IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: CHESONI, C. J, KWACH & OWUOR, JJ.A)

CRIMINAL APPEAL NO. 21 OF 1998

BETWEEN

AHMED MOHAMMED ALI ……..APPELLANT

AND

REPUBLIC ……...…..RESPONDENT

(Appeal from a conviction, judgment, of the High Court of Kenya at Mombasa (Mr. Justice Waki) dated 9th May, 1997

in

H.C.CR. NO. 342 of 1996)

****

JUDGMENT OF THE COURT

Ahmed Mohammed Ali (hereinafter called "the appellant"), Ahmed Salim and Abdulrahman Mohammed, were tried and convicted by the Senior Resident Magistrate, Mombasa, on an indictment containing two counts of being in possession of narcotic drugs contrary to section 3(1) of the Narcotic and Psychotropic Substances (Control) Act (the Act), as read with sub-sections 2(a) and (b) of the Act. The first count alleged that on the 12th day of November, 1995, at Kisauni village in Mombasa District, within Coast Province, the accuseds were found in possession of 26 sachets of Diacentromophine narcotic drug, commonly known as heroine, which was not in its medicinal preparation form. In count two, it was alleged that on the same date at the same place, they were found in possession of one roll of cannabis sativa (bhang). The appellant and his co-accuseds were each sentenced to ten years imprisonment on count one, and three months imprisonment on count two which sentences were ordered to run concurrently.

The appellant and the other two accused persons appealed to the superior court against both conviction and sentence but their appeals were dismissed. Ahmed Salim and Abdulrahman Mohammed filed a joint appeal to this Court (Criminal Appeal No. 38 of 1997) but the appellant filed his own appeal. For some reason, not easily ascertainable from the record, Criminal Appeal No. 38/97 came up earlier for hearing and was determined on 14th July, 1997. The appeal was allowed and the conviction of Salim and Mohammed quashed.

The evidence before the learned trial magistrate was that on Sunday, 12th November, 1995, at about 9.00 p.m, four administration Policemen (APs) from the District Commissioner's Office in Mombasa, acting on information received, raided a house at Mlaleo in Kisauni area and found five persons in a small room with one bed, a table and a few chairs. Some of the occupants were sitting on the bed and others on chairs. Some of the occupants were sitting on the bed and others on chairs around the table. They were smoking what to the APs appeared to be bhang and they appeared to be drunk. The officers searched the men and the room. Under the table between the feet of the appellant, who was seated at the table, they saw rolls of paper resembling cigarettes. They picked up these and they were 26 in number. They contained white powder. Under the bed the officers retrieved a roll of bhang. All the five men were arrested by the APs, handed over to the regular Police together with the satchets and bhang and were taken to Nyali Police station. Two of the suspects including one who was alleged by the appellant to have been the owner of the house in which the drugs were found, were released in suspicious circumstances by one Inspector Wanyonyi and were never charged. Although Waki J in his judgment ordered the Attorney-General to investigate the circumstances in which these suspects were released, no action was taken, with the result that when Criminal Appeal No. 38/97 came up for hearing on 14th July, 1997, before a different bench of this court and the Attorney-General's default was brought to the attention of the Court, the Court allowed the appeal by Ahmed Salim and Abdulrahman Mohammed. The Court took the view that the prosecution's failure to call those two suspects as witnesses raised the inevitable presumption that had they been called they would have given evidence unfavourable to the prosecution's case. We do not know whether the two suspects would have been charged with the same offence.

The issue of the release of the two suspects was also raised in this appeal by Mr.Gacuhi, for the appellant. We ordered and investigation and Bwonwonga, for the Republic, informed us that the matter was being investigated and a report would be submitted to the Court soon. We are concerned that the order made by Waki J was simply ignored and our own order to the same effect has been treated with lamentable lack of dispatch.

The evidence of the search and finding of the drugs was given by three Administration Policemen (APC Edward Kiengo (P.W.1), APC Peter Kahome (P.W.2) and APC Kilei Mbogo (P.W.4). Their evidence agreed in material particulars. The items found in the house by the APs were sent to the Government Chemist for examination and were found and certified to be heroine and bhang. The appellant in his unsworn statement told the trial Magistrate that he had gone to that house to visit his friends called Fared Omar and Mohammed Salim and while he was there the Police raided the premises and arrested them. He could not tell whether the police recovered any drugs. He said the house belonged to Omar and he was surprised that Omar had not been taken to court and charged.

Mr. Gacuhi's submission before us was that the prosecution's failure to prove that the appellant was the owner of the house in which the drugs were found and the decision not to call the two suspects who were released, as witnesses was fatal to the appellant's conviction. He cited in support of this submission the decision of this Court in the case of Ahmed Salim and Abdulrahman Mohammed v. Republic (Criminal Appeal No. 38 of 1997) (unreported). This was the appeal filed by the other two suspects who were tried and convicted together with the appellant and to which we have already alluded. In the course of their very short judgment the learned Judges said:-

> "The drugs in question were found in the house which the appellants had visited. The owner of the house and another who were arrested with the appellants were released and never called to testify at the trial. This raised the inevitable presumption that witnesses if called would have given unfavourable evidence against the prosecution. This failure on the part of the prosecution was fatal to the conviction. There is no evidence sufficient to raise any presumption of possession against the appellants."

This is a judgment of this Court and we are bound as usual to accord it utmost respect. In the ordinary course of events we would have followed the decision and applied it in this case because it arose from the same case and under the same circumstances in which the appellant was jointly tried with those appellants and convicted. What has caused us some anxiety is the implication in the judgment that the ownership of the house in which the contraband drugs were found had to be proved before the accused persons could

be found guilty of possession of the drugs. Section 3(1) of the Act under which the charge was laid states:-

> "3 (1) subject to subsection (3) any person who has in his possession any narcotic drug or psychotropic substance shall be guilty of an offence."

It is true that possession has not been defined for the purpose of the Act and the definition in the Penal Code is inapplicable. But that omission presents no difficulty because it is not unusual. In the Chang'aa Prohibition Act (Cap. 70) a statute enacted in August 1980 to prohibit the manufacture, supply and possession of chang'aa, "possession" is not defined either. "Possession" is not defined either. Possession is defined in Stephen's digest of the Criminal Law (9th Edition) at page 304 as follows-

> "a movable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need."

This court adopted this definition in the case of Hussein Salim v Republic [1980] KLR 139 when dealing with the issue of possession under section 10 (e) of the Dangerous Drugs Act which was repealed by the Act. The appellant in that case had been convicted of being in possession of cannabis sativa. The appellant had led the police to a room in a house, he opened the door and from under the bed he pulled out a box and a plastic container which between them contained 19Kg of bhang. Both the trial court and the superior court were satisfied that this evidence was sufficient to show possession of the bhang on the part of the appellant and that finding was upheld by this Court. As regards the issue of possession the Court said-

> "We take this definition to mean, not that any legal title has to be proved, nor that access to the complete exclusion of all other persons has to be shown, but that a possessor, must have such access to and physical control over the thing that he is in a position to deal with it as an owner could to the exclusion of strangers."

With respect, we agree with this definition of possession which should be the meaning to be attached to that word for the purposes of the Act.

The drugs were found in a small room in which the appellant and four other men were found sitting and actually smoking, and as regards the appellant, the satchets of heroine were lying between his feet under the table. In that situation the denial by the appellant and his co-accused that they knew nothing about the presence of drugs in the room and that they had only gone to see their friends, could not possibly be true. The learned Judge directed himself correctly when he said that there was no necessity for the prosecution to prove the legal ownership of the drugs found in the room or that the appellants had access to them to the complete exclusion of all other persons. The Judge was also right in the view he took that legal ownership of the room in which the drugs were found was not material. The proximity of the drugs to all the five men in that small room was so close as to leave no doubt that they were in possession and control of the stuff.

We are satisfied that on the evidence on record the appellant and the other four persons in the room with him were in possession of the drugs within the meaning of section 3(1) of the Act and the fact that two of them were set free by inspector Wanyonyi and not called by the prosecution to give evidence at the trial does not make any difference to the appellant's criminal responsibility. The appellant was properly convicted and first appeal dismissed. His appeal accordingly fails and is dismissed.

Dated and delivered at Nairobi this 7th day of September, 1998.

Z.R. CHESONI

CHIEF JUSTICE

R.O. KWACH

JUDGE OF APPEAL

E.OWUOR

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR