CELESTINO SHATE

And

FASO MOYO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MOYO & DUBE-BANDA JJ
BULAWAYO 27 SEPTEMBER 2021

Criminal appeal

K. Ngwenya, for the appellants
B. Gundani, for the respondent

DUBE-BANDA J: At the conclusion of submission by counsel, in an *ex tempore* judgment we allowed the appeal and set aside the sentence, and indicated that the full reasons for judgment would follow. The following are the full reasons for judgment.

This is an appeal against the whole judgment of the Magistrate's Court, sitting at Beitbridge Court. The appellants were charged in the court *a quo* together with one other accomplice, with the crime of contravening section 45(1) of the Parks and Wildlife Act [Chapter 20:14] (Act), as read with section 11 of the General Laws Amendment Act No. 5 of 11. It being alleged that on the 28th August 2021, at Bubye Valley Conservancy, Beitbridge, appellants not being holders of a valid permit or licence issued in terms of the Act, unlawfully and intentionally hunted rhinoceros which are specially protected animals by following their spoor.

The case for the prosecution was that on the 28th August 2021, the appellants, together with one other person hatched a plan to hunt and kill rhinoceros at Bubye Valley Conservancy. They carried a 375 rifle, an axe and two satchels with food. A fence guard observed a three men spoor entering the conservancy. Scouts picked the three men spoor, which was on top of a fresh rhino spoor. The Scouts tracked the spoor, caught up with three men. Two were arrested and one escaped. The one who escaped was holding a rifle. The police arrived and took over the investigations.

The appellants pleaded not guilty. At the conclusion of the trial they were convicted as charged. The trial court failed to find special circumstances and sentenced each appellant to a mandatory term of ten years imprisonment. Aggrieved by the conviction, appellants noted an appeal to this court against their conviction. There are five grounds of appeal, whose net effect amount to this: that the evidence adduced by the State does not prove the guilt of the appellants beyond a reasonable doubt, and that the version of the appellants was not shown to be false beyond a reasonable doubt, put differently, that their version is reasonably possible true.

The court *a quo* convicted the appellants on the basis that their foot prints were identified and that it is clear that the foot impressions were following a rhino spoor. The court *a quo* concluded that in a nutshell the appellants' actions has only one inference that can be drawn that they were hunting a rhino. The court *a quo* came to the conclusion that the hunting of a rhino had been proved.

The basis upon which it did so was apparently the following: The evidence of Ismael Nyathi is to the effect that on the 28th August they saw a trail of three men who had gone through the wire to the conservancy. They followed the tracks and noticed that the tracks were also following a rhino spoor. He testified that these three men followed a spoor of a rhino that had passed. They tracked the spoor for seven kilometres. They abandoned tracking the spoor when they had seen people. Two persons were apprehended and the third one fled. 1st appellant had an axe, 2nd appellant had a satchet, and the 3rd person who escaped, and ended up being accused 3 at the trial had a rifle. He testified that the appellants were arrested in the conservancy. They were hunting a rhinoceros.

The evidence of Absolum Matuka is to the effect that he is employed at Parks and Wildlife Department. He does investigations and arrests offenders who commit crimes to do with wildlife. On the 28 August 2018, he received a telephone call from a member of the anti-poaching unit. He was informed that two persons were arrested at Bubye Valley Conservancy. This witness testified that Ismael Nyathi narrated to him what happened. He told the court *a quo* that the foot prints of the appellants showed that they were hunting a rhino. He said the foot prints followed a rhino spoor.

The evidence of Matare Nyerere is to the effect that he is a member of the Zimbabwe Republic Police (ZRP). He received information that there were two suspected poachers who had been arrested at Bubye Conservancy. He proceeded to the conservancy and the two appellants were handed over to him. He was shown the spoor of three men and of a rhino. He testified about certain extra curial statements and indications made to him by the appellants.

The appellants were charged with the crime of hunting a rhino without a permit. The Act criminalises the hunting of a rhino.

> Section 2 of the Parks and Wildlife Act defines "'hunt' to mean (*a*) to kill, injure, shoot at or capture; or (*b*) with intent to kill, injure, shoot at or capture, to wilfully disturb or molest by any method; or (*c*) with intent to kill, injure, shoot at or capture, to lie in wait for, follow or search for."(My emphasis).

Therefore, the following of a rhino qualifies as act of hunting in terms of the Act. The court *a quo* found it proved that the appellants were hunting a rhino as contemplated by the Act.

The court *a quo* relied on the evidence of the witnesses that the appellants were tracking a rhino spoor to find that the appellants were hunting a rhino. The court found that the appellants' footprints were identified and it is clear that the foot impressions were following a rhino spoor. The court then concluded that there is only one inference that can be drawn from the appellants' actions, being that they were hunting a rhino. The identification and tracking of spoors require training, special skills and experience. It requires the highest level of expertise in spoor interpretation. To interpret a spoor the tracker must have a sophisticated understanding of the behaviour of the animal being tracked. Tracking is a specialised profession.

