IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CRIMINAL SESSION CASE NO. 27 OF 2016

REPUBLIC

VERSUS

EDWIN CHELEH SWEN

JUDGMENT

Date of Lat Order: 3/9/2021
Date of Judgment: 20/10/2021

MASABO, J.:-

Edwin Cheleh Swen, the accussed herein is charged of trafficking in narcotic drugs contrary to **16 (1)(b)(i)** of the Drugs and Prevention of Illicit Trafficking in Drugs Act [Cap 95 RE 2002]. The particulars of the charge were that on the 28/5/2012 at Julius Nyerere International Airport (JNIA) within Ilala in Dar es Salaam, the accussed trafficked 1509.35 grams of heroine hydrochloride valued at Tshs. 67,920,750/=.

The further facts are such that, on the material date, the accussed was set to travel by Kenya Airways and while at JNIA he was arrested by PW8 (Makolle). Upon interrogation, the accussed was held under observation at Anti-Drugs Unit (ADU) offices within JNIA from 28th May 2012 to 1st June

2012, and in the span of this period he excreted 97 pellets containing substance suspected to be narcotic drugs. The pellets were taken to the Government Chemist (CGC) Laboratory where its substance was examined and found to be heroine hydrochloride weighing 1509.35 grams valued at Tshs. 67,920,750/= and he was thereafter, charged.

To prove the charges against the accused, the prosecution, led by Ms. Monica Mbogo, learned Principal State Attorney, Ms. Sabrina Joshi, Ms. Tuli Helela, Ms, Anosiata Leopold and Ms. Clara Chalwe, learned State Attorneys and later by Mr. Joseph Maugo, learned Senior State Attorney and Ms. Estazia Wilson, learned State Attorney, paraded eleven (11) witness and two physical exhbits comprising of the 97 pellets (Exhibit P3) and its package in form of a khaki envelope (Exhibit P4). In addition, they had 5 documentary evidence comprising of a certificate of Value of Narcotic Drugs (Exhibit P1), A report of the CGC (Exhibit P2); the accused's passport (Exhibit P5), an electronic air ticket/itinerary (Exhibit P6) and an observation form (Exhibit P7). The accussed defended himself on oath as DW1 and sought reliance on the statement of PW2 (Ziliwa Machibya (Exhbit D1) and a charge sheet (Exhibit D2).

With this preface. I will now proceed to summaries, albeit briefly, the evidence rendered by each party. For the prosecution, the summary shall be based on the chronology of events ranging from arrest to arraignment in court.

PW8 Makole Bulugu, retired police officer then working for ADU, was the first person to come into contact with the accused. Acting on information received earlier on from an informer, he apprehended the accussed at around 03:45 on 28/5/2012. He conducted a physical search which ended barre. Thereafter, on instruction of the his superior, Commissioner Alfred Nzowa, he put the suspect under observation at the ADU offices at JNIA.

His second crucial evidence is that he was an eye witness to the excretion of the pellets by the accussed. He told the court that, at different time on 29/5/2012; 30/5/2012 and 1/6/2012 he witnessed the excretion 79 pallets by the accussed. On 29/5/2012 he saw the accussed excreting 35 pellets at around 20:40hrs and at around 23.35hrs the accussed excreted 22 pellets. On 30/5/2012 the accussed excreted 8 pellets at around 01.21 hours and around 06.00hrs he excreted 13 pellets. On 1/6/2012 at around 07.00hrs the accussed excreted 1 pellet all making a total of 79 pellets witnessed by this witness. He testified that, the excretion happened in a special toilet at ADU's offices and was witnessed by policeman and independent witnesses who included Fundisha Mayombola from TRA (PW9); Valerian Mosha from Immigration Department (PW7) and Nicolaus Lugusi (PW6) and after each incident the witnesses and the accused signed the observation form (Exhibit P7). PW8 also conveyed the 79 pellets; the observation form, the accused's passport, air tickets and two mobile phones to the exhibit custodian (PW3). Also, on 3/6/2012, PW8 witnessed the wrapping and packing of 97 pellets by PW3 at ADU offices in Kurasini area and on 4/6/2012 he escorted PW3 as she took the exhibit to the CGC for analysis.

SP Sylvester Clement Siame (PW11) had the accused under observation on 30/5/2012 at ADU's offices within JNIA when the accused excreted 18 pellets in three intervals. He exerted 7 pellets around 9 hours; other 7 pellets around 12 hours and 4 pellets at around 16 hours. Later, on the same day PW11 conveyed the 18 pellets to PW3.

PW4, PW6, PW7, PW9 and PW10 were independent eye witnesses to the excretion of pellets. PW4 Herman Gervas, an employee of the Tanzania Revenue Authority (TRA) told the court that that he witnessed the excretion of four (4) pellets on 30/5/2012 at around 15.00hours. He thereafter signed the observation form which he recognised in court. PW6: Nicholaus Lugusi, witnessed the exertion of 1 pellet on 1/6/2012 at around 07.00hrs. He too signed the observation form which he recognized in court. Valerian Josephat Moshi (PW7) and Fundisha Ezakieli Mayombola (PW9) testified to have witnessed the excretion of 35 pellets at around 20.40hrs and 22 pellets at around 23.40hrs on 29/5/2012. Further on 30/5/2012, they witnessed the excretion of 8 of pellets and 13 pellets. Ruben Mussa (PW10) witnessed the defecation of 7 pellets on 30/5/2012 at around 9.14am, 7 pellets and on same date at around 12hours he witnessed the second batch of 7 pellets.

ASP Neema Andrew Mwakagenda (PW3) is the exhibit custodian. She received all the exhibits from PW8 and PW1 and kept them in the exhibit room. Her recollection is that, on 30/5/2012 at around 09.00 hours she received 78 pellets from PW8 and on the same date at around 20.00 hours she received 18 pellets from PW11 and on 1/6/2012 at around 10.00hrs she

received 1 pellet from PW8. In the course of her testimony, she tendered the accused's passport which was admitted as **exhibit P5**; electronic air ticket (**Exhibit P6**); and observation form (**Exhibit P7**) which she also received from PW8 on 1/6/2012. On 3/6/2012, she packed the 97 pellets in a Khaki envelope and sealed them ready for transmission to CGC for analysis and on 4/6/2012, in the company of PW8 she conveyed the exhibit to the CGC where she met PW2 who conducted a preliminary test of the pellets and upon completion of the same, she returned and stored the exhibit in the exhibit store where it remained until its production in court.

Zainabu Dua Maulana, PW5, a cell leader for Kurasini area was an independent witness to the packaging and sealing of the exhibit at ADU offices on 3/6/ 2012. She narrated how PW3 packed and sealed the exhibit. Ziliwa Machibya (PW2) is the chemist who conducted the preliminary and confirmatory analysis of the substance contained in the 97 pellets on 4/6/2012 at the CGC Laboratory. Prior to the analysis, he weighed the exhibit and established that the gross weight of the substance contained in the exhibit which was then coded with a Lab No. 360/2012 to be 1509.35 grams. He then conducted a preliminary test by collecting a small sample from each pellet and mixed it up with Meca solution. The mixture turned green hence indicative that the substance in the exhibit was heroine. He thereafter collected a sample from each pellet for a confirmatory test which was done in a Gas Chromatophy Mass Spetrometa, the result of which conclusively confirmed that the substance was heroin hydrochloride. He then recorded the results of the confirmatory tests in an analytical laboratory report signed

by him and counter signed by Acting CGC. PW2 also tendered the CGC report (Exhibit P2; the 97 pellets (exhibit P3) and its packaging-khaki envelope (exhibit P4).

Christopher Joseph Shekiondo (PW1) is a retired Commissioner for the Drug Control and Enforcement Authority (DCEA). In his official capacity, he was responsible for assessing the market value of narcotic drugs. On 5/6/2012 he assessed the market value of 1509.35 grams of heroin hydrochloride to be Tshs. 67,920,750/= and issued a certificate of value of narcotic drug and psychotropic substance which was admitted as Exhibit P1. This marks the end of prosecution's case.

On the defence side, there was only one witness, the accussed, who testified on oath as DW1. His was a total denial and an *alibi*. Apart from the passport and the air ticket to which he admitted ownership, he denied all the allegations implicating him for the offence. His version of the story was that, he arrived in Tanzania on 22/5/2012 for a vacation and was staying at Joel hotel along Sinza area in Dar es Salaam. On 25/5/2012 while at Africa sana, Sinza area he was arrested by 3 police men who took him to the Central Police Station. There, he was searched and all his belongings that is, his passport, air ticket, hotel receipt, and identification card were seized. He was then detained until 6/6/2012 when he was arraigned before the Court of the Resident Magistrate for Dar es Salaam at Kisutu where he was jointly charged with one Nigerian named Benjamin Obioma Onurah of trafficking in narcotic drugs in Criminal Case No. 147/2012. The case was later withdrawn

on 26/6/2012. Benjamin, his co-accused, was released but he was kept in custody and later charged with the charge he is now facing. A copy of the charge sheet was admitted as Exhibit D2.

After the closure of the defence case, both parties prayed and were granted leave to make their final submission. On the prosecution's side, Ms. Wilson, learned State Attorney, submitted that, the prosecution has proved its case to the required standards. She submitted that, through the testimony of PW2, PW3, PW8 and exhibit P2 the prosecution has proved beyond reasonable doubt that, the substance in the 97 pellet was Heroine Hydrochloride weigh 1509.35 grams hence a narcotic drug as per section 2 of the Cap 95.

She submitted further that; the prosecution witnesses have proved beyond reasonable doubt that the accused before the court is the one who excreted the 97 pellets admitted as exhibits P3. She argued that exhibit P2, P5, P6 and P7 considered in conjunction with the oral testimony of PW3, PW4, PW5, PW6, PW7, PW8, PW9, PW10 and PW11 sufficiently implicate the accussed for the offence charged and leaves no doubt that he committed the offence. She implored upon the court not to consider the alibi, as it was an afterthought raised contrary to section 194 of the Criminal Procedure Act [Cap 20 RE 2019] and established precedents.

For the defence, Mr. Jeremiah Mtobesya, learned counsel, submitted that the prosecution did not prove its case to the required standards. In his view,

the oral testimony of PW2 and exhibit P2 do not sufficiently establish that the substance in the 97 pellets in a narcotic drug because PW2 was unsure what results would meca solution produce if mixed with other substances and did not produce the data sheet from the Gas Chromatophy Mass Spetrometa Machine. He also argued that the value of the narcotic drug was not proved. Lastly, he implored the court to accord weight to the *alibi* raised by the accused because (i) it is corroborated by Exhibit P6 which shows the accused was set to travel on 26/5/2012 and not 28/5/2012, as alleged (ii) Exhibit D2 shows he was arrested and jointly charged with Benjamin thus, there is no connection between the arrest and detention and (iii) the independence of the independent witnesses was doubtful. Mr. Mtobesya also argued that, the chain of custody was not established as apart from the observation from, there was no paper trail as to the movement of the exhibit from the toilet to ADU offices at JNIA, to ADU Kurasini, CGC and back to ADU- Kurasini.

Having summarized the evidence and submissions made by both parties, I will now proceed to determine the case. The fact that the accussed person holds a Liberian passport with number L030963 (Exhibit P5) and that he is the one issued with the electronic air ticket/itinerary (Exhibit P6) were undisputed. I will, therefore not make any finding on these save for the date of travel to which I shall revert in the due course.

Section 16(1)(b)(i) of the Drugs and Prevention of Illicit Traffic in Drugs Act under which the accused stands charged, provides that any person who

traffics in any narcotic drug commits an offence. The court is, therefore, invited to determine whether the accused trafficked in narcotic drugs as alleged. To derive a conclusion, the following two sub-questions must be answered in the affirmative. *First*, whether the substance which the accussed is alleged to have trafficked in is a narcotic drug. *Second*, whether the accussed is the one who trafficked the substance produced in court. To enter a conviction in the present case, the court must not only be satisfied that the substance in the 97 pellets alleged to have been excreted by the accussed is narcotic drugs as alleged. It must as well be established that the accussed is the one who excreted the 97 pellets and he was found trafficking the narcotic drug. The duty to prove these facts rests solely on the prosecution and the standard of proof required by law, is proof beyond reasonable doubt. It must however be noted from the outset that, proving a case beyond reasonable doubt does not necessarily imply absolutely certain. As held by Lord Denning in **Miller v. Minister of Pensions 1947** (2) All ER. 373) thus:

> That degree is well-settled. It need not reach certainty but it must reach a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course, it is possible but not in the least probable", the case is proved beyond reasonable doubt.

In answering the first sub- question as to whether the substance in the 97 pellets which were admitted as Exhibit P3 is a narcotic drug, a due regard is to the definition of narcotic drugs provided under for section 2 and the Schedule to the Drugs and Prevention of Illicit Traffic in Drugs Act. Under this provision, the term narcotic drug is broadly defined to mean any substance specified in the Schedule or containing any substance specified in that Schedule the list of which include heroin.

In the light of this definition, we have carefully considered the oral testimony of PW2 and Exhibit P2 which are material evidences in answering this question. These two pieces of evidence suggest that the substance contained in Exhibit P3 is a narcotic drug of the type of Heroine Hydrochloride. PW2, the expert who conducted preliminary and confirmatory tests of exhibit P3, told the court that, upon receipt of the exhibit which was assigned a Lab No. 360/2012 and having weighed it to establish the gross weight, he conducted a preliminary test by extracting a small sample of substance from each pellet and mixed the sample so collected with Meca solution which is a standard heroine. The mixture turned green which preliminarily established that the substance was heroine. He then collected a sample from each pellet for confirmatory test in Gas Chromatophy Mass Spetrometa Machine the result of which concluded that, the substance in the 97 pellets was Heroine Hydrochloride.

Undeniably, in the course of cross examination by Mr. Mtobesya, PW2 could not answer which colour would the meca solution produce when mixed-up

with other substance such as papaverine. Having carefully contemplated this fact and its consequential impact to the credence of PW2's testimony, this court has come to the conclusion that, much as a doubt has been cast on the accuracy of the preliminary results, its effect to PW2's evidence is negligible. I say so because the results obtained after mixing the sample with meca solution were merely preliminary. A confirmatory test had to be conducted afterwards. The uncontroverted evidence on record is that PW2 conducted a confirmation test in a Gas Chromatophy Mass Spetrometa Machine from which the conclusive results that the substance is heroine was generated. Since this part of evidence and the report thereof which was admitted as Exhibit P2 were uncontroverted, there is nothing to impeach the finding.

I may also add here that, from the record PW2 is an expert who by virtue of education and training possess special knowledge and the necessary skills and expertise obtained from the University of Dar es Salaam where he graduated in 2002 with a degree of Bachelor of Science with Education majoring in chemistry and biology at University of Dar es Salaam and a certificate in forensic science obtained in Scotland. From this education and training background and his extensive work experience while at the CGC and now at the DCEA, which was never questioned in cross examination, it can be fairly concluded that his knowledge and skills on narcotic drugs is well beyond that of the average person. It is, therefore, my findings that the exposition of PW2 and his report are sufficient and reliable.

The second question as to whether the accussed is the same person who excreted the 97 pellets which were admitted in court as Exhibit P3 attracts two controversies which must both be answered in the affirmative if a conviction is to be entered. The first controversy is *whether the accussed excreted the pellets*. Testimonies of the two police officers, Makole Bulugu (PW8) and SP Sylvester Clement Siame (PW11) and the five independent witnesses who testifies as PW4, PW6, PW7, PW9 and PW10 considered conjointly with the observation form (Exhibit P7) unravel the controversy.

Through this evidence, it is established as follows: **One,** the accussed was arrested by PW8 at JNIA on 28/5/2012 at around 03:45 as he was preparing to board Kenya airways ready for travel abroad. After arrest, he was kept under observation at ADU offices within JNIA and remained there until 1/6/2012. Two, while there he excreted a total of 97 pellets in the following lots/intervals. He excreted the first lot of 35 on 29/5/2012 at around 20:40hrs under the watch PW8, PW7 and PW9 and the second lot of 22 pellets on the same date at around 23.35hrs while under the watch of PW8, PW7 and PW9. On 30/5/2012 at around 01.21 hours he excreted 8 pellets around 06.00hrs in the presence of PW8 and PW7 and PW9; and 13 pellets in the presence of PW8 and PW9; 7 pellets around 9 hours in the presence of PW11 and PW10; 7 pellets around 12 hours before PW11 and PW10; and 4 pellets at around 16 hours before PW11 and PW4. The last lot of 1 pellet was excreted on 1/6/ 2012 at around 07.00hrs before PW8 and PW6.

The absence of any contradiction between these witnesses on what happened on the respective dates and time, considered conjointly with the observation form (Exhibit P7) which was signed by these witnesses and counter signed by the accussed leave no stone unturned. They credibly establish that on the respective dates and time the accused emitted the pellets under the watch of the above-named witnesses. It is to be noted here that, the accussed signature in the observation form was not any how controverted. None of the witness was cross examined on this point the omission which attracts an inference adverse to the defence case.

The second controversy is whether the 97 pellets admitted as Exhibit P3 are the ones excreted by the accussed. the Prosecution's evidence as to storage and movement of the exhibit right from the place of collection to the date it was tendered in court discern the following leads: after the collection (excretion), the pellets were temporarily stored at ADU offices within JNIA under the custody of the officer in charge on the respective date, who are either PW8 or PW11. These had the exhibit kept in an office locker to which they personally kept the keys. From there, the exhibit was conveyed to ADU head offices at Kurasini area and received by PW3 who in her testimony told the court that PW8 conveyed to her a total of 78 pellets on 30/5/2012 at around 09.00 hours. At around 20hours on the same date she received 18 pellets from PW11 and on 1/6/2012 she received one (1) pellet from PW8.

Each lot of the pellets received was wrapped in a separate envelope labeled an IR number No. JNIA/IR/136/2012 for identification purposes and she

thereafter kept the same in the exhibit room. In addition to the last one pellet conveyed to her on 1/6/2012, she received the accused's passport (exhibit P5) and a print out of an electronic air ticket/ itinerary (Exhibit P6); the observation form (Exhibit P7) and two mobile phones make Samsung and blackberry which she wrapped in a separate envelop bearing the same IR No. JNIA/IR/136/2012. The exhibit remained in the exhibit room up to 3/6/2012 when PW3 packed it in the presence of PW5 Zainab Dua Maulana and PW8 and returned the same the exhibit room where they stayed until the next day on 4/6/2012 when PW3 in the company of PW8 took the exhibit for examination by CGC. Upon the preliminary examination, they were resealed and returned to PW3 who took them back to the exhibit room in the company of PW8 and the exhibit remained there until the date it was produced in court.

In my assessment of this evidence, I have found the evidence regarding movement of the pellets from ADU- JNIA offices to ADU Kurasini, packing of the exhibit, movement of the exhibit to and from CGC to be credible and uncontroverted and so is the evidence as to the packing and sealing of the exhibit ready for transmission to CGC. This evidence was sufficiently corroborated by PW5 in whose presence the pellets were packed. A further corroboration gathered from Exhibit P4 which bears the signature of PW2, PW3 and PW5; the IR No. JNIA/IR/136/2012 assigned to it by PW3 in the presence of PW5 during the packing and Lab No. 360/2012 assigned to it at CGC is that, Exhibit P3 is the same exhibit packed by PW3 at ADU Kurasini on 3/6/2012 and examined by PW2 on 4/6/2012.

From this evidence, it suffices to say that the prosecution has managed to establish a sequence of custody in respect of the 97 pellets admitted as exhibit P3. I consequently decline the invitation fronted by the defence counsel who in the course of final submission ardently argued the court to disregard this evidence merely because the paper trail of the movement of the exhibit was missing. The invitation by the counsel would have hold water had there being material inconsistencies between the witnesses which is not the case in point. The absence of material inconsistencies between the witnesses distinguishes this case from case of **Alberto Mendes vs Republic,** Criminal Appeal No. 473 of 2017, CAT (unreported) which the learned counsel sought to rely in fortification of his invitation to this court. Whereas in the present case the oral account of prosecution witnesses was credible and consistent, in **Alberto Mendes vs Republic (supra),** the oral account of prosecution witnesses was tainted with material contradictions and inconsistencies which required paper trail to resolve.

I similarly accord no weight to the complaint that the pellets were not sufficiently identified because, save for minor disparities on the actual colour of the pellets which I find to be minor, human and possibly ascribed to the passage of time, all the eye-witnesses consistently described the pellets as having an oval shape, with a size similar to a thumb finger and cream in colour. The only alien thing to them were numbers whose source was explained by PW3. This witness told the court that she saw PW2 numbering the pellets from 1 to 97. That said, the strength of the evidence above has

left this court with no shred of doubt that there was no any point in time when the chain of custody in respect of Exhibit P3 was broken.

Turning to the accused's defence we have considered both the general denial and the alibi. Starting with the alibi, Section 194 (4) and (6) of the Criminal Procedure Act, Cap 20 RE 2019, states that,

> (4) Where an accused person intends to rely upon an alibi in his defence, he shall give to the court and the prosecution notice of his intention to rely on such defence before the hearing of the case.
> (5) .....
> (6) Where the accused raises a defence of alibi without having first furnished the prosecution pursuant to this section, the court may in its discretion, accord no weight of any kind to the defence.

Since there is no dispute that the accussed did not give notice of his *alibi* and that he raised the same after the closure of the prosecution's case, this case falls under sub section (6). The principle applicable in cases falling under this subsection is as articulated in **Mwita S/o Mhere and Ibrahim Mhere v. R** [2003] TLR 107 thus:

> Where a defence of alibi is given after the prosecution has closed its case, and without any prior notice that such a defence would be relied upon, at least three things are important under section 194(6) of the Criminal Procedure Act, 1985:
>
> (i) the trial court is not authorized by the provision to treat the defence of alibi like it was never made;

(ii) the trial court has to take cognizance of the defence; and
(iii) it may exercise its discretion to accord no weight to the defence.

In that regard, this court has not only taken cognizance but considered the merit of the alibi. However, in the end, it has been found to be weak, self-defeated and incapable of negating the prosecution's case. For the following reasons, I decline to accord any weight to the alibi: First, as per my earlier finding, the prosecution's evidence, comprising of the oral account of PW4, PW6, PW7, PW8, PW9 and PW10 and PW11, credibly establish that not only was the accussed arrested at JNIA on 28/5/2012 but he remained there until 1/6/2021 the period within which he secreted the 97 pellets and signed the observation form (Exhibit P7). As the disposition of all these witnesses was that they saw the accussed at ADU offices at JNIA a point which he never disputed by putting forward questions that would have contradicted their disposition, it is beyond my imagination how the accussed could have been at JNIA and at the Central Police on the same time and date. Since the court was not told that the accussed crossed paths or had a bad blood with any of the two police officers or the 5 independent witnesses who testified to have seen him excreting the pellets and signing Exhibit P7, I am unable to comprehend why and how all these seven witnesses would consistently fabricate a story implicating the accussed.

Second, Exhibit P6 which the accussed sought to rely in support of his alibi is none but a print out of an electronic itinerary/receipt. Its appearance, invites no doubt that, as other electronic tickets, it is a normal print out from

a computerized flight booking data system which although issued to passengers, it is not a mandatory requirement at boarding/check-in. As the content of Exhibit P6 vividly shows, at chek-in the passenger is not mandatorily required to produce the printout of the itinerary. All is required from him is positive identification done by presenting a picture for identification and the document he used as reference during booking. This implies that a passenger may change the dates of his journey without necessarily printing the itinerary.

Much as we were not told that the accussed changed the dates of his travel, in the current age of technology where flight bookings and changes are done electronically and the issuance of the print out is, as shown above, not mandatory, the print out of an itinerary cannot negate the credible account of the eye witness. I may add here that, it would be a lucid misdirection for this court to rely on the itinerary print out as conclusive evidence that the accussed was to travel on the date none other than the one appearing in the itinerary. Such a finding would be oblivious of the current global realities and technological advancements in receipts and ticketing.

Lastly, with regard to exhibit D2, it is a common ground between the parties that prior to the current charges the accussed was jointly charged with one Benjamin Obiama Onourah in Criminal Case No. 147 of 2012 before the Court of the Resident Magistrate for Dar es Salaam at Kisutu. It is similarly common between them that, the charges against the accussed and his co-accused, Benjamin, were withdrawn after the Director of Public Prosecution entered a

nolle prosequi but the fruits of the *nolle prosequi* did not last longer for the accussed to enjoy. He was re-arrested and charged separately from the said Benjamin Obiama Onourah. Before proceeding further, it is noteworthy to underscore the trite law that, *nolle prosequi* is not a bar to future prosecution for the same offence. Therefore, the fact that the accussed was previously charged, discharged and re-arrested and that his co-accussed was left to walk scot-free, does not in itself exculpate him.

Going to the merit of Exhibit D2, from the content of the this exhibit, it is vividly clear that, the current charges are identical to the charges he was previously charged with Criminal Case No. 147 of 2012. In spite of having two accussed persons, the charge sheet had no joint count. Each of the accussed person had a separate count. Edwin Cheleh Swen, the accussed herein was charged of one count for trafficking 1509.35 grams of heroin valued at Tshs. 67,920,750/= whereas his co-accussed, Benjamin Obiama Onuorah was charged under the 2nd count for trafficking 692.51 grams of Heroin valued Tshs 31,162,950/=. The particulars of the count facing the accussed which appears in exhibit D2 as 1st count was that:

> **EDWIN CHELEH SWEN** on the 28th day of May 2012 at Julius Kambarage Nyerere International Airport within Ilala district in Dar es Salaam Region, unlawfully was found trafficking 1509.35 grams of heroine valued at Tshs. 67,920,750/= from the United Republic of Tanzania.

Much as the accussed person is not required to prove his alibi, the similarity of the date of arrest, type, weight and value of the narcotic drugs between

this count and the count he now stands charged with weakens the alibi. When this point is considered conjointly with the exposition above and the accused's failure to raise the alibi aforehand, failure to call as witness the police men who allegedly arrested him and failure to cross examine the witnesses who saw him signing Exhibit P7, weigh heavily against the *alibi*.

For the reasons above assigned, I concur with the unanimous opinion of the Ladies Assessors' unanimous finding that the case against the accussed has been proved beyond reasonable doubt and that he is guilty of the offence charged. Accordingly, I hereby convict the accussed for 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.

X

Signed by: J.L.MASABO

J.L. MASABO

JUDGE