THE STATE
versus
WEBSTER STANLEY

HIGH COURT OF ZIMBABWE
OMERJEE AND MAVANGIRA JJ.
HARARE, 1 and 9 June 2010

Criminal Appeal

A.A. Debwe, for the appellant
C. M. Dube, for the respondent

MAVANGIRA J: The appellant was charged firstly with contravening s 45(1) (a) as read with s 128(a) of the Parks and Wildlife act [*Cap 20:14*] and secondly contravening s 28(1) (a) of the Criminal law (Codification and Reform) Act [*Cap 9:23*]. He pleaded not guilty to both counts but was convicted of both after a trial. He was sentenced on the first count to US$2000 or 8 months imprisonment with labour. On the second count he was sentenced to US$40 or 6 days imprisonment. In addition he was sentenced to 2 years imprisonment which was wholly suspended for 5 years on condition that during that period he does not hunt for specially protected animals for which upon conviction he is sentenced to imprisonment without the option of a fine.

The facts as outlined by the State before the trial court are as follows: On 9 May 2009 the appellant and four accomplices three of whom are now deceased entered Malilangwe Trust Estate in Chiredzi to hunt rhinoceros. The appellant who was driving a Toyota Hilux registration number ABE 2449 dropped off his accomplices about 3 km into Malilangwe Trust Estate. The accomplices were to pursue the spoor of rhinoceros which they intended to shoot and kill for their horns.

A team of police detectives and game scouts who had observed the appellant dropping off his accomplices then kept the accomplices under surveillance. The appellant's accomplices and the detectives and game scouts then met in the bush. As the detectives and the game scouts tried to arrest the poachers the poachers shot at them and a heavy exchange of gunfire ensued. Three poachers were shot dead and one escaped. The police detectives recovered two rifles, a 303 rifle serial number CA2416 and a 306 rifle serial number 7D 3888 fitted with a telescope, a 303 gun bag, 52 live rounds of ammunition and an axe.

The appellant was arrested by the police detectives at about 18.30 hours whilst parked within the Malilangwe Trust area. They carried out a search and recovered two live rounds of ammunition behind the seat. The deceased poachers' jackets were also found in the appellant's truck.

In his defence outline the appellant stated as follows: He said that he denied the allegations. On Saturday 9 May 2009 in the morning one Albert Svuure approached him and asked that he escort him to Mvuma for the purpose of collecting his colleagues so that they could proceed to Malilangwe Trust in order to poach. Svuure said that he and his friends wanted to hunt rhinoceros and that they would pay him the sum of US$500 for providing them with transport. He agreed. Albert then took two guns and an axe which he said they were to use during the poaching. Albert placed these at the back of the front seat. They then proceeded to Mvuma where they collected one Mhofu who was himself in the company of a friend. They then proceeded to Chiredzi via Masvingo. In Chiredzi they went to Croco Motors where Albert and Mhofu went away for about ten to fifteen minutes. When they returned they were in the company of a man clad in blue overalls. The man in the blue overalls sat in the front passenger seat and gave directions to the appellant as he drove them all to Chiredzi. From Chiredzi turn-off they traveled for about 30 km along the Chiredzi-Mutare road. The man in the blue overalls then advised him to turn left and follow a secluded path into a bushy area. After driving for about one to one and half kilometers into the bush the appellant was instructed to stop. The three men took their guns and advised him to go back to Chiredzi and to return to collect them at around 19.00 hours in the evening. They then went into the bush. When the appellant returned to the same place in the evening to collect them he was arrested by the Police.

The appellant stated that he knew nothing, had not participated in the criminal activity in any way and that the ammunition found in his motor vehicle was left there by Albert Svuure.

The prosecutor then applied to the court to seek formal admissions from the appellant. He indicated to the court the admissions that he seeking from the appellant. The trial magistrate then explained the provisions of s 314 of the Criminal Procedure and Evidence Act [*Cap 9:07*] to the appellant and advised him that he is not obliged to make any admission and that if he does the substance of the admission will be taken as proven fact(s). The following are the submissions which were sought from and made by the appellant: Firstly, that he was hired by Albert Svuure and his friends to drive them to Malilangwe Trust Estate in Chiredzi on

the day in question. Secondly, that he drove them to Malilangwe Trust Estate knowing that they were going to hunt rhinoceros. Thirdly, that upon arrival he drove them deep into Malilangwe Trust Estate. Fourthly, that later in the day at around 19.00 hours he then proceeded to collect or pick them up. Fifthly, that he had been promised a payment of US$500 for his services from the proceeds of the hunting expedition. Sixthly, that when he went with Albert Svuure and company to Malilangwe Trust Estate he knew that they were going to hunt for rhinoceros and that he knew that it was unlawful. The seventh admission sought and made was that when he took them from Mvuma to Malilangwe Trust Estate Albert and his friends had guns and ammunition. The eighth admission sought by the State and made by the appellant was that two rounds of ammunition were subsequently recovered from his motor vehicle Toyota Hilux registration number ABE 2449. The ninth and last admission sought and made was that when he was subsequently arrested along the Chiredzi-Mutare road he was still in the premises of Malilangwe Trust Estate.

After the accused had made the admissions the prosecutor closed the State case. In his evidence in chief the appellant stood by his defence outline and stated further that he was only hired by Albert Svuure to take him to Chiredzi where he and his colleagues would hunt for rhinoceros. In return for transporting them he would subsequently be paid a fee of US$500. He reiterated his denial of hunting rhinoceros emphasizing that it was Svuure and his friends who had hunted and not himself. He said that the rounds of ammunition found in his motor vehicle were left in there by Svuure and his friends and not by him.

During cross-examination by the prosecutor the appellant among other things, admitted that when he left Mvuma for Chiredzi he knew that the business for which he had been hired was unlawful. He was told the full nature of the transaction whose purpose was to hunt rhinoceros. He said that he knew at the time that hunting of rhinoceros is illegal but that he proceeded to assist or abet them because he only wanted the money. When it was put to him that he had facilitated the transaction and that he was therefore criminally liable his response was that he was not involved and was only after money. The appellant then closed his case.

The appellant has appealed against his conviction on the grounds firstly, that the lower court misdirected itself by convicting the appellant solely on admissions that had been improperly and unprocedurally led and initiated by the prosecution. Secondly, that the lower court erred at law in not assisting the unrepresented appellant on the effect “legally and procedurally of the forced submissions”. Thirdly, that the appellant having only admitted to

providing transport to the perpetrators the lower court "erred in relying on admissions to lable (label) Appellant an accomplice". The final ground of appeal is that the lower court misdirected itself in convicting the appellant on the second count of possessing ammunition when the court was aware that the appellant did not know of the bullets left behind the seat.

In his oral submissions Mr *Debwe* for the appellant conceded that from a perusal of the record it is clear the appellant was properly advised by the court of the legal effect of him making the admissions that the State was seeking. He also submitted that as no hunting took place because of the exchange of fire that then ensued and resulted in the unfortunate death of three members of the gang, the appellant was rather a conspirator and not an accomplice to hunting.

There is no evidence that any hunting took place. The would-be hunters met their demise before they could carry out their planned mission. The basis for the appellant's prosecution appears to be a contention that he was part and parcel of the planned scheme to hunt rhinoceros in Malilangwe Trust Estate. That he was a willing participant is clear even on his own version of events. He was advised in no uncertain terms what the planned expedition entailed and he was clearly told what his role in the whole scheme was. He agreed to perform his own part of the scheme well knowing that the whole intended operation was illegal. We therefore agree with Mr *Debwe* that the appellant was a conspirator in the intended scheme or expedition.

Section 273 of the Criminal Law (Codification and Reform) Act provides as follows:

"A person charged with any crime may be found guilty of-

(a) threatening, incitement, conspiracy or attempting to commit that crime or any other crime of which the person might be convicted on the charge; or

(b) assisting a perpetrator of that crime or of any other crime of which the person might be convicted on the charge. (emphasis added)

In casu, there was no hunting but there certainly was a conspiracy to hunt. The appellant, with the full knowledge of the proposed operation and with the full knowledge that the planned operation was illegal, willingly agreed to be part of and to perform a crucial part in the unlawful affair. The Concise Oxford dictionary defines the word "conspiracy" in the following terms:

"act of conspiring; combination for unlawful purpose, plot"

and a "conspirator" as

"one engaged in a conspiracy".

In *S v Beahan* 1991 (2) ZLR 98 at 118C –E GUBBAY CJ as he then was stated:

> "In general a conspirator is liable for the crime perpetrated by his co-conspirators. But where he has effectively withdrawn from the conspiracy, he does not remain liable for the commission of any subsequent criminal acts. The terms "withdrawal" and "dissociation" which are often used in this context of the law, refer to voluntary action by a conspirator which is legally effective to terminate his relationship to the conspiracy. (emphasis added)
> The dominant policy of the law in allowing such a defence is to encourage the conspirator to abandon the conspiracy prior to the attainment of its specific object and, by encouraging his withdrawal, to weaken the group which he has entered.

In *R v Chinyerere* 1980 ZLR 3 (AD) at 8E; 1980 (2) SA 576 (R AD) at 579G;

LEWIS JP said that:

> ". . . a conspirator can withdraw from the enterprise even at the last moment, and in the event of his withdrawal he is entitled to his acquittal on the main charge, and is liable to be convicted only of the offence of conspiring to commit the crime in question."
> (emphasis added)

And at 121D –F:

> "I respectfully associate myself with what I perceive to be a shared approach, namely, that it is the actual role of the conspirator which should determine the kind of withdrawal necessary to effectively terminate his liability for the commission of the substantive crime. I would venture to state the rule this way: Where a person has merely conspired with others to commit a crime but has not commenced an overt act toward the successful completion of that crime, a withdrawal is effective upon timely and unequivocal notification to the co-conspirators of the decision to abandon the common unlawful purpose. Where, however, there has been participation in a more substantial manner something further than a communication to the co-conspirators of the intention to dissociate is necessary. A reasonable effort to nullify or frustrate the effect of his contribution is required. To the extent, therefore, that the principle enunciated in *R v Chinyerere* supra at 8E is at variance, I would with all deference depart from it."

I am aware that there is no debate in the instant matter as to whether or not the appellant withdrew or dissociated himself from the enterprise. He in fact played a prominent though complementary role that was meant to ensure the successful completion of the illegal mission. As fate would have it his intended role of providing essential and necessary transport out of the trust area was overtaken by events. But that is of no immediate relevance to his criminal liability. The above dicta are cited merely for their assistance in exposing or clarifying how the law views a conspirator. Indeed when the provisions of s 273 of the

Criminal Law (Codification and Reform) Act were brought to Mr *Debwe*'s attention he indicated that he had not had regard to it earlier but that on his reading of it, it was clear that the appellant's conduct and participation placed the appellant squarely within its ambit. We agree with him.

Although in written submissions Ms *Dube* for the State did not support both the conviction and the sentence, in her oral submissions she revised her stance and indicated that she had adopted a very narrow view of the facts but was now of the view that both the conviction and sentence were in order and there was no justification for any interference with either.

Although submissions were made regarding the order of forfeiture, there was no appeal against sentence. In any event no valid justification was placed before us why we should interfere with it. Neither was any misdirection on the part of the trial court in this regard placed before us. The only pertinent observation that we made was that the appellant was fortunate in that he got off with a more lenient sentence than the case otherwise warranted.

In the result and for the above reasons the appellant's appeal is dismissed.

OMERJEE J, agrees…….. .

Muzenda & Partners, appellant's legal practitioners.