These are matters which simply cannot be decided without expert guidance. Expert witnesses are of assistance to courts in such a case where the court is unable to make a decision, because of lack of specialised knowledge. Expert evidence amounts to an opinion of the expert witness and it would be admissible in a trial if it was relevant and the facts on which the expert's opinion is based are established. When evaluating the evidence, inferences may be drawn and probabilities may be considered and such inferences and probabilities must be distinguished

from conjecture or speculation. There must be proven facts from which the inference can be drawn and there should not be speculation as to the possible existence of other facts.[1]

A witness may be qualified as an expert based on knowledge, skill, experience, training, or education. The expert's qualifications must be established on the record before the witness is asked to give opinions. The witness Ismael Nyathi did not tell the court his qualifications and skills in identification and tracking spoors. The fact that he is a game Scout, is inadequate. The evidence of his qualifications and experience must be on record. Absolum Matuka did not tell the court his qualifications, skills and experience in tracking spoors. The fact that he is employed by the Parks and Wildlife Department, standing alone is inadequate. Matare Nyerere also did not testify about his qualifications, skills and experience in tracking spoors. Again, the fact that he is a member of the ZRP, standing alone, is inadequate. The court *a quo* remained in the dark about the qualifications and experience of these witnesses in the field in which they testified. Ismael Nyathi was asked in examination in chief to give a description of the spoor of a rhino, this question was not answered. Matare Nyerere was also asked to describe a rhino spoor, no answer was given.

It requires training, special skills and experience to distinguish a spoor of a rhino from the spoor of other animals. There is evidence on record that there are other different animals in the conservancy. This is the kind of knowledge that is beyond the reach and understanding of a person untrained and unskilled in the identification, tracking and interpretation of spoors. The court *a quo* did not make a finding regarding the ability of the witnesses to identify and interpret spoors. This is a misdirection. Again, the court *a quo* misdirected itself in finding that the appellants were hunting a rhino without evidence of the qualifications, skills and experiences of the witnesses in tracking, identification and interpretation of a spoor of a rhino. It is on this point that this matter turns.

[1] Ndou M.M. "Assessment of Contested Expert Medical Evidence in Medical Negligence Cases: A Comparative Analysis of the Court's Approach to the *Bolam/Bolitho* test in England, South Africa and Singapore" 2019 (Vol. 33 No. 1) Speculum Juris 55.

The appellants' presence at the conservancy, in the company of someone who was carrying a rifle, 1st appellant carrying an axe, 2nd appellant carrying a satchel with food raises a suspicion that they were hunting. If they were hunting, there is no evidence of the type of animal they were hunting. They were charged with the crime of hunting of a rhino, and a rhino alone. What remains is just a suspicion. But suspicion is not proof. Our law requires proof beyond a reasonable doubt for a conviction to follow. In our law there can never be a conviction anchored on a suspicion, strong as it might turn out to be.

I am constrained by the facts of this matter to note in passing that the witnesses Absolum Matuka and Matare Nyerere were allowed to testify on statements made to them by the appellants outside the court room without first complying with the rules of admissibility of extra curial statements. A police officer or a person in authority may not give evidence of any such statements unless he first satisfies the rules about admissibility. See: *S v Nkomo* 1989 (3) ZLR 117 (SC); *S v Ndlovu* 1988 (2) ZLR 465 (SC). Again, the indications were not documented. One would have expected of the officers involved to have had a record of what transpired during the indications. It is time to remind the police of the obiter remarks of Macaulay J in *S v Mutasa 1976 (1) PH (H) 24 (R)* when he remarked as follows:

> At the same time, it is high time and it would be a salutary thing if, when interrogations are conducted by the police with the object of ascertaining an accused's attitude to a particular charge, it were appreciated that what happens to an accused during interrogation is a matter of utmost importance to which the police should give their closest attention in respect of which there should be some satisfactory record of what takes place; such a record can be the basis of subsequent evidence when police details later come to refresh their memories.

I take the view that the failure to produce investigation notes or statements regarding what transpired during interviews with suspects or accused persons by police officers is highly suggestive that undue influence might have been applied during their interrogation. As this in case where the appellants complained of ill-treatment and assaults by the members of the investigating team. This in my view is an irregularity which militates against any perception of fair play, and was prejudicial to the appellant in the sense that it negatively affected his right to a fair trial.

The State did not support the conviction. The concession was properly taken. It is for these reasons that we allowed the appeal at the conclusion of argument and ordered the conviction and sentence to be set aside.

Moyo J……I agree

T.J Mabhikwa & Partners, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners