Hon. Justice Tsekoko.

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT JINJA

CRIMINAL APPEAL CASE NO. 11 OF 1992

FROM JINJA TRAFFIC CASE NO. NFT 324/92

UGANDA :: APPELLANT

VERSUS

GODFREY KABIBI :: RESPONDENT

BEFORE: THE HON. JUSTICE MR. C.L. KATO

JUDGEMENT

This is one of those rare cases where the state finds it necessary to appeal against the decision of the court in criminal matters. The present respondent was tried and acquitted by a magistrate grade I sitting at Jinja of a traffic offence of causing death by reckless driving contrary to sections 116(1) and 138(2) of the traffic and Road safety Act. The appellant (state) appealed against the acquittal.

The appellant give 3 reasons for his appeal. The 3 reasons or grounds are:-

1. The trial court errered in law and fact when it based its ruling(sic) solely on the absence of a sketch plan of the scene of the accident and ignored the unshakable consistent evidence adduced by appellant's witnesses.
2. The trial court erred in law when it failed to direct itself properly on fresh matter that was adduced by the respondent when such fresh matter could have been received in court by the way of cross examination of the appellant's witnesses.
3. The trial court occasioned miscarriage of justice when it failed to caution itself of the high possibility of undue influence that might have been exercised on the passangers of the respondent's motor vehicle in giving evidence.

...../2.

This being the first appellate court it has the power to reconsider the evidence as adduced in the court below and make its own evaluation and draw its own conclusions from that evidence: Dinkerrai Ramkishan Pandya v R (1957) EA 336 at page 337 and Williamson Diamonds, LTD. and another v Brown (1970) EAI. That being the correct proposition of the law, I will endeavour to consider the evidence as recorded in the lower court and come to my own conclusion.

Since both counsel argued each of the 3 grounds of appeal separately I find it convinient also to consider them in that same way starting e with the first ground. In this ground of appeal the appellant is seriously complaining that the trial court was wrong to have acquitted the respondent merely because prosecution had failed to produce the sketch plan of the scene of the accident when in fact there was some other evidence upon which a conviction would have been based. In the course of her submission Miss Twanza who ably argued this appeal pointed out that the trial court was wrong to have considered the evidence of prosecution witnesses in isolation to that of defence witnesses, on this point she relied on the case of: Suleiman Oyo v Uganda EACA Criminal Appeal No. 150 of 1971 (unreported) which I have not been able to get hold of. On his part Mr. Maibale who appeared for the respondent contended that the learned trial magistrate had in fact considered the evidence as adduced by both sides together and then she had come to the conclusion that it was a 50-50 case she therefore had no alternative but to acquit the accused/respondent.

Failure by the trial court to convict the appellant in the absence of the sketch plan appears to be the key reason for this first ground of appeal. with due respect to the learned counsel for the appellant, I do not subscribe to the view that the only reason why the respondent was acquitted was because there was no sketch plan. That was but one of the reasons, the main reason being that prosecution had not adduced sufficient evidence to enable the court to determine exactly on what side of the road the victim was the learned trial magistrate suggested that the court would have found it easier to ressolve that issue if a sketch plan had been produced.

..../3.

That does not mean that the absence of sketch plan was the sole reason for acquitting the respondent, what the learned trial magistrate was saying is that the absence of such plan weakened the case for prosecution, as stated by Mr. Waibale in his submission that in the absence of such plan the case became 50 - 50 (meaning 50% in favour of the accused and 50% in favour of prosecution). The learned trial magistrate summarised the whole matter in the last sentence of her judgment by saying; "In criminal cases, the burden is cast upon the prosecution to prove its case beyond reasonable doubt and if any doubt is raised, the benefit must go to the accused". That sentence clearly represents a correct statement of the law and the principle contained in the statement was properly applied in this particular case.

The other arguement raised by Miss Twanza was that the learned trial magistrate had been in error when she first considered the case for prosecution and then turned to the case for defence to rebut the evidence as adduced by prosecution. Looking at the judgment of the court below that is not what happened; what happened is that the learned trial magistrate first reproduced prosecution evidence then the defence evidence as given during the trial without discussing any of such evidence. After she had assembled all the evidence then she said: "On considering the evidence put forward by both sides..... "That statement should be construed to mean that the learned trial magistrate in fact considered the evidence from both sides together. There is nothing to suggest that the learned trial magistrate first considered prosecution evidence then she sought the defence evidence later to destroy what had been established by prosecution in isolation.

During the course of his argument Mr. Waibale who represented the respondent in this appeal argued that prosecution had not at the trial proved that the respondent had been reckless and he based his argument on the case of: Saidi Matovu v Uganda (1978) HCB 134.

...../4.

I feel this was a point well taken because the respondent having been charged with causing death by reckless driving it was imperative for the trial court to make a finding of fact as to whether or not the respondent was reckless as recklessness was a vital ingredient of the offence. According to the record of the lower court apparently the learned trial magistrate did not address her mind to that important issue which I must now deal with.

Both sides are agreed that immediately before the accident the respondent slowed down. The 3 prosecution eye witnesses PW2, PW3 and PW6 who claim to have witnessed the accident did not offer any explanation as to how the car came to knock the deceased after it had slowed down as if it was stopping. On the other hand the respondent explained in some considerable details as to what happened in his sworn testimony. According to him as he was approaching Nafubira where this fatal accident took place he slowed down because there was a number of bicycle riders around and a number of people were standing by and there was another taxi on the stage off loading people but the road was clear and there was no any other vehicle in front. As he was going up hill on the second hump the deceased came running from the right side while trying to cross the road, he swered in an effort to avoid knocking her but it seems it was too late as the deceased banged herself on the side of the vehicle and fell on the tarmac. Judging from the above evidence of the respondent which was not effectively challenged by prosecution it cannot be said the accused was driving recklessly. I do not believe the prosecution witnesses who say the respondent just slowed down then drove to where the girl was standing thus knocking her, it cannot be seriously suggested that this driver just deliberately headed for the deceased and knocked her for the sake of it, the respondent's explanation as to what happened should be accepted as truthful and reasonable.

...../5.

The mere fact that there is an accident involving death of a human being does not necessarily mean that the person who caused the accident was reckless, since the victim of the accident himself might have been reckless. Recklessness must be proved as a fact; in this case it was not proved by prosecution.

I feel I have said enough to bring the first ground of this appeal to an end. In view of what has been said above this ground of appeal must fail.

That leads me to the second ground of this appeal. This ground of appeal revolves on the issue of introduction of fresh evidence by the defence which prosecution claims was not in their contemplation. In her rather forceful submission Miss Twanza maintained that when the defence avered that the deceased was on the right side and not on the left side as alleged by prosecution they (defence) were introducing a new matter and therefore the trial court should have complied with the provisions of section 128 of M.C.A. and allowed prosecution to call evidence to rebut that fresh evidence and have the defence witnesses cross-examined by prosecution on that evidence.

With due respect I agree with Mr. Maibale when he says in his submission that the issue of from which direction the deceased came or was standing was not new. The accused/respondent told the court at the hearing of the case that immediately after the accident he went and reported the matter to the police it is reasonable to assume, without concluding, that he mentioned to the police the direction from which the girl was coming. It was the case for prosecution that the girl was on the left side of the road while the defence contended she was on the right side. The mere fact that the defence gave a different story from that of prosecution does not mean that prosecution is being taken by surprise and that provisions of section 128 of M.C.A. should apply.

...../6.

Prosecution having put the position where the girl was standing they must have expected the defence to say something on that same issue, so when the accused and his witnesses were speaking of the girl having been on the right side they were in fact rebutting what prosecution had put in motion. Section 128 of M.C.A. upon which the learned counsel relied r lie when dealing with this ground of appeal was intended to deal with those extreme situations where the defence out of the blue comes up with a story which no prudent prosecutor could have imagined to have existed which is not the case in the present case. The prosecutor who represented the appellant at the trial seem to have been quite alive to the issue of where the deceased was at the time of the accident because when carrying out his cross-examination, he asked all the 4 defence witnesses as to where the girl was and they all said she was on the right side. Had he been taken by surprise he would not have afforded to cross-examine the defence witnesses on the issue the way he did.

The record of the proceedings in the lower court do not anywhere suggest that prosecution ever at anytime applied to the court for the provisions of section 128 of M.C.A. to be invoked and they were not allowed to utilise that section. The only reason why the prosecutor did not make such an application must be that he was never confronted with any matter which he did not expect the defence to put forward. It is my firm finding that there is no merit in the 2nd ground of this appeal as there was no need to resort to section 128 of M.C.A. like the first ground this ground must also fail.

I must finally deal with the third and last ground of the appeal. I find it necessary to reproduce this ground verbatim because of the manner in which it was drafted, it reads: "The trial court occasioned miscarriage of justice when it failed to caution itself of the high possibility of undue influence that might have been exercised on the passangers of the respondent's motor vehicle in giving evidence".

...../7.

I will deal with this rather speculative ground very briefly. It is trite law that where a party pleads undue influence he must prove it as a fact by calling evidence in that connection; although there may be exceptions to this principle where undue influence may be presumed the present case does not fall under such exceptions. In her submission the learned counsel for the appellant opined that defence witnesses were related to the respondent so they must have given evidence that tended to cast shadow on prosecution case. She further argued that the defence only called the people who were travelling in the same vehicle but not other people who were at the scene of the accident.

The first argument by the learned counsel for the appellant seems to have its origin in the judgment of the lower court where the learned trial magistrate speaks of some defence witnesses being related to the respondent; with due respect to the learned trial magistrate that statement was uncalled for because according to the evidence on record there was only one witness who was related to the respondent and that is his mother Faith Basalilwa (DW4) with whom he was travelling in the same vehicle; there is nothing in our law which prohibits relatives from testifying in favour or against each other. As for the second part of the argument the accused/respondent explained why he called some of his passangers as witnesses, the reason was that they were residents of his area and they were known to him by names and appearance, so there was nothing peculiar as to why the passangers from accused's village had to give evidence on his behalf at any rate those are the people who witnessed the accident. There is no evidence on record indicating that any of these witnesses was acting under any undue influence from the accused/respondent directly or indirectly. It is my considered opinion that the question of undue influence has been a matter of speculation rather than a proved fact or reality.

...../8.

At this point I must point out one point which is that the appellant when drawing this third ground of appeal seems not to have read the judgment of the lower court properly. In her judgment the learned trial magistrate said: "Court could not rule out the possibility of dishonest among the defence witnesses since some were relatives and all villagemates but then the court found no demerit to discredit their demeanour." This passage clearly shows that the trial court was quite mindful of the matter being complained of in the 3rd ground of appeal. The learned trial magistrate acknowledged the fact that there were some relatives (although it was only accused's mother who was related to the accused) among the defence witnesses but she found nothing in their demeanour which could lead her to discrediting their evidence; it was therefore wrong for the appellant to allege in his appeal that the trial court did not address its mind to the issue of undue influence having been exercised on the defence witnesses. I find no merit in the third ground of appeal since there is no evidence showing that any undue influence was exercised on any defence witness by the accused/respondent. This ground of appeal cannot be sustained.

Considering all the circumstances of this appeal I find that the learned trial magistrate came to a correct decision when she found that prosecution had not proved its case against the accused sufficiently to warrant his conviction. This was a case of 50 - 50 as pointed out by Mr. Waibale, the le the learned counsel for the respondent and the learned trial magistrate acted properly when she resolved the benefit of doubt in favour of the accused/respondent. The position being what it is this appeal cannot be sustained it is accordingly dismissed with costs of the appeal to the respondent.

C.M. KATO

J U D G E

28/4/93.