



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MADAN, LAW & POTTER JJ A)**

**CRIMINAL APPEAL NO 59 OF 1980**

**BETWEEN**

**DUSARA.....1<sup>ST</sup> APPELLANT**

**KHIMJI..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

*(Appeal from a judgment of the High Court at Mombasa (Simpson J) in Criminal Appeal No 95 of 1980 dated 9th September 1980)*

March 10, 1981, the following Judgment of the Court was delivered:

The first appellant, Dusara, was convicted by a Resident Magistrate at Mombasa of the offence of acquisition of uncustomed goods, contrary to section 185 (d) (iii) of the Customs and Excise Act, (hereinafter referred to as “the Act), and the second appellant Khimji was convicted at the same trial on one count of the offence of possession of uncustomed goods, contrary to section 185 (d) (iii) of the Act, and on another count of the offence of corruption contrary to section 3(2) of the Prevention of Corruption Act (Cap 65). They both appealed to the High Court but their appeals were dismissed.

The facts of the case appear to be that one Mr Sharman owned a residential house on a 2 acre plot on Mtwapa Creek. Towards the end of June, 1979, he was approached by both appellants. Khimji told him that Dusara wanted to rent the house for one year. The house was purely residential, with access to the creek for fishing. Mr Sharman said he would not let it for less than two years. Some time later Khimji and Dusara again saw Mr Sharman, and on this occasion Dusara agreed to take the house for 2 years at a monthly rent of shs 6,000/- “for fishing and for leisure”. Dusara paid 4 months rent (Shs 24,000/-) in advance.

Between June and October a ten foot high corrugated iron fence was built all round the property, the windows of the house were boarded up, and a concrete stairway was constructed from the house to the edge of the creek, all this without the knowledge or consent of Mr Sharman. This activity was observed with interest by an Anti-Poaching Unit of the Ministry of Tourism and Wildlife which was encamped about 100 yards away from Mr Sharman’s house. This Unit was supervised by Mr Goss, who flew over the property in a helicopter, and noted the newly constructed stairway leading from the house to the

Water's edge. Later Mr Goss met Khimji at the nearby Lepichet Restaurant, and had a conversation with him, in the course of which Khimji said he had nothing to do with the smuggling of game trophies, and offered to supply information about such trophies and dealer therein, in return for the removal of the Anti-Poaching squad which he complained was interfering with his use of the house for smuggling cardamoms, cloves and other articles from Tanzania. Khimji showed Mr Goss round the house and compound. There was no furniture in the house, whose windows were boarded up. There was a strong smell of spices and traces of cardamoms.

Later, on 11th October, Khimji approached Lerumben, who was in command of the Anti-Poaching Unit, and asked him to remove the Unit as he had goods at sea which he wanted to bring in. Lerumben refused. Then on 24th October Khimji told Lerumben that a load of ivory was being brought from Malindi to Mombasa that night. Lerumben took his unit to a spot near Mtwapa bridge, and laid an ambush at about 8 p.m, but the next thing that happened was that Lerumben and his men were arrested by policemen from Kijipwa, and detained at the police station there until about 3 a.m next morning. At about that time Mr Maconnel, a neighbour of Mr Sharman, living about 100 yards away, was awoken by the noise of a small motorized dhow which he saw. It went about 100 yards up the creek, which would bring it opposite the Sharman house, and returned half an hour or so later. Being suspicious, Mr Maconnel reported the matter next morning to Mr Goss who in turn reported to the police. A police party under Assistant Commissioner of Police Ndambuki arrived on the scene at about 10.30 a.m. Soon afterwards Khimji arrived in a car, and entered the compound of Mr Sharman's house. The police followed Khimji in and arrested him. The door of the house was opened with keys taken from Khimji. In the house were found 49 bags of cardamoms and 20 bags of betelnuts, some of which were wet although it had not rained. On being confronted with these goods Khimji fell on his knees, grovelled on the ground, kissed A C P Ndambuki's feet and begged his forgiveness saying he would never smuggle again. According to A C P Ndambuki, Khimji took him aside and promised to give him Shs 50,000/- if he left him (sic). The other officers did not hear this, but they were told about the offer at once by A C P Ndambuki. The goods were removed and Khimji taken to Nyali Police Station where he was visited during the night by Dusara who had a conversation with him. Next day Dusara went to the house at the Creek and told police officers there that the cardamoms and betelnuts belonged to him, that he had bought them lawfully and that they were not uncustomed.

He was arrested, and made a voluntary extra-judicial statement to the effect that the cardamoms and betelnuts were his alone and had nothing to do with Khimji. He produced several documents purporting to show that he had bought large quantities of cardamoms and betelnuts locally. He made an unsworn statement to this effect at the trial, explaining how he rebagged these cardamoms into 50 kg bags which he took to his farm near Mombasa and later to Mtwapa where they were found. He said that the alterations to Mr Sharman's house were made by him so that he could use the house for commercial fishing after refrigeration had been installed. Khimji also made a long unsworn statement in his defence at the trial. He said that he was slapped and beaten by police officers on 25th October. In the house a pistol was aimed at him and he was kicked and threatened with beating, and that is why he grovelled at the feet of A C P Ndambuki. He said nothing about his conversations with Goss and Lerumben as deposed to by them. He disclaimed any interest in the house at Mtwapa Creek, or the bags found in it.

This being a second appeal it is confined to points of law. Mr Sharma appeared for both appellants. Mr Harwood appeared for the State. Mr Sharma argued a number of points of law, including the following.

### **Revocation of bail**

Having originally granted bail to both appellants, although the prosecution had objected to the grant of bail, the learned magistrate at a subsequent hearing revoked the bail on being informed that a second count charging corruption was being brought against Khimji, and that potential prosecution witnesses had been interfered with and were being kept out of the way. This revocation of bail, in Mr Sharma's submission, indicated prejudice and bias on the part of the magistrate against the appellants. We do not agree. Before revoking bail, the magistrate heard all the parties, and wrote a long considered ruling. We have no reason to believe that he exercised his discretion in the matter other than properly and judicially, and see no merit in this ground of appeal.

## **Consent to prosecute**

Mr Sharma then submitted that the Attorney-General's consent to Khimji's prosecution on a charge of corruption was invalid, and Khimji's conviction and sentence on that charge void for want of jurisdiction, because the consent was for an offence of corruption contrary to section 3(2) of the Prevention of Corruption Act (cap 65) and alleged a corrupt offer of an inducement on account of A C P Ndambuki forbearing to arrest Khimji upon a charge of possession of uncustomed goods, whereas the charge as framed at the trial alleged that the corrupt offer was on account of A C P Ndambuki forbearing to charge Khimji upon an offence of possession of uncustomed goods. According to Mr Sharma, the consent related to "forbearing to arrest" and the actual charge to "forebearing to charge", so that the charge as framed was for a totally different offence to that consented to by the Attorney-General, and Mr Sharma submitted that a case instituted without proper sanction must fail. We agree with that proposition but have no doubt that it does not apply in this appeal. A person cannot be charged unless he is first arrested, and in our opinion the words "forbearing to arrest ... upon a charge of possession" used in the section fully covered the words used in the charge which were "forbearing to charge upon an offence of possession". We see no merit in this ground.

## **Necessity for corroboration**

Mr Sharma then submitted that as there was no corroboration whatsoever of A C P Ndambuki's evidence as to the offer of a bribe by Khimji, and as it is a rule of practice having the force of a rule of law that a conviction cannot be had on the uncorroborated evidence of a single witness, Khimji's conviction on the corruption charge could not stand. Mr Sharma cited a number of Indian authorities which show that the Supreme Court of India insists on independent and reliable corroboration in corruption case. We agree that corroboration is desirable and should be sought of the complaint's evidence in corruption cases in Kenya but we do not agree that the necessity for corroboration has effect as a rule of law. We think that a court, if it carefully directs itself as to the desirability for corroboration and the danger inherent in convicting upon the uncorroborated evidence of a single witness, may nevertheless convict on such uncorroborated evidence if it is certain of the truth and reliability of that evidence. We do not think that the absence of corroboration of A C P Ndambuki's evidence in this case necessitates quashing the conviction of Khimji on the charge of corruption, but we think Mr Sharma is on stronger ground when he challenges the reliability of that evidence. Mr Sharma has pointed out –

(a) That we do not know in what language Khimji made the alleged corrupt offer. It may have been in Swahili or in English. If in Swahili, then A C P Ndambuki ( who gave evidence in English) may have made an honest mistake in his understanding of Khimji's Swahili, or in translating it into English.

(b) That A C P Ndambuki made no contemporaneous note of the alleged corrupt offer in his notebook (if indeed he had one), or in the Occurrence Book at Nyali Police Station, when he made an entry later on the same day of the reasons for Khimji's arrest and detention.

(c) That the exact words used by Khimji are not known. According to A C P Ndambuki, Khimji "told me that he was going to give me Kshs 50,000/- if I left him". According to Inspector Mbogo "I heard Mr Khimji ask for forgiveness and that he would help Ndambuki if Ndambuki helped him."

Shortly after the alleged corrupt offer was made, A C P Ndambuki told the other police officers in his party that an offer had been made to him. This evidence was hearsay and inadmissible, as what Ndambuki said was not spoken in the presence or hearing of Khimji, but no objection was taken to it. In fairness to Khimji we think it right to say that these police officers gave different versions of what Ndambuki told them that Khimji had said. In all the circumstances, we are of the opinion that the alleged corrupt offer in this case was not proved with sufficient particularity or certainty. The evidence in our view was not sufficient in law to sustain the conviction of Khimji on the count laid under the Prevention of Corruption Act, and we are not satisfied that all reasonable possibility of misunderstanding or mistranslation has been

excluded. We would allow the appeal of Khimji on this count, quash the conviction for an offence under section 3(2) of the Prevention of Corruption Act, and set aside the sentence of 31/2 years imprisonment passed on that conviction.

This leaves for consideration the appeals of both appellants each on one count under section 185(d) (iii) of the Customs and Excise Act, 1978 (hereinafter referred to as “The Act”).

The particulars of the charge against Dusara were stated as follows, that he –

“On or before the 25th day of October, 1979, at Mtwapa Area within the Kilifi District of the Coast Province, acquired 49 bags of cardamoms and 20 bags of betelnuts, all valued at Shs 72,400/-, which he knew or ought reasonably to have known to be uncustomed goods.”

The charge against Khimji was similarly worded except that for word “acquired” were substituted the words “had in his possession.” We will deal first with the ground of appeal alleging that the joinder of the appellants and of the various counts was wrong in law, and that certain evidence was inadmissible. Clearly the two counts under the Act, relating to the same goods found in the same house on the same date, justified the original joinder of the appellants. The addition of the corruption charge against Khimji was, in our opinion, quite proper, as it formed part of the same transaction and flowed from the offence charged against him in the possession of uncustomed goods charge. The corruption charge affected Khimji and Khimji alone. It might have been better not to have included the corruption charge in the joint trial of the appellants. However, in the particular circumstances of this case the joinder did not, in our opinion, in fact occasion a failure of justice (section 382, Criminal Procedure Code).

We therefore do not think that the addition of the corruption charge necessitated separate trials of the two appellants. It would have been within the discretion of the learned magistrate to have ordered separate trials, but there are other considerations such as the undesirability of duplicating proceedings, with the attendant expense and inconvenience, unless it is absolutely necessary to do so to avoid possible prejudice, and we do not think that any prejudice to either appellant arose in this case out of their being tried together by a professional magistrate. Nor do we think that Mr Goss’s evidence, to the effect that Khimji asked him to remove the Anti-Poaching Unit on the grounds that its presence interfered with his smuggling activities in the Mtwapa Creek house, was inadmissible. Khimji volunteered all this to Mr Goss, absolutely freely, and no objection was taken to Mr Goss’ evidence on this point, although Khimji was represented. In any event, we agree with the learned first appellate judge that this evidence was admissible to rebut Khimji’s foreseeable defence that he had no knowledge of the presence in the house of the allegedly smuggled goods, and that his presence at the house when the goods were discovered was fortuitous and innocent.

Then Mr Sharma submitted that, as regards the charge against Khimji, the learned magistrate had misdirected himself in relying on the definition of the word “possession” in section 4 of the Penal Code, which section is stated to apply only to the Code. There is no definition of the word in the Act. We can see no objection to the definition in the Penal Code being looked at for guidance as to the meaning of the word “possession” in another enactment creating a criminal offence. But the magistrate also considered the decision in *Biharusi d/o Ruanda v R* [1959] EA 696 in which the question of the meaning of the word “possession” in the Diamond Industry Protection Ordinance of Tanganyika was considered, and the definition from Stephen’s *Digest of the Criminal Law* (9th Ed) cited in *Stroud’s Judicial Dictionary* (3rd Ed) was approved.

The question arose again in connection with an appeal from a conviction for possession of drugs under the Dangerous Drugs Act (cap 245) which again contains no definition of the word “possession” (*Hussein Salim v Republic*, Cr App 51 of 1980 at Mombasa), when this Court adopted and followed the decision on the point in the *Biharusi* case, adding that we took the definition of possession approved in that case 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”.

We think the same applies to “possession” within the meaning of section 185 (d) (iii) of the Act. We agree with the first appellate judge that the learned magistrate did not misdirect himself and that Khimji was shown to have the necessary custody of and control over the goods as well as knowledge of their presence. The case against Khimji was in our view overwhelming. He had tried to secure the removal of the Anti-Poaching Unit which was watching the house; he actually managed to effect the removal of the unit on the night of 24th – 25th October on a pretext; on the morning of the 25th October he arrived on the scene accompanied by a relative of Dusara’s; he had the key of the gate and of the house itself; some betelnuts were scattered on the shore near the water of the creek; some of the bags in the house were wet although it had not rained recently; and when confronted with the goods, he fell on his knees, kissed the senior police officer’s feet, begging for mercy and forgiveness. Mr Sharma submitted that he was begging not to be beaten again, or killed, but both courts below found that Khimji had not been ill-treated or threatened, and there was ample evidence to support that concurrent finding. The prosecution proved beyond any doubt, in our view, that Khimji had possession of the goods and that he knew or ought reasonably to have known that they were uncustomed, and he made no attempt to discharge the onus placed on him by section 208 (b) of the Act, of proving on a balance of probabilities that the goods were not uncustomed, his defence being that he knew nothing about them until shown the goods by the police. We see no merit in his appeal against conviction for possession uncustomed goods, contrary to section 185 (d) (iii) of the Act.

The position of the appellant Dusara is somewhat different. He has always claimed ownership of the goods, so that the prosecution is relieved of having to discharge the onus of proving that he acquired them. Dusara has always claimed that the goods were not uncustomed, and the question now arises whether he has discharged the onus of proving this on a balance of probabilities.

Dusara was not at the house when Khimji was arrested. He came to hear of the arrest the same day, the 25th October, and went to see Khimji at Nyali Police Station, where he was apparently allowed to speak to him privately. He was arrested next day, and on 28th October made a voluntary extra-judicial statement to this effect –

“The 49 bags of cardamoms and 20 bags of betelnuts are my property alone but not together with Kanaksingh Mawji (Khimji). I have paid the customs duty and I have produced all the documents to police which they still have.”

