REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(Coram: Ojwang, J.)

CRIMINAL APPEAL NO. 392 OF 2006

BETWEEN

JOHN KAMAU NJERI.....APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An Appeal from the Judgement of Senior Resident Magistrate Ms. Mutai dated 18th July, 2006 in Criminal Case No. 2057 of 2005 at the Githunguri Law Courts)

JUDGEMENT

The appellant was charged with the offence of being in possession of bhang contrary to section 3(1) and (2) of the Narcotic Drugs and Psychotropic Substances Control Act (Act No. 4 of 1994). The particulars were that the appellant, on 3rd December, 2005 at Githiga Trading Centre in Kiambu District, within Central Province, was found being in possession of bhang (*cannabis sativa)*, to wit 600 rolls which was not in the form of a medical preparation, in contravention of the said Act.

On the evidence of the prosecution witnesses, the learned Magistrate made certain findings: PW2 and PW1, who are Police officers, had been together on patrol in the Githiga area, and, after they learned that the appellant herein was a bhang peddler, they proceeded to his house, and after they knocked on the door and it was opened, they were immediately struck by the wafting smell of bhang. The two introduced themselves as Policemen, searched the appellant's house, and recovered several rolls of bhang stuffed in the back of the sofa set which they had to cut open to retrieve the stuff. PW1 and PW2 arrested the appellant and took him to the Police Station, where the rolls of bhang were counted and found to number 600. PW2 later had the rolls of bhang sent to the Government analyst; and the ensuing report confirmed them to be bhang.

The appellant made an unsworn defence in which he denied the offence.

The learned Magistrate noted that the mutually corroborative evidence adduced by PW1 and PW2 had not been challenged by the appellant herein. The appellant had not challenged the testimony that the 600 rolls of bhang were found in his house, and that he is the one who opened the door to that house, letting in PW1 and PW2 who then found the stuff hidden in the house, and the ownership of the house was not denied. The Court noted that neither PW1 nor PW2 had known the appellant prior to this incident, and

their discovery of bhang in his house was purely in the course of discharge of their public duty and was unrelated to any personal misunderstanding.

The learned Magistrate thus found:

> ***"…the accused's defence was a mere denial and an afterthought which defence evidence failed to discredit that of the prosecution….***
>
> ***"The prosecution evidence, I found, was overwhelming which evidence was not discredited by that of the defence. The prosecution evidence tended to link the accused person with the offence charged. I found that he had in his possession 600 rolls of bhang…I declare [the] accused guilty as charged, and …..convict him accordingly…."***

The learned Magistrate sentenced the appellant to a seven-year term of imprisonment.

In his grounds of appeal, the appellant has contended that the prosecution testimonies were contradictory and should not have led to conviction; that there was no proof beyond reasonable doubt; that the trial Court had not taken into account the defence testimony.

The appellant, who had brought to Court written submissions, elected to have the State counsel present the State's case first. And learned State Counsel ***Mr. Makura*** urged that there had been overwhelming evidence proving the offence charged. Both PW1 and PW2 had acted on a tip-off, when they came to the appellant's house and there, came by the rolls of bhang which were the basis of the charge. Once the stuff was confirmed to be bhang, as was done by the Government Chemist, there was sufficient evidence for a conviction to be entered. Counsel urged that the learned Magistrate had considered the very specific evidence tendered by the prosecution, alongside the unsworn testimony of the appellant, and had come to the conclusion that an offence had been committed.

On sentence, ***Mr. Makura*** noted that under s.3(1) of the applicable Act, the maximum term of imprisonment provided was 10 years where the drug was held in possession for personal use; and 20 years if it was held in possession for any other purpose. He submitted that the 600 rolls of bhang found in the appellant's possession could not have been for personal use; and hence the maximum term of imprisonment applicable would be 20 years, so that the trial Court's award of 7 years could not, in the circumstances, be said to be excessive. Counsel urged that conviction be upheld, and sentence affirmed.

As the appellant elected to rely exclusively upon his written submissions, I have considered the same alongside the respondent's case, and taken the respective positions in the context of all the evidence and the analysis conducted by the learned Magistrate.

My finding is that the tip-off which the two Police officers (PW1 and PW2) had received led them to the precise *locus* of crime; at that *locus*, only one person, the appellant was in charge. The appellant owned or was in charge of the house, and also owned or was in charge of the sofa set which was the receptacle holding the offending drug. Either it is the appellant who enclosed the 600 rolls of bhang in the back of the sofa set, or somebody under his instruction and for his benefit, did so; therefore, for the purpose of the Narcotic Drugs and Psychotropic Substances Control Act, 1994, the 600 rolls of bhang were in the *possession* of the appellant, and for purposes – judging by their quantity – other than *medical*.

I hold that the appellant was properly convicted; I dismiss his appeal; I uphold the conviction; I affirm the sentence meted out by the trial Court.

Orders accordingly.

DATED and DELIVERED at Nairobi this 21st day of November, 2007

J. B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Odero

For the Respondent: Mr. Makura

Appellant in person