REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 966 OF 2002

AMJAD JAVED ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

On 22.08.02 the appellant was convicted, after a full trial by the Senior Resident Magistrate, Kibera (Githinji, Esq), of the offence of trafficking in narcotic drugs, contrary to section 4 (a) of the Narcotic Drugs and Psychotropic Substances (control) Act, No 4 of 1994 and fined Kshs 1 million and also to serve 5 years imprisonment. He lodged the present appeal against his conviction and sentence. His grounds of appeal are basically as follows:-

1. That the charge against him was not proved beyond reasonable doubt.

2. That the initial report in the relevant police occurrence book (OB), defence exhibit DMFI – 1 did not disclose who was the arrested passenger referred to therein.

3. That the evidence of prosecution witnesses was not corroborated by independent evidence, eg of X-Rays.

4. That the purported writings and signatures in the observation sheet, exhibit MFI – 7 was not proved to belong to the appellant by a handwriting expert.

5. That the oral evidence of PW6 that the appellant admitted before him that he (appellant) signed exhibit MFI – 7 should be ignored as the alleged admission was not reduced into a cautionary statement under inquiry, contrary to Judges' rule 2.

6. That whereas PW6 conceded that he recovered from the appellant some money, ie US$ 300, unspecified amounts in Pakistan, Uganda and Rwanda currencies, etc, entries in Defence Exhibit DMFI – 1 clearly show that the appellant was never arrested on the said date and that, by extension, nothing was recovered from the appellant He contended that this was against standard police procedure which dictates that whenever a suspect is arrested, an entry should be made in a police station or formation OB giving particulars of the suspect, reasons for his detention and the properties recovered itemized.

7. That the learned trial magistrate failed to consider the merits of the appellant's defence to the effect that the police fabricated the drug trafficking charge against him as a cover-up for their theft of his money which they (police) removed from his bag when they searched him and his said bag and also to punish

him for insisting that he would not continue with his onward journey unless the police produced his money. In this regard, the appellant took exception to the trial magistrate's comment that his (appellant's) complaint that he lost money was an afterthought and drew attention to another OB entry, Exhibit DMFI – 2 to the effect that he had lodged this complaint with the police while he was in their custody.

At the hearing of this appeal the appellant, who appeared in person, relied on the grounds enumerated above plus written submissions he handed in during the hearing. The written submissions were essentially an elaboration of the grounds in his petition of appeal. The points in the appellant's written submissions that may warrant highlighting here are that the transit lounge where he was arrested is in no man's land; that the police preferred the drug trafficking charge against him to intimidate him into not pursuing his claim for the arresting officers to return his money which he said they stole while searching him and his accompanied baggage; and that there are contradictions between the evidence of PW1, PW3, PW4 and PW6.

The appellant elaborated on the issue of contradictions as follows:- That whereas in his evidence-in-chief Benson Munyoki (PW1) said Sgt Koikai (PW4) handed over 4 pellets (should be 3 pellets) to C I Kemboi, the said Sgt Koikai never mentioned in his evidence-in-chief that he did duty together with PW1. That whereas PW1 said he left PW3 (PC Otieno) and PW4, which means at one/that time PW1, PW3 and PW4 were together, PW1 said during cross-examination that he recovered some money but it was not part of exhibits. That, additionally, PW4 said he did not know whether any money was recovered from the appellant. Finally, that whereas PW3 said during cross-examination that the appellant signed in the OB for the pellets and that the OBs for the days the pellets were recovered would show that and whereas PW4 also said during cross-examination that the appellant signed for the pellets in the OB, PW6 said during cross examination that the appellant did not sign anywhere.

The appellant urged that his conviction be quashed, his sentence set aside and US$ 3,000 stolen from him by PW1 and PW4 as well as his passport, air tickets and vaccination certificate be restituted to him.

Learned counsel for the respondent, Mr Monda supported the appellant's conviction and sentence. He (respondent's counsel) narrated that the appellant was arrested on 27.02.02 at Jomo Kenyatta International Airport (JKIA), Nairobi while in transit from Dubai. Counsel stated, erroneously, that the appellant was given a meal to eat and he emitted a total of 17 pellets which were confirmed to be heroin by the Government Analyst. I note that there is no evidence of the appellant being given a meal. Respondent's counsel additionally stated, also erroneously, that PW6 took an inquiry statement from the appellant which he retracted but that it was admitted after a trial-within-trial. The correct position according to the lower court record is that PW6 took an inquiry statement from the appellant in which he denied having made an oral admission to PW6 that he (appellant) emitted the pellets in question. In respondent's counsel's view, prosecution witnesses were reliable; that they gave a vivid account of the events of the day; and that there is concrete evidence against the appellant. Counsel noted that under Act No 4 of 1994, the maximum prison sentence for the offence charged is life imprisonment and, in addition, a fine of Kshs 1 million or 3 times the street value of the drug, whichever is the greater. He noted that the appellant is Pakistanese; that the value of the drug emitted was given by PW6 as Kshs 170,000/=; and that the fine of Kshs 1 million plus 5 years imprisonment are within the law.

Respondent's counsel submitted that the combined sentence of fine and imprisonment is not excessive and urged that the appellant's appeal against conviction and sentence be dismissed.

In reply, the appellant said he was not booked in the OB. He complained that the maximum fine is Kshs 1 million and that he was fined the maximum and, in addition, to a 5 – year jail term which in his view is excessive. He also complained that he had been in custody for almost 2 years. The appellant said he is from Pakistan; that he is aged 35 years; that he has nobody in Kenya to visit him in prison; and urged that the Court should have mercy and release him to go back to his people. He challenged the contents of the Exhibit Memo Form exhibit 8 prepared by PW5 about samples of the subject pellets and said he was not present when exhibit 8 was prepared and that it did not bear his signature. He also complained that since his conviction, the police had his passport, ticket, vaccination card and money US$ 3,150 and that the police had not returned these to him. Otherwise the appellant relied on his written submissions and the

proceedings.

The basic issue for the determination of this Court is whether there is on record proper and adequate evidence to sustain the appellant's conviction.

I shall address grounds 1 and 2 together. Under ground 1, the appellant contended that the learned trial magistrate mis-directed himself in law and fact by failing to observe that the charge was not proved beyond reasonable doubt in that no detailed account was given of why and how PW1, PW3 and PW4 arrested the appellant and recovered from him the pellets, i.e. exhibits 4, 11 and 13 on the various dates and times reflected in the Observation Sheet, Exhibits MFI – 7 as these matters are not reflected anywhere in the initial entry in the Police OB, Defence Exhibit DMFI – 1. Under ground 2, the appellant contended that the initial report in Police OB, Defence Exhibit DMFI – 2 did not disclose who the arrested passenger was and that there is no explanation for this as the arresting officers had the appellant's documents containing his particulars.

It would appear that the police OBs in question were produced in Court by PW6 as demanded by the appellant and the subject entries assigned the exhibit numbers DMFI –1 and DMFI – 2 and thereafter the OBs, were returned to the police. No photocopies of these entries were made, marked and placed in the Lower Court file. This should have been done. I called for the two police OBs and shall have something to say about the subject entries therein later. For now I note that the Lower Court record shows that C I John Kemboi (PW6) referred to the two subject OB entries in the following order: the one for Jomo Kenyatta International Airport Police Station and then the one for Jomo Kenyatta International Airport Anti- Narcotic Unit. However, it is the subject entry in the latter OB from Narcotic Unit which was assigned defence exhibit number DMFI – 1 while the subject entry in the OB from the Police Station was assigned defence exhibit number DMFI – 2. When cross-examined about the OB entry DMFI – 1, PW6 said:

"The entry does not indicate who the passenger was. The nature of the interrogation conducted on the suspect is not stated. The suspect did not sign anywhere."

However, during re-examination, PW6 made a clarification as follows:

"In defence exhibit 1 entry, the name of the suspect was not given. According to the occurrence book nobody else was being interviewed for drugs. It was therefore referring to Amjad Javed, the accused person."

The learned trial magistrate did not make specific reference to this aspect of the appellant's defence.

Earlier on I indicated that I called for the two police OBs under discussion. Both OBs were brought. The book from Anti-Narcotic Unit supposed to have contained entries for the period in question had its portion prior to 10.03.02 torn and missing. IP Emmanuel Mwasi of Anti-Narcotic Unit at Jomo Kenyatta International Airport who brought the book explained that when he was posted there in August, 2002 the unit was using ordinary hard-cover books, not formal Police Occurrence Books. That he searched for the book in use at the material time and found the torn book in the cabinets. I did not, therefore, have an opportunity of seeing for myself the OB entry which the trial court had assigned defence exhibit number DMFI – 1. I shall accordingly, go by what PW6 said about it in the Lower Court.

The relevant entry from Jomo Kenyatta International Airport Police Station OB, was, however, availed to me. I examined the questioned "initial entry" in the said OB and my findings are that the appellant is named at entries Nos 30 and 31 of 27.02.02; that the entries show that Amjad Javed, a Pakistan national, was arrested at about 6.20 a.m. and was to be charged with the offence of trafficking of narcotic drugs; that he was placed in cells and then temporarily removed to Anti-Narcotic office where he was to be under observation. I wish to add that the essence of these entries is reflected in the evidence of the police officers who testified as to the appellant's arrest, search, observation, recovery from him of the subject pellets and his eventual prosecution and conviction in respect of the subject heroin.

I find no merit in grounds 1 and 2 in so far as the appellant's complaint about non-recording of his personal details are concerned.

There is, however, no mention in the entries just discussed of recovery of any property from the appellant. Unless items recovered from suspects in police custody are recorded in a different document which was not called for in the appellant's case, such omission lays the police open to justifiable criticism that they may not have discharged their duties in strict compliance with the law. The police should avoid such pitfalls.

Under ground 3, the appellant in effect contended that for the evidence of prosecution witnesses to be validated, it had to be corroborated by independent evidence, such as evidence of X-Rays showing that the appellant carried the subject drugs in his body. I suppose such option could have been pursued, but it does not appear to have been. It is not a legal requirement under Kenyan Law that there must always either be corroboration generally or that corroboration has to be of a particular type. The Lower Court record shows that the omissions of the first two lots of pellets (3 and 4, respectively) were each witnessed by two police officers, all of whom testified on the matter and corroborated each other. The officers were Sgt Koikai (PW4) and PC Otieno (PW3) and the trial magistrate believed them. The emissions of the third and fourth/final lots of pellets (6 and 4, respectively) were witnessed by a different combination of police officers. These were PC Otieno who testified as PW3 and PC Kareithi who was not called to testify in respect of the third lot; and by CPL Maritim who was not called to testify and PC Otieno who testified as PW3 in respect of the fourth/final lot. PC Otieno is a common witness to the emissions of the third and fourth lots. I note that he had earlier on witnessed the emission of the first lot while in the company of Sgt Koikai and that he was found to be a credible witness in respect of the emission of that first lot. I find no good reason why his testimony that he witnessed the emissions, by the appellant, of the third and fourth lots should not be believed. It would, however, have been better if PC Karethi and CPL Maritim had been called to testify but the omission to call them to give evidence has not made a material difference in the present case. I find ground 3 to have no merit also.

Ground 4 is akin to ground 3. Under ground 3 the appellant was in effect urging this Court not to accept the Observation Sheet, Exhibit MFI – 7 as valid evidence against him because the signatures thereon ascribed to him by PW4, PW3 and PW1 were not proved to belong to him (appellant) by a handwriting expert. I note that the three prosecution witnesses (PW4, PW3 and PW1) signed Exhibit MFI - 7 to signify that they witnessed the appellant emit the four lots of pellets amounting to 17 pellets. Once they were found credible as eye-witnesses, there was no legal requirement that the signatories to Exhibit MFI - 7 should have their signatures verified by a handwriting expert. This ground too has no merit. The appellant urged under ground 5 that the oral evidence of No 2 18936 C I John Kemboi (PW6) that he (appellant) admitted signing Exhibit MFI – 7, which he subsequently retracted, should be ignored or rejected since the alleged admission was not reduced into a cautionary statement under inquiry and that this contravened Judges' rule 2. Actually in this case Judges' rule 2 should be read with Judges' Rules 1 and 3. The three rules provide as follows:

"1. When a police officer is endeavouring to discover the author of a crime, there is no objection to putting questions in respect thereof to any person, whether suspected or not, from whom he thinks that useful information can be obtained.

2. Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking him any questions, as the case may be.

3. Persons in custody should not be questioned without the usual caution being first administered."

The evidence on record shows that the appellant was in police custody. It should be noted that Judges' Rules 1 and 2 envisage a situation where the person in question is not in custody and may be suspected to be involved in a crime being investigated or may simply be suspected to have information about the crime without necessarily being involved in it. In *Njuguna s/o Kimani & 3 others* (1954) 21 EACA 316 the then Court of Appeal for Eastern Africa while considering appeals from the then Supreme Court of Kenya categorically held that rules 1 and 2 of the Judges' Rules do not apply to cases where the person

questioned is in police custody. As the present appellant was in police custody, I think Judges' rule 3 is more appropriate, subject to the Court's discretion either to accept or reject a statement taken from him in contravention of the Judges' Rules. The issue of the Court's aforesaid discretion came up for consideration in*Nayinda s/o Batungwa vs R* [1959] EA 688 while the then Court of Appeal for Eastern Africa was dealing with an appeal from the High Court of Tanganyika and the Court of Appeal, *inter alia*, held as follows:

" (i) failure to comply with the Judges' Rules when taking a statement from a prisoner will usually result in the rejection of the statement as evidence but the Judges' Rules are administrative rules, and a breach of these does not automatically result in the exclusion of the statement."

