis, the appeal against conviction is dismissed.

On the question of sentence, Mr Kaweche's submission is that as the appellant was a first offender, he was entitled to be given an option of a fine, rather than a custodial sentence. In *Lungu* (2) we said at page 211 that, as we could not describe the appellant's driving as reckless or in wilful disregard of the safety of other road users, a fine should have been imposed in the circumstances of that case. That case is distinguishable from the present one in that, here, the appellant was clearly guilty of recklessness and wilful disregard of the safety of other road users, it being immaterial that the deceased's death occurred off the road. Having said this, we are unable to hold that the trial court was wrong

to impose a custodial sentence. However, as the appellant was a first offender, he was entitled to

some degree of leniency. In the circumstances, we regard as severe the sentence of 5 years I.H.L., which is the maximum in a case of this nature. The sentence is set aside and, in its place, the appellant is ordered to serve 30 months IHL with effect from 19-3-82. The other orders will remain undisturbed. To this extent, therefore, the appeal against sentence succeeds.

Appeal against sentence allowed
