IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CRIMINAL SESSION CASE NO. 149 OF 2015

REPUBLIC

VERSUS

PRINCEWILL EJIKE

JUDGMENT

Last order: 27/8/2021
Date of Judgment:20/10/2021

MASABO, J.:-

The accused person, Princewill Ejike, is charged under section 16 (1)(b)(i) of the Drugs and Prevention of Illicit Trafficking in Drugs Act [Cap 95 RE 2002] herein after referred to as the Act, for trafficking in narcotic drugs. It is alleged that on 30/4/2012, at Julius Nyerere International Airport (JNIA) within Ilala district in Dar es Salaam region, the accussed did traffic in narcotic drugs to wit, Heroine Hydrochloride weighing 982.12 grams valued at Tanzania shillings Forty-Four Million One Hundred Ninety-Five Thousand and Four Hundred only (Tshs 44,195,400/=).

The brief facts are that, on the material date the accussed arrived at JNIA ready for departure by Kenya Airways to his home country, Nigeria. While at the security screening point, he was suspected of carrying narcotics drugs and was forthwith arrested, interrogated and put under police observation

from 30/4/2012 to 1/5/2012 and during these days, he emitted 66 pellets containing substance suspected to be narcotic drugs. The pellets were later taken to the Chief Government Chemist (CGC) where its substance was examined and found to be heroine hydrochloride.

There was no dispute that the accussed who is a holder of a Nigerian Passport with No. A 01356861(Exhibit P3) was arrested on 30/4/2012 when he was about to travel by Kenya Airways to Nigeria. As for the rest of the facts which were all disputed, the prosecution, led by Ms. Veronica Matikila, learned senior State Attorney who was assisted by Ms. Tuli Helela, learned State Attorney, paraded a total of nine (9) witness who are, PW1: Machibya Ziliwa; PW2: E2926 DSSG Dacto; PW3: Christopher Joseph Shekiondo; PW4: SSP Neema Andrew Mwakagenda, PW5: Herman Gervas; PW6: Zainab Duwa Maulana; PW7: SP Silvester Clement Siame; PW8: Joseph Elison Mduma and PW9: Inspector Brown. The accussed defended himself after he decline legal representation. He testified on oath as DW1 and sought reliance on the statement of PW2 E2926 DSSG Dacto.

It was the prosecution's case that the accused was apprehended at around 1:30 hours on 30/4/2012 by PW2, E2926 D/SSG Dacto, a police officer working under the Anti- Drugs Unit of the Police Force (ADU) who had earlier on received reliable information from a whistleblower that the accused was carrying narcotic drugs in his bowel and was set to transport the same. As the suspicion against the accused was that he had the drugs in his rectum he was detained for observation and remained there until 1/5/2012. During

this time, he emitted a total of 66 pellets. The emissions which were in 5 lots took place in a special toilet that sieves the pellets from bodily waste and was witnessed by PW3, PW7, PW9 and independent witnesses obtained from different offices within JNIA.

The **first** lot was at about 12:05 hrs on 30/4/2012 when the accussed emitted 15 pellets. The **second** lot was on the same day at about 14:08 hrs when he defecated 14 pellets; and the **third** was at 16:18 hrs when he defecated 25 pellets making total of 54 pellets. In all the three lots, the accussed was under the watch of PW7: SP Silvester Clement Siame and PW5: Herman Gervas, an officer from the Tanzania Revenue Authority who was an independent witness. The **fourth** lot, was on the same date at around 21: 06 hours when the accussed emitted 10 pellets while under the observation of PW2 and PW8: Joseph Elison Mduma, an officer from the Tanzania Revenue Authority, as an independent witness. The **last** one was on 1st May 2012 at 14:30 hrs when he emitted 2 pellets in the presence of PW9 and PW5. 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 accussed and counter signed by the respective police officer and the independent witness(es) present.

The recovered pellets were temporarily kept by the police officer in charge of the ADU offices at JNIA. Later, they were moved to ADU Head offices at Kurasini. In their respective testimonies, PW2, PW7, and PW9 told the court that they temporarily kept the pellets emitted by the accussed person and they later transmitted the same to ADU storage facility at Kurasini where

they were received by PW4: SSP Neema Mwakagenda who marked them as JNIA/IR/112/2012 and locked them in the exhibit storage room where they remained until on 2/5/2012 when she sealed the pellets ready for transmission to the CGC laboratory. PW4 also received and kept the accused's passport, air ticket, vaccination card and 2 mobile phones which she registered in the exhibit book for the case file JNIA/IR/112/2012.

