

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT DAR ES SALAAM

ECONOMIC CASE NO. 14 OF 2018

THE REPUBLIC

VERSUS

- 1. NABIBAKHSH PIRBAKHSH BIBARDE**
- 2. MOHAMADHANIF NAZIRAHMAD DORZADE**
- 3. ABDALLAH KHATOON SAHIB**
- 4. UBEIDULLA GULAMZADE ABDI**
- 5. NAIM BALTIK ISHAQA**
- 6. MOSLEM AMIREE GOLMOHAMAD**
- 7. RASHID BADFAR**
- 8. OMARY DORZADE AYOUB**
- 9. TAHIR BISHKAR MUBARAK**
- 10. ABDULMAJID ASQAN PIRMUHAMAD**
- 11. ALLY ABDALLAH ALLY**
- 12. JUMA AMOUR JUMA**
- 13. OMARI SAIDI MTANGI**

JUDGMENT

1st October & 6th November, 2020

BANZI, J.:

In this case, there are thirteen accused persons, namely Nabibakhsh Pirbakhsh Bibarde, Mohamadhanif Nazirahmad Dorzade, Abdallah Khatoon

Sahib, Ubeidulla Gulamzade Abdi, Naim Baltik Ishaqa, Moslem Amiree Golmohamad, Rashid Badfar, Omary Dorzade Ayoub, Tahir Bishkar Mubarak, Abdulmajid Asqan, Ally Abdallah Ally, Juma Amour Juma and Omari Saidi Mtangi. They all stand charged with two counts of trafficking in narcotic drugs and unlawful possession of narcotic drugs contrary to sections 15 (1) (b) and 15 (1) (a) respectively, of the Drug Control and Enforcement Act, No. 5 of 2015 ("the Drug Act") read together with paragraph 23 of the First Schedule to the Economic and Organised Crime Control Act [Cap. 200 R.E. 2002] ("the EOCCA") as amended by the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016.

In respect of the first count, it is alleged that on 25th October, 2017 at a certain point in the Indian Ocean, within Tanzania's territorial waters, the accused persons trafficked in narcotic drug namely Heroin weighing 111.2 kilograms. In respect of the second count, it is alleged that, on 25th October, 2017 at the same point in the Indian Ocean, within Tanzania's territorial waters, the accused persons were found in unlawful possession of narcotic drug namely *Cannabis Sativa* weighing 451.7 grams.

At the trial, Ms. Monica Mbogo, learned Principal State Attorney, Ms. Cecilia Shelly, learned Senior State Attorney, Ms. Batilda Mushi and Ms. Clara Charwe, learned State Attorneys represented the Republic, whereas Mr. Jethro Turyamwesiga, learned Advocate, represented the first, second, fourth to tenth accused persons; Ms. Hajra Mungula and Mr. Ahmed Mwita, learned Advocates, represented the third accused person, while Messrs. Juma Nassoro and Alfred Shanyangi, learned Advocates, represented the eleventh and twelfth accused persons and Ms. Mwanahamisi Kilongo, learned Advocate, represented the thirteenth accused person. Since the first to tenth accused persons did not

understand the language of the proceedings, *i.e.* Kiswahili, they for that reason enjoyed the services of Ms. Flora Washokera who interpreted the proceedings from Kiswahili to Farsi language and vice versa. I sincerely thank the Counsel of both parties, the interpreter and everyone who took part in the proceedings of this case for their tireless efforts towards determination of this case.

To establish the case against the accused persons, the prosecution side called in ten (10) witnesses to testify, namely, Francis Emily Kway (PW1), SP Neema Andrew Mwakagenda (PW2), Edwin Emilian (PW3), Inspector Lubambe Kanyumbu (PW4), Sylvester Samwel Mombo (PW5), H.8843 D/C Optatus (PW6), Meja Ally Ndakeye (PW7), Amani Pascal Mbilinyi (PW8), Francis Hyasint Hyera (PW9) and Assistant Inspector Wamba (PW10). They also tendered thirteen (13) exhibits, which were all admitted, thus: Exhibit P1, Government Chemist Analysis Report dated 31/10/2017; Exhibit P2, Submission Form No. DCEA 001; Exhibit P3, 104 packets of narcotic drugs with their packages; Exhibit P4, Government Chemist Analysis Report dated 15/11/2017; Exhibit P5, Envelopes containing Cannabis Sativa labelled 'F' & 'F1' and 'H'; Exhibit P6, Black bag, Light green bag, Khaki bag, Sulphate bag and Green bag; Exhibit P7, a map titled "Point of verification within the outer limit of extended continental shelf of the United Republic of Tanzania"; Exhibit P8, Certificate of Seizure dated 26/10/2017; Exhibit P9, Dhow named MV Ammar; Exhibit P10, Certificate of Seizure dated 26/10/2017; Exhibit P11, Certificate of Seizure dated 27/10/2017; Exhibit P12, Sample Submission Form No. DCEA 001 and Exhibit P13, Cautioned Statement of Ally Abdallah Ally. On the other hand, the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth, accused persons testified

under oath as DW1, DW2, DW3, DW4, DW5, DW6, DW7, DW8, DW9, DW10, DW11, DW12 and DW13 respectively, and did not tender any exhibit.

In the main, the body of evidence by the prosecution presents a case that, on 24th October, 2017, PW2 received instructions from his superior to go to the Navy Brigade at Kigamboni to join a navy team for a patrol to be conducted in the Indian ocean following information about drug traffickers from Iran to Tanzania. PW8, senior captain in one of two patrol boats, crew and some essential tools around 1730 hours departed from Kigamboni to start the patrol. According to PW8 they headed towards North Eastern part of Unguja Island and after sailing for about four and a half hours, at a distance of 6 nautical miles, he detected a vessel on their radar. They went closer and managed to see a wooden dhow, Exhibit P9. PW8 switched on the search light and managed to see the crew on the dhow, *i.e.* the first to the tenth accused persons, who were of Arab descent. In the meanwhile, they also saw another small boat, by the side of the dhow with four persons, the two of them, *i.e.* the eleventh and twelfth accused persons managed to board in the navy boat upon being instructed to do so. The other two remained in their boat on the reason of mechanical defect. Somehow, that small boat with the other two persons in it, due to bad weather drifted away and could not be traced again. According to PW4, upon preliminary interrogation, the eleventh and twelfth accused persons told them that they went there to receive drugs from the said dhow on the instructions of the thirteenth accused person. They searched them and seized various items including mobile phones, GPS device and an exercise book containing recorded coordinates.

Thereafter, PW8 instructed certain members of the patrol team, *i.e.* the boarding team, including PW4, to board in Exhibit P9. On a quick search in the captain's cabin, they saw several bags, which they suspected to contain narcotic drugs. Accordingly, they informed PW8 who instructed other members of the patrol team to enhance security. In the course of preparation for the journey back to Kigamboni, the weather changed. Due to rain and heavy waves, as noted above, the small boat drifted away and that is how the two other persons managed to escape. Around 0100 to 0200 hours, they started to return back. They arrived at Navy port at Kigamboni on 25th October, 2017 at around 2300 hours where all twelve accused persons remained and slept in the dhow. On 26th October, 2017 in the morning, other officers from the Drug Control and Enforcement Authority (DCEA) including PW6, PW9 and PW10 went to the dhow together with an independent witness, PW5 and the interpreter, PW7. Upon inquiry, PW7 realised that, ten accused persons were speaking Farsi language and were Iranian nationals. He introduced himself and they also introduced themselves by their respective names. Through PW7, the accused persons were told about an intended search to be carried out in the dhow; after they agreed, the search began.

In the course of searching, at the bottom room in the captain's cabin, they found five bags, four were clothed bags, while one was made of polythene materials, commonly known as "*sulphate*" bag as it was referred by prosecution witnesses; all bags contained some packets with powdered substance suspected to be narcotic drugs. Upon opening the bags, they found 19 packets in a black bag, 30 packets in a light green bag, 20 packets in a khaki bag, 14 packets in the *sulphate* bag and 21 packets in a green bag. A total of 104 packets and the bags were seized by PW4

through the certificates of seizure (Exhibits P8) which was signed by all twelve accused persons together with PW5. On the same day, PW4 handed over the seized exhibits to the custodian of exhibits, PW2 who labelled the black bag as "A" and the packets therein "A1 to A19"; the light green bag as "B" and the packets therein "B1 to B30"; the khaki bag as "C" and the packets therein "C1 to C20"; the *sulphate* bag as "D" and the packets therein "D1 to D14" and the green bag as "E" and the packets therein "E1 to E21". After that, he sealed the bags and stored them in the exhibits' room.

Around 1400 hours to 1600 hours, PW10 continued with the search exercise and in the course, he found various items including substances in the form of powder and 27 small packets containing black substances suspected to be narcotic drugs. The same were retrieved from a drawer in captain's cabin and seized through exhibit P10 that was signed by the twelve accused persons and PW5. After that, he handed over seized exhibit to PW6 who stayed with them in the dhow until the following day. At the same time, the search exercise was postponed until the following day. In the same evening, PW9 recorded the cautioned statement of the eleventh accused person in the dhow.

On 27th October, 2017 in the morning hours, PW9 continued with the search exercise in the dhow in the presence of all twelve accused persons, PW5, PW7 and other DCEA officers. In the course of search in the captain's cabin, he managed to find various items including two other plastic bags containing semi solid substance in black colour. The exhibits were found in the drawer and seized through Exhibit P11 that was signed by first to tenth accused persons together with PW5. After that he handed over the seized exhibits to PW6 and proceeded to record additional statement of the

eleventh accused person which was admitted in court as Exhibit P13 following a trial within a trial. Upon completing the search exercise, PW6 went to the office and handed over the exhibits to PW2 who after receiving, registered them in the exhibits' register, followed by labelling exercise. Among the exhibits she labelled were Exhibit P5, some 27 small packets containing black substance, which were labelled as "H" and two plastic bags containing semi solid black substance were labelled as "F" and "F1". After labelling, PW2 continued with the packing exercise in the presence of all twelve accused persons. The packets marked "H", "F" and "F1" were packed in envelopes marked H, F and F1 respectively. The 104 packets in bags A, B, C, D and E were packed in nylon bags and labelled A, B, C, D and E respectively. Thereafter, she handed over bags with mark "A", "B", "C", "D" and "E" to PW4 and envelopes marked "H", "F", "F1" with other envelopes and small box containing substances seized from the dhow to PW6 so that they could be submitted afterwards to the Government Chemist Laboratory Authority (GCLA).

Then, PW2, PW4 and PW6 went to GCLA offices and upon arrival at the reception, PW1 was called for purpose of registration. PW1 went at the reception and registered the exhibits by laboratory number. Exhibits submitted by PW4 were registered as Lab. No. 3030/2017 and those submitted by PW6 were given Lab. No. 3031/2017. After that, they went to the laboratory with the exhibits. At the laboratory, PW1 began by receiving exhibits submitted by PW4. Upon receiving and confirming, PW1 opened bag "A" with 19 packets marked "A1 to A19", bag B" with 30 packets marked "B1 to B30", bag "C" with 20 packets marked "C1 to C20", bag "D" with 14 packets marked "D1 to D14" and bag "E" with 14 packets marked "E1 to E21". He opened a total of 140 packets containing powder

substance and began to weigh each packet by separating powder with package. After weighing all 104 packets, he got a total weight of 111.2 kilograms. Then he proceeded with preliminary tests by drawing sample from each packet. After that, he mixed the sample with Mecke reagent whereby every sample from all 104 packets changed colour to dark green which is a preliminary result of narcotic drug namely heroin hydrochloride.

Following the preliminary tests, PW1 drew samples from each packet for confirmatory test. Then he repacked the packets, sealed the same and put back into their respective bags, "A", "B", "C", "D" and "E". After that, he put bags "A" and "B" in one box, bag "C" and "D" in another box and bag "E" in another box. He then sealed all three boxes with GCLA seals, marked the same with Lab. No. 3030/2017 and handed over to PW4. Thereafter, he turned to PW6 and received the exhibits he submitted. He received eight envelopes and small box containing other envelopes including those with mark "F", "F1" and "H". Then he drew samples from each envelope and conducted preliminary test by mixing with *dequesnos-levine* reagent. All samples did not change colour except sample from envelope "F", "F1" and "H" which changed into violet colour indicating narcotic drug namely *cannabis sativa*. He then drew samples from each all envelopes for confirmation test and stored the same in his locker. Thereafter, he repacked each envelope, sealed them and handed over back to PW6. PW4 and PW6 handed over the exhibits to PW2 who stored them until they were brought and tendered before this Court.

PW1 proceeded to conduct confirmatory test over the samples he drew. He used the machine called Liquid Chromatography Mass Spectrometer (LC-MS/MS). According to him, during the analysis the machine was working properly whereby before and after each test, he

tested the machine by running a blank sample so as to ensure it is not contaminated. After analysis, all 104 samples from 104 packets were confirmed as narcotic drugs namely heroin hydrochloride. On the other hand, samples from envelopes "F", "F1" and "H" were confirmed as *cannabis sativa* after being found with tetrahydrocannabinol chemical which is only found in cannabis sativa. According to PW1, a total weight of cannabis sativa in the three envelopes was 451.7 grams. After getting the results, he prepared a report for each test and submitted to the Chief Government Chemist for approval. Both reports were admitted as Exhibits P1 and P4.

In their defence, the accused persons categorically refuted to traffic the 111.2 kilograms of heroin hydrochloride. They also denied to be found in possession of 451.7 grams of cannabis sativa. The first to the tenth accused persons claimed that they were mere fishermen in Chabakhar Iran. Apart from being fishermen, DW1 is also a captain whereas, DW2 is a mechanic but he was referred as engineer by his co-accused and DW3 was a cook in the said dhow. As for DW4 to DW10 their main duty was fishing by throwing nets in the ocean and pulling the same from the ocean. Save for DW6 who claimed to be hired by DW2 but others said to be hired by DW1. On the other hand, DW11 is a fisherman in Zanzibar, DW12 is involved in maintenance of boats and DW13 is a businessman of used clothes at Mwenge, Dar es Salaam.

According to the evidence of DW1 to DW10, they left Chabakhar, Iran and went to fish in the high sea. In the high sea, they were caught by Australian soldiers who conducted search in their ship but found nothing. Then they put a sticker to confirm nothing was found therein. After being released, they kept on fishing and in the following morning the weather

and due to heavy waves, their ship was damaged and engine got defect. It began to leak as a result it drifted away and found themselves into the territorial waters of the United Republic of Tanzania. Then, around 2100 hours to 2200 hours, they saw two ships and were put under restraint following a gun shot on air. Thereafter, a small boat came closer with seven to eight police officers who boarded in their ship. After boarding, according to DW1, he was taken out of his cabin, handcuffed and gathered in one area with his colleagues who were also handcuffed. Thirty minutes later, he was taken back to his cabin where he was showed the alleged narcotic drugs in two plastic bags. However, according to DW2 to DW10, they did not see those drugs in their ship and they claimed to see them for the first time when they were tendered before this Court.

After the arrest on the said night, they travelled until the following night when they arrived at the place unknown to them. Upon arrival, they slept until the following morning whereby after breakfast, other people arrived including interpreter (PW7) who was speaking broken Farsi. DW1 denied to sign Exhibit P10. DW2 to DW10 also denied to have signed the documents brought before this Court but admitted to sign a in document after being told by PW7 that it will be taken to their Embassy to be assisted with their impaired ship. They denied to know DW11 to DW13 or to have any connection or communication with them. They also claimed to had the fishing permit but the same was taken by the police upon arrest. They insisted to be innocent and prayed to be acquitted.

On the other hand, the evidence of DW11 and DW12 is to the extent that, on 24th October, 2017, they departed Saateni area in Zanzibar and went to fish in the ocean. The captain of their boat is called Feisal and they were four in total. Upon reaching at the fishing area, the weather changed

and the rain began. They decided to return back to avoid strong wind and heavy waves. On their way back, their boat broke and started to leak in water whereby they saw light and following the order, they went close and managed to see navy boat. After conversation, they were ordered to board in the said boat but later the captain and his assistant were taken back to their boat. According to DW11, inside the navy boat, he was put in a corridor and beaten while called pirate and terrorist. On arrival at Navy base, Kigamboni, he was taken to Central police station and on 26th and 27th October, 2017, he was taken to Navy base, Kigamboni and returned to central police. On 28th October, 2017, he was taken to the office of drug Authority and it was when he was tortured and forced to confess that he went to the ocean to receive drugs. They claimed to see DW1 to DW10 for the first time on the date they were arraigned to court. As for DW13, they met him for the first time on 27th November, 2017 before the court. They insisted to be innocent and prayed to be acquitted by the order of this Court.

