IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MUSSA, J.A., LILA, J.A., And MKUYE, J.A.)

CRIMINAL APPEAL NO. 266 OF 2016

THE DIRECTOR OF PUBLIC PROSECUTIONS..... APPELLANT

VERSUS

1. **ISMAIL SHEBE ISLEM.....1ST RESPONDENT**
2. **RASHID SAID SALIM.....2ND RESPONDENT**
3. **MAJED ARJMAND.....3RD RESPONDENT**

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

(Msuya, J.)

Dated 30th day of June, 2016

in

Criminal Session No. 7 of 2013

JUDGMENT OF THE COURT

11th & 18th February, 2019.

MUSSA, J.A.

In the High Court of Tanzania, at Tanga Registry, the respondents were arraigned for two counts, namely, conspiracy to commit an offence (first count) and Trafficking in Narcotic Drugs (second count). The two counts were, respectively, predicated under sections 384 of the Penal Code, Chapter 16 of the Revised Edition of 2002 (first count) and section

16(1) (b) (i) of the Drugs and Prevention of Illicit Traffic in Drugs Act, Chapter 95 of the Revised Edition of 2002 (second count). We shall henceforth refer the latter legislation as "the Act."

In the first count, the particulars of the initial information were that, on divers dates, between the 1st July, 2010 and the 19th December 2010, at various places, within the City of Dar es Salaam and, at various places, within the United Republic of Tanzania, the Republic of Kenya and the Islamic Republic of Iran, the respondents, jointly and together, conspired to commit an offence, to wit, trafficking in narcotic drugs.

As regards the second count, the particulars of the information were that on the 19th December, 2010, at Tengwe area, within Handeni District, the respondents, jointly and together, did traffic narcotic drugs, to wit, 48.53 kilograms of heroin hydrochloride or diacetylmorphine hydrochloride valued at Tanzanian Shillings two billion four hundred twenty six million five hundred thousand only (2,426,500,000/=).

At the commencement of the trial, the prosecution sought and was granted leave to vary the date on the particulars of the first count to read "8th May, 2010" instead of "1st July, 2010". Soon after, when the information was read over and explained to the respondents, they all

refuted the prosecution accusation and, it is, perhaps, noteworthy that the third respondent, an Iranian National, denied the information through an interpreter appointed by the trial court, namely, Mr. Henry John Mlonga.

Thereafter, three assessors, namely, Zahira Kakere, Biana Mtali and Saidi Kihiga were chosen to aid the presiding Judge and, after all the preliminaries were done, the trial commenced, whereupon the prosecution featured fourteen (14) witnesses as well as a host of exhibits which included the packets of drugs (exhibits P7 and 8) which were allegedly involved in the trafficking. On their part, save for the first respondent, who featured one witness to fortify his testimonial account, the other respondents gave sole testimony in denial of the prosecution accusation.

When the respective cases from either side were closed, the presiding officer (Msuya, J., presently the late,) summed up the case to the assessors who sat with her in aid. In their lengthy deliberations, the three assessors unanimously returned a verdict of not guilty in favour of all the respondents. On her part, the learned trial Judge concurred and the respondents were, accordingly, found not guilty and acquitted. In addition, the Judge made a consequential order to the effect that *"the exhibits belonging to the accused persons to be restored to them".*

The Director of Public Prosecutions (the DPP) is aggrieved and presently seeks to impugn the whole decision of the High Court upon a memorandum of appeal which complains thus:-

> *"1. That, the learned Trial judge erred in fact in finding that the Prosecutions did not prove acts or conducts of the respondents from which the trial court could draw inference that the respondents conspired to traffic in narcotic drugs.*
>
> *2. That, the Learned Trial Judge erred in fact in finding that the 1st and 2nd respondents were innocent carriers who did not have the knowledge of the narcotic drugs, Exh. P7 and P8 in the car they were fond driving, Exh, P6.*
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> *3. That, the learned Trial Judge erred in fact in drawing adverse inference against the Prosecutions for failure to call Assad Azizi in whose house the narcotic drugs, Exh. P7 and P8 were packed in the car, Exh. P6 and Mohamed Ally whose car Exh. P6 was used to carry the narcotic drugs.*
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> *4. That, the learned Trial Judge erred in fact in finding that a search for the narcotic drugs, Exh. P7 and P8 in the car, Exh. P6 was conducted in the absence of 1st and 2nd respondents.*

5. That, the Learned Trial Judge erred in law in finding that the chain of custody of the narcotic drugs, Exh. P7 and P8 was not proved since the transfer of the drugs from one witness to another was not documented.

6. That, the Learned Trial Judge erred in law and fact for finding that the 1st and 2nd respondents never made oral confessions to the police officers and civilians during and after seizure of the narcotic drugs, Exh. P7 and Exh. P8.

7. That, the Learned Trial Judge erred in law in ordering the restoration of the car, Exh. P6, which carried the narcotic drugs to the respondents.

When the appeal was placed before us for hearing, the appellant was represented by Messrs Joseph Pande and Peter Maugo, learned Principal State Attorneys. On the adversary side, the first respondent was represented by Messrs Ipilinga Panga and Aliko Mwamanenge, learned Advocates, whereas the second respondent had the services of Mr. Nassor Mohamed, also learned advocate. The third respondent was unserved, unrepresented and absent. It should be recalled that at the last hearing, the Court was requested and ordered that the third respondent be issued with a notice of trial by way of substituted service at the instance of the

appellant. Before us, nothing was said about the proposed course of action but, instead, Mr. Pande rose to withdraw the appeal against the third respondent under the provisions of Rule 4(2)(a) of the Tanzania Court of Appeal Rules, 2009(the Rules). The quest for withdrawal was not objected by the learned counsel for the respondents and the appeal against the third respondent was, accordingly, marked withdrawn.

Addressing the appeal, the learned counsel from both sides put up industrious submissions either in support or in opposition to which we are, indeed, appreciative. Nonetheless, for a reason that will shortly become apparent, we think that it will be unnecessary for us to address the points raised in the memorandum of appeal just as we need not recapitulate the factual background leading to the arrest, arraignment and the ultimate acquittal which was accorded to the respondents.

More particularly, as we gleaned from the summing up notes to assessors, we noted that the trial judge sufficiently addressed the assessors on the salient facts of the case but our issue of concern relates to whether or not the assessors were properly directed on the vital points of law which were involved in the trial before her. In this regard, it is noteworthy that aside from stating that the respondents stood trial for two

counts of conspiracy to commit an offence and trafficking in narcotic drugs, all what the trial Judge directed the assessors in relation to the vital points of law involved was on the subject of the burden of proof. She did not, so to speak, direct them on what entails, or what were the ingredients of the offences to which the respondents stood charged. Thus, an issue looms as to what are the consequences of this omission? We raised this issue ***suo motu*** and prompted the learned counsel from either side to comment on it ahead of their submissions on the merits of the appeal.

In response, counsel from both sides conceded that the learned Judge did not, at all, direct the assessors on the ingredients of the two offences to which the respondents stood charged. But, the learned counsel from the opposing sides differed on the consequences of the omission as well as the way forward. For one, Mr. Pande submitted that omission hardly worked to the prejudice of the parties, more particularly, in the light of the salient facts of the case which were brought to the attention of the assessors in detail. For another, the learned Principal State Attorney submitted that should the Court be minded to find fatality in the omission, it should be wary of the fact that a retrial may be impracticable, on account that some of the evidence would be irretrievable.

For their part, counsel for the respondents took the position that a retrial should take effect from the stage when the trial Judge composed the summing up notes. That is to say, the proceedings, of the trial court up to the 14th June, 2016 when the trial Judge scheduled a date for the summing up, should be left intact.

Having heard the learned counsel from either side on our issue of concern, it is, indeed, beyond question that the learned trial Judge omitted to direct the assessors on what entails the offences to which the respondents stood charged. The non-direction on the ingredients of the offences charged is appalling and, in similar circumstances, its non-compliance has had the effect of vitiating the entire trial proceedings (see, for instance, the unreported Criminal Appeal No. 290 of 2011 – **Charles Lyatii @ Sadala V. The Republic)**. The need to properly address the assessors on both the salient facts of the case and the relevant law was underscored by the defunct Court of Appeal for Eastern Africa in the old case of **Washington Odindo V. R,** [1954] 21 EACA 392 in the following words:-

> *"The opinion of assessors can be of great value and assistance to a trial judge but only if they fully*

understand the facts of the case before them in relation to the relevant law. If the law is not explained and attention not drawn to the salient facts of the case, the value of the assessors opinion is correspondingly reduced."

In the matter at hand, as we have already intimated, the assessors were sufficiently directed on the salient facts of the case but, on account of the non-direction on the ingredients of the offences charged, the value of their respective opinions correspondingly depreciates.

All things being equal we would have similarly nullified the entire proceedings but, the peculiar circumstances of this case dictate the taking of a different course. We note that this is not the first time the Court has been forced to back-pedal from the usual course. In the unreported Criminal Appeal No. 199 of 2010 – **Makumbi Ramadhani Makumbi and four others V. R**, where cautioned and extra –judicial statements were improperly adduced by the trial Court, the Court refrained from taking the course of an entire nullification of the proceedings for the following reasons:-

"First of all, there is the issue of the possibility of non-availability of witnesses, whose evidence was

properly received in case we quash the entire trial court's proceedings, Secondly, we have considered the issue of the exhibits which have already been disposed of. How will they be traced? Thirdly, and of great significance in the orderly administration of justice, in ordering a re-trial the court must guard the prospect of giving the prosecution a chance to fill in gaps in its evidence at the trial (see Fatehali Manji V. R [1966] EA 334)"

In the case under our consideration, we are faced with similar circumstances. More particularly, the alleged narcotic drugs which were the subject of the trial below, have been irretrievably disposed by an order of the trial court. Having such a peculiar circumstance in mind, we have found it apposite, in the interest of justice, to partially nullify and set aside, in revision, the proceedings of the trial court starting with the irregularly conducted summing up notes up to the judgment and all orders subsequent thereof. That is to say, all the proceedings of the trial court prior to the 15th June, 2016 are left intact.

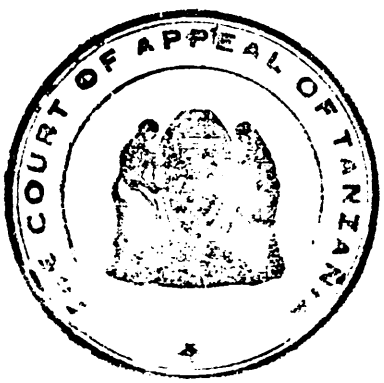
The effect of this order, therefore, is that the case against the respondents should be heard afresh by another Judge and a new set of assessors from the stage of summing up and, we should expect that the

assessors will be properly directed on the facts as well as the relevant law. For avoidance of doubt, this order does not extend to the third respondent who was relieved of responsibility at the commencement of the appeal. We hope that the High Court will take hasts to resume the hearing of the trial as expediously as is practicable.

Order accordingly.

DATED at **TANGA** this 15th day of February, 2019.

K. M. MUSSA
JUSTICE OF APPEAL



S. A. LILA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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

E. Y. Mkwizu
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL (T)