On 2/5/2012 she wrapped and sealed them in the two khaki envelopes in the presence of the officer in Charge ADU and PW6: Zainab Duwa Maulana who was then a ten-cell leader Kurasini. On 3/5/2012, in the company of PW2 **D/SSGT** and another police officer D/SGT Emmanuel, she took the wrapped pellets to the CGC for analysis. At the CGC laboratory, PW1: Machibya Ziliwe, weighed the exhibit which had then been coded as Lab No. 286 of 2012 to get its actual weighed and proceeded to conduct a preliminary test which established that the substance in the pellets was heroine weighing 982.12 grams and upon a confirmatory test, he established that it was "Heroin Hydrochloride." The analysis report was produced in court and admitted as Exhibit P1 and pellets were admitted as Exhibit P2.

The value of the pellets was assessed by PW3 Christopher Shekiondo, the then Commissioner of the DCEA who certified that, the estimated market value of the drug was Tshs 44,195,400/=. The certificate of value produced by him was admitted as exhibit P5.

In his defence, the accused while testifying under oath admitted to have been arrested at the JNIA on the fateful day as he was destined to Nigeria

but denied any involvement in the offence, He refuted all the prosecution evidence that implicated him for trafficking in narcotic drugs. He told the court that, he arrived in Tanzania on 17/4/2012 for vacation and spent a good time in Zanzibar with his friend one Ally Sharif Ally and that on the fateful date and time, he arrived at JNIA ready for his flight back to Nigeria but had a bad encounter with a certain airport official which led to his arrest.

There were also final submissions from both parties. In these submissions which were made in writing the accussed, whom we highly commend for his industry, cited the law on burden and standard of proof in criminal cases and proceeded to submit that the prosecution has miserably failed their duty.

He submitted that, no concrete evidence was rendered in proof that the substance in the pellets is a narcotic drug as the evidence of PW1 was a mere assertion, thus it should not be acted upon. Also, there was no proof of the weight of the narcotic drug as the testimony of PW1, the chargesheet, Exhibit P2 and the certificate of value varied materially on this aspect. Moreover, no proof was rendered that the accused was arrested in connection with the offence charged as there was no paper trail on seizure and handling of exhibit P2 from the date of seizure to the date they were tendered in court. His further submission was that, the pellets were not properly identified as there were inconsistencies on the prosecution witnesses' description of the colour, size and shape of the pellets; such that, PW1 stated that the pellets were off white in colour whereas PW2, PW4 and PW6 stated different colours; there were material contradictions on the seal

of the envelope which was taken to the Government Chemist. Lastly, he argued that, although not every inconsistence or break down of chain of custody would lead to rejection of the evidence, in the present case, the breakdown of the chain of custody and the contradictions are material and should be resolved in the accused's favour.

For the prosecution, Ms. Veronica Matikila, Senior State Attorney submitted that the prosecution has proved the charges against the accussed beyond reasonable doubt. Through PW1 and Exhibit P1, it has been proved with no reasonable doubt that the substance in the 66 pellets contains Heroin hence a narcotic drug as per section 2 of the Act and Schedule to the Act. On the evidence implicating the accussed, she submitted that, the evidence of PW1, PW2, PW4, PW5, PW6, PW7, PW8 and PW9 when considered in conjunction with the observation form (Exhibit P5) and the Pellets (Exhibit P2) sufficiently establishes the chain of custody. She then argued that, although the paper trail of the movement of the exhibit is missing, the available evidence strongly implicates the accused and shows that there was no breakdown of the chain of custody. In fortification, she submitted that, the disposition of PW2, PW5, PW7, PW8 & PW9; the special observation form (Exhibit P4) which was counter signed by the accused and Exbibit P2 which was ably identified by the prosecution witnesses, sufficiently implicate the accused. It was further submitted that contradictions in the evidence of PW2, PW4, and PW6 as regards sealing of the exhibit at ADU Kurasini, the same are minor and do not go to the root of the case hence excusable.