As far as DW13 is concerned, he claimed to be arrested on 31st October, 2017 on his way from Mlimani city to his office, Mwenge by police officers in the motorcycle commonly known as "tigo". He was arrested because he was riding a motorcycle without helmet and insurance. Upon the arrest, the police officers demanded to be given Tshs.300,000/= but he refused and after arguing, they took him to Salender police station and locked him. On 1st November, 2017, the same officers arrived and took him up to his house for search. In the course of search, they found nothing whereby they took him up to central police station where he stayed until 10th November, 2017 when he was taken to Kigamboni police station. After staying for seven days, on 17th November, 2017 he was taken back to

Central police station until 27th November, 2017 when he was arraigned to Kisumu Resident Magistrate Court where he met DW1 to DW12 for the first time. He denied to send DW11 to receive narcotic drugs or to have communicated with him as alleged by prosecution witnesses. He persisted to be innocent and prayed to be acquitted.

In a nutshell, that was the evidence of the Prosecution and Defence. Counsel of both parties save for Mr. Turyamwesiga filed their final written submissions. In their submissions counsel for Defence raised various issues including jurisdiction, chain of custody, status of retracted confession and common intention. I will consider these issues in the course of this judgment. Having carefully considered the evidence on record and submissions by Counsel of both sides, the issues before the Court for determination are, **one**, *whether this Court has jurisdiction to try this case*; **two**, *whether Exhibits P3 and P5 were found in the dhow*; **three**, *whether substance contained in Exhibits P3 and P5 is narcotic drugs*; **four**; *whether chain of custody was maintained* **and five**, *whether the accused persons had common intention*.

Before determining the issues at hand, it is vital to underscore here that, according to Section 3 (2) (a) of the Evidence Act [Cap. 6 R.E. 2002], in criminal matters, a fact is said to be proved when the court is satisfied by the prosecution beyond reasonable doubt that such fact exists. That is to say, the guilt of the accused person must be established beyond reasonable doubt. Generally, and always, such duty lies with the prosecution except where any statute or other law provides otherwise. One of such exceptions is Section 28 (1) of the Drug Act. According to this section, in drugs cases, the accused person has the duty to prove that the possession, dealing in, trafficking, selling, cultivation, purchasing, using or

financing is in accordance with the licence or permit granted under the Drug Act. However, it is trite law that, when the burden shifts to the accused person, the standard of proof is not as higher as that of the prosecution. See the case of **Said Hemed v. Republic** [1987] TLR 117.

Starting with the first issue, it was the contention of Mr. Nassoro that the offence was committed between Pemba and Unguja Islands which is outside Tanzania Mainland upon which the Drug Act is not applicable. He further contended that, although before being amended in December, 2017, the Drug Act was applicable outside Mainland in circumstances mentioned under section 1 (3) (b) (i) to (iv) but still, this Court has no jurisdiction to try any offences committed outside Tanzania Mainland. To him, the accused persons were supposed to be tried by the High Court of Zanzibar.

First and foremost, it is undisputed that save for the thirteenth accused person, all accused persons were arrested in the Indian ocean within the territorial waters of the United Republic of Tanzania. This has been established by the evidence of PW8, the captain of the Navy boat who stated that, the accused persons were arrested at longitude 39⁰ 24' and latitude 05⁰ 34'. The coordinates were sent to the Ministry of Lands and Human Settlement Development and interpreted by PW3 who confirmed that it was within the territorial waters of the United Republic of Tanzania. Their evidence is supported by Exhibit P7. But there is no evidence from PW3 or PW8 stating that the point of arrest was either at Tanzania Mainland or Tanzania Zanzibar. However, according to section 1 (2) of the Drug Act, its applicability is limited to Tanzania Mainland only. Nonetheless, there are circumstances upon which the Drug Act is

applicable outside Tanzania Mainland. These are provided under section 1
(3) (b). The section is reproduced as hereunder;

(3) In respect of Part III and IV, shall apply to conduct;

(a) N/A

(b) Outside Mainland Tanzania, to-

(i) a citizen of the United Republic or person who ordinarily reside in Mainland Tanzania.

(ii) a body corporate incorporated in or carrying on business in Mainland Tanzania; or

(iii) any other person, in relation to the supply or possible supply by that person of any narcotic drug or psychotropic substance to a person in Mainland Tanzania

(iv) on a ship registered in or having a nationality of a convention State other than Tanzania;

(v) a ship not registered in any state; or

(vi) on a ship assimilated under the international law of the sea, a ship of no nationality.

What I gather from the extract above is that, in any amongst the situations mentioned above, the Drug Act is applicable outside Tanzania Mainland for the conduct under Part III which include the offences under section 15 upon which the accused persons are charged. In the matter at hand, there was no evidence from either side to establish that the dhow in which the first to the tenth accused persons were found is registered by any state. The same applies to the small boat that was used by the eleventh and twelfth accused persons. Apart from that, this Court had the opportunity to see Exhibit P9 on a visit at the Navy base in Kigamboni where it is parked. There was no any flag of any state to establish its

nationality. Therefore, basing on the circumstances mentioned under (v) and (vi) above, the Drug Act is applicable in the conduct concerning the case at hand. Likewise, since this Court has powers to try offences under the Drug Act pursuant to paragraph 23 of EOCCA, the issue of lack of jurisdiction does not arise. Thus, it suffices to conclude that, this Court has jurisdiction to try and determine this case.

Reverting to the second issue, it is the evidence of PW4 that, after they boarded in Exhibit P9, and upon a quick search, they found several bags suspected to have narcotic drugs. Upon seeing that, they intensified the security and began their journey back to Dar es Salaam. On arrival at the Navy base at Kigamboni, the accused persons stayed in Exhibit P9 and in the morning, a search was conducted therein. In the course of search, they found five bags containing packets with powder suspected to be narcotic drugs. The bags were found at the bottom room in the captain's cabin. After opening, they found 19 packets in the black bag, 30 packets in light green bag, 20 packets in khaki bag, 14 packets in the *sulphate* bag and 21 packets in green bag. He seized the bags with a total of 104 packets via Exhibits P8. According to him, all twelve accused persons signed it together with PW5. The evidence of PW4 is supported by the evidence of the independent witness to the search, PW5 and the interpreter, PW7 whereby they witnessed the four bags and one *sulphate* bag retrieving from the bottom room in captain's cabin. Apart from that, after opening the bags, they also saw packets containing powder suspected to be narcotic drugs. According to their evidence, the packets were 104 after being counted. It was also their evidence that, after counting, the certificate of seizure was prepared and signed by all accused persons together with PW5.

So far as Exhibit P5 is concerned, according to the evidence of PW10 when PW4 completed his part of search, he took over and continued with search exercise whereby, in the course, he found various items including 27 small packets containing black substances suspected to be narcotic drugs. According to his evidence, the same were retrieved from a drawer in the captain's cabin. After retrieving, he seized them and prepared certificate of seizure, Exhibit P10 that was signed by all twelve accused persons and PW5. His evidence is also supported by the evidence of PW5 and PW7. Although PW5 during cross examination he admitted that the eleventh and twelfth accused persons did not sign in exhibit P10 but he insisted that the first to tenth accused persons signed it. Moreover, according to PW9, on the next day, 27th October, 2017 during the search conducted by him, among other things, he managed to retrieve two packets with semi solid substance from the drawer in captain's cabin. After that, he prepared the certificate of seizure, Exhibit P11 which was signed by him, accused persons and PW5. His evidence is also supported by the evidence of PW5 and PW7.

Therefore, from the evidence of PW4, PW5, PW7, PW9 and PW10 as well as Exhibits P8, P10 and P11, there is no doubt that 104 packets containing powder substance as well as 27 seven small packets and two packets containing semi solid substance were found in the bottom room and drawer in the captain's cabin. However, the first to tenth accused persons disassociated themselves with Exhibits P3 and P5. According to their defence, Exhibits P3 and P5 were not retrieved from their dhow. They totally denied to have ever seen those exhibits in the said dhow. As for first accused, he claimed to see them after the police officers boarded in the dhow. According to them, in the high sea they were arrested and searched

by Australian soldiers and nothing was found in their dhow. They also claimed that, after search, those soldiers put a sticker to signify that they found nothing therein.

If I understood them correctly, to them, those exhibits were planted by the police or navy officers who boarded in their dhow. I have carefully examined their defence on this issue. Nonetheless, I must hasten to state rightly that, I see no basis of their defence due to the following reasons. First and foremost, during cross-examination by counsel for the Republic, all ten accused persons admitted that the persons who boarded in their dhow carried nothing apart from guns. Secondly, the issue of being searched and given the sticker by Australian soldiers is implausible. I had the opportunity of examining the said sticker in Exhibit P9 on a visit at the Navy base in Kigamboni. The sticker in question has a sign of mobile phone with number 16 at the centre and surrounded by other signs including danger sign, firearms crossing each other, sinking ship and leaf. These signs by themselves do not show anything to signify that search was conducted in the dhow and nothing was found. The said sticker has nothing to show it is issued by or belongs to Australian authorities. If they were really searched in the high sea, one may wonder what the Australian soldiers were doing in the high sea beyond territorial waters of the Australia. Be it as it may, assuming they were really searched within territorial waters of Australia and found with nothing, yet still, from Australia to territorial waters of the United Republic of Tanzania is very far and anything might have happened in between.

Apart from that, the accused persons also denied to have signed in seizure certificates claiming that they understood nothing written therein. Also, they claimed that they did not understand PW7. But the accused

persons were availed with the interpreter, PW7 who was translating Kiswahili to Farsi language and the vice versa. They claimed to understand PW7 a little bit because he was speaking broken Farsi. If they did not understand him as they claimed, then how come they heard and understand him when he told them to sign a document for purpose of taking the same to their Embassy for assistance! Also, how come they understood him on the first day before the committal court when they were told they are not required to say anything as it appeared in their testimonies? In the considered view of this Court, the first to tenth accused persons signed in Exhibits P8, P10 and P11 to acknowledge the seizure of all exhibits found in the dhow. In the case of **Song Lei v. The Director of Public Prosecutions and Others**, Consolidated Criminal Appeals No. 16 A of 2016 & 16 of 2017 [2019] TZCA 265 at www.tanzlii.org the Court of Appeal stated that:

"...having signed the certificate of seizure which is in our considered view valid, he acknowledged that the horns were actually found in his motor vehicle."

Basing on the position of the law above, it is clear that the certificates of seizure, Exhibits P8, P10 and P11 are valid, and they prove that the seizure was conducted in the dhow by PW4, PW9 and PW10 on 26th and 27th October, 2017 at Navy base, Kigamboni where Exhibits P3 and P5 were found therein. Basing on the evidence on record, there is no possibility of those exhibits to have been planted to incriminate the accused persons. Hence, the second issue is answered in affirmative.

I now turn to the third issue, whether Exhibits P3 and P5 are narcotic drugs. It is on evidence of PW1 that, after receiving exhibit P3, he weighed the same and got total weight of 111.2 kilograms for all 104 packets.

Thereafter, he drew sample from each packet and conducted preliminary test whereby after mixing sample with Mecke reagent, every sample from all 104 packets changed its colour to dark green which is preliminary result of narcotic drug namely heroin hydrochloride. He did the same to Exhibit P5 which weighed 451.7 grams. After drawing sample from each envelope, he conducted preliminary test by mixing with *dequesnos-levine* reagent. The sample from envelope "F", "F1" and "H" changed its colour into violet indicating narcotic drug namely *cannabis sativa*. After preliminary tests, he drew samples from each exhibit for confirmation test. PW1 proceeded to conduct confirmatory test by using the machine called Liquid Chromatography Mass Spectrometer (LC-MS/MS). According to him, during the analysis the machine was working properly whereby before and after each test, he tested the machine by running a blank sample so as to ensure it is not contaminated. After analysis, all 104 samples from 104 packets were confirmed as narcotic drugs namely heroin hydrochloride. On the other hand, samples from envelopes "F", "F1" and "H" were confirmed as *cannabis sativa* after being found with *tetrahydrocannabinol* chemical which is only found in *cannabis sativa*. PW1 concluded his analysis by preparing the reports, Exhibit P1 and P4. Section 48A (2) of the Drug Act as amended provides as follows;

*"Notwithstanding anything contained in any other law for the time being in force, any document purporting to be a report signed by a Government Analyst shall be admissible as evidence of the facts stated therein without formal proof **and such evidence shall, unless rebutted, be conclusive.**"*
(Emphasis supplied).

From the evidence of PW1 there is no doubt that Exhibits P3 and P5 are narcotic drugs namely heroin hydrochloride and *cannabis sativa*. In the light of provisions of the law above, since there is no any evidence to the contrary, Exhibits P1 and P4 are conclusive proof that Exhibits P3 and P5 are narcotic drugs in the ambit of section 2 and the First Schedule to the Drug Act. According to the reports heroin hydrochloride and *cannabis sativa* have effect of causing drug dependence which lead to central nervous system disorder. Thus, the third issue is answered positively.

Coming to the fourth issue concerning chain of custody, counsel for the Republic submitted that, through oral testimony of PW1, PW2, PW4, PW5, PW6, PW7, PW9 and PW10, it was proved how Exhibits P3 and P5 were handled from seizure to point they were brought before this Court. To them, these witnesses were credible, hence they should not be doubted. They cited the cases of **Goodluck Kyando v. Republic** [2006] TLR 363, **Khamisi Said Bakari v. Republic**, Criminal Appeal No. 359 of 2017 CAT (unreported) to support their submission. On the other hand, counsel for thirteenth accused person was of the view that, the prosecution has failed to establish chain of custody from the moment the exhibits were seized. It was also her contention that, the prosecution did not produce any document to establish movement of exhibits from PW4 to PW2 and from PW6 to PW2. She cited the famous case of **Paulo Maduka and Another v. Republic**, Criminal Appeal No. 110 of 2007 CAT (unreported) to support her argument.

It is settled that, in cases involving movement of exhibits from one point to another, the evidence concerning chain of custody is of utmost importance. As a matter of principle, it is well settled that as far as the issue of chain of custody is concerned, it is crucial to follow carefully the

handling of what was seized from the accused, is the same which was finally tendered in court. There is a mammoth of authorities giving guidance on chain of custody including the landmark case of **Paulo Maduka and Four Others v. Republic** (supra). This case insisted on the proper documentation of the paper trail from the time of seizure up to the stage the exhibit is tendered in court as evidence.

However, documentation is not the only way of establishing chain of custody. The jurisprudence on this area has been developed day after day. In the case of **Chacha Jeremiah Murimi and Three Others v. Republic**, Criminal Appeal No.551 of 2015 [2019] TZCA 52 at www.tanzlii.org it was held and I quote;

"In establishing chain of custody, we are convinced that the most accurate method is on documentation as stated in Paulo Maduka and Others vs. R., Criminal Appeal No. 110 of 2007 and followed by Makoye Samwel @ Kashinje and Kashindye Bundala, Criminal Appeal No. 32 of 2014 cases (both unreported). However, documentation will not be the only requirement in dealing with exhibits. An exhibit will not fail the test merely because there was no documentation. Other factors have to be looked at depending on the prevailing circumstances in every particular case. For instance, in cases relating to items which cannot change hands easily and therefore not easy to tamper with, the principle laid down in Paulo Maduka (supra) would be relaxed."

It is apparent from the extract above that, for exhibits which cannot change hands easily, oral testimony on handling the exhibit suffices to establish the chain of custody. On the other hand, for exhibits that change

hands quickly, such as narcotic drugs and the like, the most accurate method to establish chain of custody since is documentation. However, with jurisprudence development, even in the latter type of exhibits, oral testimony from credible witnesses is sufficient to establish the chain of custody. See the case of **Charo Said Kimilu and Another v. Republic**, Criminal Appeal No. 111 of 2015 CAT (unreported) which involved *cannabis sativa*. In another case of **Chukwudi Denis Okechukwu and Three Others v. Republic**, Criminal Appeal No. 507 of 2015 [2018] TZCA 255 at www.tanzlii.org which involved narcotic drugs namely cocaine hydrochloride, oral testimony was held to be sufficient to establish chain of custody. See also the case of **Marceline Koivogui v. Republic**, Criminal Appeal No. 469 of 2017 [2020] TZCA 252 at www.tanzlii.org which involved narcotic drugs namely heroin hydrochloride.

