IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 92 OF 2019

(Originating from Lindi District Court Criminal Case No. 111 of 2017)

AIDI SELEMANI AIDI .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

27 May & 8 June, 2020

JUDGMENT

DYANSOBERA J.:

The appellant is appealing to this court against the conviction and sentence by trial District Court at Lindi in Criminal Case No. 111 of 2017. In that court, he was charged with an offence of unlawful possession of prohibited seeds contrary to section 11 (b) of the Drugs Control and Enforcement Act, No. 5 of 2015 and sentenced to thirty (30) years term of imprisonment. The particulars of the offence alleged that the appellant, on 13th September, 2017 at Rondo-Chikombe village within the District and Region of Lindi, was found in possession of seeds used to produce Narcotic drugs to wit, 36.38 grams of cannabis sativa seeds.

The appellant is armed with six grounds of appeal. In his first ground of appeal, the appellant insists that he did not commit the offence and pleaded not guilty to the charge. In the second ground of appeal, the appellant is complaining on the denial of his opportunity of hearing and cross examining PW 1 when the latter was testifying before the trial court on 2nd August, 2018 right of being. He urges the court to find that there was no fair hearing, the conduct which adversely affected the legality of his conviction. The appellant, in his 3rd ground of appeal, reminds this court of the duty of the prosecution to prove the case against an accused beyond reasonable doubt and argues that the ingredients of the offence he was facing were not proved. In the 4th ground of appeal, it is the appellant's complaint that at the time of the delivery of the judgment, he was not given enough time to get prepared for the reception of the judgment. The appellant's 5th ground of appeal is essentially on the excessive sentence which he argues, did not take into account the former sentence he was serving and in the 6th ground of appeal, the appellant is complaining that the conviction was based on his admission of some of the material facts which could not have been the basis to ground conviction.

The facts of the case are simple and straight forward. The appellant is a resident of Rondo-Chikombe within the District and Region of Lindi and

Inspector Mussa Mohamed Khatib (PW 2) is a police officer stationed at Lindi Police Station. On 12th September, 2017 he was informed that the appellant was keeping bhang drugs at his home. The following day, he with other police officers, went to the appellant and, in the presence of a local leader one Abdallah Selemani, conducted a search. In the course of the search some seeds suspected to be bhang products were retrieved.

PW 2 and his fellows seized the article and prepared a certificate of seizure (exhibit P 3). The seized item was, at the Police Station, handed over to G 9431 DC Hashim (PW 3), the police exhibit keeper who, after receiving the exhibit, recorded it in the exhibit register and kept it in the exhibit room. On 14th September, 2017 he handed the exhibit to G 1297 DC Dominic (PW 4) through Form No. DCEA 001 (exhibit P 4). PW 4 took it to the Government Chemist Laboratory Authority for analysis. At the Authority, Emmanuel Gwae (PW 1), a Principal Chemist Grade II received the sample, entered it in the Laboratory Register as 3136/2017 (exhibit P 1) and in his scientific analysis, found it to be seeds of cannabis sativa. He prepared a report (exhibit P 2). At the police, the appellant was interviewed by G 1297 DC Daniel (PW 5) who recorded the appellant's confessional statement (exhibit P 5).

At the trial, the appellant admitted to be found with the said seeds of bhang. He explained that he had a sick child who was one year old. After his attempts to have it treated at normal hospitals, he went to the local doctor who directed him to look for seeds of bhang and mix them with the faeces of elephant and then administer it to the child. The appellant obliged and when he did as directed by the local doctor, his child recovered. Although the prosecution told the trial court that the appellant was found with 36.38 grams, the appellant maintained that he was found with only 5 grams which was used for medical purposes to treat his ailing child. Admitting that the said seeds were wrapped in a black nylon plastic bag, the appellant denied it to have been found under his bed but argued that it was found on the table in his room. The appellant's version was supported by Sofia Mussa Mkoto, DW 2 who is the appellant's wife.

On 27th May, 2020 when the appeal was called for hearing, Mr. Meshack Lyabonga, learned state attorney who represented the respondent Republic opposed the appeal. When invited to argue the appeal, the appellant opted to hear submission of learned state attorney first.

In his submission, the learned state attorney stated that the appellant admitted to be found with the seeds of bhang and explained that

the seeds were being used as medicine upon the advice of the Doctor. Mr. Lyabonga was of the view that the appellant's assertion that the bhang was used as medicine was not proved as the child was not brought in court to explain and that there are no explanation on part of the appellant to prove that the bhang seeds are authorised medicines. He contended that since the appellant admitted, that was the best evidence against himself as it amounted to confession. He relied on the case of Vivian Edigin v. R, Criminal Appeal No. 455 of 2015 to support his argument. It was learned state attorney's further submission that before PW 5, the appellant confessed to have committed the offence and likewise, during his defence, he admitted to be found with the bhang in his house. Learned state attorney was of the view that the appellant committed the charged offence in view of the meaning of the term production stipulated under section 11 (1) (b) of the Drugs Control and Enforcement Act, No. 5 of 2015.

With respect to the appellant's 3rd, 4th and 5th grounds of appeal, learned state attorney contended that they lack merit in that the judgment is read at the time its composition becomes complete and that the sentence was proper.

I have anxiously and with circumspection considered the petition of appeal, the submissions of both the learned state attorney and the

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I have anxiously and with circumspection considered the petition of appeal, the submissions of both the learned state attorney and the

appellant. I have also taken into account the trial court's record. There is no dispute and the evidence is clear that the appellant was found with the seeds of cannabis sativa. This is not in the evidence of the prosecution but also during the defence, the appellant categorically and in no uncertain terms, admitted to be found with the said item. His argument before the trial court both in his confessional statement recorded before PW 5 (exhibit P. 5) and in his defence was that the said seeds of bhang was used for treatment of his son who was ill and upon the instructions from the local doctor. It is therefore, crystal clear that the issue of being found with the seeds of cannabis sativa is not disputed. A close look at the petition of appeal does not indicate that the appellant disputed being found with the said seeds of cannabis sativa. What is disputed is only the amount, the place where it was found and the purposes for which that item was being used.

In view of the fact that the prosecution failed to call in court the independent witness who eye witnessed the seizure and impounding of the item, and since the prosecution was silent on what the purpose of the said seeds of cannabis sativa found with the appellant was, the argument by the appellant he was found with only 5 grams only the item which were on the table and not under his bed and further that, the drugs were used for

the treatment of his ailing child was not ruled out, particularly where it is established principle that in a criminal case where the doubt arises, it has to be resolved in favour of the accused. Besides, the appellant's version was supported by DW 2, his wife.

The argument by the learned state attorney that the accused failed to bring that child to testify in court lacks substance as the appellant clearly stated in his defence (at p. 30 of the typed proceedings of the trial court) that the said child was one year old. It is inconceivable that such child could be called in court to testify.

The issue is whether the appellant committed the charged offence. Section 11 (b) of the Drugs Control and Enforcement Act, No. 5 of 2015 in clear and uncertain terms provides:-

11.-(1) Any person who:

(a).....(not relevant);

(b)possess or supplies seeds in production of drug

(c).....(not relevant);

(d).....(not relevant),

commits an offence and upon conviction shall be liablisonment for a term of not less than thirty years.

With the available evidence coupled with the appellant's admission of being found with seeds of cannabis sativa, I am satisfied and hereby find that the appellant commmitted the charged offence. the conviction was rightly earned by the appellant. The appeal against conviction has no merit

The record shows that the appellant's first appeal to this court vide Criminal Appeal No. 129 of 2017 was heard but the former judgment was declared a nullity, the record was ordered to be returned back to the trial court so that the trial Magistrate composed a new judgment based on the same evidence and proceedings adduced in court during trial. This order was duly complied with as evidenced by the trial court's proceedings. The appellant's complaint that he was not given enough time to prepare for the delivery of judgment has no basis as the judgment was prepared upon the directions of this court and the appellant was called and a new judgment read over to him as directed.

The next issue is whether the sentence of thirty (30) years prison term was, in the circumstances of the case, deserved. It was amply demonstrated by the appellant and not disputed by the prosecution that the seeds of cannabis sativa the appellant was found with were used to treat his ailing child. The appellant maintained this throughout the trial. At the hearing of this appeal he did not seek to negate this fact. It is true that

the use of cannabis sativa seeds as a medicine has not been authorised but I am convinced that the appellant was merely a victim of the circumstances. Apart from the fact that the sentence of 30 years was not the minimum sentence prescribed by the law, I am of the view that it was extremely excessive taking into account the amount of 5 grams the appellant was found with and the explanation that he was using the seeds to treat his child who was sick.

I, therefore, agree that the sentence of 30 years imprisonment imposed on the appellant was, in the circumstances of the case, extremely excessive.

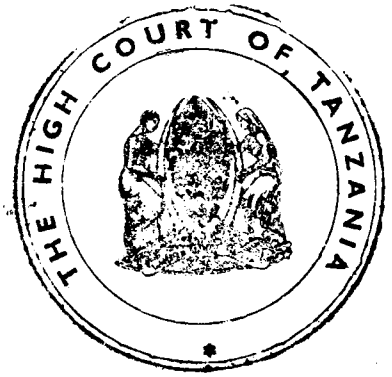
I reduce that sentence by sentencing the appellant to a prison term that will result into his immediate release from custody.

The appeal is allowed to that extent.

W.P.Dyansobera

JUDGE

8.6.2020



This judgment is delivered under my hand and the seal of this Court on this 8th day of June, 2020 in the presence of Mr. Paul Kimweri, learned senior state attorney for the respondent Republic and in the presence of the appellant (virtually present in court).

W.P. Dyansobera

JUDGE