The main issue for deliberation and determination is whether the accused trafficked in narcotic drugs. To derive an affirmative conclusion, two sub questions need be answered in the affirmative. **One,** whether the substance which the accussed is alleged to have trafficked in is a narcotic drug. **Two,** whether the accussed is the one who trafficked the substance produced in court.

Regarding the first sub question, PW1 gave an eloquent narration of the methods he applied in the analysis of the substance contained in the 66 pellets. He told the court that having received the exhibit from PW4 and weighing it and establishing that the drugs had a net weight of 982.12 grams, he proceeded to conduct a preliminary test of the substance and a confirmatory or instrumentation machine test. In conducting the preliminary test, he used chemicals, whereby he drilled all the 66 pellets and extracted a small sample from each of the 66 pellets and mixed the sample with Mecke reagent solution which yielded the sample a green colour hence indicative of the presence of heroine in the substance.

He then extracted a small sample for the second/confirmatory test which was conducted on 20th August, 2012 by injecting all the sixty-six samples extracted in the gas chromatography mass spectrometer-GCMS, whose results conclusively established that the samples were Heroine Hydrochloride as per the report (exhibit P1)

The argument by the accussed that the type of the drug was not established simply because PW1 did not produce the data sheet from the machine is unfounded. It was not brought up in evidence hence untested. Besides, it is to be noted that the record shows that, by virtue of his education and training, PW1 possess special knowledge, skills and the necessary expertise on drugs. He is a graduate, holding Bachelor of Science with Education with specialization in chemistry and biology from University of Dar es Salaam and a certificate of forensic science from Scotland. His skills and understanding of drugs are thus beyond that of an average person. In view this and his eloquent exposition of the methods deployed, detailed procedures for conducting analysis, I find no good reason to doubt his findings and results of the analysis which are hereby taken to be reliable and relevant to this case.

Section 2 of the Act, broadly defines the term narcotic drugs to mean, any substance specified in the Schedule or containing any substance specified in that Schedule. As heroin is one of the substances listed in the schedule, the uncontroverted narration of PW1 and Exhibit P1 which credibly establish that the substance in Exhibit P2 is Heroine Hydrochloride, entertains an affirmative answer to the first question. Accordingly, I find and hold that, the prosecution has proved to the required standards that Exhibit P2 is a narcotic drug.

The second sub-question deals with evidence which implicates the accused for trafficking in narcotic drug. The law requires the prosecution not only to establish that the substance in the 66 pellets is a narcotic drug but to afford

a reasonable assurance that the exhibit tendered at the trial court was the same as the one seized from the accused. In other words, it is upon the prosecution to establish that the accussed in the dock is the one who was found trafficking in the narcotic drug produced in court and admitted as exhibit P2. Answering this question would require us to navigate through the concept of trafficking and the principle of chain of custody. Trafficking, for purposes of narcotic drugs, is broadly defined to include among other things, exportation of a narcotic drug or psychotropic substance (section 2 of the Act). Since in this case there is no dispute that the accussed was arrested as he was about to travel to Nigeria, if it is proved as alleged that he had carried the narcotic drug in his rectum, the prosecution's case that the he was trafficking the said drug, will be deemed to have been proved.

The principle of chain of custody which is one of the cardinal principles in criminal trials is premised on the chronological movement and storage of the exhibits. It is meant to establish that the item exhibited in court and relied upon as evidence is the same item seized from the accussed. Much as in the past the chain of custody was defined with reference to the chronological documentation and/or paper trail, showing the seizure, custody, control, transfer, analysis and disposition of evidence (**Paul Maduka & 4 Others versus Republic,** Criminal Appeal No. 110 of 2007, CAT) (unreported), the position has now been relaxed.

In the instant case, save for the special observation form which was admitted in court as Exhibit P4, the prosecution has not tendered before the court any

other documentation as to the seizure, transfer of the exhibits from ADU offices at JNIA to ADU headquarters at Kurasini as well as the movement of the exhibit to and from CGC. All we have on record, is the oral testimonies of 7 witnesses who either witnessed the emission of the pellets, transportation of the pellets from JN1A to ADU, handling the exhibit at ADU or its subsequent movement to and from the CGC Laboratory. it is therefore to be answered whether the absence of paper trail is fatal and renders the evidence of these witnesses inconsequential.

In his final submission, the accused has argued the court not to accord any weight to the evidence on record as the chronological documentation showing how each stage of holding of the exhibit was done from seizure, custody, control, transfer, analysis right up to the exhibition in court was missing. He referred us to the Police General Orders (PGO) No. 229 which provides guidelines on handling of exhibits by the police officers from the time the exhibit is collected/seized to the time of its production/ exhibition as evidence in court. He criticized the prosecution witnesses for using the observation form instead of using specified police forms and especially PF 180 and 145 which requires that whenever an exhibit is passed or changes hands from one officer to the other, the officer who hands over the exhibit must record the movement.

Fortunately, this is not the first time such a controversy is raised. The Court of Appeal of Tanzania has dealt with this issue in **Abuhi Omary Abdallah & 3 Others v Republic**, Crim Appeal No. 28 of 2010; **Vuyo Jack v.**

Director of Public Prosecutions, Criminal Appeal No. 334 of 2016; **Joseph Leonard Manyota v. Republic**, Criminal Appeal No. 485 of 2015; **Zainabu d/o Nassoro @ Zena vs Republic**, Criminal Appeal No.348 of 2015, **Issa Hassan Uki v. Republic**, Criminal Appeal No. 129 of 2017 **Marceline Koivogui v. R,** Criminal Appeal No. 469 of 2017, **Kadiria Saidi Kimario v Republic**, Crim Appeal No. 301 of 2017 and **DPP vs Stephen Gerald Sipuka**, Criminal Appeal No.373 of 2019 (all unreported) and many other classes. In the latTer case, the Court restated its position in the previous cases above cited in which it relaxed its position on chain of custody and proceeded to hold that:

> It is settled law that, though the chain of custody can be proved by way of trail of documentation, this is not the only prerequisite in dealing with exhibits. There are other factors to be considered depending on prevailing circumstances in each particular case. In cases where the relevant exhibit can neither change hands easily nor be easily compromised then principles as laid down in the case of PauloMaduka (supra) can be relaxed. In all circumstances, the underlying rationale for ascertaining a chain of custody, is to show to a reasonable possibility that the item that is finally exhibited in court and relied on as evidence, has not been tampered with along the way to the court.

The principle obtaining from the above cases and other cases not cited here is that the prosecution case would not flop merely because there was no paper trail. Due regard must have to other factors and in particular, the circumstances of the case and the nature of the exhibit. A conviction would be entered even the absence of paper trail save where it is found that there are material contradictions which would require paper trail to resolve.

With this principle in mind, I will now assess the evidence starting from the point of seizure/collection point. The account given by PW2, PW7, PW8 and PW9, consistently pointed out that the accussed is the one who emitted the pellets. At different times, these witnesses saw the accussed emitting the respective pellets. It is also gathered from their exposition that all the necessary protocols were followed. The toilet was flushed prior to use by the accussed and this was done under the watch of police officers and independent witnesses present at the scene hence eliminating any possibility that the pellets were emitted by a person other than the accussed. When the accussed emitted the first lot of 15 pellets 30/4/2012 at 12:05 PW7 and PW5 were present. They were also present when he emitted 14 pellets and 25 pellets on the same day at around14:08 hrs and around 16:18hrs, PW2 and PW8 were witnesses to the emission of 10 pellets on 30/4/2012. PW9 was also present when the accused emitted 25 pellets on 30/4/2012 and he witnessed the emission of 2 pellets at around 14 hours on 1/5/2012 together with PW5.

More important at this stage is the concurrent evidence as to the signing of the observation form. All the above witnesses accounted that after every incident they signed Exhibit P4 which was also counter signed by the accused. All the witnesses identified their respective signature and their testimony was not anyhow controverted as none of them was cross examined on this point. The accused's major contestation both at the time of admission of this exhibit and in the course of final submission was that the observation form is not statutorily provided for hence should be rejected and disregarded. This argument is outrightly rejected because, much as the observation form is not prescribed under the law, there is no law prohibiting its use. Besides, as precedents will show, the use of the special observation form has now been accepted in practise as a sufficient evidence albeit in substantiating, as it is the case in point, that it is the accussed person who emitted the pellets. It is to be noted further that, apart from its statutory standing, the observation form and its content was not anyhow disputed by the accussed. In view of this, it is taken to be established that the accussed emitted the 66 pellets.

Regarding storage of the exhibit after seizure, save for minor inconsistencies which I will point out in due course, testimonies as to the storage was consistent. The court was told that, after every incident, the pellets which were placed in a small black plastic bag which remained under the custody of the police officer in charge in the respective dates and time who are PW2, PW7 or PW9. Moreover, the evidence by PW2, PW7 and PW9 regarding the movement of the exhibit from JNIA to Kurasini ADU offices was also

plausible. Having left JNIA they went straight to ADU Kurasini and handed over the exhibit to PW4 whose account on the date and time she received the pellets and the material used to carry the exhibit coincide with that of PW2, PW7 and PW9. There were similarly no material contradictions between PW4 and PW6 regarding wrapping and packing of the exhibit and so was the evidence as to the transmission of the exhibit to and from CGC.

As alluded to earlier on and as complained by the accussed, there were certain inconsistencies and contradistinctions which I will now endeavor to address. The *first* inconsistence requiring due consideration of this court is the contradictory account by PW2 regarding interrogation of the accussed and the time he reported the incident to his superior SACP Godfrey Nzowa. In the statement he recorded shortly after the incident (Exhibit D1), he stated that he notified his superior about the suspected incident well before the arrest of accussed but when testifying in court he stated that the notification was done after the arrest. With regard to the interrogation of the accused, exhibit D1 shows that upon arresting the accused PW1 interrogated him whereas in his exposition in court he stated that he did not interrogate the accussed. The s*econd* inconsistent revolves around the storage, packing and sealing of the exhibit and of specific relevance here is the contradiction between PW2 and PW8 regarding the material used to store the 10 pellets after being seized. Whereas PW2 stated that the 10 pellets were stored in a small black plastic bag PW8 who was an independent witness stated that the pellets were transferred from the black plastic bag and put in a khaki envelope. Another contradiction is between PW2 and PW4 and it concerns

the storage of the 10 pellets. PW4 narrated that after receiving the 10 pellets from PW2 she put them in a khaki envelope and sealed it in the presence of PW2 whereas on the other hand, PW2 stated that she left the envelope open. The *fourth inconsistence* which was between PW4 and PW6 concerns the sealing of the three khaki envelopes used by PW4 to store the exhibit in the exhibit room prior to the packing. The *last* inconsistence was on the description of the drug. Whereas all the witness were consistent in their figurative description of the pellets and its packaging, their recollection of the colour was different. PW1 said the pellets were off white whereas other witnesses such as, PW4, PW5, PW7 said it was brownish/brown.

Where in any trial there are inconsistencies contradictions such as these, it is a trite law that they be resolved. As stated in **Mohamed Said Matula v Republic** (1995) TLR 3, where the testimony by witnesses contains inconsistencies and contradictions, the trial court is duty bound to address the inconsistencies and resolve them. It is to be noted that, it is now a settled law that not every contradiction or discrepancy on witness's account is fatal to the case. Minor discrepancies on details due to normal errors of observations, lapse of memory on account of passages of time, or due to mental disposition such as shock and horror at the time of occurrence of the event could be disregarded as opposed to fundamental discrepancies that are not expected of a normal person counts which has the effect of discrediting a witness (see **Kavula William & Another vs Republic**, Criminal Appeal No.119 of 2020 CAT (unreported); **Moshi Hamisi**

Kapwacha V R Criminal Appeal No 143 Of 2015; **Bahati Makeja Vs Republic** Criminal Appeal No 118 Of 2006.

In the light of the above principles, I have found all the inconsistencies minor as they are normal errors of observations and ascribed to lapse of memory on account of passages of time. It is to be noted that, there is a difference of nine (9) years between the seizure of the exhibit in April 2012 and August 2021 when most of the witnesses testified. Thus, it is not expected that the witness will have a perfect memory of the minute details such whether PW2 reported the incident to his superior before or after the arrest, or whether the small kakhi envelope was sealed with a cello tape or stepper, whether upon receipt of the 10 pellets PW4 sealed the envelope, etc. None of these contradictions erode the credibility of the witnesses. In any case, regarding the arrest and interrogation, there is no contradiction whatsoever that the accussed was arrested at JNIA at around 1:30 on 29/4/2020. His testimony to this court, corroborates the prosecution's case that he was arrested on the same date and place indicated in the charge sheet and as proved by the prosecution witnesses. The only contention, is the reason for his arrest to which I shall revert later when I deal with the accused's defence.

As for the colour, apart from being a human error attributed to the passage of time, the disparity might have been contributed by two additions made by the PW2 to the pellets. In his testimony, PW2 told the court that, he numbered the pellets and that, after he had extracted the small sample from

each of the pellets, he sealed the pellet with a cello tape. The slight change of colour is not unexpected under the circumstances.

That said, it is taken that, there is no major contradictions/disparities which would require paper trail to resolve. Thus, much as the paper trail is missing, looking at the reliable evidence on record, I entertain no flicker of doubt that the 66 pellets admitted as Exhibit P2 were the same pellets emitted by the accussed between 30/4/2012 and 1/5/2012, and temporary stored and conveyed by PW2, PW7 and PW9 to PW4; stored by PW4 in the exhibit room and examined by PW1. The prosecution has ably proved to the chain of custody in respect of Exhibit P2 was not broken.

As for the discrepancy on the weight of the narcotic drug as appearing in the charge sheet and the evidence adduced by the prosecution witness, much as it true that the charge sheet shows that the weight of the narcotic drug is 982.10 contrary to the oral testimony of PW1 and exhibits P1 and P5 which consistently shows that its net weight is 982.12 grams, the disparity is too trivial for the prosecution's case to flop. Apart from being a mere slip of the pen as it appears to be, the accussed has not anyhow been prejudiced. From the record, the accussed he knew all along that the charges against him were for trafficking of narcotic drugs of the type of heroine weight 982.12 grams and he was able to render his defence.

Regarding the accused person's arrest which I have previously put on hold, I have carefully considered the accused's defence and especially the

attribution of his travails to the work of a certain female airport official with the name tag of Valentino with whom he allegedly crossed swords as she was forcefully removing perfumes from his bag and sarcastically calling him Boko Haram the utterance which disturbed him mentally as a result he lost his temper and hit her hence the arrest. I have also considered the alibi he raised by stating that he had never been at ADU offices in JNIA as upon arrest he was taken to the airport police post where he remined until 1/5/2012 when he was transferred to the central police station. None of these was able raise a doubt let alone, a reasonable doubt on the prosecution's cogent evidence. The alibi which could have possibly pinched some holes in the prosecution's case was, in addition to being un-procedurally raised, not worth any weight when considered in the light of the testimony of PW2, PW5, PW7, PW8 and PW9 who not only witnessed the excretion of the pellets but saw the accussed as he signed the observation form as well as PW4 and PW6 who saw him at ADU Head offices in Kurasini.

This lands me to the final point for determination, namely whether the act committed by the accused person amounted to trafficking in narcotic drugs. As alluded to earlier on, under section 2 of the Act, trafficking in narcotic drugs is broadly defined to include importation of narcotic drugs and exportation of narcotic drugs outside the United Republic. Now that it has been established that, the 66 pellets contain a narcotic drug namely heroine hydrochloride and that, the accussed who had the pellets in his rectum was impounded at JNIA as he was preparing to travel by Kenya Airways to

Nigeria, the accussed is taken to have been exporting heroine outside the United Republic which amount to trafficking in narcotic drug within the purview of the definition of trafficking depicted above.

In the upshot, based on what I have endevoured to demonstrate above, I have come to the conclusion that the prosecution has proved its case to the required standard which is proof beyond reasonable doubt. I join hands with the non-binding opinion of the Gentleman and Ladies Assessors who unanimously opined that the case against the accussed has been proved. Accordingly, the accussed Princewill Ejike is found guilty and is hereby convicted of the offence of trafficking in narcotic drugs contrary to section 16 (1)(b)(i) of the Drugs and Prevention of Illicit Trafficking in Drugs Act [Cap 95 RE 2002].

DATED at DAR ES SALAAM this 20th day of October 2021.

THE HIGH COURT OF TANZANIA

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Signed by: J.L.MASABO

J.L. MASABO

JUDGE