



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL APPEAL NO 37 OF 2017

MATTHEW SHAKE BOLI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 594 of 2016 in the Senior Principal Magistrate's court in Wundanyi delivered by Hon N. N. Njagi (SPM) on 7th February 2017)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Matthew Shake Boli, was charged on two (2) Counts of being in possession of narcotic drugs contrary to 1. Section 3(1) as read with Section 3(2) of the Narcotic Drugs and Psychotropic Substances Control Act No 4 of 1994. In Count I, he was jointly charged with Darius Mwandie (hereinafter referred to as “the Co-Accused person”). The particulars of the said Charge were that on the night of the 3rd day of November 2016 at around 1600 hours at Bura Trading Centre within Taita Taveta County, they were jointly found in possession of narcotic drugs to wit 300 grammes of bhang with a street value of Kshs 3,000/= in contravention of the said Act.
2. In Count II, the Appellant herein was charged alone. The particulars of this charge were that on the aforementioned date, time and place, he was found in possession of narcotic drugs to wit two and a half (2 ½) rolls of bhang with a street value of Kshs 50/= in contravention of the aforesaid Act.
3. The Learned Trial Magistrate Hon N. N. Njagi, Senior Principal Magistrate, convicted the Appellant on Count I and Count II and sentenced him to three (3) and two (2) years imprisonment respectively. He directed that the sentences would run consecutively.
4. Being dissatisfied with the said judgment, on 4th May 2017 the Appellant filed a Notice of Motion application seeking leave to have his Appeal heard out of time, which application was allowed and his Appeal was deemed to have been duly filed and served. He relied on two (2) Grounds of Appeal. He filed his Written Submissions on 31st July 2017.
5. When the matter came up on 14th November 2011, the State informed this court that it would not be filing its Written Submissions because it was conceding to the Appeal herein.

LEGAL ANALYSIS

6. Despite the State conceding to the Appeal herein, this court found it prudent to consider if the reasons it gave for conceding to the appeal were fair and reasonable. Appreciably, an appellate court should consider the facts of a case even where the State has conceded to an appeal to establish if such a concession should be granted.

7. In the case of **Mwanguo Gwede Mwarua vs Republic [2015] eKLR**, the Court of Appeal made a similar observation when it stated as follows:-

“The concession notwithstanding, it is still our duty as a second appellate Court to consider the issues of law raised by the respondent as grounds for conceding the appeal in order to determine whether the said concession is merited.”(See NORMAN AMBICH MIERO & ANOTHER VS REPUBLIC, CR.APP.NO.279 OF 2005 (NYERI)).

8. A perusal of the Appellant’s said Grounds of Appeal and Written Submissions related to the question as to whether or not the Prosecution proved its case beyond reasonable doubt. He had argued that there were contradictions in the evidence of No 2009032216 APC Mohamed Rashid (hereinafter referred to as “PW 2”) who had stated that there were three (3) people who had been found in possession of the bhang and that of No 2008123975 APC Julius Mwendu (hereinafter referred to as “PW 1”) and No 2013021877 APC Saidi Kassim (hereinafter referred to as “PW 3”).

9. He pointed out that PW 3 testified that the bhang he was shown in court was not same one he found him to have been in possession with at the material time and that the bhang was found in his Co-Accused person’s compound, a fact he said, was confirmed by No 88391 PC David Masinde (hereinafter referred to as “PW 4”). It was therefore his submission that the Learned Trial Magistrate erred when he did not consider his defence and mitigation when he sentenced him as aforesaid.

10. Through oral submissions of its counsel, the State admitted that PW 1, PW 2 and PW 3 contradicted each other in their testimonies relating to the amount of bhang the Appellant was said to have been found in possession with and where it was found.

11. It pointed out that PW 1 and PW 2 testified that the Appellant had two (2) rolls of bhang but that PW 2 denied that it was the roll he was shown in court during the hearing. On his part, PW 3 said that the Appellant was found with two and a half (2 ½) rolls of bhang while PW 4 stated that he was found with three (3) rolls of bhang.

12. It was its further submission that the mere fact that the Appellant was found in his Co-Accused person’s house was not conclusive evidence that he was actually in possession of the bhang that was recovered. It argued that the contradictions in the evidence of PW 1, PW 2, PW 3 and PW 4 left it to wonder if they had been truthful while adducing their respective testimonies.

