REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL NOS 641 AND 642 OF 1979

BETWEEN

FESTO WANDERA MUKANDO .....APPELLANT

MICHAEL KARIUKI WAWERU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against their convictions and sentences in the Senior Resident Magistrate's Court, Nairobi, in Criminal Case No 1090 of 1979)

JUDGMENT OF THE COURT

The two appellants, Festo and Michael, and a woman called Justine, were charged with an offence contrary to section 13(l)(a) of the Coffee Act, the statement of charge reading "Prohibition of sale of coffee without a licence, contrary to section 13(1)(a), punishable by section 13(3) of the Coffee Act, cap 333, Laws of Kenya" and the particulars of charge alleging that they:

> transacted a business of sale of 94 bags of coffee without being the holders of a current licence issued by the Coffee Board of Kenya authorising them to do so.

The woman was acquitted of the charge after the prosecution had closed its case but the appellants were put to their defence and, at the end of the day, each was convicted and sentenced to serve five years in prison and to receive ten strokes by way of corporal punishment, the coffee being ordered to be forfeited to the Government. The two men now appeal against those convictions and sentences. There are various grounds of appeal against conviction in each of the petitions, all of which we have considered, but we think that we may fairly say that they come to this: that the statement of charge and the particulars of the offence do not match; that the *quantum* and quality of the evidence led against the appellants was not enough to establish the facts upon which the prosecution relied; and that, even be it otherwise, those facts were yet not enough in law to support the charge brought. In respect of sentence they say that the awards are so severe that they ought not to be maintained.

The marginal note to section 13 is "Prohibition of certain acts without licence" and subsection (l)(a) does not, as we shall see, refer to a "business of sale" so that the statement and particulars could both the better have been expressed. But we are unable to accept, as counsel has asked us to do, that the convictions have to be quashed because no money changed hands. What the prosecution obviously had in mind and set out to do was to serve notice that they regarded the facts upon which they relied as a matter of business and not of domesticity; and whilst the words "of sale" where they appear in the particulars are otiose, the appellants could not have been in any doubt that what they were facing was a charge of transacting

business in coffee on an uncompleted sale. They were in no way confused, embarrassed or prejudiced by the form of charge and particulars set against them.

As for the facts, the trial magistrate accepted those for which the prosecution contended and rejected those put forward in defence. He found that, the police being possessed of certain information, a policeman acting as an *agent provocateur* posed as a prospective purchaser of coffee, the appellants produced the coffee with which we are concerned to him, negotiations were entered into, and a bargain was struck whereby they would sell (and he would buy) it at a price depending on whether they or he bore the transport charges needed to be incurred in respect of it. The sale was not concluded because an ambush was laid, the coffee was taken by the police and the appellants were arrested. For all that the appellants put forward by way of defence (ie that the central part of the evidence derives only from the policeman, that there are the odd differences in the evidence and that hearsay evidence was wrongly let in), the magistrate could have arrived at the findings which he did; and it is clear that he would yet have arrived at those findings without relying on the inadmissible evidence. It was argued before us on behalf of the appellant Festo that no more had been proved against him than that the coffee was found in his house (or a house said to be his); but that is not so. Apart from anything else it was he who said that he and the appellant Michael had "agreed on the price of the coffee". The two men were acting in concert. We, making our own assessment on the recorded evidence to the extent that it is admissible, arrive at the same findings as the magistrate did.

The provision under which the charge was laid (leaving aside exemptions which do not concern us in this appeal and sentence with which we shall be dealing in a moment) reads as follows:

> Subject to subsection (2) of this section no person shall buy, sell, export, mill, warehouse or otherwise deal in or transact any business in coffee unless he is the holder of a current licence thereto authorising him, issued, in its discretion by the Board;

and what needs to be resolved is whether the negotiations entered into between the appellants and the policeman amounted to a transaction in business in coffee within it. In the court below, as before us, the appellants relied on just one case, *Wallis v Lomas* (1890), *The Times*, 10th February, in support of his contention that it did not. The facts of the case were these. A member of a benefit society claimed, and was entitled to, sick pay unless he was "transacting business"; and it was argued that, because he might have bought some tobacco for his own smoking in one shop and certainly bought some bacon for his own eating in another, he was transacting business and so ineligible for the sick pay to which he would otherwise have been entitled. Of course the argument failed. In its context the expression "transacting business" obviously had to do with the earning of a living; not the making of personal purchases. In any case the circumstances discussed are far different from those before us.

But there are other decisions in the books and the three which we now cite (two on section 133 of the Bankrupt Law Consolidation Act 1849 (England) and the other on section 27(1) of the Finance Act 1927 (England" are of help to us, as will appear. In *Brewin v Short* (1855) 5 E & B 227 the Court said:

> Looking at the language of section 133 ... and the general scope of the legislation of which it is a part, there seems strong ground for contending that the object of Legislature was to give the same validity and force w'†all contracts, dealings and transactions by and with any bankrupt ... and that the word "transaction" as here used, has not any extraordinary or technical meaning, but is used in its ordinary sense of "act, doing, negotiation or dealing", as defined in the common dictionaries.

Much the same thing was said in *Krehl v Great Central Gas Co* (1870) LR 5 Exch 289, ie:

> Section 133 ... uses the words "contract, dealing and transaction", Of these words … the third appears to have been inserted to give as large an operation as possible to any arrangement made *bona fide* with the bankrupt. "Transaction" is a general word, and is thus defined in *Webster's Dictionary*: "Doing or performing; business; that which is done; an affair."

So too did Lord Normand in respect of the Finance Act 1927 describe the scope of the word "transaction"

in *Barron v Littman* [1952] 2 All ER 548. He said, “In my opinion, ‘transaction’ ... is a comprehensive word which includes any dealings in property.”

The assistance to be had from considering words where they appear in one piece of legislation in aid of interpreting those same words where they appear in another can vary a good deal because, apart from all else, the purport of the legislation must not be lost sight of. But whilst in the two cases to do with bankruptcy the Courts were concerned that it should be understood that certain dealings with a bankrupt were not sought to be prohibited, the purpose of the revenue case was to garner tax and section 13(1)(a), our central concern, relates to the prohibition of certain acts without benefit of license. The four cases have this in common: that the legislation applicable to each of them sets out to cover as much ground as possible. In our Act the words “transact any business in coffee” follow on the words “no person shall buy, sell, export, mill, warehouse or otherwise deal in”; and we experience no doubt that they were put in because they are comprehensive words, it not being intended that they should be interpreted restrictively, but in their ordinary dictionary meaning. They were intended to give as large an operation as possible to what the Act, passed as its long title tells us, “To provide for the regulation of the coffee industry and the control of the production, marketing and export of coffee; and for purposes incidental thereto and connected therewith” wanted not to be done without licence. The verb “to transact” which may be used transitively or intransitively, means to conduct or negotiate about, to perform, to do business, to deal with or in, to have dealings, to treat to have to do; and so on; and on the accepted facts of the case before us, there having been negotiations and treating between the parties and (so far as the appellants are concerned) their arrangements having been frustrated only just before fruition by the intervention of the police, they were transacting business within the meaning of section 13(1)(a).

Possessed of no current licence enabling them to do so, and not being exempted from the necessity to have such licence, they were proved, upon the evidence accepted before the court below and by us, guilty of the offence charged against them and their appeals against conviction are dismissed.

We are asked to reduce the sentences because they had not long before the offence was committed been very much less. But the substantial increase in the maximum punishment awardable shows how much more serious in legislative eyes the offence had become. We believe that the sentences of imprisonment were deserved; but, having regard to their extent, we are not disposed to differ from the view expressed by counsel for the Republic that the award of corporal punishment was not required, and we set it aside. Save as to this do we also dismiss the appeals as to sentence.

On an unrelated point we once more draw attention to the inadvisability of giving reasons for holding that an accused has a case to answer. It can prove embarrassing to the Court and, in an extreme case, may require an appellate court to set aside an otherwise sound judgment. Where a submission of “no case” is rejected, the Court should say no more than that it is. It is otherwise where the submission is upheld when reasons should be given; for then that is an end to the case or the count or counts concerned.

Appeal against conviction dismissed.

Appeal against sentence allowed in part.

Dated and delivered at Nairobi this 24th day of April 1980.

E. TREVELYAN

JUDGE

Z.R CHESONI

JUDGE