



***REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI***

Criminal Appeal 142 of 2009

(From original conviction and in Criminal Case No. 156 of 2008 sentence of the Senior Resident Magistrate's Court at Malindi Before Hon. A. R. Kithinji - SRM)

SHAHASI SAID HAMISI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

Shahasi Said Hamisi (appellant) was convicted on a charge of trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances Act No. 4 of 1994.

Appellant denied the charge and upon hearing in which five witnesses testified on behalf of the prosecution, and appellant was the only defence witness, she was convicted and sentenced to twenty (20) years imprisonment.

The prosecution case was that on 26th day of May 2008 at about 5.30am at Sea Front Jetty in Lamu District, she was found trafficking in narcotic Drugs by conveying 229 rolls of cannabis sativa (bhanga) valued at Kshs. 68,700/-.

Omar Salim Bagdam (PW1) told the trial court that on 26th May 2008 at about 3.00am, he was at Mangrove Hotel alone, when he saw one Mohamed Shee & appellant carrying cartons. They placed the cartons in a boat, and the lady was left, in that boat PW1 had received information that the carton contained bhanga, so he called police who came and searched the carton and recovered the drugs.

Appellant offered them Kshs. 50,000/- so as to hush the matter. Appellant gave PW1 a mobile phone number so as to talk to a lady. Meanwhile, a brother of the appellant brought Kshs. 15,000/- so as to have her released. That brother was arrested and charged for corruption whilst appellant was arrested and charged with the said offence. PW1 informed the trial court that he knew appellant even before that day, and gave her name as Shahasi. PW1 works with a lobby group which fights drugs in Lamu and that from the carton, 229 rolls of bhanga were recovered. He knew Shee as a porter. On cross-examination PW1 stated that once appellant got into the boat and sat, she placed her hand on the carton and he named Cpl. Mwachome as one of the officers he called to come to the scene.

Cpl. Amos Mwachome (PW2) of Lamu Police Station confirmed receiving a call from PW1 saying he had seen a suspected drug dealer board a boat with a carton. So they rushed to the scene, got onto the boat and introduced

themselves, saying they wanted to carry out a search. They carried out the search, and as they moved toward the appellant, PW2 noticed that she was leaning on a carton box. She was ordered to open the cargo and the police officers found 229 rolls of bhang which were produced in court as exhibit. The recovered plant material was taken to the Government Analyst who examined it and prepared a report (Exh.1) confirming it was cannabis sativa.

On cross-examination PW2 confirmed that pW1 belongs to a group of people fighting drugs and pW1 accompanied him into the boat. He further stated:-

“Accused was sitted (sic) alone placing her hand on the box. I know the box was hers because she was seen with a porter carrying the box.”

PW2 indicated he sent 10 rolls, from the recovered rolls, to the Government Analyst for examination.

Shee Bwana (PW3) confirmed that he is a tour guide cum porter and on 25th May 2008, appellant had called him to go and pick her from Mkowe Jetty – she was en-route to Faza. So he took her to his house where she spent the night. On 26th May 2008, he escorted her to the boat which was to take her to Faza. He helped her carry a box to the boat – he identified that box as the one in court.

On cross-examination PW3 said he had not known what was in the carton.

PW4, Pc Justus Manyamba accompanied Cpl. Mwachombi to the jetty – he gave evidence similar to PW2 regarding the recovery and also stated (as did PW1) that appellant offered them a bribe but they declined.

Constable Asella Tumaini (Government Analyst) confirmed that she recovered ten rolls of dry plant material – she sampled the whole lot and confirmed it was cannabis sativa.

Upon being put on her defence, appellant gave sworn evidence in which she denied being found trafficking drugs. She insisted she was going to see her father in Faza and had no luggage. Her evidence is that police and PW1 just entered the boat and arrested her without even carrying a search. She denied sleeping in any one's home and stated the drugs were not recovered from her.

On cross-examination, she confirmed arriving in Lamu on 25-5-09 at 5.00pm but says that she slept in her aunt Sudi's house. She also denied ever seeing pW3 (Shee Bwana), saying she only sells potatoes.

In his judgment, the trial magistrate noted that there was no dispute that appellant was at Lamu Jetty in a boat on her way to Faza and that although PW1 had referred to the date as 16-5-09, it must have been a mistake. He took into consideration PW3's evidence, noting that PW3 said appellant used to be his neighbour and that he helped her carry the carton without knowing what were the contents – he found that pW3 had no reason to be against appellant.

He considered that all the prosecution witnesses confirmed that the boxes were the same ones appellant had been seen with – which evidence was corroborated by evidence of PW2 and pW4.

He observed the prosecution witnesses and stated that they struck him as being honest and straightforward nor did he

find anything to suggest they were lying.

He considered that the government analyst analysed the recovered plant material both chemically and some physically and confirmed them to be cannabis sativa.

The trial magistrate also considered appellant's defence and dismissed it as an afterthought and not to be relied on.

The appellant challenged these findings on grounds that:

- (1) The trial magistrate did not adequately consider and evaluate evidence of witnesses which was contradictory.
- (2) The trial magistrate abandoned his role as an adjudicator and took on the role of prosecutor by bridging gaps left by the prosecution.
- (3) The sentence was improper and irregular
- (4) The government analyst's evidence was contradictory.
- (5) The trial magistrate did not pay regard to the movement of the exhibits and that their production was improper.
- (6) There was no evidence to support the finding that appellant intended to transport the drugs to Faza Island.
- (7) The sentence was harsh and excessive.

At the hearing of the appeal, Mr. Aboubakar appeared for the appellant and submitted that there was contradiction in the evidence of PW2 as he referred to the date of offence as 26-4-06. Miss Waigera, in opposing the appeal argued that this was probably a typing error.

I have read the handwritten copy of the trial court's proceedings, actually it is even in words, reading 26th April. However I don't think it is fatal because appellant did confirm that on 26-05-08, two police officers and PW1 approached her while she was inside a boat on her way to Faza.

The trial magistrate did in fact take into consideration that anomaly in the date and resolved it in favour of prosecution – taking into account that all the other prosecution witnesses, as well as the appellant consistently referred to 26-5-08, and he held that there was an error made by the witness.

Mr. Abuobakar further submits that there was a contradiction as regards time, because charge sheet refers to 5.30am, the investigating officer gave the time as between 4-5am while PW4 (another police officer) said it was 5.00am and the key witness referred to 3.00am.

Miss Waigera's response is that it must be considered that when PW1 spotted the appellant at 3.00am, he did not immediately report to police, and certainly after making the report, he waited for police to arrive – so time could not have stood still.

Indeed PW1 on cross-examination stated:

“I did not follow the lady immediately until the police came...”

In any event, this difference in time, does not alter the fact that appellant was in the boat bound for Faza, in the early

hours of 26-05-08, when police confronted her – she confirmed as much – that limb of Mr. Aboubakar’s submission has no leg on which to stand.

Mr. Aboubaqor submits that another contradiction is that the charge sheet refers to the Sea Front Jetty in Lamu, yet according to the witnesses the incident was inside a boat. I think Mr. Aboubakar is splitting hairs here – surely the boat was not floating some where in outer space, and whether it was a public boat or a private boat, the evidence adduced and confirmed by the appellant is that she boarded the board, and there were other passengers – she was headed for Faza. There is no suggestion whatsoever that she was the owner of the boat – the prosecution’s case is simply that she had with her the cannabis sativa which was packed in carton box and which she was accompanying to her destination.

Was appellant arrested simply on the basis of having a carton box? NO – PW1, a member of anti-drugs activists had got information that appellant was a drug dealer and that she had bhang in the carton boxes. PW3 Shee (the porter) confirmed escorting appellant with the very carton box onto the boat and when police got into the boat she had her hand over the box. So the suggestion by Mr. Aboubaqar that the box(es) perhaps belonged to other persons does not hold.

Perhaps it would be important at this point to consider the definition of trafficking under the act. It is Mr. Aboubaqar’s contention that for the charge of trafficking, there must be some means of conveyance in the control of the appellant and once she was in a public boat and not the owner of the boat, then the charge of trafficking by conveyance fails – to support his argument, he has cited the decision in Gathara v R KLR vol.2 page 58.

Under section 2 of the Narcotic Drugs and Psychotropic Substances Act, trafficking is defined as follows;

“trafficking” means the importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution by any person of a narcotic drug or psychotropic substance or any substance represented or held out by such person to be narcotic drug or psychotropic substance.”

I am clear in my mind, that trafficking includes conveyance, delivery or distribution. I can do no better than to quote from the decision in Hussein Salim v R (1980) KLR 139 which held:

“To establish possession, the accused must be shown to have access to, and physical control over the thing (or substance) that he is on a position to deal with it as an owner could, to the exclusion of strangers, but it is not necessary to prove that the accused has legal title nor that he was access to it to the complete exclusion of all other persons”

It is control over the SUBSTANCE not the vessel of conveyance which is to be considered.

From the evidence presented, from the moment PW3 begun his porter services, to the point when police got into the boat and found her hand resting on the carton, there is a clear demonstration that she was in physical control of the carton. I fail to comprehend Mr. Abuoubaqar’s argument that for such a charge to be proved it must be shown that the offender has control or owns the vessel.

That is playing poker – what would happen to all those risk takers who find safety in members by boarding public means of transport such as buses, matatus, aeroplanes, when plying their illegal trade – should they be set free just because they don’t own or control the vessel in which they are riding along with the offending substance? Certainly not, and with greatest respect to Mr. Aboubaqar that manner of reaosnign is off target. He also argues that the trial court did not determine how many carton boxes were involved because whereas PW1 claimed to have seen PW3 and appellant each carrying a carton – all the other witnesses referred to one carton box.

To my mind, that is a non starter, even if PW2 had two boxes, the relevant one is the one which was recovered and which was identified by all prosecution witnesses. He also takes issue with regard to how many rolls were examined by the Government analyst and caps it up by arguing that cannabis sativa is not described as a narcotic drug.

Cannabis sativa is not a prohibited drug? With profound respect to Mr. Aboubaqar, that argument is misplaced. Under the first schedule, cannabis is listed as a narcotic drug and cannabis plant is defined in section 2(1) to mean any plant of the genus cannabis by whatever name called and includes any part of that plant – cannabis sativa is a genus of cannabis and is the plant material recovered and which was presented to the Government Chemist for analysis

Penalty? Is the sentence legal or too harsh?

Under section 4(a)

“Any person who traffics in any narcotic drug or psychotropic substance...shall be guilty of an offence and liable.

(a) in respect of any narcotic drug or psychotropic substance, to a fine of one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater and in addition to imprisonment for life”

It would seem that the trial magistrate used section 4(b) in carrying out the sentence – the proper penalty is as cited above and in this. I am guided by the recent Court of Appeal decision **C.A No. 257 of 2007 Kingsley Chukwu v R.** The value of the drugs is given in the charge sheet is Kshs. 68700/-. I have read through the Act – there is no provision as to how the value ought to be calculated – since it is an illegal trade then I suppose that is the street value in the black market as there would be no ‘legal’ price control list for the same and in any event there is no evidence to suggest that it would be of lesser value. Under the circumstances then, I interfere with the sentence, which was irregular by setting it aside, and substituting it with a sentence of a fine Kshs. 1,000,000/- (one million) being the greater and in addition to the appellant shall be imprisoned to life.

Delivered and dated this **29th June 2010** at Malindi.

H. A. Omondi
JUDGE

Mr Aboubakar for appellant
Mr Kemo for state
c/c Randu_