IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MSOFFE, J.A., LUANDA, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO. 335 OF 2009

1. JOHN PAULO @ SHIDA]
2. PAULO JOACKIM] ..... APPELLANTS

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Tanga)

(Teemba, J.)

dated the 25th day of September, 2009
in
Criminal Appeal No. 28 of 2009

JUDGMENT OF THE COURT

22 & 24 March 2011

MSOFFE, J.A.:

At the hearing of the appeal Mr. Faraja Nchimbi, learned State Attorney appearing on behalf of the respondent Republic, sought not to support the convictions and sentences. In this sense he argued in support of the appeal. With respect, we are in agreement with his approach on the appeal for reasons which we will endeavour to state hereunder.

Before the District Court of Tanga the prosecution side presented a charge sheet dated 27/3/2008. The charge sheet contained four counts. In the first and second counts the appellants and others were alleged to have conspired to commit an offence and to have committed the offence of armed robbery contrary to sections 384 and 287A, respectively, of the Penal Code. The third count involved the first appellant alone in which it was alleged that he was found in possession of ammunition contrary to sections 4 (1) (a) and 34 (1), (2) and (3) of the Arms and Ammunition Act No. 2 of 1991. The fourth count was in respect of both appellants and the others in which it was alleged that they were found in unlawful possession of firearms contrary to sections 4 (1) (a) and 34 (1), (2) and (3) of the Arms and Ammunition Act No. 2 of 1991.

After a full trial the appellants were convicted in the first and second counts; the first appellant was acquitted in the third count; and the second appellant was convicted in the fourth count. Accordingly, in the first count sentences of three years imprisonment were meted on each appellant; thirty years imprisonment each in the

second count with corporal punishment of twelve strokes; and three years imprisonment in the fourth count in respect of the second appellant. The sentences were ordered to run concurrently.

The first question we have to ask and resolve is whether or not it was correct in law to prefer the conspiracy and the armed robbery counts in the same charge. From the outset, our answer to this question is in the negative.

Section 384 of the Penal Code reads as follows:-

> ***Any person who conspires with another*** *to commit any offence, punishable with imprisonment for a term of three years or more, or to do any act in any part of world which if done in Tanzania would be an offence so punishable, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of an offence, and is liable if no other punishment is provided, to imprisonment for seven years or, if the greatest punishment to which a person*

convicted of the offence in question is liable is less than imprisonment for seven years, then to such lesser punishment.

(Emphasis supplied.)

From the above definition it follows that conspiracy is an offence consisting in the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. So, unless two or more persons are found to have combined to do the act there can be no conviction. Indeed, as stated by ARCHBOLD, PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES, 1992 Edition, at page 3584 citing O'Connel v R (1844) 5 St. Tr (NS) 1:-

The crime of conspiracy is completely committed .... the moment two or more have agreed that they will do, at once or at some future time, certain things. It is not necessary in order to complete the offence that any one thing should be done beyond the agreement. The conspirators may repent and stop, or may have no opportunity, or may be prevented, or may fail. Nevertheless the crime is complete: it was completed when they agreed: R v

Aspinall (1876) 2 Q.B. 48, pp 58-59. per Brett, J.

From the above definitions one other point comes to light. That conspiracy is an offence in itself. It stands in itself. It is self sustaining. It does not have to be pegged or combined with another offence. Like any other criminal offence, to be compete it has, in its own right, **actus reus** and ***mens rea.***

In this case for the above exposition of the law to be complete and conclusive we wish, at this juncture, to revert back or look at the definition of the word "cognate". In the **Oxford Advanced Learner's Dictionary of Current English,** Sixth Edition by Sally Wehmeier at page 213 the word is defined, *inter alia,* as:-

Having the same origin as another word or language....related in some way and therefore similar ....

Applying the above exposition of the law to this case two matters are evident. **One,** no positive evidence of conspiracy was

forthcoming. We have carefully gone through the entire evidence on record. There is absolutely no scintilla of evidence that the appellants and the others "sat, met, or communicated together" somewhere and conspired to commit the offence of armed robbery. The evidence on record relates to the offence of armed robbery, without more. **Two,** it was not correct in law to indict or charge the appellants with conspiracy and armed robbery in the same charge because, as already stated, in a fit case conspiracy is an offence which is capable of standing on its own.

In the justice of this case, the first count is related to the second count in that it is alleged that the appellants and the others conspired to commit armed robbery which is the subject of the accusation in the second count. To this end, the first count is cognate to the second count. That being the case, since the first count is similar or related to the second count, and therefore cognate for that matter, there was no need of preferring the two counts in the same charge. At any rate, since armed robbery could stand and be proved on its own there was no point in preferring the conspiracy

count in the same charge. Needless to say, once armed robbery was proved the conspiracy count ought to have died a natural death.

In so far as the offence of armed robbery is concerned, the appellants were convicted on the basis of two aspects of the evidence; visual identification and the doctrine of recent possession.

On visual identification the key and material witness was PW3 Zabibu Juma. She stated that on 24/10/2007 at around 9.45 a.m. she was in her room dressing the bed. Suddenly four men entered into the room with a gun, told her to keep quiet, and ordered her to give them money. She told them that she had no money to give them. They opened the wardrobe drawer and took a sum of Shs. 127,000/=. At the same time they also took her earrings and went away after locking the door from the outside. According to her, she identified the appellants in the group of the four men.

At this stage, the question is whether or not PW3 properly identified the appellants on the fateful day and time. Admittedly, the

incident took place in broad day light. But it should be borne in mind that the incident was sudden and PW3 was seeing the appellants for the first time. In the circumstances, one would have expected more positive evidence of identification. For instance, PW3 could have given some descriptions, if any, of the appellants, the attire worn by each one of them etc. In the absence of evidence along those lines it cannot be safely said and concluded that PW3 properly and adequately identified the appellants on the said day.

Indeed, in the circumstances of this case, we think this was a fit case for conducting an identification parade soon after the incident with a view to testing whether PW3 could identify the appellants as the same people whom she saw on the date of incident. As this Court stated in **Abdul Farijalah and Another v Republic,** Criminal Appeal No. 99 of 2008 (unreported) at page 11:-

> *.... It is trite law that the test in an identification parade is to enable a witness to identify a person or persons whom he or she had not known or seen before the incident*

> *..... An identification parade held soon after the incident in which a witness positively identifies an accused lends assurance to the court of that witness's dock identification of that person.*

This brings us to the evidence on the doctrine of recent possession. Again, the evidence on this aspect of the case is that of PW3. At page 27 of the record before us PW3 is on record as having stated:-

> *.... The earrings which they stole were gold and round. I can identify them. These are the very ear rings which they stole from me.*

Thereafter, the trial court made the following observation:-

> *Court:- PW3 has identified golden earrings which are round. It is hereby noted.*

It should be noted here that PW3 allegedly identified the earrings because they were golden and round. With respect, this kind of

identification was not enough and conclusive proof that the earrings exhibited in court were the same ones that were stolen from PW3 on that fateful day. We wish to observe that earrings are common items which can change hands easily. In the absence of any special marks made or inscribed on the said earrings by PW3 it was not safe to say and conclude with certainty that these were necessarily the same earrings that were stolen from PW3 on the day in question. In this regard, we are of the considered or settled view that the doctrine of recent possession was improperly invoked in this case. Indeed, as this Court stated in **Ally Bakari and Another v Republic** (1992) TLR 10 at page 15:-

> *Quite clearly, as a matter of law and logic, it is essential for a proper application of the doctrine of recent possession, that the stolen thing in the possession of the accused must have a reference to the charge laid against the accused. That is to say that the presumption of guilt can only arise where there is cogent proof that the stolen thing possessed by the accused is the one that was*

stolen during the commission of the offence charged, and, no doubt, it is the prosecution who assumes the burden of such proof, and the fact that the accused does not claim to be the owner of the property does not relieve the prosecution of that obligation.

The last point is on the fourth count whereby, as already stated, the second appellant was convicted of unlawful possession of a firearm and sentenced to an imprisonment term of three years. In terms of Paragraph 19 of the First Schedule to The Economic and Organized Crime Control Act (CAP 200 R.E. 2002) this was an economic crime which under section 3 (2) of the above Act is triable by the High Court sitting as an Economic Crimes Court. In this sense, the District Court of Tanga had no jurisdiction to try this offence. The District Court could have dealt with the offence if the Director of Public Prosecutions had exercised the powers conferred by Section 12 (3) and (5) of the above Act. Sub-sections 3 and 5 read as under:-

> *(3) The Director of Public Prosecutions or any State Attorney duly authorized by him, may, in each case in which he deems it necessary or appropriate in the public interest, by certificate under his hand, order that any case involving an offence triable by the Court under this Act be tried by such court subordinate to the High Court as he may specify in the certificate.*
>
> *(5) Where a certificate is issued under subsection (3), it shall be lodged in the court concerned, and shall constitute full authority for, and confer jurisdiction upon, the court in which it is lodged to try the case in question. [ss. (4)].*

When all is said and done, we hereby allow the appeal and accordingly quash the convictions and set aside the sentences. The appellants are to be released from prison unless they are otherwise lawfully held therein.

For the avoidance of doubt, we leave it to the wisdom of the Director of Public Prosecutions to decide on whether or not it will be worthwhile, sensible and prudent to proceed with the offence under the fourth count taking into account that the second appellant was convicted and sentenced to imprisonment for three years in the fourth count on 15/12/2008, which means that by now he is just about to complete, or has actually completed, serving the sentence.

DATED at TANGA this 24th day of March, 2011.

J.H. MSOFFE
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(E.Y. Mkwizu)
DEPUTY REGISTRAR