



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: AKIWUMI, LAKHA & OWUOR, J.J.A)

CRIMINAL APPEAL NO. 159 OF 2000

BETWEEN

HAMAYUN KHAN APPELLANT

AND

REPUBLIC RESPONDENT

**(Appeal from the Judgment of the High Court of Kenya at
Nairobi (Mr. Justice Oguk) dated 12th October, 2000**

in

H.C. CRIMINAL APPEAL NO. 1332 OF 1999)

JUDGMENT OF THE COURT

On or about 9th September, 1998 cargo consisting of six cartons arrived at Jomo Kenyatta International Airport (J.K.I.A) Cargo section, on an Emirate Airline Flight from Kabul, Afghanistan. The Airway-Bill accompanying the cargo clearly indicated that the consignee of the cargo was one Poltical Mewa and the contents were some five hundred pieces of towels with a declared value of \$1500.

On 14th September, 1998 Yusuf Abdala Ibrahim Abdi showed up at the office of Livingstone Ruto, the officer-in-charge of security at Jomo Kenyatta International Airport seeking his assistance to have the cargo cleared.

This happened to have been immediately after the bomb blast in Nairobi in which a lot of people had perished. The origin of the cargo roused Ruto's suspicion and he instructed the customs officials to verify the cargo very carefully. In the process of clearing and the verification of the goods, the customs officials of the Kenya Revenue Authority and the police attached to CID Anti-Narcotics at J.K.I.A discovered in a second layer of compartment in the cartons, 1,715 straws filled with what turned out to be white heroin. The total weight was 6.5Kg. Pursuant to this discovery seven people were arrested and charged before the Chief Magistrate's Court with the offence of Trafficking in Narcotic Drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994.

Particulars of the charge were that: "(1) Poltical Mewa Gul, (2) Shah Falsal (3) Hamayum Khan (4) Mohamanad Ahmed Khan (5) Yusuf Abdala Ibrahim Abdi (6) Sher Ali (7) Said Amin. On diverse

dated between 9th September, 1998 and 22nd September, 1998 at Cargo Service Centre at Jomo Kenyatta International Airport in Nairobi within Nairobi Area trafficked in 6.5Kg of Narcotic Drugs namely white heroin valued at Ksh.13 million in contravention of the said Act".

The trial before the learned magistrate was fairly long. At the end of the prosecution case the learned Magistrate in a short ruling acquitted the 4th, 6th and 7th accused persons under the provisions of section 210 of the Criminal Procedure Code. According to the ruling, the reasons for the acquittal were supposed to be given later. We have not seen the same on record. Before the commencement of the defence case, Political Mewa Gul, who was the first accused at the trial, was released or disappeared from prison custody in circumstances that we are unable to comprehend, allegedly on the basis of some false or forged bond papers. The learned magistrate's order, that she be informed of the circumstances under which the first accused had disappeared does not seem to have yielded any results as at the time she completed the trial.

The remaining three accused persons were put on their defence. In her judgment the learned magistrate acquitted Shah Falsal and convicted Yusuf Abdi and Hamayun Khan, the present appellant of the offence charged. The acquittal was after her own finding that:-

"The 2nd accused denies accompanying the 3rd accused to have the goods in issue cleared. That however is not possible from evidence of three eye witnesses, PW 1, PW 2 and PW 3. They were reliable witnesses with excellent demeanour. I did scrutinise them in court and was convinced that they were telling the truth. I do find 2nd accused was in company of the 3rd and 5th accused in pursuit as explained".

The two convicted persons, Yusuf and Hamayun appealed to the superior court. Oguk J. consolidated and heard the two appeals together. Yusuf was represented by Mr. Wandugi, while Hamayun was unrepresented. Counsel challenged the conviction and sentence of Yusuf mainly on the ground that there was no evidence to establish any knowledge on his part, of the existence of the drugs in the cartons that he was merely assisting to clear. The State conceded the appeal notwithstanding the substantial evidence, which in our view, had been led against Yusuf and upon which the learned magistrate had based the conviction. Yusuf's appeal was allowed.

The record indicates that although the appellant herein was in court, he did not canvass his appeal in any manner. He merely stated:- "I have nothing to say. I leave everything to the court".

Oguk J. in his judgment upheld the appellant's conviction and confirmed the sentence of ten years imprisonment and a fine of 39 million shillings in default one year imprisonment imposed on him by the learned magistrate. Hence the present appeal.

This being a second appeal our jurisdiction by reason of the provision of section 361

(1) of the Criminal Procedure Code is confined to questions of law. The point of law argued by Dr. Khaminwa for the appellant and as contained in the petition of appeal is as follows:-
"1. The learned Judge erred in law in upholding the conviction of the offence of trafficking in narcotic drugs contrary to section 4(a) of the Narcotics Drugs and Psychotropic Substances (Control) Act No. 4 of 1994 and

2. That the learned judge erred in law in making a finding that the offence of trafficking in narcotic drugs contrary to section 4(a) of the Narcotics Drugs and Psychotropic Substances (Control) Act No. 4 of 1994 had been proved beyond reasonable doubt."

