IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF TANGA

AT TANGA

CRIMINAL APPEAL No. 1 OF 2020

(Originating from the District Court of Tanga at Tanga in Criminal Case No. 129 of 2019)

GIFT SAID @ MBONYO ---------- APPELLANT

Versus

THE REPUBLIC ---------- RESPONDENT

JUDGMENT

22.11.2021 & 26.11.2021
F.H. Mtulya, J.:

Mr. Gift Said @ Mbonyo (the appellant) was charged with the offence of **Trafficking in Narcotic Drugs** contrary to section 15A (1) (2) (c) of the **Drugs Control and Enforcement Act, No. 5 of 2015 as amended by the Drug Control and Enforcement (Amendment) Act, 2017** (the Drugs Control Act) and was arraigned before the District Court of Tanga at Tanga (the district court) in Criminal Case No. 129 of 2019 (the case) to reply the charges against him. After a full trial in the district court, the appellant was found guilty and sentenced to thirty (30) years imprisonment from the enactment in section 15A (1) and (2) (c) of the Drugs Control Act which provides that:

> *15A- (1) Any person who traffics in narcotic drugs, psychotropic substances or illegally deals or diverts precursor chemicals or substances with drug related*

effects or substances used in the process of manufacturing drugs of the quantity specified under this section, commits an offence and upon conviction ***shall be liable to*** *imprisonment for a term of thirty years.*

From the materials registered by the prosecution, the facts show that on the 20th day of October 2018 at Mwakizaro area within the District of Tanga in Tanga City, the accused trafficked narcotic drugs to wit one bundle of Cannabis Sativa commonly known as bhangi weighing 115.81 grams. When the charge was read over and explained to him, the appellant pleaded not guilty to the charge. The prosecution in the case summoned a total of five (5) witnesses to establish its case against the appellant and the district court decided in its favour. The decision aggrieved the appellant hence preferred seven (7) grounds of appeal in this court. As this is the first appellate court, the substance of the materials registered in testimony in the district court and grounds of appeal in this court, will be expounded in the course of determining the appeal. I will first of all display the complaints of the appellant against the decision, briefly, in the following texts:

1. That the trial court erred in law and fact to convict the appellant by use of wrong provision of the law;

2. *That the trial court erred in law and fact in admitting the cautioned statement which was recorded out of the prescribed time;*
3. *That the trial court erred in law and fact by failing to consider the discrepancies in favour of the appellant;*
4. *That the trial court erred in law and fact by failing to consider calling of an independent witness in arrest and search of the appellant;*
5. *That the trial court erred in law and fact in relying on exhibit P.4 without evidence of the Government Chemist who prepared P.4;*
6. *That the trial court erred in law and fact in imposing excessive sentence to the appellant; and*
7. *That the prosecution did not prove its case beyond reasonable doubt.*

In this court the appellant appeared in person without any legal representation whereas Mr. Paul Kusekwa, learned State Attorney appeared for the Republic. When the appeal was set for hearing on 19th April 2021, the parties agreed to settle the matter by way of written submissions. It was fortunate that both parties complied with the scheduling order hence this decision.

In his submission in support of the appeal, the appellant began with ground number one (1) in which he stated that he was found

with a small quantity of cannabis sativa (bhangi) measuring 115.81 grams, hence he was supposed to be charged with section 17(1)(b) (2) of the Drug Control Act. In the second ground, the appellant contended that he was previously prosecuted in trafficking drugs measuring 250 grams and the charge against him was dropped on 5th November 2019 and subsequently charged with the present charge on the same substance, but measuring 115.81 grams, which is contradiction to be decided in his favour.

On ground number three (3) the appellant submitted that the materials registered by the prosecution in the district court were contradicting on whether he was interrogated at around 11:00 hours or at noon time. In his opinion, the recording of his cautioned statement was done at noon hours after the statutory time as per requirement of the law in section 50(1) (a) of the **Criminal Procedure Act** [Cap. 20 R.E. 2019] (the Act) hence exhibit P.2 must be expunged from the record.

In the fourth ground of appeal, the appellant contended that the certificate of seizure which was admitted as exhibit P.1 was prepared, recorded and signed by police officer (PW2) and witnessed by other police officers without there being an independent witness while his arrest took place at Mwakizaro Street where there were many civilians.

