IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: KWACH, BOSIRE & KEIWUA, JJ.A.)

CRIMINAL APPEAL NO. 61 OF 2000

BETWEEN

ALI MOHAMMED ..... APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Commissioner Shah) dated 2nd March, 2000

in

H.C.CR.A. NO. 176 OF 1999)
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JUDGMENT OF THE COURT

This is a second appeal, and by dint of the provisions of section 361(1) of the Criminal Procedure Code, such an appeal must be confined to matters of law only. Ali Mohamed (the appellant) complains that his first appeal to the superior court against his conviction and sentence of 10 years imprisonment for the offence of being in possession of a narcotic drug contrary to section 3(1) of The Narcotic Drugs and Psychotropic Substances (Control) Act, (Act No.4 of 1994), was improperly disallowed. He has put forward the following three grounds in support thereof:

(1)The dismissal was against the weight of the evidence.

(2)The evidence of prosecution witnesses was fabricated.

(3)The first appellate court failed to consider his defence which was cogent, firm and believable.

As the first two grounds raise matters of fact they do not fall for consideration in this appeal in view of the provisions of section 361 of the Criminal Procedure Code.

As regards the third ground, the evidence which was presented before the trial court was to the following effect.

On 22nd February, 1999, the appellant and another person were stopped by two police officers on patrol duties on suspicion that they had or were preparing to commit a criminal offence.

Upon being searched, the appellant was found with thirty sachets of a substance which was suspected to be heroin. The appellant and his companion were then arrested, but only the appellant appears to us to have been charged in connection with the possession of the said substance, which after analysis by the Government Chemist, was confirmed to be heroin.

In his defence the appellant denied he was found in possession of heroin and stated that the police officers who arrested him had a grudge against him; and because he was unable to give them Kshs.30,000/= which they demanded they framed the charge against him. He did not, however, state the nature or basis of the grudge.

The trial magistrate, B. Maloba, believed the evidence of the two police officers and rejected the appellant's story. In his submissions before the superior court on first appeal the appellant rehashed his evidence before the trial court and also challenged, inter alia; the sufficiency of the evidence in support of the charge. On this latter issue the superior court (Commissioner of Assize, K. Shah) had this to say:

> "The other grounds relate to the weight of evidence before the trial court. I have considered the evidence and am satisfied that the prosecution had met the required standard of proof to which the Defence of the appellant did nothing to Militate (sic)."

In view of the fact that the first appellate court did not say more on the issue, the appellant's complaint that the court did not specifically deal with his defence is valid. It is also clear that in the aforequoted passage the learned Commissioner of Assize appears to suggest that the appellant had some burden of establishing his innocence. The law is quite clear, that an accused in a criminal case does not at all assume any role at any time of establishing his innocence. The burden remains with the prosecution throughout to prove by evidence his guilt. The foregoing notwithstanding, it is our view that the appellant's conviction is sound. A decision on the appellant's guilt or innocence before both the trial and the first appellate courts depended on credibility of witnesses. It is trite law that a trial court is best placed to assess the credibility of witnesses in view of the fact that unlike an appellate court, it has the advantage of seeing and hearing the witnesses testify. We have no material before us upon which to find that the two police officers who arrested the appellant lied to the trial court about the appellant. In the result the omission by the first appellate court to consider with particularity the appellant's defence is inconsequential to his conviction as no failure or miscarriage of justice was thereby occasioned.

As regards sentence, the appellant, who has all along acted in person, has not specifically raised any ground in his memorandum of appeal to challenge the legality or severity of the sentence which was meted out to him. However, neither the particulars of the charge nor the evidence state the value of the heroin which was found on the appellant. Besides, there is no evidence on record as to the purpose or purposes for which the substance was intended to be used. Section 3(2)(b) of the Narcotic Drugs and Psychotropic Substances (Control) Act, cited in the statement of the offence and under which the appellant was sentenced, provides for two types of sentences.

The first type concerns persons who satisfy the court or who evidence shows that the narcotic drug found in their possession, other than cannabis, was intended solely for their own consumption. The second type concerns any other case not falling within the first type. In the former a sentence of twenty years imprisonment is provided, while in the latter, a minimum fine of one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, or to imprisonment for life or to both such fine and imprisonment is provided. Neither the trial magistrate nor the first appellate court adverted to this point which when looked at closely raises a fundamental issue of law concerning the legality of the sentence which was imposed on the appellant.

Where as here, an accused is charged under section 3(1) aforesaid, the prosecution is obliged to state, in the particulars of the offence, the value of the drug or substance found on the accused, and thereafter to call evidence at his trial to establish not only such value but also the purpose or reason for possessing the drug or substance. In an appropriate case the omission to do so may fatally affect the conviction entered against the accused as the penal provision does not seem to vest in the court any discretion of deciding, without evidence in that regard whether an accused's case falls under the first or second limb of the

provision. The court must proceed on the basis of evidence before it to determine whether in the peculiar circumstances of the case the drug was for personal consumption or for any other purpose in order to decide whether to mete out the sentence under the first or second limb of the said section.

In the case before us the appellant denied he was found in possession of heroin. He could not therefore offer any explanation regarding the purpose for which he had the drug. In view of that he was improperly sentenced to a term of imprisonment without the option of a fine as under section 3(2)(b), above, the trial court did not have the jurisdiction to impose such a sentence as the section provides for a fine as the first option. Besides the quantities of the drug found on him could not possibly have been intended for his own consumption. In the circumstances, as an issue touching on jurisdiction may be raised by the court, suo motu, at any stage, we are legally obliged to correct the error. We accordingly set aside the sentence of 10 years imprisonment which was imposed on the appellant and substitute therefor the minimum fine of One Million Shillings provided under section 3(2)(b), aforesaid, and in default of such fine the appellant to serve a term of seven years imprisonment.

In the result the appellant's appeal succeeds only to the limited extent stated above.

Dated and delivered this 20th day of July, 2000.

R. O. KWACH

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

M. KEIWUA

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR