



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL APPEAL NO 615 OF 2001
(From Original Conviction and Sentence in Criminal Case No. 2460 of 2000 of the
Principal Magistrate's Court at Nairobi)

EVERIL ELAINE TRACEY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant Everill Elaine Tracey was convicted of the offence of Trafficking in Narcotic Drugs c/s 4(a) of The Narcotic Drugs and psychotropic substances Control Act No. 4 of 1994 and sentenced to pay a fine of Kshs.9.18 million in default to serve one year imprisonment in addition she was sentenced to serve ten years imprisonment.

Aggrieved by the said conviction and sentences she lodged an appeal. The appellant arrived at Jomo Kenyatta International Airport, Nairobi aboard a flight from Dubai on 29th October, 2000 when police officers attached to Anti narcotic Unit suspected her to be a drug dealer. These officers namely Stella maritime, Wilfred Otieno and Henry Kareithi were all on duty on that day covering arriving flights.

The appellant who appeared suspicious from her conduct, dress and demeanor was monitored by these officers and more so Stella Maritim. On being intercepted, her ticket and passport were examined. The documents routing was Johannesburg, Dubai Islamabad Dubai, Nairobi on Transit to Harare. The ticket had a luggage tag for one piece which the appellant was asked to pick from the conveyor belt. When opened the bag was found to contain clothes of assorted kind but once emptied it still felt abnormally heavy. As the bag had a lining the police decided to tear open the same and on doing so found a total of six plastic packets plastered therein and stuck with glue. They weighed 3,060kg. And each contained a white substance in powder form. Samples were removed there from and forwarded to the government chemist for analysis. They were confirmed to be the offending subject matter set out in the charge. The appellant was then charged with the offence.

In her defence, the appellant said she was contracted to travel from South Africa to Islamabad to collect some documents by an acquaintance. The appellant who said she was a police informer allegedly contacted South African Police to inform them she was going to Islamaad but could not leave a message on an answering machine. She then went to Islamabad.

On arrival at Islamabad she went to the hotel the details of which she had been provided with and booked in. The following is what she told the court:

“Then I locked my room and went to take a bath. When I got out of the bath I was surprised to find a black man in my room. I asked him how he got into my room. He told me it was not locked so he entered. He said he was the one to give me the parcel. He said unfortunately he did not have the documents. He said that is what he had come to tell me. I asked him to call Izzy for me. He phoned on his cell phone. He spoke in Nigerian language which I did not understand. He gave the phone to me and Izzy asked if I would stay to wait for the documents. I said no because I needed to be at work on 1/11/2000. He said in that case he would not pay my fee. I told him I would not stay and lose my job for a fee of 5000 Rand. He said he could do/say nothing since papers were not ready. I returned. I booked my luggage at 3.00pm. At Islamabad. My destination was Harare”.

The appellant then told the court how she was arrested and the offending substance found. She said she told the police about her encounter with a stranger in her room in Islamabad and asked them to call the hotel to get his details as he was also a resident of the hotel. She said she knew nothing about the heroin found in her bag. She admitted that prior to this incident, a Nigerian had contracted her to ferry drugs from South America to South Africa but flushed the drugs in the plane toilet. She was then using a false passport.

The learned trial magistrate believed the prosecution witnesses dismissed the defence of the appellant and convicted her. In so doing, the learned trial magistrate noted that the three police officers would not have reached a suspicion assessment on separate observation of the appellant without a good reason.

On her arrest the appellant self-recorded a statement before Inspector John Kemboi which was produced in evidence without any objection. She said more or less what is contained in her statement of defence. Of the stranger in her room and her bag she said in her statement.

“I think he changed my bag at that time because yesterday when I left my bag was very heavy and I had to book it in.”

To this the learned trial magistrate wondered loudly “Is it believable that the accused ignored the weight and merely booked in the bag even after a “stranger” had mysteriously intruded into her hotel room?” Having noted the unusual weight, and considering that previously some Nigerians had given her a bag containing drugs, there was no reasonable explanation why she did not check her bag.

The learned trial magistrate also questioned the appellants conduct in undertaking the trip to Islamabad and her reaction (or lack of it) when she encountered a stranger in her hotel room. The learned trial magistrate said:

“I do not consider it plausible that a normal 51 year old woman would leave her home in short notice on a journey whose purpose she did not know. Or even why coming out of a bath and finding an intruder in her room proceeded to have a normal conversation with the intruder, a total stranger whom on all accounts she knew nothing of in advance. I would have expected a normal woman to scream and raise..... And cry about the intrusion into her privacy.....she is not a foolish person. Indeed she struck me as a sharp and well exposed person. She herself presents herself as such in her two statements. In the circumstances she describes, there is no way she could have been fooled by the intruder to ferry drugs without her knowledge.....The chain of evidence regarding the custody of the heroin in this case was complete. Moreover there was no dispute regarding the fact that the accused was indeed found in possession of the 3.06kg of heroin. The defence merely disputed her awareness of the presence of the drugs in her luggage.

As the first appellate court, it is my duty to re-evaluate the evidence afresh and arrive at independent conclusions.

The identity of the appellant is not in doubt. That she was a passenger in the flight in question is also not in doubt. Her passport and ticket proved this all. On her own admission she had been to Islamabad on a mission to collect some documents. She did not work for the people who sent her there. She said she was the Financial Controller, Philips-South Africa. She knew little of those people. If she knew them well, she

would have their second names.

In Islamabad, she did not raise an alarm or inform any authorities, including the hotel staff, of the man who allegedly entered her room which according to her she had locked before she went to take a bath. This man instead drew her into a conversation and even called a contact at her request. The man was Nigerian, she said as much or rather implied so as he talked with the other contact in Nigerian. The appellant had been misused by Nigerians before yet she never doubted this mission. She even alluded to her bag being substituted and that the bag was unusually heavy. She took no steps to check the contents.

This is unbelievable and I, with respect agree with the learned trial magistrate in her analysis in this respect. There was no way she could have undertaken a trip from South Africa to Pakistan without her full knowledge of the implications and it is not true that she did not get the documents and had to return without them.

Like the learned trial magistrate rightly observed one does not have to travel that distance to take delivery of documents when mode in technology and courier services would have secured the same at much faster speed. The bag linings that concealed the offending subject matter were machine sewn. This was a classic case of preconceived operation and I believe the appellant was an active player therein.

Her conduct, if true at the hotel in Islamabad and at the airport in Nairobi consolidates the belief that she knew of her role as trafficker, she had total control of the bag that concealed the drugs to the exclusion of any other person and no one had the opportunity to plant the same on her. I have no doubt that the offence was proved beyond any reasonable doubt and the conviction was well founded.

I take note of what the appellant has said about the prison conditions and her medical concerns. It must be understood however that the offence is serious and all convicts must be prepared to face up to their mistakes. This was a voluntary undertaking. There is also no provision in the laws of this country that allows a convict to be moved to another country to serve a sentence of imprisonment.

The sentence imposed was lawful and commensurate with the offence charged.

In the end this appeal is dismissed.

Right of appeal to the court of appeal explained.

Orders accordingly.

Dated and delivered at Nairobi this 2nd day of April, 2003.

MBOGHOLI MSAGHA

JUDGE