THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

APPELLATE JURISDICTION

HIGH COURT CRIMINAL APPEAL NO. 60 OF 1993
ORIGINAL CRIMINAL CASE NO. 843 OF 1992 OF THE
DISTRICT COURT OF ILALA DISTRICT AT KISUTU

Before: Lyamuya, Principal Resident Magistrate

1. HUSSEIN RAMADHANI)
2. ATHUMANI SAIDI) ..... APPELLANTS (Original Accuseds)

versus

THE UNITED REPUBLIC ..... RESPONDENT (Original Prosecutor)

J U D G M E N T :

KYANDO, J.

Severin Msofe (PW1), the complainant in this case, owned motor-vehicle Reg. No. TZB 6899, Toyota Corona. On 18.6.91 he entrusted it to, or rather employed, Athumani Salun, the second appellant, to use or drive it as a taxi. On 5.7.92, according to the second appellant, he was with the complainant's family, driving them, for the larger part of the day-up to around 5.00 p.m. He then returned home, but he had to go to the Mosque. He therefore, according to him, asked Hussein Ramadhani, the first appellant, a friend of his, to drive the vehicle and earn money for fuel for it (the vehicle). The first appellant agreed and took the vehicle and according to him, at around 8.45 p.m. near the Tanganyika Legion Club, he was hired by three passengers who later turned out to be bandits. He said during the trial that they asked him to drive them to various places in the City and finally, at Sam Nujoma Road, they robbed him of the vehicle. He lost consciousness in the course of the robbery; when he came to he went and reported the incident to the police. Following the report the second appellant was too arrested. They were then jointly charged and tried for (1) Conspiracy to steal c/s 384 of the Penal Code, the particulars for this offence being that on unknown date and time, in 1992, in Dar es Salaam Region, the appellants "did conspire to steal one motor vehicle Reg. No. TZB 6899, Toyota Corona

..../2.

valued at shs.2,500,000/=, the property of Severin s/o Msoffe"; (2) Stealing of the vehicle at San Nujoma Road on 5.7.92 at about 9.30 p.m. c/s 265 Penal Code and (3) Neglect to prevent an offence c/s 383 Penal Code. This was charged as an alternative count to counts 1 & 2, and as against the second appellant alone.

The District Court (Lyamuya, Principal Resident Magistrate) following a full trial, convicted the appellants of the conspiracy and stealing offences. It then sentenced each one of them to 3 years' imprisonment for conspiracy and to four for stealing. The learned magistrate also ordered each of the appellants to pay shs.1,750,000/= to the complainant for the stolen car "or distress forthwith." Needless to say, the vehicle had not been recovered by the time of the appellants' conviction and I am not aware if it now has been recovered.

The appellants were aggrieved by the entire decision of the trial court and therefore lodged this appeal with this court. At the hearing of the appeal before me they were represented by Mr. Maftah, learned Advocate, and Mr. Makia, learned State Attorney, appeared for the Republic. The arguments by both sides were exhaustive and I must pay compliments to both learned counsel for their efforts.

I wish to start by making an observation about the offence of conspiracy charged in the case. There is no illegality in joining a conspiracy charge with specific charges; however, it is not generally good practice. Disapproval for the practice can be found, for example, in the following passage from a decision of the Court of Criminal Appeal in England in the case R. V. Dawson (1960) 1 All E. R. 558, per Pinnemore, J. at p.563:-

> "This court has more than once warned of the danger of conspiracy counts, especially these long conspiracy counts. ..... several reasons have been given. First of all if there are substantive charges which can be proved it is in general undesirable to complicate matters and to lengthen matters by adding a charge of conspiracy. Secondly, it can work injustice, because it means that evidence which otherwise would be in admissible on the substantive charges against certain people, becomes admissible. Thirdly it adds to the length and complexity of the case."

In the instant case, therefore, it was unnecessary to charge conspiracy when there was the substantive offence of stealing charged. Even on pratical considerations, the conspiracy count served no important practical purpose: the magistrate directed that the sentences in respect of the two offences be served concurrently. As seen, she imposed 3 years for conspiracy and 4 years for stealing. The sentence for conspiracy therefore merges into the sentence for stealing and is of no, as stated,

../3.

practical significance at all. It is hoped therefore that in future the prosecution will be slow to entertain fondness for charging conspiracy offences.

I pass now to consider the appeal itself. I will, in connection with this, deal with the conspiracy count first. The Penal Code, Cap. 16, does not define conspiracy. The learned magistrate adopted the definition of the term in "Blacks Law Dictionary With Pronunciations", by Henry Campbell, Black M.A., 5th Edn. I prefer the one in Crofter Hand Woven Harris Tweed Company Limited v. Veitch, (1942) A.C. at 435 by Viscount Simon L. C. He (Viscount Simon L.C.) said:

> "Conspiracy, when regarded as a crime, is the agreement of two or more persons to effect any unlawful purpose, whether as the ultimate aim, or only as a means to it, and the crime is complete if there is such agreement ..... though in most cases overt acts done in pursuance of the combination are available to prove the fact of the agreement".

(My underscoring) ( )

The basic element for a conspiracy is, according to the above definition, an agreement. Of course, existence of an agreement may be inferred from facts (See, e.g. R. V. Harris 16 W.A.C.A. 116) but the question in this case is: was any agreement within the definition stated above proved? In the charge sheet, there is no specific act alleged as constituting an agreement to steal the vehicle in this case. I can discern nothing, from the evidence indicating that the appellants agreed to steal the vehicle. The learned magistrate decided that there was a conspiracy after directing himself as follows:-

> "..... adopting the above definition (from Black's Law Dictionary) this court finds that the facts of the case above shows conspiracy. This can be inferred in the fact that the second accused (second appellant) was the one given the car above by PW.1 for exclusive use in business. The reason he gave for giving it to the first accused, i.e. on humanitarian grounds puzzled the court which took a lot of pains to find out from the 2nd accused who reportedly talked of humanitarian grounds (ubimdamu). What he really meant by this proved futile. This 2nd accused said he had gone for purposes, that is why he gave the above car to the 1st accused to use but it disappeared. The 2nd accused had been driving the above vehicle since 10.6.91. If he is a person who prays often as he said, then this time he did it

...../4.

> purposely so that he creates an alibi but he had intentionally gone to Prayers assuming he did and gave the 1st accused the vehicle after agreeing to steal the same. This was done by the first accused. The first accused explanation is a hoax because if he was given the car to drive because the 2nd accused went for prayers and he said the time he drove off the 2nd accused was back, why did he he hand him the vehicle even the 2nd time? He alleges that the 2nd accused was taking dups which is denied by 2nd accused This 1st accused said nothing about being tied up with ropes in his defence in chief though he raised it when XXD by the prosecution. Even assuming he was tied up, he managed to release himself, why did he not take the rope to the police Station?, If he was tied up and injured to the extent of being unconscious why did not he have the medical report or show any marks of violence? This shows that his story is just a hoax. Why would 2nd accused go home after getting news of the theft and not to Police Station? In other words I find that the 1st count is proved against both accusedS".

The learned magistrate may be entitled to the above views. To me, however, they amount to nothing more than more speculative arguments. As noted above, there is no positive or even circumstantial evidence from the prosecution side to show that the two appellants agreed to steal the complainant's vehicle. The charge sheet, as noted already also, alleges no act constituting an agreement to steal the vehicle by the appellants. As for the matters in the passage above reproduced from the judgment of the learned Magistrate I do not understand the case of the second appellant to be that he had no explanation for his handing over the vehicle to the first appellant: He explained that he wanted him to drive the vehicle to earn money for petrol. The matter of "humanitarian grounds" was not the reason for his giving the vehicle to the first appellant. To my understanding the second appellant, by saying that he gave the vehicle to the first appellant on humanitarian grounds, he meant that he gave the vehicle to him (first appellant) because he trusted him as a human being should trust another human being - especially because the first appellant was his relative or friend. That is how I understand the phrase "on humanitaria grounds" as used by the second appellant. It is not that what made him give the first appellant the vehicle were humanitarian considerations; that is not my understanding of the statement. My understanding of it is that he gave the vehicle to earn money for petrol while he (the second appellant) went to the mosque. To this there is no evidence from the prosecution to contradict. Indeed all the analysis in the passage above from the judgment of the learned Magistrate is an analysis of weaknesses in the defence case. There is no analysis of any prosecution evidence supporting the charges against the appellants. There may therefore have been weaknesses indeed in the defence case, but, as it is often said,

a conviction should be based on the strength of the prosecution case and not on the weakness of the defence. Here there was not even a prima facie case established by the prosecution against the appellants. All they relied on was the fact of the disappearance of the vehicle. How it disappeared, they relied on the appellants for explanations, and because those explanations were viewed to be weak by the court below they were rejected and convictions followed. This should not have been the approach. In my view, there was no evidence at all proving conspiracy against the appellants. Their convictions for that offence therefore were bad in law. I allow the appeal in relation to that offence.

Coming now to the second count, the learned magistrate led herself as follows:-

> "As for the 2nd count it is not in dispute ..... that the 2nd accused gave the 1st accused the above vehicle. The accused No.1 did not return the same. His story that he was robbed the same I have said it is a hoax. After proving conspiracy to steal the 2nd count follows automatically so it is proved."

By this logic, I would say that having held that conspiracy was not proved, stealing "automatically" goes also. But looking at the case as a whole the question is whether the first appellant's story that he was robbed of the vehicle is to be disbelieved. The trial court disbelieved the story because, inter alia, there were no marks of violence at the alleged scene of the robbery or on the first appellant's person. But in my view, it is, not that commission of all robberies leaves behind marks. If the appellant was alone and, as he says, three people overpowered him and knocked him unconscious, there would have been no opportunity for him to struggle and leave marks of violence at the scene. Looking at the first appellant's defence as a whole, I cannot say that it is altogether not worth of belief. He could have been robbed of the vehicle as he testified. There is no prosecution evidence to disprove his testimony on how the vehicle otherwise disappeared. This being the case I allow the appeal in relation to the offence of stealing as well.

In the final result I allow the entire appeal, quash the convictions of the appellants for conspiracy (count 1) and stealing (count 2). I set aside the sentences imposed on them, plus the order for compensation, and direct that the appellants be released from jail immediately unless they are held there for another lawful cause.

...../6.

I would also observe, in conclusion, that this case should have been brought as a civil case rather than as a Criminal Case-as it was brought. This is because the facts are in line more with a Civil action for recovery of compensation for the loss of the vehicle - than with a Criminal Case. That is why I feel a civil suit would have been more appropriate than a Criminal Case.

Appeal allowed. Sentences of imprisonment and order of compensation quashed.

L. A. K. KYANDO
JUDGE

AT DAR ES SALAAM
19TH JANUARY, 1994

For the Republic - Miss Lwasia, State Attorney
For the Appellants - in person.

Court: Judgment delivered.