Regarding ground number five, the appellant submitted that failure to summon the Government Chemist who prepared Exhibit P.4, the Government Chemist Report was prejudicial to the prosecution case. In support of his argument, the appellant cited the case of *Moses Muhagama* without its full citation. He referred the court back to page 31 of the proceedings and stated that it is not reflected anywhere on the record where the accused was addressed in terms of section 240 (3) of the Act. The appellant stated further that failure to summon the witness denied him an opportunity to cross examine the witness. Citing the case of **Adel Mohamed El Dabba v. Attorney General for Palestine** (1994) A.C 156 and **Aziz Abdallah v. Republic** [1991] TLR 71, the appellant stated that the fact that the witness was not called to testify in the case, this court should draw an adverse inference against the prosecution's case.

The appellant registered ground number six in the petition of appeal in details, but declined to submit in the written submission in support of the appeal. The ground in the petition of appeal shows, in brief, that: *the trial court erred in law and fact in imposing excessive sentence to the appellant.* With all these reasons, the appellant summed up his appeal that the case against him was not proved beyond reasonable doubt as per requirement in criminal law.

In replying the appeal, the Respondent submitted that the section of law with which the appellant was charged was the

appropriate one as he was found with narcotic drugs less than Fifty (50) Kilograms. With regard to the complaint that the accused was previously charged with trafficking 250 grams of drugs bhang, it was submission of Mr. Kusekwa that the same was just an estimation before the drugs were measured by the Government Chemist. Concerning the cautioned statement being recorded out of time, Mr. Kusekwa contended that the statement was recorded within four hours from the time of arrest hence it was lawful under Section 50 (1)(a) of the Act.

Submitting on the fourth ground regarding the absence of an independent witness during search and seizure of the drugs, Mr. Kusekwa stated that section 48 (2)(c) (ii) (vii) of the Drug Control Act does not provide for an independent witness as a prerequisite during arrest and search. In support he cited the case of **Jabri Okash Ahmed v. Republic**, Criminal Appeal No. 331 of 2017. With regard to the question on address to the appellant in terms of section 240 (3) of the Act on calling the Government Chemist for cross examination, it was submitted by Mr. Kusekwa that the same was done and displayed at page 31 of the proceedings of the district court.

On the last ground it was Mr. Kusekwa's submission that the case was proved beyond reasonable doubt: first, by certificate of seizure which proves that the drugs were found with the accused;

and secondly, cautioned statement, where the appellant was recorded to confess the crime of trafficking in drugs. Additionally, Mr. Kusekwa submitted that there was a Government Chemist Report which ascertained what was found was indeed narcotic drugs bhang. With all these facts in display, Mr. Kusekwa insisted that the district court was correct in convicting and sentencing the accused hence his appeal be dismissed as it lacks merit.

On my part, I have canvassed through the record of the district court, the submissions of both parties along with the authorities cited. I am well aware that there are a lot of principles derived from many cases of this kind, but I am also alive of the fact that every case must be decided according to its own peculiar circumstances (see: **NBC Limited & Another v. Bruno Vitus Swalo**, Civil Application No. 139 of 2019). Having considered the evidence on record and submissions by both parties, this court is specifically asked to reply the following contentious issues in this appeal:

i. *Whether the section which was invited to charge and convict the appellant was proper;*
ii. *Whether the cautioned statement of the appellant was recorded within the required time;*
iii. *Whether absence of an independent witness (civilian) was fatal to the prosecution's case;*

iv. *Whether section 240 of the Act was complied with during the hearing of the case;*

v. *Whether the evidences adduced were sufficient to prove the charged offence; and*

vi. *Whether the sentence imposed to the appellant was excessive.*

Starting with the first identified issue before this appeal, the particulars of the offence in the charge sheet show that the appellant was arrested on 20th day of October 2018. By this time, there was already in place amendment of Drug Control and Enforcement Act, 2015, via the Drug Control and Enforcement (Amendment) Act, 2017 which came into force in November 2017. By virtue of section 9 of the amendment Act, section 15 of the former Act of 2015 was amended by adding section 15A which reads:

15A (1) Any person who traffics in narcotic drugs, psychotropic substances or illegally deals or diverts precursor chemicals or substances with drug related effects or substances used in the process of manufacturing drugs of the quantity specified under this section, commits an offence and ***upon conviction shall be liable to imprisonment for a term of thirty years.***

(2) For purposes of this section, a person commits an offence under subsection (1) if such person traffics in:

(a) narcotic drugs, psychotropic substances weighing two hundred grams or below;

(b) precursor chemicals or substance with drug related effect weighing 100 litres or below in liquid form, or 100 kilogram or below in solid form;

(c) cannabis or khat weighing not more than fifty kilograms.

According to page 11 of the judgment, the trial magistrate entered the conviction to the appellant as follows:

> *In the upshot the accused person is hereby found guilty for a charge of trafficking in narcotic drugs. He is accordingly convicted with the offence of trafficking in narcotic drugs contrary to section 15A (2) (c) of the Drug Control and Enforcement Act Number 5 of 2015 as amended by the Drug Control and Enforcement (Amendment) Act, 2017. It is accordingly ordered.*

Having quoted so, I find that the provision of law with which the appellant was convicted was proper and I find no reason to fault the trial court's decision.

Concerning the second issue, which is on the time limit in recording cautioned statements, this argument will not detain this

court. According to section 50 (1) (a) of the Act, the time requisite for recording an interview for suspects is four hours. For clarity reasons, the section is quoted hereunder:

50 (1) For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is:

(a) subject to paragraph (b), the basic period available for interviewing the person, that is to say, the ***period of four hours commencing at the time when he was taken under restraint*** *in respect of the offence.*

According to the law, the time from arrest to interviewing an accused person is four (4) hours. The materials in evidence show that the appellant was arrested on 20th October 2018 at around 0900 hours in the morning. The evidence in record at page 20 of the proceedings displays that police officer H.6329 DC Deusdedith (PW4) testified that on 20th October 2018 at around 11:00 hours, he was assigned by the OC-CID to record the appellant's cautioned statement. This fact was not contested by the appellant during the cross-examination as depicted at page 25 and 26 of the proceedings. It is therefore certain that from appellant's arrest to the recoding of his cautioned statement, it is two (2) hours after the restraint. The appellant has also complained on interpretation of

noon hours as PW4 was assigned the assignment at noon time. In my considered opinion, even if that is the case, according to **Cambridge English Dictionary**, noon means twelve o'clock in the middle of the day. Eventually, counting from 09:00 hours when he was arrested, to noon time, yet the recording was still done within three (3) hours according to the law hence this ground also fails.

Moving to the third issue on whether the absence of an independent witness rendered the prosecution case a nullity. I have considered the circumstances of this case. It is true that according to the record available, there is no iota of evidence suggesting that there was a civilian called to witness the event of arrest and search of the narcotic drugs bhangi. The only witnesses to the search were two (2) police officers who happen to be arresting officers as well.

Now, I am not unaware of various cases of this court which provided for compulsory requirement of having an independent witness when conducting such a search to a suspect (see: **Saidi Thabit & Another v. Republic**, Criminal Appeal No. 26 0f 2020; **Republic v. Mussa Hatibu Sembe**, Economic Case No. 4 of 2019; **David Athanas @ Makasi Joseph Masima @ Shando v. Republic**, Criminal Appeal No. 168 of 2017; and **Kassim Abdallah v. Republic**, Criminal Appeal No. 52 of 2020). The presence of third party independent witness is important to demonstrate fairness and truthfulness of the entire exercise of arrest and search, and in any

case removes doubts on whether the exhibit has been planted fraudulently to make a suspect guilt. However, the practice of the Court of Appeal in situations, like the present one, the directives have been that absence of the third party independent witness, does not render the arrest and search exercise illegal or prosecution case fail. In the commonly cited precedent of the Court of Appeal in **Tongora Wambura v. Director of Public Prosecution**, Criminal Appeal No. 212 of 2006, the Court categorically stated that:

> *As **there was no independent person to witness the arrest that in our considered view depends on particular circumstances of each case**. However, it should be emphasised that the absence of such people per se did not render the operation illegal or prosecution case fail.*
>
> (Emphasis supplied).

