THE ATTORNEY GENERAL

Versus

HITEM PARMER

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 7 MARCH AND 23 JUNE 2011

T Makoni for the applicant
T Cherry for the respondent

Application for leave to Appeal

NDOU J: This is an application for leave to appeal against the acquittal of the respondent in terms of section 61(1) of the Magistrates' Court Act [Chapter 7:10]. The salient facts of this case are the following. It is common cause that the respondent is a young man doing his final year of a Masters Degree in South Africa. He is heavily involved in motor racing as clearly evinced from the documents produced during the trial. This was not challenged by the state. On the fateful day he was taken by lift to Victoria Falls Airport where he intended to board a flight to South Africa. He had left it rather late to check in. He had packed a non-working starter device subject matter of this case in his hold luggage. He intended to take the device to South Africa to see if it could be mended in order to use it in his leisure activities. In the process of checking in prior to departure he did not mention to the aviation authorities that he had this device in the luggage that was to be put in the hold of the aircraft. There is no evidence to show that, had he mentioned that the device was in the luggage intended for the hold rather than cabin luggage that he would not have been allowed to proceed. The scanning security device at the airport revealed the presence of this device in the hold luggage when the respondent was about to board the aircraft. He was arrested and detained and the device seized. It was accepted during the trial that there was no sinister motive in the respondent's possession of the device. It was also accepted that during the flight neither he nor anyone else, could have had any access to the device. The respondent was charged under section 150(a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23], the allegation being that he handed a race starter gun to the airport handling staff for the purpose of being placed aboard an aircraft. This section falls under Part VI with the heading "Hijack and Other Crimes Involving Aircraft"

In this part, "dangerous goods" are defined in section 145(1)(a) and (b). Subsection (1)(a) is inappropriate as on the applicant's own evidence, at page 44, at paragraph 6(g) of the expert witness Inspector Makumbe (A Zimbabwe Republic Police Provincial Armourer) describes the device as follows – "the weapon is therefore not a firearm as it is only used for purposes as a starter gun for athletics". He also states that the device used ".22 ammo blanks only as the barrel is blocked and has a spout on the top". Further that "the weapon's main components are made of putah, an aluminum alloy and has got plastic grips … the material that was used, if not reinforced with steel or gun metal cannot be made into a firearm and neither can it be converted into a firearm." In the circumstances, the applicant must therefore rely on subsection (1)(b) which states "substances and things which by reason of their nature or condition may endanger the safety of an aircraft or of any person on board on aircraft". The applicant did not adduce evidence during the trial that a starter gun of this kind placed in the hold of the aircraft was by reason of its nature or condition dangerous to the safety of the aircraft or any person aboard the aircraft.

In my humble view the clear intention of the legislature is to punish persons who place on board an aircraft items like bombs and explosives that may detonate when the aircraft is in flight. The offence, on conviction, carries a sentence of up to fifteen (15) years imprisonment without the option of a fine. The applicant's main argument appears to be that the act by the respondent was one of strict liability. It seems to me that the entire basis of this application is premised on this strict liability argument. As alluded to above, the penalty for contravention section 150, *supra*, is imprisonment for up to fifteen (15) years without the option of a fine. This submission, is with respect, untenable. This is so because of the proviso to section 17 of the Criminal Law (Codification and Reform) Act, *supra*, which states:-

> "Provided that notwithstanding subparagraph (i) and (ii) the court shall not hold that the legislature impliedly intended a crime to be a strict liability if the penalty for it is <u>mandatory imprisonment or imprisonment without the option of a fine."</u>

The offence defined in section 150, *supra*, carried a penalty of imprisonment without the option of a fine, and accordingly, falls squarely within the terms of the proviso to section 17, *supra*. In other words, it cannot be argued that the offence defined under section 150, *supra*, is one of strict liability. *Mens rea*, is therefore, an element that the applicant had to prove – *S* v *Zemura* 1973 (2) ZLR 357 ( ) and *Attorney General* v *Mbewe* 2004 ( ) ZLR 86 (H). This main submission by the applicant is clearly wrong.

This is however, not the end of the matter. The full citation of the charge sheet, *in casu*, is the following-

"C/S 150(a) of the Criminal Law Code Act Chapter 9:23 [sic]"

"Placing or carrying dangerous goods on an aircraft" ARW section 49(c)(i) and 50 of the Aviation (Security) *[sic]* Regulations 2006"

It was wrong for the applicant to endeavour to import into section 150, *supra*, the definitions in provisions of sections 49 and 50 of the Civil Aviation Regulations, *supra*. The enabling Act under which these Regulations are promulgated makes it quite clear that the offence which the applicant endeavoured to import to this prosecution is in effect a "stand alone" offence. In other words Part VII of the regulations sets out a substantive offence and provides a penalty. If the applicant framed a charge under the Regulations it would have been entitled to use the definition contained in section 49 *supra*. The court would have been able to impose the penalty prescribed in section 79(5) of the Regulations.

However, the applicant chose not to charge the respondent under the more appropriate legislation. If the applicant had done so, it seems to me that it would have been difficult for the respondent to avoid a conviction. This is so because Part VII of the regulations covers a vast array of prohibited articles. It covers not only firearms and grenades but also such items as pellet guns, toy guns, scissors, pocket knives, spears, wooden articles, lighter fluid, certain wrist bands etc. But does this error mark the end of the applicant's case? The applicant erred by simply not charging the offence defined in section 150, *supra*, as the main charge with alternative charge (s) defined in Part VII of the Regulations. This limits me to consider whether there are any competent verdicts flowing from a charge defined in section 150 *supra*. Put in another way, would the provisions of section 274 of the Criminal Law (Codification and Reform) Act, *supra*, come to the aid of the applicant's case?

The court *a quo* should have at least considered whether the essential elements of the offences under Part VII of the Regulations are present as provided for by section 274 *supra*. The magistrate overlooked the provisions of section 274, *supra*. For that reason alone I would grant leave to appeal.

Accordingly, the application for leave to appeal is hereby granted.

Criminal Division, *Attorney General's Office*, applicant's legal practitioners
Paul Connolly Legal Practitioners, respondent's legal practitioners