These documents were described by the first appellate judge as follows –

“..... two receipts which were proved to have been stolen from a receipt book at Lunga Lunga and two dated 1977 which he admitted were irrelevant. The other documents may have been genuine. One was proved by a prosecution witness- a sale by him to the two appellants on 8th August, 1979, of 89 bags of cardamoms. He said he had bought them from Customs the same day”.

Now Dusara claimed that the bags of cardamoms found in the house at Mtwapa were part of these 89 Kgs. In his unsworn statement in his defence at the trial Dusara said that the 89 bags were first taken to his warehouse at Dana Dana on the island where he repacked some of them into 50 Kg bags and then took all the cardamoms to his farm at Utange on the mainland. On 4th or 5th October the farm was raided by customs officials who removed 43 bags Cardamons, but failed to discover and left behind 49 bags. In order to prevent these bags being seized in a second raid, he took them, together with 20 bags of betelnuts, to the Mtwapa house on 22nd October, where they were discovered by the police on 25th October.

It is difficult to see how this large quantity of goods could have been taken to the Mtwapa house by the land route, in view of the watch being kept on the house by the Anti-Poaching Unit. The onus of proving that the goods were not uncustomed was on Dusara, and we would have expected some evidence to

support his story to have been called for instance that of the driver of the vehicle concerned.

It is also significant, to our minds, that Dusara made no mention in his statement of the 10 ft fence, the boarding of the windows, and the construction of a concrete staircase giving access to the creek, all of which matters in the view of both courts below were done with the intention of transforming a residential house into a base for smuggling goods. It is true that Dusara suggested that he was proposing to use the house for commercial fishing, and he said “I gave a contract to Asian traders to build me a cold storage on the plot”, but he did not call evidence to this effect, or even name the contractors.

It is not surprising, in these circumstances, that the trial magistrate was not satisfied, on a balance of probabilities, that the goods were not uncustomed. On the contrary, he came to the positive finding that the goods had come by sea, and were uncustomed. He said the finding was irresistible, in the light of Mr Maconnel’s evidence, and from the fact that the goods could not have come through the main door as the property was being watched “round the clock”, and from the wetness of some of the bags. The magistrate was accordingly satisfied beyond all reasonable doubt that the goods were uncustomed. Mr Sharma submitted that the first appellate judge had not made a concurrent finding of fact that the goods were uncustomed, so that it was open to this Court to make a finding to the contrary effect. But in our opinion the learned judge did come to a concurrent finding on this point. He reviewed all the relevant evidence in detail and said –

“This evidence and other relevant evidence was fully and properly considered by the learned magistrate and he correctly directed himself on the burden of proof. He concluded that the first appellant had failed to prove on the balance of probabilities that the goods were not uncustomed and I think his finding was fully justified”.

The learned judge is not merely saying “I think there was evidence to support the magistrate’s finding” but is making a concurrent finding of his own, agreeing with that of the magistrate. In these circumstances, even if we felt inclined to hold otherwise (which we do not), we are satisfied on the concurrent findings in the courts below that the goods had come by sea and were uncustomed, and that Dusara had acquired these goods and knew that they were uncustomed, and that he had failed to prove on a balance of probabilities that the goods were not uncustomed. His appeal accordingly fails.

To sum up, we allow Khimji’s appeal against conviction on the charge of corruption contrary to section 3(2) of the Prevention of Corruption Act, quash that conviction, and set aside the sentence of 31/2 years imprisonment passed on that conviction. We dismiss the appeals of Dusara and Khimji on the charges of respectively acquiring and possessing goods which they knew or had reason to know were uncustomed, contrary to section 185(d) (iii) of the Customs and Excise Act, and it is so ordered.

**March 10, 1981**

**MADAN, LAW & POTTER JJ A**