The practice received support of the same court a decade later in the precedent of **David Athanas @ Makasi and Another v. Republic**, Criminal Appeal No. 168 of 2017, where the Court stated that:

> *.... as per section 38 (3) of the Criminal Procedure Act, CAP 20 R.E 2002, the certificate of seizure ought to have been signed at the place where the search was*

conducted and in the presence of an independent witness. Since the certificate of seizure was not signed at Chinangali, the place where the search was conducted ***and considering that there was no independent witness present as required by law, the said certificate cannot be accorded weight.***

(Emphasis supplied).

Following these statements from our superior court and considering this court is bound by decisions emanating from the Court of Appeal, I will accord no weight to the certificate of seizure admitted as Exhibit P.1.

The next issue of complaint by the appellant is that he was not addressed in terms of section 240 (3) of the Act. The practice in this court has been that when determining appeals from lower courts, it is strictly confined in the records available from lower courts. I have gone through the proceedings of the trial court on the 4th December 2019 as displayed at page 31 of the proceedings of the district court. At the last paragraph, the district court has recorded the following text:

The accused has been addressed in terms of Section 240 (3) of the CPA, Cap. 20 R.E 2002 and has opted the examiner and author of Exhibit P4 not to be called for cross examination.

Having noted so, this issue is rendered baseless and cannot detain this court any further. Courts' records reflect what transpired on the material day during proceedings in the case.

The last ground of appeal was whether the case against the accused was proved beyond reasonable doubt. I have earlier discussed the discrepancies in the prosecution case by not having a civilian independent witness. I have also pondered on the role which that witness ought to have played in this case. What that independent witness ought to have done was to prove that the narcotic drugs were indeed recovered in the belongings of the appellant in the rag bag.

The obvious question in this case is whether the evidence available on record establishes the appellant was found with the drugs? In responding to this question, I have glimpsed at the evidence of the prosecution as well as the defence, there is Exhibit P.1 whose weight is low as it was not signed by an independent witness, against it there is the defence of the appellant at page 36 of the proceedings lamenting that the weight of the drugs he was found with has been lowered from 250/grams to 115.81/grams.

Although this allegation is unfounded as before this court and in the case there is nowhere that 250/grams is mentioned as the weight of the narcotic drugs. Further there is no proof that the appellant was charged to have trafficked 250/grams of drugs, there

is nowhere that the appellant gives evidence to the effect that he did not possess the drugs. The only thing he laments on is the procedure used in prosecuting him and not the substance of his charges.

The appellant does not seem to have any evidence to refute the charge levelled against him. As if that is not enough there is a cautioned statement in which he confessed using the drugs admitted as Exhibit P.2. Moreover, a Government Chemist Report, Exhibit P.4 certified that the leaves seized from the appellant were cannabis sativa commonly known as bhangi. In such circumstances, this court invites section 388 (1) of the Act, which states that:

> *Subject to the provisions of section 387, no finding sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or in any inquiry or other proceedings under this Act; save that where on appeal or revision, the court is satisfied that such error, omission or irregularity has in fact occasioned a failure of justice, the court may order a retrial or make such other order as it may consider just and equitable.*

By inviting this provision and also the recent precedent of the Court of Appeal in **Salehe Ramadhani Othman @ Salehe Bejja v. Republic**, Criminal Appeal No. 532 of 2019, where it was observed that not every contravention of law vitiates the case, I hold that the prosecution proved its case to the required standard and that is beyond reasonable doubt.

There is an issue of legality or excessiveness of the sentence meted upon the appellant. This issue has drawn my close attention. The facts of the case show that the appellant was charged with the offence of trafficking in narcotic drugs to wit one bundle of cannabis sativa commonly known as bhang weighing 115.81 grams. He was found guilty and sentenced to thirty (30) years imprisonment. According to the district court, the section under which the accused has been convicted imposes a mandatory sentence of thirty (30) years. The basis of this sentence was enactment in section 15A (1) and (2) (c) of the Drugs Control Act which provides that:

> *15A (1) Any person who traffics in narcotic drugs, psychotropic substances or illegally deals or diverts precursor chemicals or substances with drug related effects or substances used in the process of manufacturing drugs of the quantity specified under this section, commits an offence and upon conviction* ***shall be liable to*** *imprisonment for a term of thirty years.*