The Court of Appeal also observed in *Nayinda's* case that breach of the Judges' Rules is but one of the circumstances, through an important one, for the trial judge to take into account in deciding whether or not the statement was voluntary, or was made in circumstances which render it unfair to the prisoner that it should be admitted in evidence.

I note from PW6's evidence that the appellant in his cautionary statement under inquiry denied having made the oral admission alluded to by PW6. Further, the Lower Court record shows that when PW6's junior officers handed over to him the subject drugs in the form of pellets in different instalments and said they had been emitted by the appellant, PW6 said he orally asked the appellant to confirm what the junior police officers had said and that the appellant either "agreed" or "was positive". Such casual treatment by PW6 of a serious subject like this is not good enough and I consider it unfair to accept the appellant's alleged admissions. Accordingly, I reject and ignore PW6's evidence that the appellant orally admitted to him having emitted the pellets in question.

There was an interesting submission by the appellant that the transit lounge where he was arrested is in no man's land. To the best of my knowledge the said lounge is very much in and within the jurisdiction of Kenya. This submission lacks merit.

Another interesting challenge made by the appellant to the prosecution case related to the Exhibit Memo Form, Exhibit 8. He contended that it was invalid since he did not sign it. This form was prepared by No 63172 CPL Damaris Obina (PW5) and she used it to forward samples of the pellets said to have been emitted by the appellant to the Government Analyst for chemical analysis. The Government Analyst, John Kinyati Kibuthi (PW2) confirmed receiving the samples from PW5 and that chemical analysis of the samples confirmed that the pellets from which the samples were taken contained heroin. There was no legal requirement for the appellant to sign exhibit 8. This ground too has no merit.

The last of the appellant's grounds I have to address is the one in which he complains that the trial magistrate failed to consider his defence that the police fabricated the drug trafficking charge against him as a coverup for their theft of his money when they searched him and his accompanied baggage and also to punish the appellant for insisting that they must produce his money. The appellant criticized the trial magistrate for treating this defence as an afterthought. In this regard, the appellant drew attention to the fact that he raised with the police while in their custody the issue of his money having gone missing from his bag during the police search.

The appellant gave a lengthy statement in his defence. In essence he said that he was a Coca-cola agent in Pakistan. That he operated a hotel in Uganda, but he did not name it. He narrated that he was on his way to Uganda when he was arrested at Jomo Kenyatta International Airport (JKIA), Nairobi. The next thing he said was that he was to take his next flight to Kigali when he was arrested. I take judicial notice of the fact that Kigali is in Rwanda. The appellant did not indicate why he should take a Kigali flight from Nairobi if his destination was Uganda. In this regard I note from the evidence of PW1 that the appellant had air tickets showing he was travelling from Lahore in Pakistan and his routing was Lahore – Dubai – Nairobi – Kigali – Nairobi. Uganda did not feature in the tickets. He confirmed having been stopped by police officers including Otieno (PW3) at JKIA, Nairobi and that they searched him. He said, however, that the search of himself and his baggage lasted only 5 – 7 minutes. That he was told to put his luggage to be searched on one table while he himself was made to lie on a different table for his bodily search and

that he could not see his luggage as he was being searched. That he was asked if he was carrying narcotic drugs had he said he and none.

That after the search the appellant was cleared to proceed to catch his onward flight. That on the way to the departure gate he decided to check for his money, US$ 3,000, which he had kept in his travelling bag and found it missing. That he immediately complained to the police and insisted that he would not leave until his money was found. That there then followed exchanges between him and the police and eventually he was made to lodge a formal complaint, which he did, and PW6 said his initial investigations did not establish that the officers who searched the appellant took his money. That he (appellant) was told the money may have been lost elsewhere but he insisted that the money was lost during the search at JKIA. That following the statement the police decided to fix the appellant by preferring the drug trafficking charge. That PW6 beat and injured him in an attempt to get him to accept that he had drugs but he (appellant) refused. That the appellant requested to be taken for treatment but PW6 refused. That PW6 then searched the appellant's body and took away US $ 300 for which no receipt was issued and that eventually when the money was being returned, a fake dollar bill was found included in it.

PW6 testified, *inter alia*, that he recovered from the appellant some US $ 300 hidden in his innerwear which he subsequently returned to the appellant in full. That police OB entry No 32 of 04.03.02 in DMFI – 2 showed that the appellant complained that he gave US$ 350 to an officer at Anti-Narcotic Unit and that when it was returned, it was less US $ 50 while one note was fake. The prosecution denied this.

In his oral submissions at the hearing of this appeal, however, the appellant said the money taken from his bag by the police was US $ 3,150.

It is true there is reference in the trial magistrate's judgment to the effect that the appellant's defence in Court was an afterthought. This comment by the magistrate was made in the context that most of the details on allegations raised in the appellant's defence did not come out during crossexamination of prosecution witnesses. The magistrate's comment is borne out by the lower court record. For instance, the appellant's complaints in his unsworn defence that PW6 beat and injured him and that PW6 refused to take him for treatment despite the appellant making such request were not put by the appellant to PW6 during cross-examination. These are the types of allegations described by the magistrate as an afterthought, designed to cast doubt on the truth of the prosecution case. The accusations leveled against the police are serious and would be most damaging to them if true. The learned trial magistrate accepted the prosecution case and rejected the appellant's defence, including his allegations against the police. The magistrate had the benefit of seeing and hearing witnesses testifying and of observing their demeanour. He was in a better position to gauge their credibility and he believed the prosecution witnesses. I have no good reason to come to a contrary finding on the matter.

The appellant alluded to contradictions or discrepancies in the prosecution evidence. I have considered them and do not find them sufficiently material such as to vitiate the appellant's conviction.

On the other hand, the appellant's own story has a number of discrepancies. For instance, he at one stage said he was going to Uganda while his air tickets indicated only Kigali in Rwanda as his destination. He also referred to the money he said had been taken from his bag by the police as US $ 3,000 and also as US $ 3,150. He also made reference to money taken from his person by the Police. At one stage he said this money was US $ 300 but at another stage he said it was US $ 350. Such discrepancies by the same person do not assist much in building his credibility.

I note from Exhibit MFI – 7 that the appellant emitted the first lot of 3 pellets at 1300 hours (1.00 pm) on 27.02.02; the second lot of 4 pellets at 7.00 am on 28.02.02; the third lot of 6 pellets at 11.00 am on 28.02.02; and the fourth/final lot of 4 pellets at 5.00 pm on 01.03.02. The emissions were witnesses by five police officers, three of whom testified before the trial court on the matter. The three are Sgt Koikai (PW4), PC Otieno (PW3) and PC Munyoki (PW1). It would take very fertile imagination on their part to cook up the numbers of pellets and different times and dates for their emission. The trial magistrate believed their testimony and I have no good reason to find otherwise.

The appellant's appeal against his conviction for the offence of trafficking in narcotic drugs, contrary to section 4 (a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, No 4 of 1994 is hereby dismissed.

Section 4 (a) of Act No 4 of 1994 under which the appellant was charged and convicted provides as follows:

"4. Any person who traffics in any narcotic drug or psychotropic substance or any substance represented or held out by him to be a 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."

The market or street value of the drugs in this case was given by PW6 as Kshs 170,000/=. The statutory minimum fine is, therefore, Kshs 1 million and the Court has no discretion in the matter. As regards imprisonment, the offence attracts life imprisonment in addition to the statutory fine. The appellant was awarded 5 years imprisonment. This is within the law and is neither harsh nor excessive, having regard to the dangers the subject drugs pose to the consuming community. I shall not interfere with the fine and prison sentence imposed.

The appellant's appeal against his fine of Kshs 1 million plus 5 years imprisonment is hereby also dismissed.

The learned trial magistrate did not indicate what should happen in case the appellant does not raise the fine. The law under which the fine was imposed does not provide for a default prison sentence in the event of non-payment of fine. In the event that the appellant does not raise the Kshs 1 million fine, he shall serve a default prison sentence of 12 months under section 28 (2) of the Penal Code (Cap 63).

Orders accordingly.

Dated and Delivered at Nairobi this 18th day of May 2004.

B.KUBO

JUDGE