13. A careful perusal of the proceedings herein showed that on the material date, time and place, PW 1, PW 2 and PW 3 were tipped off by an informer that there was a person selling bhang at a certain house. When they got there, the Appellant attempted to flee but he was arrested by PW 2. PW 1 conducted a search and recovered two (2) rolls of bhang from the Appellant herein. He also searched the Appellant’s Co-Accused person’s pockets but he did not recover any bhang. He then dug two (2) different areas in the Appellant’s Co-Accused person’s compound and recovered bhang, which the Appellant’s Co-Accused person admitted he was selling.

14. Notably, all the witnesses were agreed that the bhang was found in the Appellant’s Co-Accused person’s compound. There was, however, a discrepancy as to how many number of people they found there. PW 2 stated that there were three (3) people in the Appellant’s Co-Accused person’s house. PW 1 and PW 3 did not make reference to this third person. This was a glaring inconsistency in their evidence because a court should not be left to wonder if a witness was really present at the scene of an incident.

15. PW 1, PW 2 and PW 3 all said they conducted a search on the Appellant person. PW 1 said he recovered two(2) rolls of bhang. PW 2 also said he conducted a search on the Appellant and recovered

two (2) rolls of bhang. However, PW 3 who also said he conducted a search on the Appellant recovered two and a half (2 ½) rolls of bhang.

16. It did appear to this court that PW 1, PW 2 and PW 3 all conducted a search on the Appellant. It was expected that they ought to have come up with the same number of rolls of bhang he was alleged to have been found in possession with. The discrepancy in the number of rolls the Appellant was found in possession was also a material fact that could not be ignored in view of the standard of proof in criminal cases.

17. Appreciably, evidence pointed to the fact that the Appellant's Co-Accused person was the one who owned the compound where the bhang was found. The mere fact that the Appellant was found in his Co-Accused person's house was not conclusive evidence that he was found in possession of the bhang. In any case, the said bhang was dug from two (2) areas in the Appellant's Co-Accused person's house. It was not recovered on the body of the Appellant herein.

18. This court therefore agreed with the Appellant's and the State's submission that the key element of "possession" as envisaged under Section 3(1) of the Narcotic Drugs and Psychotropic Substances Control Act was not proven by the Prosecution witnesses herein.

19. Accordingly, having considered the evidence that was adduced in court and the submissions by the Appellant and the State, this court agreed with both parties that the Prosecution did not prove its case against the Appellant herein to the required standard, which is proof beyond reasonable doubt.

20. Having said so, this court looked at what it considered to be a reasonable and fair sentence where a person had been convicted with the amount of bhang that the Appellant herein had been said to have been in possession of.

21. Section 3 of the Narcotic Drugs and Psychotropic Substance Control Act provides that a trial court can convict an accused person upto ten (10) years if the drugs are his own consumption and in all other cases to twenty (20) years imprisonment. The Section 3(2)(a) of the said Act stipulates as follows:-

“in respect of cannabis, where the person satisfies the court that the cannabis was intended solely for his own consumption, to imprisonment for ten years and in every other case to imprisonment for twenty years.”

22. It was therefore clear that the sentence to be imposed upon conviction under the aforesaid Section is not the mandatory sentence. Rather, it is the maximum sentence that a trial court can impose on a convicted person. The State relied on the case of **Opoya vs Ugandato** buttress its argument. However, it did not give the complete citation of the said case.

23. Against the background of the aforesaid, in the event this court may have arrived at a wrong conclusion regarding the Appellant's possession of the two (2) rolls of bhang with a street value of Kshs 50/=, if at all, it was its considered view that his incarceration for a period of over six (6) months was sufficient punishment. This court was apprehensive that additional punishment than he had already served vis-à-vis the said value of bhang he was said to have been found in possession of would only be counter-productive as it had the potential of hardening him to commit more serious crimes in future.

DISPOSITION

24. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 4th May 2017 was successful and there was merit in the State conceding to the said Appeal. The same is hereby allowed.

25. Doubts were raised in the mind of this court lending it to give the Appellant benefit of doubt. This court therefore hereby quashes the conviction and sets aside the sentence that was meted upon him by the Trial Court as it would be clearly unsafe to confirm the same. The court hereby orders that the Appellant

be set free forthwith unless held or detained for any other lawful reason.

26. It is so ordered.

DATED and **DELIVERED** at **VOI** this **23rd** day of **November** 2017

J. KAMAU

JUDGE

In the presence of:-

Matthew Shake Boli- Appellant

Miss Anyumba for State

Susan Sarikoki- Court Clerk