

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF MWANZA

AT MWANZA

HIGH COURT CRIMINAL APPEAL No 17 OF 2012

(Original Tarime District Court Criminal Case No 51 of 2010).

SHEMATUHU S/o YOSE @HIZA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

MRUMA, J.

This is an appeal against sentence. The appellant who is a driver was arraigned at Tarime District Court and charged with the offence of Unlawfully Possession of Narcotic Drugs c/s 12(d) of the Drugs and Prevention of Illicit Trafficking in Drugs Act No

9 of 1995 as amended by Act No 9 of 1996 and Act No 31 of 1997.

Upon being convicted on his own plea of guilty, the appellant was sentenced to pay a fine of T.shs 1,000,000/= or to 15 years imprisonment in default. He was aggrieved with the sentence which according to him is unduly harsh and hence this appeal.

The learned State Attorney for the Republic was of the view that the sentence meted against the appellant was, in all circumstances on the high side. With respect, I am on my part of the same view. The record tells us that the appellant was found in possession of three (3) grammes of Bhang. He pleaded guilty straight away. He was the first offender as the prosecution told the court that they had no records of his previous convictions.

Section 12(d) of the Drugs and Prevention of Illicit and Trafficking in Drugs Act provides that:

12. Any person who-

(d) produces, possesses, transports, imports into the United Republic sells, purchases, uses or does any act or omits to do anything in respect of poppy straw, coca plants, coca leaves, prepared opium, opium poppy, cannabis, manufactured drugs,.....narcotic drugs.....such act or omission amounting to contravention of the provisions of this Act or rule or order made under this Act, commits an offence and upon conviction is liable to a fine one million shillings or three times the market value of the prohibited plant, whichever is greater, or to imprisonment for a term not exceeding twenty years or to both the fine and imprisonment"

It would appear from the above quoted provision of the law that a fine of one million shillings is the maximum sentence a magistrate can impose whenever he opts to impose a fine and the 20 years imprisonment is the maximum sentence the magistrate can impose in case he chooses to send the offender to prison. The language used by the law is not "**shall be liable**" which would mean that once the offender is found to be guilty, the magistrate must impose the sentence prescribed by the law. The term used here is "**is liable**" which means that the sentence prescribed by the law is the maximum court can impose.

It is a cherished principle of punishment that a fine must bear reasonable relation to the accused's power to pay [See **R V. Samon (1971) HCD 224**]. The learned trial Magistrate didn't inquire into appellant's power to pay the fine of T.shs 1,000,000/=. A fine that will prove impossible for the offender to pay, having regard to his income and financial commitments,

will take away the right already given to the offender by the law, for good reason, to escape incarceration since he will automatically go to jail as alternative for his inability to pay the fine. It would be unjudicious and highly unfair for a court to impose such a fine as was imposed on the appellant, a mere driver without inquiring into his power to pay. [**See Stephen s/o Mkone & Another Vs Republic (1987) TLR 36**]. As stated earlier, he was a first offender with no previous records of criminal convictions. The amount (quantity) of the illicit drug he was found with was small and he readily pleaded guilty to the charge. Thus, there can hardly be a doubt that the sentence passed was in all circumstances of this case, excessive.

In the case of **G. Avel & Another Vs R [1970] H.C.D. 159**, Gorges C.J. (as he then was) said that in deciding whether or not to interfere with a sentence, an appellate court must consider whether the magistrate has in fact misdirected himself in any

particular, or whether the sentence is so manifestly excessive that it is clear that there must have been misdirection even though not explicit. In the case under consideration, the trial magistrate didn't comment anything before passing the sentence. He said nothing. He simply pronounced sentence. He misdirected himself in interpreting the prescribed sentence. Probably he thought that his hands were tied by the law to impose the sentence mentioned by the law. I think he was wrong. The sentence prescribed by section 12(d) of the Drugs and Prevention of Illicit Trafficking in Drugs Act is only the maximum sentence that court can pass. For the court to resort to the maximum sentence prescribed by the law there must be some aggravating factors which warrant that. In this case there is none.

For reasons already stated, I am satisfied that the sentence was so manifestly excessive that it is clear that there must be misdirection on the part of the trial Magistrate.

I therefore allow the appeal and hereby reduce the sentence to a fine of T.shs 100,000/= or one year imprisonment. As the appellant has been in jail since 28th January, 2010, this order will result into his automatic release from prison unless he is lawfully held for any other cause.

Appeal allowed.

A.R. Mruma

JUDGE

At Mwanza

17th August, 2012

Date : 27th August, 2012

Coram : Hon. A.R. Mruma, J.

Appellant: Present

Respondent: Mr. Hemed – State Attorney for the Republic

Mr. Hemed – State Attorney:

This appeal is coming for judgment and we are ready to receive it.

Court:-

Judgment delivered this 27th day of August, 2012.

Right of Appeal Explained.

A handwritten signature in black ink, appearing to read 'A. R. Muma', with a stylized flourish above the name.

JUDGE

At Mwanza

27th August, 2012