Dr. Khaminwa's main complaint is that the conviction of the appellant was not grounded on any evidence at all. Therefore the learned Judge of the superior court misdirected himself by upholding the conviction of the appellant and confirming the sentence. Further, that had the learned judge given the evidence before the trial court a fresh analysis and subjected the same to a close scrutiny as indeed, he was obliged to do, in order to satisfy himself that the evidence left no doubt as to the guilt of the

appellant, he would not have come to the conclusion that he did. There was, according to counsel no competent evidence to warrant the conviction of the appellant. We understand Dr. Khaminwa to be contending that the two courts below erred in that respect.

We take this opportunity to repeat that on a second appeal such as this one, it is not the function of the Court, as it were, to go into a fresh re-evaluation and reassessment of the evidence in order to see if the finding of the lower courts is or is not supportable. Neither is it the duty of this Court to interfere with concurrent findings of fact unless the Court is satisfied that there was in fact no evidence to support the finding, or that the two courts below wholly misunderstood the nature and effect of the evidence. But where there is evidence upon which a reasonable tribunal, properly directing itself on that evidence and the law applicable to it, could reasonably convict, this Court will really have no jurisdiction to interfere. See **Shantlal Memeklal Ruwala V R [1957] EA 570.**

The learned judge of the superior court found and correctly so, and as had the trial court found, that there was no dispute that six unaccompanied cartons consigned to one Poltical Mewa Gul from Pakistan had arrived at J.K.I.A on or about the 14th of September, 1998. The cartons, contrary to the declared information, turned out to contain about 250 towels and 1715 straws filled with heroine weighing 6.5Kg.

Secondly, that that substance was indeed, a drug within the meaning of the Narcotic Drugs & Psychotropic Substance (Control) Act No. 4 of 1994 and that both Yusuf and Hamayun had denied any connection with the drugs. He then made his finding in respect of the guilt of the appellant as follows:-

"I find that there is clear and reliable evidence proving beyond reasonable doubt that the 1st appellant had accompanied the 2nd appellant to J.K.I.A to introduce him to the security officers to clear the said consignment containing the drugs. The 2nd appellant according to the evidence was the one who produced the Way Bill in respect of the said goods in the name of Poltical Mewa Gul a fellow of Pakistan national (original 1) who mysteriously escaped from prison custody. He had with him not only the release order for the said goods but also the passport of the consignee Poltical Mewa Gul. When the said goods were traced the said cartons had entries relating to the documents which the 2nd appellant had produced bearing the name of the consignee.

This was clear from the evidence of PW 1, PW 4, PW 5, PW 6. I am satisfied that these were witnesses of truth and there was no reason for them to falsely testify before the court that it was the 2nd appellant who had produced the said documents which were the only documents necessary for the clearance of the said goods. I am of the view that in the particular circumstances of this case, the 2nd appellant cannot be heard to say that he had no knowledge of the nature of the contents of the goods he was seeking to be released to him on behalf of the consignee who had entrusted him with all the necessary documents or that he never went to the airport to clear the said goods. Indeed he is the one who paid Sh.30,000/= as a deposit towards the charges of the clearing agent".

But was there sufficient evidence upon which the two lower courts came to the conclusion that it was the appellant who handed over the documents namely the passport, Airway Bill and the Release order? Secondly, was there any conclusive evidence that he was the one that cleared the goods, that paid the clearing fee to Rono the clearing agent and finally that his possession of the documents was conclusive evidence that he knew that the cartons contained heroin and as such, was indeed guilty of trafficking the drugs?

Ruto was the first person that came into contact with the appellant and his group. When Yusuf went into his office seeking his assistance to clear the cargo, he was in the company of Falsal and the appellant. One of the two people with Yusuf produced the Airway Bill, but Ruto couldn't tell which one. Ruto sent the three to Muraguri another security officer at Cargo centre for assistance and whom he instructed to make sure that the cargo was carefully verified by the customs officials. According to Muraguri, Yusuf introduced himself to him but he did not introduce the two people he was with and whom he identified as Falsal and the appellant. Muraguri demanded to see the passport of the consignee and the Airbill. Yusuf asked the appellant, who produced the passport and the Airbill. The passport did not belong to the

appellant. It belonged to one Poltical Mewa Gul. Muraguri called the clearing agent, Rono and asked him to clear the cargo but to make sure that the same is verified. He also reported the matter to the police. Thereafter Yusuf and the two persons kept on coming to his office to check on the cargo. On 22nd September, 1998, Yusuf and one Ali Mwanzi were in his office when they were arrested by Police Inspector Kibet. He referred to the appellant as Poltical because he gave him a passport bearing the same name. However, he could see from the photograph in the passport that the passport did not belong to the appellant.

According to Rono, when Muraguri called him to his office he introduced Yusuf, Falsal and the appellant as those who had goods to be cleared. Yusuf he said, was the man that talked to him and gave instructions that the goods had to be cleared quickly. The issue of the costs was discussed and,

"Yusuf gave out 30,000/= as part of the duty and charges. I gave the money to Murefu."

Murefu was the special agent that Rono entrusted with the clearing of the goods. Later on, Yusuf once more gave out another 40,000/= which was also given to Murefu. In his eagerness to have the goods released quickly, Yusuf even went to his house and told him, Rono, that there was something in the goods that he did not want the police to see.

The question of who had to sign the custom import entry and declaration of value forms arose. Yusuf signed all the 8 copies indicating that Poltical was the owner. These two documents allowed duty to be assessed and the goods to be verified by Grace Njeri, a customs officer with Kenya Revenue Authority in the presence of Cpl. Stelle Maritim and Cpl. Samuel Karagu.

Rono testified that he was the one who handed over the documents for the verification exercise. His testimony was supported by Cpl. Maritim who stated as follows:-

"In the verification room the documents were handed to Grace by Rono. He verified the first box with Cpl. Karagu, Grace, Rono and myself. No one else was there. Rono was chasing documents to clear the luggage. He was outside the cargo shade at 1.30 p.m. when I saw him. I saw him at Grace's desk. He gave Grace some documents which I saw. There were the passport and the Airway Bill".

There is no doubt that the passport and the Airway Bill were handled by a lot of other people. We fully agree with counsel that there were many people at the Airport trying to have the goods released. There is no conclusive evidence that it was the appellant that had in his possession the Release Order or the Airway Bill. There was, however, evidence that he is the one that produced Poltical's passport the first time it was demanded. Thereafter, the passport was handed over to other people to clear the goods. Nor was there evidence that the appellant claimed to be the owner of the goods, or knew of the heroin therein. Everybody involved was quite aware that the consignment belonged to Poltical, a man who was actually present in Nairobi, who was arrested in a house in Karen, charged with the offence, but who disappeared in the course of the trial. In these circumstances it cannot be said that the appellant told a lie or even knew what was in the cartons.

The person who can be said to have had knowledge of the contents of the cartons was Poltical and he was in court. We similarly agree with Dr. Khaminwa that nothing turns on the fact that the appellant was at some point in possession of Poltical's passport. All that can be said was that he was one of those trying to get the cartons cleared, that is all.

Similarly, there was no evidence whatsoever that the appellant was the one that paid the money for the clearing of the goods as categorically found by the lower courts thereby identifying him as the owner of the goods. Rono was categoric in his evidence:

"Yes there were places which needed to be signed in the documents used to clear the goods. 2nd and 3rd accused did not sign anywhere. None of them gave the money to pay for the clearing of the goods".

Then there is also in our view, vital evidence of Grace Njeri as to the ownership of the goods and who officially claimed the same, which was not the appellant. This evidence was not considered by any of the lower courts. Nor was a finding made in respect of the same. In our view this was important evidence that led to an issue that the court should have made a finding upon either in favour or against the appellant. Grace Njeri testified that when she was called to the cargo shade to verify the goods in the presence of the police and the clearing agent, only Poltical Mewa Gul and Falsal were present. The appellant was not there. She prepared the seizure documents and the two people signed the same, thereby laying claim to the goods as theirs:

"Both the 1st & 2nd accused signed the notice and they said that the goods were theirs: Through the interpreter I told them that whoever signed the notice would be treated as the owner of the goods. It is after this explanation that they signed".

It is clear that the appellant did not take part in this exercise. He was not in the custom's hall nor was it established that he made any claim to the goods or that he attempted to clear the same. With the evidence we have referred to above, we are of the view that the learned judge had no evidence whatsoever to reach the finding that he did and to which we have alluded to in details above. In the result, that the case against the appellant had not been proved beyond reasonable doubt. The finding reached was no doubt erroneous. Our view is that the real culprits in this very serious case were let to go free.

We are at loss why and how people like Poltical, the consignee of the cargo and the man who acknowledged the ownership of the goods by signing the seizure order, could manage to disappear from prison custody. Furthermore, how Falsal, who also signed the seizure order and who was with Yusuf all the time, could be discharged on account of there being no evidence against him. Finally, how the selfappointed translator and "Mr. know it all", Yusuf, could be acquitted for lack of evidence against him and all that notwithstanding, the appellant convicted on erroneous finding that he is the one that paid for the clearance of the goods and is the one that had in his possession Poltical's passport and finally that he was the one who handed over the vital documents which turned out to have been either with Yusuf or Rono. On account of the errors alluded to above, we are of the view that the lower courts' misdirections were fatal. There was no evidence upon which to convict the appellant or to confirm his conviction as the superior court did. The case against the appellant was not proved beyond reasonable doubt.

Furthermore, there was no evidence adduced at the trial as to the value of the heroin and upon which the sentence of Ksh.39 million or in default 1 year imprisonment, could be based. The value of the heroin as given in the charge sheet, is by itself, no evidence as to the value of the heroin. The sentence imposed in this respect is invalid. Unfortunately the learned judge of the superior court did not even notice this illegality.

In these circumstance, we think it would be unsafe to sustain the conviction of the appellant. We allow the appeal, quash the conviction, set aside the sentence and order that the appellant be released from prison forthwith unless he is held for some other lawful cause.

Dated and delivered at Nairobi this 9th day of March, 2001.

A. M. AKIWUMI

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JUDGE OF APPEAL

A. A. LAKHA

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR