REPUBLIC OF KENYA

IN THE COURT OF APPEAL
NAIROBI
(CORAM: GICHERU, SHAH & BOSIRE JJ.A)
CRIMINAL APPEAL NO.93 OF 1997
BETWEEN

MOHAMMED SHAFIQ .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal from a conviction, judgment, decree, order or as the case may be) of the High Court of Kenya at Nairobi (Mr Justice Ringera) dated 2nd September 1994
in
H.C.CR..A. No.835 of 1994)
****

JUDGMENT OF THE COURT

The appellant, a Pakistan national, was convicted on his own plea of guilty to a charge of being in possession of a narcotic substance to wit heroine, by the Chief Magistrate, Nairobi, and was thereafter sentenced to 10 years imprisonment. His first appeal to the superior court was summarily rejected under Section 353(2) of the Criminal Procedure Code. He comes to us on second appeal.

The issue that is raised by the appeal is whether the appellant's appeal to the superior court was properly summarily rejected. The appellant was treated as a first offender by the trial court. In his statement in mitigation he stated that he was a married man with three children; he was their sole bread winner; that he was in transit to Uganda from Pakistan and had been given a briefcase to pass on to one Mangur in Kenya, but that he was arrested before he could do so; that he did not know the contents inside the brief case and that he was remorseful.

In his notes on sentence the trial magistrate took all those factors into account and added that the offence the appellant had been convicted of was serious; that he was arrested with eight satchets of heroine worth Kshs.2.1 million, which the court considered to be large; and that he would, in effect, treat the appellant more sympathetically because he was a first offender and had pleaded guilty. All that notwithstanding the trial Magistrate imposed a sentence of 10 years imprisonment which was then the maximum prescribed for such an offence. It would appear to us that either the trial Magistrate was unaware of the maximum sentence for the offence or that the remarks he made indicating that he would consider the appellant's case sympathetically were merely stated perfunctorily. Otherwise the maximum sentence was not justified.

The learned first appeal Judge (Ringera J.) in summarily rejecting the appellant's appeal did not allude to that anomaly and we think that had he done so he would not have summarily rejected the appellant's

appeal. The issue of severity of sentence was a point of law which would have entitled the appellant to a hearing more so in the circumstances of this matter.

Having considered the matter in its entirety we are of the view that if the trial and the first appellante courts had properly addressed their minds to the law, a proper sentence would have been seven years imprisonment. We accordingly allow the appellant's appeal, set aside the sentence of 10 years imprisonment which was imposed on him, and substitute therefor a sentence of 7 years imprisonment. In addition we recommend under Section 26 A of the penal code that upon completion of his sentence the appellant be removed from Kenya.

Dated and delivered at Nairobi this 3rd day of March 1998.

J.E. GICHERU

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

S.E.O. BOSIRE

....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR