



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: LAKHA, BOSIRE & OWUOR, JJ.A.)**

**CRIMINAL APPEAL NO. 107 OF 2001**

**BETWEEN**

**1. ALI BIN ALI**

**2. SHEE OBO MOHAMED**

**APPELLANTS**

**AND**

**REPUBLIC**

**RESPONDENT**

**(Appeal from a decision of the High Court of Kenya at Mombasa**

**(Justice Hayanga) dated 21st day of July, 2000**

**in**

**H.C.C.R.A. NO. 48 TO 57 OF 1997)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

This is a second appeal. The appellants who were jointly charged with thirteen other accused persons were convicted in the Chief Magistrate's Court at Mombasa of trafficking in narcotic drug contrary to **section 4 (a)** of the Narcotic Drugs and Psychotropic Substances (Control) Act (No. 4 of 1994) (the Act). Of the other thirteen, two were acquitted by the trial court and three had absconded and did not stand trial. Out of the ten who were originally convicted eight had their appeals allowed on first appeal leaving these two appellants convicted.

The facts of the case were that one **RASHID AHMED** (Original Accused No. 12) was the owner of a dhow called **AL HUSNA** whose captain was **SHEE OBO MOHAMED** (Original Accused No. 7 and the second appellant herein). He also has another vessel called **HAIFA** whose captain was **ALI BIN ALI** (Original Accused No. 9 and the first appellant herein). **AL HUSNA** left Old Port, Mombasa, in the evening of 3 April 1996 for Pemba to take detergents, mattresses and drums of diesel. They abandoned that trip for a while and took the dhow to the high seas where another dhow was waiting with 984 bags of **HASHISH**. It was put in **AL HUSNA** which took it to about three miles from the Kenya Coast in Msambweni. There were three motor boats waiting into which Hashish was loaded. They took it to Galu-Kinondo Beach where a Mercedes Benz semi-trailer was waiting along with many people to do the work. The Hashish was off-loaded into the lorry. Unfortunately for them, the lorry had sunk into the sand on the beach and could not be removed. Day had broken. All those involved ran away from the sunk lorry now that it was daylight. At about 2:00 p.m. on 6 April, 1996 P.C. **DAMARIS ARUSE** (P.W.1.) went to Galu- Kinondo beach to buy fish and found this lorry stuck in the sand on the beach, with makuti covering the trailer. But underneath she could see greenish canvas covering something under it. The lorry was unattended. She could not understand what the lorry was doing there. She decided to leave the fish business for a while and went back to the

Police Station to report. That is how Kenyans came to know about this Hashish.

The learned Chief Magistrate, in convicting the ten accused persons, concluded by saying:-

**"I have considered all the evidence in this case quite anxiously. I find it shows beyond doubt that all the facts point to one irresistible conclusion that the crew and 9th accused knew they were going to transport on their dhow AL HUSNA HASHISH from the dhow which was enclosed in the high seas to the 3 motor-boats on the coast line of Kenya, and I find**

**so.**

**To "traffick" in narcotic drug or psychotropic substance means to import, export, manufacture, buy, sell,**

**give, supply, store, administer, convey, deliver or distribute the same. It follows that, whether looked at as "conveying" or "delivering", the accused who were members of the crew of AL HUSNA "trafficked" in this Hashish. They were charged under section 4(a) of the Act. In this respect I find them jointly guilty as charged and convict them accordingly."**

Against these convictions, the ten convicted accused persons appealed to the superior court. Their appeals were

consolidated and heard together. On their behalf, it was contended that no offence against them was proved because they

had no knowledge that the substance being carried was Hashish. The superior court allowed the appeal of the eight crew men,

quashed their convictions and set them free unless otherwise lawfully held. As for the two captains of the two vessels, Ali bin Ali (appellant No. 1 herein and Original Accused No. 9) and Shee Obo Mohamed (appellant No. 2 herein and Original Accused No. 2

7), the superior court upheld their convictions and confirmed their sentences. In doing so, the learned judge held:-

**"In my view, looking at the evidence in this case that the crew had no knowledge but I think the case of the two captains is different. I think they deliberately shut their eyes to the facts of the situation. They were possessed of actual knowledge."**

With respect, we fully agree. It is not in dispute that the 984 bags being carried contained 19,633 slabs of the substance

HASHISH weighing about 19,633 kg. in contravention of the Act. Captain Ali bin Ali (appellant No. 1) conceded in his statement-

**"When we loaded goods on the high seas, I discovered that it is bhang we were loading as some of it spilled out of the bags..... "**

There were a great number of factors to which the two captains deliberately shut their eyes concerning the facts of

the situation. We mention the following by way of an example-

*(a) the task was to be undertaken at night;*

*(b)the crew was going to be paid Shs.150,000/=;*

*(c)the "luggage" was not coming to Mombasa Port but the transfer of "luggage" from one vessel to another was in the High Seas between Pemba Island and Kenya;*

*(d)the crew of AL HUSNA took Rashid (Original Accused No. 12 and the owner of the dhow) and an Asian on board which was illegal as these were not authorised travellers;*

*(e)the dhow was going to go off -course (as she did) for most of the night and the following day, in a journey that was illegal;*

*(f)the merchandise that was being carried was unknown and unauthorised;*

*(g)the first appellant told the trial court that he was going to assist RASHID (Original Accused No. 12) and the mysterious ASIAN to avoid duty.*

Having regard to all the evidence on record and all the circumstances of the case, we are satisfied that the appellants deliberately shut their eyes to the facts of the situation. In the eyes of the law this was actual knowledge.

Lack of knowledge can be a defence and indeed it was the only one pressed upon us. But the burden of proof of this

defence is upon the person seeking to avail himself thereof, i.e. the appellants in this case. Section 68 of the Act provides that:

**"68. In any proceedings against any person for an offence under this Act, it shall not be necessary for the prosecution to negative by evidence any licence, authority, or other matter of exception or defence, and the burden of proving any such matter shall be on the person seeking to avail himself thereof."**

There is nothing to show that the appellants discharged the burden of proof of this defence. On the contrary, upon a careful scrutiny of the evidence as a whole we are satisfied, as the learned judge was, that the appellants had actual knowledge in the eyes of the law. We are satisfied that the convictions of the appellants are safe and proper. Accordingly, we dismiss their appeals and uphold the convictions of the appellants. As for sentence, on a second appeal, no appeal lies except if the sentence is illegal. The first appellant was sentenced to 25 years' jail with a fine of **Shs.500,000/=** and the second appellant to **20 years' jail** with a fine of **Shs.500,000/=**. Although they are heavy, they are within the prescribed limits and we find nothing illegal against sentence are also dismissed.

**Dated and delivered at Nairobi this 28th day of September, 2001.**

**A.A. LAKHA  
JUDGE OF APPEAL  
S.E.O. BOSIRE**

**JUDGE OF APPEAL  
E. OWUOR**

**JUDGE OF APPEAL**

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