IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., NDIKA, J.A., And KITUSI, J.A.)

CRIMINAL APPEAL NO. 359 OF 2017

KHAMIS SAID BAKARI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Dar es Salaam)

(Korosso, J.)

dated the 23rd day of August, 2017
in
Criminal Sessions Case No. 119 of 2016

.....

JUDGMENT OF THE COURT

13th & 29th May, 2020

NDIKA, J.A.:

Khamis Said Bakari, the appellant herein, was convicted by the High Court of Tanzania at Dar es Salaam of trafficking in narcotic drugs contrary to section 16 (1) (b) (i) of the Drugs and Prevention of Illicit Traffic in Drugs Act, Cap. 95 RE 2002 ("the DPITDA"). He was sentenced to twenty years' imprisonment. In addition, he was ordered to pay a fine of TZS. 130,172,400.00 being three times the market

value of the narcotic drug the subject of the charge. Aggrieved, he now appeals to this Court against both conviction and sentence.

The prosecution produced a total of twelve witnesses to prove what was alleged in the charge sheet that the appellant, on or about 2nd November, 2012 at the Julius Nyerere International Airport ("JNIA") within the District of Ilala in Dar es Salaam Region, trafficked in narcotic drugs namely Heroin Hydrochloride weighing 964.24 grammes valued at TZS. 43,390,800.00.

There was no dispute that the appellant, a holder of a Tanzanian Passport No. AB441769 (Exhibit P.3), was arrested at the JNIA on 2nd November, 2012 at about 19:00 hours shortly before he boarded a Kenya Airways flight on an electronic ticket (Exhibit P.4) for a trip to Hong Kong via Nairobi, Kenya.

It was the prosecution case that the appellant's arrest was initially made by Amiri Salim Kibwana, a security officer at the JNIA, acting on information received from a whistleblower that he was carrying pellets of a certain narcotic drug in his bowels. The said Kibwana handed over the appellant to PW8 No. E.4048 D/Sgt Erick who then called the attention of his superior, PW3 Assistant Inspector

Makole Bulugu, from the Criminal Investigations Department Headquarters – Anti-Drug Unit ("ADU"). The appellant was taken to the ADU Offices at the airport where his body and baggage were searched but no drugs were found. Since he was suspected to have the drugs in his rectum, he was detained there for observation until 6thNovember, 2012. Whenever he asked to answer the call of nature, he was taken to a special toilet (a drug loo) that sieves any foreign matter except bodily waste. It was ensured that the toilet was clean and that the appellant confirmed this before he used it.

In the course of his detention as aforesaid, he emitted, in nine lots, a total of seventy-five pellets suspected to be narcotic drugs as follows: **first**, on 3rd November, 2012 at 09:10 hours, under the watch of PW3, PW5 Shaban Nassoro, an officer from the Tanzania Revenue Authority ("the TRA") and Alex Luanda, an officer from the Immigration Department, he excreted seventeen pellets. **Secondly**, later on the same day at 14:10 hours he emitted ten pellets under the surveillance of PW6 No. E.2926 D/SSgt Dacto, the said Luanda and Herman Gervas, a TRA official. **Thirdly**, later that day at 17:35 hours under the watch of PW6, the said Gervas and Aziz Mussa, a security

officer, again the appellant defecated ten pellets. **Fourthly**, the appellant emitted eleven pellets later that day at 21:00 hours this time under the observation of PW3, PW9 Joseph Elson Mduma, a TRA official, and Makame Hamisi, an Immigration Department official. **Fifthly**, at 22:52 hours the same day, he defecated thirteen pellets under the watch of PW3, PW9 and the said Makame Hamisi. **Sixthly**, on 4th November, 2012 at 03:05 hours, he expelled from his bowels seven pellets under the observation of PW3, PW9 and Allois Chaula, an Immigration Department official. **Seventhly**, on the same day at 06:45 hours while under the watchful eyes of PW3, the said Makame and TRA Official Hafidh Abdallah Lupembe (PW10), the appellant emitted five pellets. **Eighthly**, on 5th November, 2012 at 02:40 hours while being observed by PW3 and PW5, he excreted one pellet. **Finally**, on 6th November, 2011 at 03:00 hours under the surveillance of PW3 and PW7 Mcharo G. Kiluwa, an Immigration Department official, the appellant emitted one pellet.

It was in evidence that each emission of the pellets as aforesaid was recorded in an observation form (Exhibit P.5), which was then signed by the appellant as well as the police and independent

witnesses. The recovered pellets were initially kept by the police officer in charge at the ADU offices at the airport (either PW3 or PW6), but they were subsequently handed over in lots by these officers to PW2 SP Neema Mwakagenda, from the ADU Offices at Kilwa Road, Dar es Salaam, who stored them there under lock and key. More particularly, on 6th November, 2012 between 16:00 and 17:00 hours, PW2 counted the pellets, packed them in an envelope which she then sealed and marked with a code – JNIA/IR/264/2012. This was done in the presence of the appellant who had then been moved there, PW11 Zainabu Dua Maulana (a ten cell leader), and another ADU police officer.

On 8th November, 2012, PW2, in the company of PW6, PW12 Assistant Inspector Wamba and two other police officers, took the wrapped pellets to the Chief Government Chemist ("the CGC") for analysis. PW1 Machibya Ziliwa Peter, a chemist, analysed the substance, then coded as 814/2012, and confirmed that it was "Heroin Hydrochloride" or "Diacetylmorphine Hydrochloride" weighing 964.24 grammes. He produced in evidence the analysis report and the wrapped pellets, which were admitted as Exhibits P.1 and P.2

respectively. PW4 Christopher Shekiondo, the then Commissioner of the Anti-Drug Commission, certified that the estimated market value of the substance was TZS. 43,390,800.00 as per the certificate of value dated 26th November, 2012 that he produced in court (Exhibit P.6) in terms of section 27 (1) (b) of the DPITDA.

There was further evidence from PW12 that the appellant made a cautioned statement to him on 6th November, 2012, confessing to trafficking in narcotic drugs as charged. The statement was repudiated by the appellant but it was admitted as Exhibit P.7 by the learned trial Judge after she conducted a trial within trial and concluded that he made it voluntarily. Moreover, PW12 produced in evidence under section 34B (2) of the Evidence Act, Cap. 6 RE 2002 the respective statements of two witnesses who could not be produced at the trial on account of being untraceable or in ill-health. These comprised a statement made by Herman Gervas (Exhibit P.8) and another one recorded by Amiri Salim Kibwana (Exhibit P.9). They were admitted without any objection from the defence (see page 122 of the record of appeal).

When the appellant was put on his defence, he admitted having been arrested at the JNIA on the fateful day as he was destined to China but denied committing the offence. He attributed his travails to the work of a certain female official from the TRA with whom he crossed swords previously on 16th October, 2012 over her assessment of chargeable import duty on certain goods he had imported from China. He bemoaned that he was initially charged with trafficking in 753.46 grammes of heroin worth TZS. 87,507,000.00 but that the charge was dropped and a new one the subject of this appeal was lodged.

Like the three assessors that sat at the trial, the learned High Court Judge was satisfied that the charged offence was proven beyond reasonable doubt. Accordingly, she convicted the appellant and sentenced him as hinted earlier.

At the hearing of the appeal before us on 13th May, 2020, Mr. Jeremia Mtobesya, learned counsel, appeared for the appellant on a dock brief whereas the respondent had the services of Ms. Veronica Matikila, learned Senior State Attorney, who was assisted by Mr. Elia Kalonge Athanas and Ms. Estazia Wilson, learned State Attorneys.

Before the hearing commenced in earnest the appellant, who also appeared in person via a video link to the prison where he sojourned, intimated that he had no confidence in the court-appointed counsel and beseeched to be allowed to prosecute the appeal on his own on the basis of the Memoranda of Appeal and list of authorities he had filed. Given the circumstances, we discharged Mr. Mtobesya and expunged from the record the Supplementary Memorandum of Appeal and list of authorities he had lodged on 11th May, 2020.

