REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 48-57 OF 1997

HEMEDI AMERI .....1ST APPELLANT

MOHAMED ALI .....2ND APPELLANT

ALI BIN ALI .....3RD APPELLANT

OMAR HEMED.....4TH APPELLANT

SHEE OBO MOHAMED.....5TH APPELLANT

BWANA BUNU .....6TH APPELLANT

MOHAMED KALI FUMO .....7TH APPELLANT

OMAR SALIM KATAMBO .....8TH APPELLANT

MOHAMED LIWALI ALI .....9TH APPELLANT

OMAR HAMISI .....10TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

These appellants were originally charged with the offence of trafficking in narcotic drug contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act No 4 of 1994 in that on diverse dates between 4th & 6th April, 1996 at Kinondo in Kwale district of the Coast province jointly with others not before Court trafficked in 19,633 slabs of *cannabis resin* (commonly known as *hashish*) weighing about 19,633 in contravention of the said Act. They were 15 accuseds now 10 appellants. They are ordinary persons of mixed nationalities, 4 Tanzanians, 1 Yemen, 1 Ugandan and 9 Kenyans who happened to have been seamen of the two subject dhows and their ages ranged from 16-70. The facts of these cases were contained in the testimony of 20 witnesses. PW1 PC Damaris Aruse a police officer stationed in Msambweni Police Station testified that on 6-4-96 when she went to Galu- Kinondo beach to buy fish she found an unattended lorry Mercedes KUW 648 stuck in sand loaded with slabs which turned out to be *hashish*. She grew suspicious and reported the matter to her commanding officer PW 4 who sent further reinforcements and carried investigations. Eventually the lorry was towed to the police station

after having been guarded by PW 3 and other police personnel. At that same time the chief of Kinondo location PW 11 in whose area the lorry was, saw it fit for unexplained reasons to go to report to PW 10 OCS at Diani Police Station yet leaving Msambweni Police Station which was near and then much later reported to his DO. The evidence was adduced that in all the lorry had 986 bags containing 19,633 slabs each of the slabs was wrapped in nylon paper and on which was printed "Fancy Ketchup". It had writings saying ingredients – tomatoes, corn sweeteners, distilled vinegar salt and natural flavouring" origin – Chatworth CA 91311 USA. The wrappings on the satchet were different. PW 2 Francis Macharia Maina a government analyst attached to Government Chemist Department in Mombasa carried out several chemical tests and made a report Ex 7 he found that the substance was *cannabis resin* (*hashish*) which is included in the Narcotics Drugs and Psychotropic Substances (Control) Act No 4 of 1994. PW 8 IP Samson Kyalo Nzioki of Marine Police Unit arrested the crew members of Al Husna, a boat suspected to have transported the *hashish*. On searching it they found documents resembling bags of *hashish* already recovered and confiscated the boat. PW 16 Frank Rogalei Njau identified the lorry KRA 785 Mercedes which he said bore Reg No UXV 161 when earlier on they repaired it at their garage. He said a man called Alwi came on 4/4/96 to the garage, rubbed off "Kampala" address and put on Mombasa address at the door of the lorry and this evidence was corroborated by PW1 Joseph Simon Ngowi who said how the owner of the lorry Abdi Nassir left without paying for the repair and that his driver Adam drove the lorry away. It was this lorry that was found loaded with *hashish* drugs. It had coconut leaves on top and under these were packets of *hashish* drugs packed in 984 bags. According to the statement of accused No 9 Ali bin Ali that the learned Chief Magistrate admitted. He said he was captain of MV Haifa whose owner was Rashid Ahmed. On 4/4/96 he sailed in Rashid Ahmed's boat named MV Al Husna with 11 sailors. He had been introduced to two persons Ali and Nassir on 3/4/96 who said they wanted to offload some clothes near Chale Island on the coastline and they were to offload those clothes from another vessel on the high seas between Pemba Island and Kenya. They were paid Kshs 150,000/- to be shared together with the sailors for the job. So next day he left for Pemba with a load of Toss detergent, mattresses and drums of diesel. They sailed off at 1 pm from Port of Kilindini towards Pemba but at midnight they met with another vessel from Pemba which they captioned together with theirs where sailors in the 2nd night vessel loaded bags into Al Husna. There was an Indian who came and went into the next vessel. The Al Husna proceeded to Pemba then later went to Kenya on 5/4/96. Al Husna got other small boats off Chale Island to take the luggage to the coastline where accused No 2 at the trial and the Indian got in the 3 boats to the coastline. They found the lorry stuck in the sand. Although the captains of the other motor boats suggested they go back with the bags the Indian, Ali and Nassir decided to load the bags in the stuck lorry as Ali was confident he would get a trailer to push the lorry and that was later done using about 60 people. After offloading, the three vessels left. The Indian left with Nassir as offloading was going on but Nassir came back after about 20 minutes.

Accused 9 Ali bin Ali realized as they were loading that it was *hashish* but there was nothing he could do.

Six accused ie Bwana Bunu, Mohammed Ali, Omar Salim Katambo, Mohammed Liwali Ali, and Omar Khamis said nothing in their defence. Accused 3 Mohammed Kame Fumo, 7 Shee Obo Mohamed and 8 Ali bin Ali, made unsworn statements where they admitted being each a member of the crew in Al Husna wherein accused No 7 Shee Obo Mohamed was captain, but on this night accused 9 Ali bin Ali took charge and piloted the boat but they denied knowing that the substance they carried was *hashish*. So was accused No 13 Mohammed Liwali Ali in his statement under inquiry Ali Hamedi 5th accused and Mohamed Ali 2nd accused accepted being crew in the Al Husna on the night of carriage in part that:-

In his very well reasoned and searching judgment the Chief Magistrate found that the police investigating the case did not establish the owner of the vehicle so accused No 15 Ali Shariff Aidarus Sagaaf was acquitted otherwise he convicted the rest of the accused persons. In his final judgment he said-

> "To "traffic" in narcotic drug or psychotropic substance means to "import, export, manufacture, buy, sell, give, supply, store, administer, convey, deliver or distribute the same. It follows that whether looked at as conveying or delivering, the accused who were members of the crew of Al Husna "trafficked" in this *hashish*. They were charged under s 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, No 4 of 1994. In this respect I find them jointly guilty as charged and convict them accordingly."

He sentenced them separately as follows:

1) Accused No 9 Ali bin Ali – 25 years plus 500,000/- fine.

2) Accused No 7 Shee Obo Mohamed – 20 years plus 500,000/- fine.

3) Accused Nos 1, 2, 4, 5, 6, 8, 13 & 14 – 10 years in jail plus Kshs 500,000/-

Al Husna and the lorry were forfeited to the Government.

Against this these convicts have now appealed and their appeals were consolidated. Their grounds were filed separately by Magolo Ochuka and Co Advocates who filed for:

Appellant No 1 Hemedi Ameri Cr A No 585/96

Appellant No 2 Mohamed Ali Cr A No 586/96

Appellant No 3 Ali bin Ali Cr A No 584/96

Appellant No 4 Ali Omar Hemedi Cr A No 584/96

Appellant No 5 Shee Obo Mohamed Cr A No 581/96

Appellant No 6 Bwana Bunu CR A 580/96

Appellant No 7 Mohammed Kali Fumo Cr A No 588/ 96

Appellant No 8 Omar Salim Katambo CR A No 579/96

Appellant No 9 Mohamed Liwali Ali 583/96

Appellant No 10 Omar Hamisi Cr A No Cr A No 582/ 96

They were consolidated and heard together.

The grounds were similar in each appeal. They were 7 grounds. They read in each appeal as:

1. That the learned magistrate erred in law and fact in presuming and holding that there was a valid charge before him and therefore convicting the appellant of non existing offence.

2. That the learned trial magistrate erred in law and fact in writing and pronouncing a judgment that did not comply with legal requirement.

3. That the learned magistrate erred in law and fact in making findings of fact and law not supported by evidence accused.

4. That the learned trial magistrate erred in law and fact in using evidence adduced selectively in order to arrive at a predetermined decision.

5. That the learned trial magistrate erred in fact and law in ignoring or giving no consideration to the case for the defence and submission made before him.

6. That the learned trial magistrate erred in fact or law in basing his sentence on facts not proved.

7. That sentence imposed is manifestly excessive.

Dr Khaminwa learned counsel for the appellants argued the appeal. He said in the main that there was no offence proved against all the appellants except 5th and 3rd appellants Shee Obo Mohamed and Ali bin Ali respectively because the rest had no knowledge of the offence. He argued that the offence required knowledge and therefore as that was not proved then the conviction cannot stand.

Of appellant Nos 5 and 3, he conceded that Obo Mohammed and Ali bin Ali were captains of Al Husna and Al Haifa respectively but they were only employees. They acted on behalf of Rashid Ahmed the owner of the two ships. Yet Ahmed Rashid was never called even to give evidence. Dr Khaminwa argued that an employee of a carrier would not be the one "to traffic".. Obo Mohammed says he was told of loading when he was on the high seas while Ali bin Ali was told they were chocolates. The two captains did not know that what they were carrying was *bhang*. He referred to s 16 of the Penal Code, but Mr Gumo Snr state counsel supported this conviction and sentence. But he said that even if they lacked knowledge that the cargo was *bhang* and that they were employees it suffices that they participated in the trafficking of the *bhang* right from the high seas to the coastline and the offence was complete. S 21 of the Penal Code is applicable he said.

The main question to be answered in this appeal first is whether the provision of the Act upon which these appellants were convicted required *mens rea* or knowledge. It is accepted as proved that two marine vessels belonging to Mohammed Rashid carried 986 bags of *bhang* from the high seas to the Kenyan coast. The crew of the Al Husna received the bags from Al Haifa and loaded the cargo and sailed to the Kenya coast with it from where they were taken to the beach by motor boats. Did they know that the cargo was *hashish*? That is the question. The two counsel in this appeal staked their stand points on two different sections of the Penal Code. Dr Khaminwa quoted s 16 thereof which says that:

> "A person is not criminally responsible for an offence if it is committed by two or more offenders and if the act is done or omitted only because during the whole of the time in which it is being done or omitted the person is compelled to do or omit to do the act by threats on the part of the other offender or offenders instantly to kill him or do him grievous bodily harm if he refuses, but threats of future injury do not excuse any offence, nor do any threats excuse the causing of, or the attempt to cause death."

This is one of those rules of criminal liability that serves as a defence to an offence. Dr Khaminwa has argued his case beyond the scope of this section as if superior orders to which a person is subordinated can be a defence to "criminal liability *per se*". Under old English practice a man could be excused for deeds he has done without his free will or of his own volition but if done under compulsion upon him exercised by another it must however be shown that accused's conduct is not voluntary and there was no mental element of volition, but whatever it is, general coercion is never easily admitted as defence to criminal liability although criminal law has treated the necessary species of the defence under orders, yet even here, a soldier, a sailor or a policeman cannot even plead obedience to superior orders against violent crime.

Secondly, coercion may operate under marital coercion, but on a very limited scale under s 19 of our Penal Code.

Under the common law necessity also was counted as coercion. Our Penal Code s 16 that was quoted by Dr Khaminwa was based on the common law called Duress Per Minds which even in its ancient application was very rare defence indeed. *Blacks Law Dictionary* says it means-

> "Duress by threats. The use of threats and menaces to compel a person, by the fear of death or grievous bodily harm as may harm or bodily limb to do some lawful act or do some misdemeanor."

In the English case of *R v Steane* [1947] KB 997 this was recognized as defence. However in English experience fears of some lesser degree of violence insufficient to excuse a crime may nevertheless mitigate its punishment. It is legally recognized and in *Kenny's Outline of Criminal Law* says that "Wherever there are two criminals, one of them is often to some extent in terror of the other, in such a

case the timid rogue may deserve a less severe punishment than his masterful associate."

This notion is retained in s 16 of our Penal Code, but apart from mentioning it Dr Khaminwa with respect did not really relate his clients to the requirements of that section. There was no evidence of fellow criminals prevailing on others by exerting physical and deadly threat of fatal consequences of violence against the perceived weaker or more suppliant fellow criminals in the boat.

That defence could avail in this case.

Mr Gumo Snr state counsel on his part quoted s 21 of the Penal Code where it says:-

> "When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose each of them is deemed to have committed the offence."

Here I think Mr Gumo is urging the Court to find that they were joint participants of the offence and are jointly guilty but for this to hold it must be proved that the participants shared a common intention to do an unlawful purpose and that the offence committed is a probable consequence of that common intention.

This can be illustrated by the case of *R v Otieno* (1947) 14 EACA 68 where the facts were that after 3 thieves had committed burglary and met a policeman on the way one of them shot the policeman dead. It was held that all were guilty of murder because when they were still engaged in burglary and theft so murder of a policeman was a probable eventuality.

I do not with respect follow the logical thread in Mr Gumo's mind on this argument. It is not clear if it could be his suggestion that once acted as carriers by ships the intention was shared by the carriers on land, or whether he meant to say that appellant 5 Shee Obo's and 3 Ali bin Ali's knowledge permeates the mind of all, but these notions are pertinent only if there was an intention by all the participants to effect an unlawful act. Dr Khaminwa's argument is that the intention of the ordinary crew of 8 appellants was merely to transport cargo in the ship. They were merely doing their work as crew of a ship would and there is no evidence that they knew or that they did something untoward or out of the ordinary.

It is granted that this is a statutory offence and a person is guilty of "trafficking in drugs" when he imports, exports, manufactures, buys, sells, gives, supplies, stores, administers, conveys, delivers or distributes the substance. The learned Chief Magistrate found and I agree with him that the Al Husna was engaged in the act of "conveying" and or "delivering" but then who was Al Husna? It was a marine vessel, that had crew under direction of a captain. Were the crew conveying and delivering? Theirs appears to have been a mere mechanical exercise. They had carried these bound up pellets which were meant to be ketch-up. Did they have to know? The learned magistrate was convinced that they knew and in that sense he did not rely on strict interpretation of the offence. His conclusion was based on his finding, and I must say the learned Chief Magistrate was very articulate on this. First he found that accused No 9 now appellant No 3 Ali bin Ali recruited accused No 7 now appellant No 5 Shee Obo Mohamed and the crew. First he Shee Obo Mohamed asked accused 9 Ali bin Ali to talk his crew into agreeing. But there is no evidence where this persuasion talk took place. He then found the task was nocturnal, but again there was no evidence that nocturnal voyages were never made. He found thirdly that, they would be paid 150,000/- to be shared among 10, but again it was not specified if this was going to remunerate the nightly undertaking for its abnormal timing. If any. Did in persuasion of accused 7 Ali bin Ali by accused 9 Shee Obo Mohamed disclose all? No. Accused 7 Ali bin Ali was not told what they were going to carry. They were not told why the ship would not come to Mombasa but to go elsewhere. Since accused No 9 Ali bin Ali says he did not know what the merchandise was. It appears he was kept in the dark. It is therefore unimaginable that the mere crew would have known any better.

The ship was to run off course but again crew would not have a say in the choice of the route. Then on board was going to be the Asian and Rashid the owner of the ship. Could it be imaginable that these simple sailors would question arrangements where the ultimate boss was the one calling shots? This was

unlikely. Accused 9 Ali bin Ali himself says the consignment was to be tomato sauce and chocolate.

In my analysis I do not see that there was any other evidence of knowledge the learned Chief Magistrate considered. But he had two contradicting statements from accused No 9 Ali bin Ali who said in Court he was told he would carry chocolate with tomato sauce markings, but in his statement under enquiry he said he was told he was going to carry clothing but found they were *bhang* while in the high seas. There was inconsistency in the testimony of accused 9, but the learned Chief Magistrate believed him without saying which version he rejected. He gave general reason for preference as well he could but not identifying which one he preferred but whichever version carried the day there was no actual evidence or legal presumption to actualize in the minds of the crew the knowledge in the mind of accused No 9 Ali bin Ali.

How would the learned Chief Magistrate determine knowledge by these crew that they were trafficking in *hashish* in these circumstances? Devlin J, once said in a case of *Roper v Taylor's Central Garages* [1951] 2 TLR 284 that :-

> "There are I think three degrees of knowledge which it may be relevant to consider in cases of this kind. The first is actual knowledge which the justices may find because they infer it from the nature of the act done for no man can prove another man's state of mind, and they may find it even when the defendant gives evidence to the contrary.
>
> They may say we do not believe him, we think that that was his state of mind. They may feel that the evidence falls short of that, and if they do they have then to consider what may be described as knowledge of the second degree, whether the defendant was as it has been called, shutting his eyes to an obvious means of knowledge. Various expressions have been used to describe that state of mind.
>
> The respondent deliberately refrains from making inquiries, the result of which he might not care to have."
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> The third kind of knowledge is what is generally known in law as constructive knowledge, it is what is encompassed by the words "Ought to have known, in the phrase knew or ought to have known....." It does not mean actual knowledge at all. It means that the defendant had in effect the means of knowledge."

The learned Chief Magistrate drew inference that all these people knew before they set out the journey to Pemba that they were going to transport *hashish*.

With difference to the learned Chief Magistrate I do not think there was such evidence not even a suggestion of it nor even a suspicion of it. The only mention of *hashish* was when in Court accused/appellant Ali bin Ali said he saw some *hashish* in the high seas, but then had this been the case the knowledge would have come too late to justify the expressed finding of the learned Chief Magistrate that they knew before they sailed. It is the obligation on the prosecution to establish accused persons attitude of mind to what he was doing from which it can be inferred that he had the requisite knowledge as a requisite *mens rea* for an offence which relies on *mens rea*. This offence required knowledge.

There is no evidence of actual knowledge, so it would appear to me that the Court relied although unwittingly, that they ought to have known or that they had means of knowledge, but without spelling it out.

Then if the case was that the accused ought to have made reasonable inquiries then prosecution should have gone further as Devlin J said in the above case:- that "there is vast distinction between a state of mind which consists of deliberately refraining from making inquiries the result of which the person does not care to have and a state of mind which is merely neglecting to make such inquiries as a reasonable and prudent person would make. The case of shutting the eyes is actual knowledge in the eyes of the law. The case of merely neglecting to make inquiries is not knowledge at all. It comes within the legal conception of constructive knowledge, a conception which generally speaking has no place in the

criminal law.

It is my view looking at the evidence in this case that the crew had no knowledge, but I think the case of the two captains is different. I think they deliberately shut their eyes to the facts of the situation. They were possessed of actual knowledge.

The offence of trafficking in *bhang* is a heinous offence and is to be fought by these Courts, but the Courts cannot do so outside the law. If the Legislature thinks that merely being in a carrier where *bhang* is carried, ie a vessel, an aeroplane, a bus, you are guilty then the statute has to say so in clear terms. In this case there was selective prosecution. The owner of the two ships plus the mysterious Indian who with him looks to be the smuggler went off without a scathe and no prosecution. They were not even called to give evidence. Where a servant is being punished for his master's sins and act which he cannot influence, restrain, rule, manage or control the law is engaged not in punishing crime but in protecting the influential criminals antisocial proprietors and acts to warm their green houses by sacrificing the most convenient victim the small and ignorant. Then the law ceases to protect but to hurt. I am of the view that prosecution of criminal offender in prevention of drug abuse and trafficking can be strict but this should be where the Legislature has expressly stated, but such cases where strict liability is enforceable should in my view be exceptions to the rule that a person cannot be convicted of a crime unless it is shown not only that he has committed the act or omitted to do something but also that a blameworthy conditions of mind can be imputed to him.

I allow appeals of 8 crewmen being appellants Nos 1 Hemedi Ameri, 2 Mohamed Ali, 4 Omar Hemed, 6 Bwana Bunu, 7 Mohamed Kali Fumo, 8 Omar Salim Katambo, 9 Mohamed Liwali Ali and 10 Omar Hamisi. I quash their convictions and set aside their sentences and set them free unless otherwise lawfully held. I however uphold the convictions of the two captains Ali bin Ali appellant No 3 and Shee Obo Mohamed, appellant No 5 and confirm their sentences, but I think I must recommend the prosecution of the owner of the ship and the Indian mentioned, that they be arrested and prosecuted for the offence.

Dated and Delivered at Mombasa this 21st day of July 2000.

A.I.HAYANGA

JUDGE