In the matter at hand, the evidence on record shows that, upon seizure, PW4 handed over Exhibit P3 within the bags whereby PW2 labelled black bag as "A" and the packets therein "A1 to A19"; light green bag as "B" and packets therein "B1 to B30"; khaki bag as "C" and packets therein "C1 to C20"; sulphate bag as "D" and packets therein "D1 to D14" and green bag as "E" and packets therein "E1 to E21". After that, he sealed the bags and stored them in exhibit room. In the following day, she packed the exhibits in the presence of all twelve accused persons and handed over to PW4 who took them and handed over to PW1. After preliminary analysis, PW1 repacked the exhibits and handed over to PW4 who on the same day, handed over to PW2. Then PW2 took back to the exhibits room and stored the same until they were brought and tendered before this Court. Likewise, for Exhibit P5, after seizure on 26th October, 2017, PW10 handed over to PW6 who stayed with them in the dhow until the following morning when

the search resumed. After search, PW9 handed over to him two packets whereby he went to the office and handed over to PW2 who labelled them as "H", "F" and "F1" respectively. Thereafter PW2 packed and handed over to PW6 who took to PW1 for analysis. After analysis, PW1 handed back to PW6 who also handed over to PW2. Upon receiving, PW2 stored the same in exhibits room until they were brought and tendered before this Court. All witnesses, PW1, PW2, PW4, PW6, PW9 and PW10 identified Exhibits P3 and P5 as the ones they handled at one point to another. Therefore, from the evidence of PW1, PW2, PW4, PW6, PW9 and PW10 which I find credible, there is no shadow of doubt that, the substance that were seized, are the very one which were examined by the Government Chemist and tendered in evidence. Thus, the fourth issue is also answered positively.

Turning to the last issue, it was the contention of counsel for eleventh and twelfth accused persons that, the evidence from the prosecution does not establish the eleventh and twelfth accused persons had common intention with the first to tenth accused persons to commit the charged offences. He insisted that, mere presence at the crime scene does not render a person criminally liable of the offence committed therein. He further contended that, the eleventh and twelfth accused persons cannot be convicted on the retracted confession of eleventh accused person without other evidence to corroborate the same. The issue of retracted confession was also raised by counsel for thirteenth accused person. According to her, the thirteenth accused person cannot be convicted basing on confession of co-accused without corroboration which is lacking from the prosecution evidence. The cases of **Morris Agunda and Two Others v. Republic** [2003] TLR 449, **Tuwamoi v. Uganda** [1967] EA 84, **Pascal Kitigwa v. Republic** [1994] TLR 65, **Republic v.**

ACP Abdallah Zombe and 12 Others, Criminal Session No. 26 of 2006 (unreported) and **Wassa and Another v. Uganda** [2002] 2EA 667 were cited to support their submissions.

It is worthwhile noting here that, when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in due course an offence is committed and its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence. See section 23 of the Penal Code [Cap.16 R.E. 2019]. To constitute common intention, it is not necessary that there should have been any concerted agreement between the accused persons prior to the commission of the offence but common intention may be inferred from their presence, their action and the omission of any of them to dissociate himself from the omission. See the case of **Godfrey James Ihuya and Another v. Republic** [1980] TLR 197. It is also prudent to note that, mere presence of the accused person at the scene of crime is not enough to infer common intention and implicate him to committed offence. Refer the case of **Jackson Mwakatoka and 2 Others v. Republic** [1990] TLR 17.

In the instant matter, the prosecution might have intended to implicate all accused persons through the evidence of PW4 and PW8 under the doctrine of common intention in the sense that, the first to thirteenth accused persons prosecuted common intention to trafficking in and possession of narcotic drugs. According to the evidence of PW4 and PW8, they arrested the first to tenth accused person in the dhow after they saw bags suspected to contain narcotic drugs. It must be recalled that, this is the same dhow that upon being searched, Exhibits P3 and P5 were retrieved. However, a mere fact that these accused persons were all in the

said dhow is not the conclusive evidence that they had common intention to traffic and possess those drugs. It can be remembered that, all accused persons denied to have ever seen those drugs in the dhow except the first accused person who claimed to have seen them thirty minutes after the police officers boarded in the dhow. But the assertion by the first accused person cannot stand as I have already concluded that, there was no possibility of those drugs to be planted therein. All prosecution witnesses who were at the search confirmed that, the drugs in question were found in the captain's cabin whereby the drugs in Exhibit P3 were found in the bottom room in the captain's cabin and the drugs in Exhibit P5 were found in the drawer within the captain's cabin.

But one may ask, who was in control of captain's cabin? The answer to this question is found in the testimony of PW4. PW4 during cross examination admitted that, the captain's room is the wheel room for controlling the ship and is not the resting room for other suspects. Apart from that the eighth accused person (DW8) on response to the question from court he stated that the back and bottom rooms in the captain's cabin were used by the captain and engineer. It can be recalled that these are the first and second accused persons. Apart from that, there is no evidence from the prosecution witnesses that in the said bottom room they found personal properties of the accused persons. From this evidence, it is clear that, apart from the captain and the engineer, no one had access to the room upon which the drugs were retrieved. Moreover, save for the sixth accused person who claimed to be hired by the second accused person, others, the third, fourth, fifth, seventh, eighth, ninth and tenth accused persons claimed to be hired by the first accused person. The third accused person was hired as a cook while others were just fishermen. In addition,

during cross examination, DW5 admitted that it was the captain who was assigning duties and it was him who told them about going to fish in the high sea. Under these circumstances, it clear that the first and second accused persons were the ones who hired the third to tenth accused persons. Besides, the first and second accused persons did not refute this fact in their defence. It was the two who had control over the dhow in question and everything contained therein. Likewise, it was the duo who had knowledge of what was in the captain's cabin including narcotic drugs found therein. In that regard, it is the considered view of this Court that, the third, fourth, fifth, sixth, seventh, eighth, ninth and tenth accused persons had no access or control of the captain's cabin hence, had no knowledge of the presence of narcotic drugs within the said cabin. Since were all hired by the first and second accused persons, they had no control of where they were going. Thus, I find it safe to conclude that, the third to tenth accused persons, did not form common intention with the first and second accused persons to traffic and possess the drugs in question. But under the circumstances explained above, it is apparent that the first and second accused persons had common intention to commit the alleged offences.

As far as the eleventh, twelfth and thirteenth accused persons are concerned, the only evidence that connects them with the alleged offences is the confession (Exhibit P13) of the eleventh accused person that was admitted following a trial within a trial after being retracted. Worse enough, far as the thirteenth accused person is concerned, there is no scintilla of evidence from the prosecution to show when and how he was arrested in connection of this case. Nonetheless, looking closely at Exhibit P13, the same is not a confession in terms of Section 3 (1) (c) of the

Evidence Act [Cap. 6 R.E. 2002] as the eleventh accused person did not admit the ingredients of the offence or trafficking or possession of narcotic drugs. Since it was retracted, it requires corroboration before relied upon as a basis for conviction against him. Likewise, as against the twelfth and thirteenth accused persons, it is a confession of co-accused whereby according to section 33 (2) of the Evidence Act, their conviction cannot be solely based on that confession. Moreover, although PW4 and PW8 claimed that upon arrest and inquiry, the eleventh and twelfth accused persons made oral confession about being there to receive narcotic drugs on instructions of the thirteenth accused person, but the two accused in their defence, denied to have confessed anything. In that view, the evidence of PW4 and PW8 on that facts needs corroboration. Since Exhibit P13 requires corroboration, it cannot be used to corroborate the evidence of PW4 and PW8. See the case of **Mkubwa Said Omar v S.M.Z.** [1992] TLR 365.

Having said so and for the foregoing reasons, it is the finding of this Court that, the prosecution side has failed to prove the case beyond reasonable doubt against the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth accused persons. Thus, I find Abdallah Khatoon Sahib, Ubeidulla Gulamzade Abdi, Naim Baltik Ishaqa, Moslem Amiree Golmohamad, Rashid Badfar, Omary Dorzade Ayoub, Tahir Bishkar Mubarak, Abdulmajid Asqan, Ally Abdallah Ally, Juma Amour Juma and Omari Saidi Mtangi, the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth accused persons respectively, not guilty and they are accordingly acquitted of the charged offences of trafficking in narcotic drugs and unlawful possession of narcotic drugs and are hereby set free.

So far as the first and second accused persons are concerned, for the reasons stated above, it is the finding of this Court that, the prosecution side has managed to prove the case against them beyond the required standard. Besides, there is no evidence from them to prove either trafficking or possession was lawful as they were required under Section 28 (1) of the Drug Act. Therefore, I find the first accused person, Nabibakhsh Pirkakhsh Bibarde and second accused person, Mohamadhanif Nazirahmad Dorzade guilty and I hereby convict them with both counts of trafficking in narcotic drugs and unlawful possession of narcotic drugs contrary to sections 15 (1) (b) and 15 (1) (a) respectively, of the Drug Control and Enforcement Act, No. 5 of 2015 read together with paragraph 23 of the First Schedule to the Economic and Organised Crime Control Act [Cap. 200 R.E. 2002] as amended by the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016.

It is so ordered.



I. K. BANZI
JUDGE
06/11/2020

SENTENCE

I have considered the submission by counsel for prosecution and for the 1st and 2nd accused persons. Admittedly, as submitted by counsel for prosecution, both accused persons are first offenders. I have also considered other mitigation factors submitted by their counsel.

It is apparent that, the offences were committed prior to the amendment of section 15 of the Drug Control and Enforcement Act, No. 5 of 2015. I understand the submission by counsel for prosecution in respect of section 15 (2) of the Drug Control and Enforcement Act, which imposes mandatory sentence of life imprisonment. However, with due respect, the subsection deals with drugs not specified in the schedule to the Act. The language used in section 15(1) (b) is "shall be liable" which according to the interpretation via the case of **Tabu Fikwa v. Republic** [1988] TLR 48 this court has discretion to give sentence other than life imprisonment. Since section 60(2) of the Economic and Organised Crime Control Act [Cap. 200 R.E 2002] as amended imposes the minimum term of 20 years and maximum term of 30 years, considering the magnitude of trafficked drugs i.e. 111.2 kilograms of heroin, I hereby sentence the 1st and 2nd accused to serve 30 years imprisonment each and for each count. The sentences shall run concurrently.



I. K. Banzi
JUDGE
06/11/2020

Order

Exhibit P9, the dhow is hereby confiscated and forfeited to the Government of the United Republic of Tanzania pursuant to section 60(3) of the Economic and Organised Crime Control Act [Cap 200 R.E. 2002] as amended. Likewise, exhibit P3, P5 and P6 are hereby confiscated and the same to be disposed of in accordance with the Drug Control and

Enforcement Act, No. 5 of 2015 together with its Regulations GN No. 173 of 2016.



I. K. Banzi
JUDGE
06/11/2020

Court

Right of appeal against the conviction sentence and order is explained.



I. K. Banzi
JUDGE
06/11/2020