



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO.271 OF 2002

**(Being an appeal from Original Conviction and Sentence in Criminal Case
No.293 of 2001 of the Chief Magistrate's Court at Mombasa – F.N.
Muchemi, CM)**

HABIB JUMA HASSAN APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G M E N T

The appellant Habib Juma Hassan was charged with the offence of being in possession of Narcotic Drug Contrary to Section 3(1) of Narcotic Drugs and Psychotropic Substances Control Act No.4 of 1994.

After trial he was found guilty and sentenced to a term of imprisonment for 5 years. He now appeals against conviction and sentence.

The simple facts disclosed by prosecution evidence is that on 20/1/2001 at mi-day the police officers PW.2, PC. Wambua and PC Kinyua PW.3, were on patrol in Magongo area of Mombasa city. They received information that there was a person who was keeping drugs (bhangi) in a certain premises. The officers were led to the house where they found a woman (PW.1) who said she was the landlady of a room she referred to as a store. She said she had rented the store to the appellant as a residential premises. The woman told them that the appellant was not in on that day and that the appellant used to sleep in the house from time to time. The policemen laid an ambush nearby and eventually the appellant approached the premises. He was pointed to them by their informer. The police officers arrested the appellant and walked with him to the premises. He voluntarily opened the premises with a key and inside the house the policemen found 4 plastic bags and 3 bags full of bhangi. They took the items as exhibits. The appellant locked the door securely with his key. The appellant in his arguments in court tended to deny the ownership of the premises. The fact is that he had the keys of the premises is an indication that he had full and exclusive use of the premises. The owner of the premises said the appellant had rented premises for Shs.1500/- p.m. and she collected rent from the appellant. She was able to show copies of receipts of his rent payments. The appellant says the receipts were forged but the witness said that he had the original receipts which is quite normal. I find her evidence truthful.

In addition to the evidence the Appellant made a statement to the police under caution. This statement was retracted and a trial within a trial was held. The trial court found that the statement was admissible. I have examined these proceedings of trial within trial and it is clear the Trial Magistrate was correct in admitting the statement.

Upon considering the total evidence including the defence of the accused with his witness I am

convinced that the appellant was in possession of the large quantity of bhang. He was in exclusive possession of the premises in which the bhang was found. Whether he was residing in the premises or not is not important. He had the keys to the premises. It is of note that his wife who gave evidence also admitted to being on a charge relating to narcotic drugs at the time of this trial.

On the issue of sentence it is to be noted that the offence committed is serious as are all offences under the Act. However there are certain mitigating factors here. The appellant has relatives and family who depend on him wholly. He was a first offender. The State Counsel Ms. Kwena was of the view that the sentence was on the higher side and she recommended rehabilitation order. There is also the provisions of the Community Service Order Act designed to keep convicts out of prison to be considered. Our prisons are overpopulated with prisoners and it may not serve any purpose to sending more and more persons inside. On the other hand the law has to be applied. Punishment must be suffered by those who are found guilty.

In the circumstances I am inclined to set aside the 5 years imprisonment but substitute the same with a Community Service Order. The appellant shall serve Community Service for a period of 3 years.

I am told that for drug offences there will be established rehabilitation facilities but there is none to-date in this Province.

In the circumstances I shall call for a report from the Community Service Officer as to suitability of placing the appellant under Community Service Order. The case shall be mentioned on 2/9/2002 for receiving report.

Dated at Mombasa this 7th Day of August, 2002.

J. KHAMINWA

COMMISSIONER OF ASSIZE