Through his Memorandum of Appeal lodged on 19th December, 2018 and a supplementary Memorandum of Appeal filed on 13th February, 2020, the appellant raised a catalogue of twenty-three grounds of appeal. In our view, these grounds raise the following points of grievance: **one**, that the information was defective for disclosing insufficient particulars of the offence; **two**, that the cautioned statement was irregularly recorded; **three**, that PW2's evidence was recorded in violation of section 215 of the Criminal Procedure Act, Cap. 20 ("the CPA"); **four**, that Exhibits P.1, P.8 and P.9 were wrongly admitted in evidence; **five**, that the observation form was wrongly relied upon as it lacked features of a police form;

six, that the appellant was denied his right to cross-examine PW3, PW5, PW6, PW7, PW9 and PW10; **seven**, that the chain of custody of the pellets was broken and that PW1 was incompetent to tender the pellets in evidence; **eight**, that adverse inference be drawn for the prosecution's failure to produce Amiri Salim Kibwana and the informer as witnesses; **nine**, the appellant's defence (particularly Exhibits D.1, D.2, D.3 and D.4) was not duly considered; **ten**, that the trial court wrongly relied upon previous facts in respect of the withdrawn charge to convict him on a new charge; **eleventh**, the charge was not proven beyond peradventure; and **finally**, the sentence was harsh for not taking into account the period of incarceration spent by the appellant in remand prison contrary to the dictates of section 170 (2) (c) of the CPA.

In his oral argument, the appellant adopted the contents of his Memoranda of Appeal and urged us to allow his appeal. He had nothing useful to add. On the adversary side, Ms. Matikila addressed the grounds of appeal having stated categorically that she was supporting the appellant's conviction and the corresponding sentence. We propose to address the learned Senior State Attorney's

submissions and the appellant's argument in rejoinder in the course of determining the grounds of appeal in the order we have reformulated them above.

At this stage, we wish to state that this being a first appeal, this Court is enjoined by Rule 36 (1) (a) of the Tanzania Court of Appeal Rules, 2009 to re-evaluate the evidence and draw its own inferences of fact or conclusions subject to the usual deference to the trial court's findings based on credibility of witnesses – See also **D.R. Pandya v. R.** [1957] E.A 336 and **Juma Kilimo v. Republic**, Criminal Appeal No. 70 of 2012 (unreported).

We wish to begin our determination of the appeal by addressing the complaint in the first ground of appeal that the information was defective for disclosing insufficient particulars of the offence. As happened for most of the grounds, the appellant did not make any elaboration on this ground. On her part, Ms. Matikila countered that the information was properly drafted as required by section 135 of the CPA and that the particulars of the offence sufficiently notified the appellant of the charged offence.

Having reviewed the impugned information at page 1 of the record of appeal, we respectfully agree with the learned Senior State Attorney. The information is evidently compliant with the dictates of sections 132 and 135 of the CPA that every charge or information must contain a statement of the specific offence charged together with such particulars as may be necessary for giving reasonable information on the nature of the offence charged. To be sure, the particulars of the offence in this case indicate the name of the appellant as the accused person, and that he trafficked in a narcotic drug known as Heroin Hydrochloride weighing 964.24 grammes worth TZS. 43,390,800.00 at the JNIA in Ilala District in Dar es Salaam. We cannot help but wonder what other detail the appellant expected in the particulars of the offence. Accordingly, the first ground of appeal fails.

On the complaint in the second ground, Ms. Matikila conceded, with remarkable forthrightness, that the cautioned statement was recorded after the statutory basic period of four hours had expired and urged us to expunge it. However, she hastened to say that the

appellant's conviction remained firmly grounded upon the rest of the prosecution evidence.

Indeed, it is on record that the impugned cautioned statement was recorded from 08:00 to 9:00 hours on 3rd November, 2012. By the time the recording commenced, the statutory basic period of four hours reckoned from 19:00 hours on 2nd November, 2012 when he was taken under police restraint had elapsed. As we could not glean on the record any sure indication that the said basic period was extended in terms of sections 50 and 51 of the CPA, we hold that the said statement was recorded in violation of the dictates of section 50 (1) (a) of the CPA, hence it was inadmissible in evidence – see, for instance, the unreported decisions of the Court in **Christopher s/o Chengula v. Republic**, Criminal Appeal No. 215 of 2010; **Gregory David Maokola @ Mbuga v. Republic**, Criminal Appeal No. 238 of 2009; and **Ramadhani Seifu @ Baharia & Two Others v. Republic**, Criminal Appeal No. 221 of 2010. As a result, we expunge the offending cautioned statement from the record.