As stated earlier the trial court took the view that the provision is couched in mandatory terms in imposing sentence of thirty (30) years imprisonment. Unfortunately, this has been the approach which is taken by most subordinate courts of this country. It has been held in a number of cases in our jurisdiction that where the word *shall be liable* is used, courts can exercise discretion in sentencing the accused persons to the maximum period stated (see: **Tabu Fikwa v Republic [1988]** TLR 8; **Opoya v. Uganda** (1967) E.A. 752; **Dauson Athanaz v. Republic**, Criminal Appeal No. 285 of 2015; **Abdi Masoud @ Iboma v. Republic**, Criminal Appeal No. 116 of 2015; and **Nyamhanga Magesa v. Republic**, Criminal Appeal No. 470 of 2015).

The provision in section 15A (1) and (2) (c) of the Drugs Control Act, therefore, does not impose mandatory sentence of thirty (30) years. The words from the interpretation of the cited precedents give room to courts to exercise their discretion in sentencing convicted persons. In any case, had the legislature intended to be a mandatory requirement it would have used the words *shall be liable to not less than*. Thus, because the appellant was a first offender, it was not proper for the district court to sentence him to the maximum punishment prescribed by the law. In the case of **Nyamhanga Magesa v. Republic** (supra), it was observed that:

Where these words ...liable to imprisonment for life are used in any particular provision providing for a punishment, the proper interpretation is that the court has discretion to pass a sentence which may be appropriate in the circumstances of that particular case.

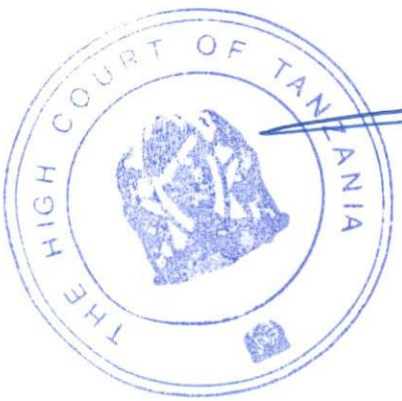
On what to do in the circumstance like the present one, this court is guided by the principles for altering a trial court sentence as narrated in the precedent of the Court of Appeal in **Zuberi Ally v. Republic**, Criminal Appeal No. 147 of 2015, where the Court set the following conditions, *viz,* where: (i) the sentence is manifestly excessive; (ii) the sentence is manifestly inadequate; (iii) the sentence is based upon a wrong principle of sentencing; (iv) a trial court overlooked a material factor; (v) the sentence has been based on irrelevant considerations, such as the race or religion of the offender; (vi) the sentence is plainly illegal, as when for example, corporal punishment is imposed for the offence of receiving stolen property; (vii) the period of time spent in custody awaiting trial.

Since I have found that the sentence of thirty (30) years imprisonment was manifestly excessive according to section 15A (1) (2) (c) of the Drugs Control Act and considering that the appellant herein was found with 115.81 grams of narcotic drugs, being an offender for the first time and also noting that the accused has been in prison custody since 8th November 2019 as a remand and since

11th December 2019 as a convict, I invite sections 29 (a) & 30 (1) of the **Magistrates Courts Act** [Cap. 11 R.E 2019], to reduce the sentence of thirty (30) years imprisonment imposed on the appellant to seven (7) years imprisonment starting from the date when the appellant started to serve his imprisonment, 11th December 2019.

Ordered accordingly.

Right of appeal explained.

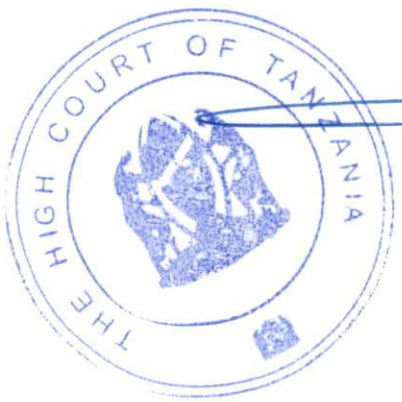


F.H. Mtulya

Judge

26.11.2021

This judgment is delivered in Chambers under the seal of this court in the presence of the appellant, Mr. Gift Said @ Mbonyo and in the presence of learned State Attorney, Mr. Joseph Makene, for the Republic.



F.H. Mtulya

Judge

26.11.2021