We now deal with the grievance that PW2's evidence was recorded in violation of section 215 of the CPA. Certainly, this section

only empowers the High Court to prescribe by rules the manner in which evidence should be recorded in cases coming before it. In this regard, the applicable rules, pursuant to the saving provisions of section 396 of the CPA, are the Criminal Procedure (Record of Evidence) (High Court) Rules, Government Notice No. 28 of 1953 as amended by Government Notice No. 286 of 1956. The relevant provision thereof is rule 3, which stipulates thus:

> *"3. In all trials of criminal cases before the High Court the record of evidence of each witness shall consist of-*
>
> *(a) a record or memorandum of the substance of the evidence taken down in writing by the Judge,* ***which shall not ordinarily be in the form of question and answer but in the form of a narrative****;*
>
> *(b) a typewritten transcript of a shorthand record of evidence, made in accordance with the provisions of rules 4 and 5 of these Rules; or*
>
> *(c) partly a record or memorandum made in accordance with paragraph (a) of this rule and partly a typewritten transcript made in*

accordance with paragraph (b) of this rule."

[Emphasis added]

Of particular interest for the purpose of the instant case is paragraph (a) above which clearly enjoins that every testimony before the High Court be taken down in the form of a narrative but not in the form of question and answer. We would underline that it is of utmost importance that the presiding judge takes down the testimony of the witness as accurately as possible and in the exact words used by the witness. The record of evidence should show that the narrative was given by the witness. Thus, the ground of complaint under consideration is unmerited. It falls by the wayside.

Having revisited the transcript of PW2's evidence we found no semblance of deviation from the prescribed format. Her evidence was recorded in the same manner as the testimonies of the other eleven prosecution witnesses as well as that of the appellant himself. We could not help but wonder why the appellant singled out PW2's account for censure, but sadly without any legal or factual basis.

The appellant, in Ground No. 4, assailed the admission of Exhibits P.1, P.2, P.8 and P.9. We begin with his attack on Exhibit P.1

(the CGC analysis report), which was two-fold: one, that what was admitted as Exhibit P.1 was a letter from the CGC but not an analysis report; and two, that the exhibit was not listed at the preliminary hearing as intended to be produced at the trial. We find these complaints rather baffling. For a start, although Exhibit P.1 is presented as a letter addressed to the Head, ADU – Police Headquarters, in essence, it reports the test result on the seventy-five pellets PW2 had submitted on 8th November, 2012 for analysis. In any case, whether it was a report or not, that fact does not affect its admissibility; it is but an evidential question. On the other hand, its admissibility obviously did not depend on whether or not it was listed during committal proceedings or preliminary hearing. However, in the present case we note, contrary to what the appellant alleged, that it was listed as one of the intended exhibits during committal proceedings, as shown at page 8 of the record, and also at the preliminary hearing, as appears at page 21 of the record.

The protest against the admission of Exhibits P.2, P.8 and P.9 is based on the contention that they were irregularly tendered by the prosecuting Principal State Attorney as opposed to the witnesses who

were evidently testifying on them. Certainly, it is apparent at page 39 of the record that the prosecuting attorney, in the midst of PW2's evidence in chief, moved the trial court to admit the wrapped pellets, which then became Exhibit P.2, saying that:

> *"We pray to tender the envelope as expounded by the witness and its contents."*

The same pattern is depicted at pages 121 and 123 of the record when Exhibits P.8 and P.9 were tendered and admitted in the course of the testimony of PW12. Ms. Matikila acknowledged that the exhibits should have actually been offered for admission by the witnesses themselves but she hastened to submit that the irregularity was curable under section 388 of the CPA.

It is certainly elementary that an exhibit can only be tendered into evidence by the witness testifying on it, not the examining counsel. In the instant case, it is apparent that the prosecuting attorney made a step too far creating an impression that she was the person that actually tendered the exhibits at the trial. We think that she should have put questions that would have led the witnesses themselves tender the exhibits. Nevertheless, we go along with Ms.

Matikila's submission that the irregularity involved is inconsequential, and hence curable. It is significant that the learned defence counsel rightly did not object to the admission of any of these exhibits.

The fifth ground constitutes an attack on the observation form (Exhibit P.5) that it was wrongly relied upon as it lacked features of a police form. Responding to this complaint, Ms. Matikila admitted that the observation sheet was designed by PW3 as he adduced at page 55 of the record. She convincingly argued that the sheet was properly used because the DPITDA, which was repealed and replaced in 2015, had not prescribed any form for recording the observations of a suspect under watch. She added that even if there were a prescribed form for observation of a suspected drug courier, what mattered in terms of section 64 of the Interpretation of Laws Act, Cap. 1 RE 2002 was the content in the form as opposed to the format.

Undoubtedly, as correctly argued by Ms. Matikila the governing law at the time (the DPITDA) prescribed no observation form. So, the use of the form prepared by PW3 cannot be legally adjudged to be a deviation from any prescribed or controlled format. In any case, what mattered was the evidential value of the content in the sheet. We find

it weighty that the form was not objected to by the defence when it was tendered. Nor was its veracity or validity challenged in the course of PW3's cross-examination by the defence counsel. Thus, complaint under consideration is hollow and we dismiss it.

The trial court is faulted in the sixth ground of appeal for denying the appellant his right to cross-examine PW3, PW5, PW6, PW7, PW9 and PW10. Again, this complaint was strikingly unnecessary as it flies in the face of the record. As rightly argued by Ms. Matikila, the appellant's counsel on dock brief, Mr. Geofrey Martin, actually cross-examined the six witnesses. The record shows that while PW3 was cross-examined at pages 61 to 62, PW5 and PW6 were quizzed at pages 70 and 74 respectively. Mr. Martin also took his turn and cross-examined PW7 at page 78, PW9 at page 86 and PW10 at page 90. Likewise, this complaint fails.

Next, we deal with the seventh ground of appeal, the main complaint being that the chain of custody of the pellets was broken. Connected with that issue is whether PW1 was competent to tender the pellets (Exhibit P.2) in evidence.

To begin with, it bears restating that when the police investigate a crime as happened in this case, the relevant provisions controlling the chain of custody is the Police General Order (PGO) No. 229 made by the Inspector General of Police in exercise of his powers under section 7 (2) of the Police Force Auxiliary Services Act, Cap. 322 R.E. 2002. These provisions guide the handling of exhibits by the police from seizure to exhibition as evidence in court. On this basis, the Court held in a number of its decisions including **Paul Maduka & Four Others v. Republic**, Criminal Appeal No. 110 of 2007 (unreported) that where the chronological documentation and/or paper trail showing the seizure, custody, control, transfer, analysis and disposition of evidence is not observed, it cannot be guaranteed that the said evidence relates to the alleged crime. In the premises, we are enjoined in the instant case to examine carefully the handling of what was seized from the appellant up to the exhibition of what came to be admitted as Exhibit P.2.

As hinted earlier, it was the prosecution case that the appellant was detained for observation at the ADU Offices at the airport after being arrested in the evening of 2nd November, 2012 until the

morning of 6th November, 2012 when he was taken to the ADU Headquarters. During that time, he emitted a total of seventy-five pellets in nine lots while under the custody of two police officers, that is, PW3 and PW6. His excretion of the pellets was also observed by PW5, PW7, PW9 and PW10 as well as a number of officials from the TRA and the Immigration Department based at the airport who were not featured as witnesses. Each emission of pellets was recorded in an observation form (Exhibit P.5), which was then signed by the appellant as well as the police and independent witnesses.

We should intercede here to remark that the appellant challenged the credibility of the supposed independent witnesses from the TRA and the Immigration Department (that is, PW5, PW7, PW9 and PW10) contending that none of them was truly neutral and independent. That they were bent to support the police version. In our view, the attack on the believability of these witnesses solely on the ground of their occupation in public service is implausible. As we held in the case of **Goodluck Kyando v. Republic** [2006] TLR 363:

> *"It is trite law that every witness is entitled to credence and must be believed and his*

testimony accepted unless there are good and cogent reasons for not believing a witness."

We think it would take a very smart imagination on the part of the two police officers and four independent witnesses to cook up the numbers of the pellets and different times and dates for their excretion in the observation form which was as well signed by the appellant. The learned trial Judge believed these witnesses and we have no good cause to find otherwise.

PW3 and PW6 said that they initially kept the recovered pellets at the ADU offices at the airport but they turned them over to PW2 who then ferried them to the ADU Headquarters at Kilwa Road where she stored them under lock and key. PW2 went into detail that the storage facility could not be accessed without the combined presence of the Head of the ADU and herself. Then, in the evening of 6th November, 2012 in the presence of the appellant and PW11, among others, PW2 counted the pellets and packed them in an envelope which she then sealed and marked with a code – JNIA/IR/264/2012. Perhaps we should interpose here and note that at page 72 of the record of appeal, PW2 is recorded to have alluded to the pellets being

seventy-two instead of seventy-five. But that appears to be a slip of the pen as she maintained the number of the capsules being seventy-five throughout the rest of her testimony.

Two days later, that is, on 8th November, 2012, PW2 took the wrapped pellets to the CGC for analysis while she was accompanied by, among others, PW6 and PW12. Her explanation that she could not submit the pellets to the CGC much earlier due to her exigencies of work was not challenged by the defence in cross-examination.

At the CGC, PW1 analysed samples of the substance, then coded as 814/2012, and confirmed that it was "Heroin Hydrochloride" or "Diacetylmorphine Hydrochloride" weighing at 964.24 grammes, a finding documented in the analysis report (Exhibit P.1). PW1 then marked each pellet, wrapped and returned them there and then to PW2 who took the package back to the ADU storage facility for custody. At the trial, PW1, PW2, PW3, PW6 and PW11 identified the contents of Exhibit P.2 as the items that they had handled or observed at various stages of the investigations.

In her submission, Ms. Matikila strongly argued that the pellets could not have been labelled at the scene by PW3 and PW6. However,

according to the credible prosecution account as found by the learned trial Judge, certainly PW2 collected the emitted seventy-five pellets from PW3 and PW6. At the ADU Offices, PW2 labelled the pellets after counting and packaging them in an envelope. She assured that the wrapped pellets remained under lock and key for about two days and thereafter she took the package to the CGC where it was handled by PW1 who analysed the contents in the pellets and confirmed them to be Heroin Hydrochloride. PW1 returned the package to PW2 who took it back to the ADU storeroom for custody until when it was tendered at the trial. Again, both PW1 and PW2 were believed by the learned trial Judge and we have no cogent reason to find otherwise. We thus uphold the trial court's finding that there was no possibility of tampering with the pellets emitted by the appellant.

Coming to the propriety of the admission of Exhibit P.2, it is the appellant's contention that PW1 was incompetent to tender it in evidence. In our view, it is clear that PW1 established fully his familiarity with the pellets (Exhibit P.2), which he had weighed, counted, examined, marked and labelled at the CGC. That testimony sufficiently established the foundation of his ability to identify and

authenticate the pellets – see pages 11 and 12 of the typed decision in the **Director of Public Prosecutions v. Sharif s/o Mohamed @ Athumani & Six Others**, Criminal Appeal No. 74 of 2016 (unreported). Even though he did not have immediate custody of the pellets before he tendered them, he was competent to do so as he was knowledgeable about them – see, for instance, **Director of Public Prosecutions v. Kristina d/o Biskasevskaja**, Criminal Appeal No. 76 of 2016 (unreported); and and **Director of Public Prosecutions v. Mirzai Pirbakhshi @ Hadji and Others**, Criminal Appeal No.493 of 2016 (both unreported). The seventh ground of appeal is bereft of merit. We dismiss it.

As regards the complaint in Ground Eight that adverse inference should have been drawn against the prosecution case for failure to produce the said Amiri Salim Kibwana and the informer at the trial, we find it utterly meaningless. Unquestionably, it is in evidence that Kibwana initially apprehended the appellant at the airport, acting on information received from an informer, that he was carrying drugs in his rectum and then he turned him over to PW3. While Kibwana was undoubtedly a material witness, PW12 adduced that Kibwana could

not appear as at the trial due to ill-health as he had been struck by tuberculosis and so, his statement was admitted in evidence under section 34B (2) of the Evidence Act. As regards the informer, there was no particular reason why the prosecution should have called him as their witness. At any rate, that person, being a whistleblower, deserved a measure of protection against disclosure of his identity by not calling him as a witness.

We think the ninth, tenth and eleventh grounds of appeal should be dealt with conjointly as we find them entwined.

It was clear to us, after a careful re-appraisal of the evidence on record, that the prosecution established to the required standard of proof that the appellant trafficked in the narcotic drugs in form of seventy-five pellets of Heroin Hydrochloride in his bowels. The pellets were recovered from his rectum after he expelled them between 3rd and 6th November, 2012 while under the observation of, among others, PW3, PW5, PW6, PW7, PW9 and PW10. Besides, the appellant acknowledged to have emitted the pellets having signed the observation form at pages 182 and 183 of the record. We find no other reasonable explanation except the fact that he had the seventy-

five pellets in his bowels for the sole purpose of trafficking them. All witnesses who had handled the retrieved pellets told the trial court on the movement of the pellets up to the crucial point of analysis by the CGC and finally their exhibition at the trial. All this constituted an assurance that the exhibited pellets (Exhibit P.2) were the items that the appellant had emitted under observation and that the CGC subsequently confirmed to be Heroin Hydrochloride.

The appellant's claim that he was framed with the charges due to his quarrel with an unnamed TRA female official is farfetched and is not supported by evidence. That defence aside, the trial court considered his exhibits, as shown in the judgment at pages 282 to 285 of the record, but found that they could not dislodge the prosecution case. Likewise, his claim that the trial court wrongly relied upon previous facts in respect of the withdrawn charge to convict him on a new charge is fanciful, if not preposterous. We noted that the learned trial Judge went into a fairly detailed discussion in her judgment, at pages 282 to 285 of the record, on the effect of the withdrawn charge on the subsequent charge, now the subject of this appeal. She concluded, rightly so, that the termination of the previous

charge upon the Director of Public Prosecutions entering *nolle prosequi* in terms of section 91 (1) of the CPA did not banish the institution of a new charge as happened against the appellant. We would thus find no merit in the three grounds under consideration. As a result, we uphold the trial court's finding that the charge against the appellant was proven beyond peradventure.

Finally, we examine the propriety of the sentence imposed on the appellant on 23rd August, 2017. The complaint here is that the sentence was harsh for not taking into account, contrary to the dictates of section 170 (2) (c) of the CPA, the period of almost five years of incarceration spent by the appellant in remand prison.

For a start, we wish to say that complaint is predicated on inapplicable provisions of the law. The said provisions only govern the sentencing powers of the High Court as a confirming court when dealing with a sentence meted out by a subordinate court but referred to it for confirmation under section 170 of the CPA. In the instant case, the High Court was itself the court of trial and so the sentencing process was mainly dictated by sections 315 and 316 of the CPA. Furthermore, we go along with Ms. Matikila's submission that the

sentence imposed on the appellant was, according to section 16 (1) (b) (i) of the DPITDA, the minimum penalty. In this regard, we find it pertinent to recall what we said in **Vuyo Jack v. The Director of Public Prosecutions**, Criminal Appeal No. 334 of 2016 (unreported) that:

> *"... since the appellant was at the time of arrest not yet convicted, bearing in mind the legal maxim that an accused person is presumed innocent before conviction, he could not be subjected to serve any sentence.* ***The time spent by the appellant behind bars before being found guilty, convicted and sentenced, would have been a mitigating factor in imposing the sentence but not (as erroneously imposed by the trial judge) to commence from the time of arrest as erroneously imposed by the trial judge.****"*[Emphasis added]

In this case, the imposed punishment being the bare minimum, the learned High Court Judge had her hands tied. She could not backdate the sentence or impose a lesser penalty.

Given the above exposition, we conclude that the appeal lacks merit in its entirety. Consequently, we uphold the appellant's conviction and the sentence imposed on him. The appeal stands dismissed.

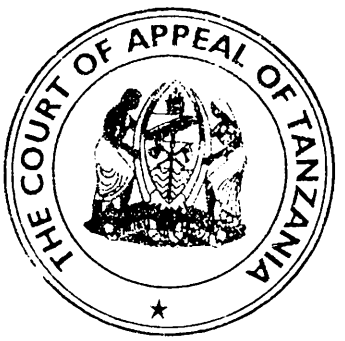
DATED at **DAR ES SALAAM** this 29th day of May, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 29th day of May, 2020 in the presence of Khamis Said Bakari, the appellant in person and Ms. Cecili Shelly learned State Attorney for the Respondent is hereby certified as a true copy of the original.



A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL