IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: RUTAKANGWA, J.A., MJASIRI, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO. 49 OF 2006

JONAS BULAI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Mwaikugile, J.)

dated the 30th day of December, 2005
in
Criminal Sessions Case No. 3 of 2002

JUDGMENT OF THE COURT

24 NOVEMBER, 2010 & 16 DECEMBER, 2010

RUTAKANGWA, J.A.:

The appellant, Jonas Bulai, and five others were arraigned before the High Court at Dar es Salaam for a number of offences under the Drugs and Prevention of Illicit Traffic in Drugs Act, 1995, Cap 95 [the Act]. At the end

of the trial, the High Court found him guilty as charged only in the third count and convicted him.

In the said third count, the appellant and one Dausen Anael Munisi, were being charged with the offence of Illicit Trafficking in Psychotropic Substance c/s 16 (b) (i) of the Act. The particulars of the charge read thus:

> *"Dausen Anael Munisi, Junas Bulai and others not before this Court on divers dates in the month of February 2001, at Kunduchi Beach Plot 168, Kinondoni District .....jointly and together trafficked in Psychotropic Substance, to wit: they unlawfully manufactured METHAQUALONE (MANDRAX) tablets."*

On being convicted, the appellant and D.A. Munisi were sentenced, on this count, to a term of imprisonment of ten (10) years. Furthermore, all of the material exhibits tendered in evidence, which included the appellant's motor vehicles, were ordered to be "confiscated". The appellant and Munisi were aggrieved by the conviction and sentences, and lodged this appeal. The appeal by Munisi was withdrawn by him and in

terms of Rule 77 (1) of the Tanzania Court of Appeal Rules, 2009, it was deemed dismissed.

At the trial of the appellant and his colleagues, twenty six (26) witnesses testified on behalf of the prosecution. However, for the purposes of the third count, the prosecution called PW8 Dr. Enock Masanja, PW17 Andrew Alfred Magembe, PW23 Leonard Paulo and PW24 ACP Essaka Mgassa. Briefly, their evidence in so far as it is relevant for this appeal, was as follows:

ON 15th February, 2001, PW24 ACP Mgassa was detailed by the Director of Criminal Investigations (DCI) to thoroughly investigate a report about a container, LCRU 211116-1. The container, whose port of origin was Dar es Salaam, had been seized in Romania containing 9 tons of illicit drugs known as cannabis Resin. Preliminary investigations led PW24 Mgassa and his team to a house on Plot 168 Kunduchi Beach, where it had been learnt the said container had been loaded with the illicit drugs. The house belonged to Dausen Munisi. A search was conducted at those premises in the presence of Munisi and independent witnesses of his own choice.

The search led to the discovery and seizure of a number of incriminating articles, plant and machinery. These included:

a) A piece of Cannabis Resin (exh. P21),

b) Two buckets of Caltex Marfak lubricating oil (exh. P22),

c) Cannabis Resin wrapping paper (exh. P34),

d) 32 bags of starch (exhibit P 52),

e) 19 bags of lactose (exh. P. 53),

f) 8½ bags of crystal sugar (exh. P54),

g) 1 shaking granulator machine (exh. P.55),

h) 1 Baketech mixer machine (exh. P 56),

i) Rotary Table press machine (exh. P57,) and

j) I Profivac So 25 machine (exh. P45).

PW24 Mgassa sought expert opinion on the use and functions of some of these machines and articles. He got it from PW8 Dr. Enock Massanja and PW17 Andrew Magembe. PW8 Dr. Massanja, holds a PH.D. degree in Chemical and Processing Engineering. He is a consultant in Designing and Production having specialized in Chemical Processing. PW17 Magembe holds a B. Sc. degree and has attended a course on identification

of narcotic drugs. He works with the office of the Chief Government Chemist as Mager of Forensic Science Division. Both experts visited Munisi's premises, inspected the machines and articles mentioned and took samples of the movable ones for chemical analysis. Each one gave his own written opinion (exhibits P3 and P4).

According to PW8 Dr. Masanja, the granulator machine (exh. 55) "manufactures particles from powder", the Tablet Press machine (exh. P57) manufactures tablets of various sizes, the mixer machine with an electric agitator open bowl (exh. P56) is used for backing, while the Profivac Machine or Vacuum Driver (exh. P45), "removes air and increases heat for things" which could be spoilt if dried at high temperature, such as medicines, vitamins, e.t.c. It was also his evidence that there was overwhelming evidence to show that those machines were in use at the time he inspected them in February, 2001.

PW7 Magembe testified that at the material premises, he saw three big machines together with other small items, and chemicals preserved in nylon and sulphate bags. The machines, he said, had remains of grey

The learned trial judge was not impressed by the appellant's denials. Acting on the evidence of PW8 Dr. Masanja, PW18 Magembe, and PW24 ACP Mugasa, he found the prosecution to have proved the third count beyond any reasonable doubt. Hence the conviction and sentences which gave rise to this appeal.

Although in the trial High Court the appellant was legally represented, he opted to fight it out alone in this appeal. As a result, he lodged a seven-point memorandum of appeal, which is admittedly discursive in the true sense of the word.

We have studied these grounds of appeal. The same can be conveniently reduced to three (3) substantive grounds namely:-

(a) that the learned trial judge erred in law and on the facts in grounding the conviction for illicit trafficking on very weak circumstancial evidence as well as hearsay evidence,

(b) that the learned trial judge erred in law in not considering the defence case at all, and

confiscation of the appellant's seized properties.

At the hearing of the appeal, the appellant appeared in person and was unrepresented. He had nothing to say either in addition to his already elaborated grounds of appeal or in detraction.

The respondent Republic was represented by Mr. Timon Vitalis, learned Senior State Attorney. Mr. Vitalis did not support the conviction of the appellant. In his focused brief submission he declined to support the conviction, because the prosecution's case against the appellant was not cogent at all. The fact that the appellant had offloaded some of the machines at the premises of his co-accused, he argued, was no proof that the was aware of the use they were to be put and/or that he shared a common intention with Dausen Munisi in the manufacture of the illicit drugs known as mandrax. Being a common carrier who was only hired to transport and/or off-load some of the machines which were used in the illicit trafficking, very cogent evidence was needed to prove both the necessary ***mens rea*** and ***actus reus*** of the offence, which he found

> "... *the law required a trial court to acquit an accused person if a prima facie case has not been made out by the prosecution.* ***If an accused person is wrongly called on for his*** *defence then this is an error of law ...*" [Emphasis is ours].

Having called upon the appellant to defend himself, if the learned trial judge had considered in any way his evidence, in our respectful opinion; for certain he would not have convicted him at all. In substantiation of this assertion, we shall start with the ground of complaint reproaching the learned judge with failing to consider the defence case.

It is settled law that failure to consider the evidence of the defence is fatal to the trial or proceedings: see for example, ***JAMES BULOW & OTHERS v. R*** [1981] T.L.R. 283. It is an imperative duty of a trial judge to evaluate the entire evidence as a whole before reaching at a verdict of guilty or not guilty. In this particular case the learned trial judge, unfortunately, did not do so. We shall let him demonstrate it himself.

The learned trial judge, after he had acquitted the appellant and Munisi in the fourth count of the offence of unlawful possession of manufactured drugs contrary to section 6(a) of the Act, proceeded as follows:

> "On the 3rd count the same accused persons are charged with Illicit Trafficking in Psychotropic Substance, to wit they unlawfully manufactured methaqualone tablets (mandrax).
>
> Prosecution led evidence which attempted to show the close relationship which exists between 5th and 6."There is evidence on record that one David Alex Buckles sought assistance of the 6th accused to offload two machines on to Plot 168.
>
> Evidence clearly shows that the 6th Accused went to offload the machine using his chainbox in the premises of the 5th Accused. The evidence further reveal that he did so in the absence of the 5th Accused owner of the premises and the 6th Accused managed to keep the machines in the house.
>
> That in my humble opinion is a clear indication that the 6th accused was not a stranger to the house on Plot 168. He was quite familiar to it that is why he managed to accomplish the work of offloading the

machines used to manufacture mandrax without assistance of the two people. That also accounts for the reason why he and the 5th accused were jointly and together charged with count 3 (sic).

Besides that, there is ample evidence on record led in by PW24, PW17 and PW8 PW24 seized medical substance after a search conducted on the house in Plot 168. The substance was sent for analysis by Government Chemist (PW17) who certified it to be mandrax. The machines which were found in the said house and tendered as exhibit were also certified by Specialist in chemical Processing that they are used for manufacture of drugs and that the machines in question were in use. I saw the witnesses testify in court before me.

I carefully observed their demeanour. I find them to be credible witnesses. On the evidence I find both Accused No. 5 and 6 guilty as charged on count No. 3 and do convict them."

We have deliberately decided to quote in full the reasoning of the trial judge leading to the conviction of the appellant, to demonstrate the merits of his complaint. That the learned trial judge never considered the defence case is obvious. The crucial issue now becomes whether or not he would have arrived at the same conclusion had he done so. In resolving this issue, we have found ourselves constrained to do what the learned trial judge, with due respect failed to do.

In his sworn evidence, the appellant told the trial High Court that he was a graduate in Economics from Eduard Mondlane University specializing in Transport. As such, he is now a transporter with a fleet of motor vehicles. This evidence got support from two prosecution witnesses, who are his neighbours, PW18 Ibrahim Lussana and PW21 Nurdin Mfalimbega.

The appellant categorically told the trial High Court that since 1998 he had known one whiteman going by the name George Buckles or David Buckles, who was a tenant of Dausen Munisi. This Buckles had in the past bought aggregates from him. He delivered three trips of the same in his 22 ton lorry, at their house on Plot 168 Kunduchi Beach area, which he

developed a business relationship and he was introduced to D. Munisi. In October, 2000, he further testified, Buckles hired his lorry with Registration No. TZ 894444 to ferry salt from Bagamoyo to Plot no. 168 Kunduchi. He made four trips after getting permits from Kinondoni District council (exhibits D6 collectively).

In December, 2000, he was again hired by Buckles to assist in offloading two machines from a vehicle at Munisi's premises. He did so with the use of a chain block which belonged to him. According to his evidence the machines which were packed in wooden boxes, were offloaded and put in the house's guest wing. On completion of this work he left. He never visited those premises again until 18th February 2001 when he went there with PW24 Mugassa, after his arrest. The appellant was very categorical in his evidence about his knowledge on the use of the machines. He said:-

> *"... The machines were packed in boxes. I do not know what they were for.... Had I known that the machines offloaded were for manufacture of drugs, I would have informed the 5th accused and tip the police....."*

This is the evidence, undiscredited as it stands, which was not considered at all, by the trial judge. He had to consider it in order to determine whether or not the appellant had the requisite **mens rea** for the offence charged, at the time he offloaded the machines in December, 2000 at the request not of D. Munisi, but of Buckles who was never charged. Failure to consider this evidence was fatal to the conviction of the appellant, in our considered opinion. We accordingly allow this particular ground of appeal.

Coming to the first listed ground of complaint, we have found the arguments of Mr. Vitalis, when considered in the light of the uncontroverted evidence of the appellant, to be very convincing. This being a criminal case the appellant had no duty of proving his innocence. The burden remained on the prosecution to prove his guilt beyond reasonable doubt. This burden is not discharged by the prosecution leading "*evidence which attempted to show the close relationship ... between the 5th and 6th accused "(now appellant)*. An "*attempt*" being an effort to achieve or complete something, in this case to prove that the appellant committed the charged offence, falls too short of proving the charge beyond reasonable doubt. The fact that Buckles, who was not jointly charged with the appellant "sought assistance of the 6th accused to offload the two machines onto Plot 168", a fact obtained from the defence cases, did not bolster the

already very weak prosecution case. This becomes more compelling when one takes into account the unchallenged evidence of the appellant to the effect that he did not know the use for which those machines were to be put and in the absence of an iota of cogent evidence going to show that the appellant did any way collaborate with D. Munisi in the manufacture of the said mandrax drugs. We are saying so advisedly because the evidence of PW8 and PW17 which the learned trial judge relied on never implicated the appellant in any way with the charged offence. Even the evidence of PW24 Mgassa was based on mere suspicions.

While under examination in chief PW24 testified, without elaborating, *that:-*

> *"... evidence that Munisi and the 6th accused (appellant) had a common intention is circumstantial ..."*

That being the case, then the prosecution abysmally failed to prove its case. Established law is that in order to find a conviction on circumstancial evidence, that evidence must point irresistly to the guilt of the accused. Such evidence must exclude any other reasonable hypothesis than that of guilt as well as exclude co-existing circumstances which would tend to

weaken or destroy such an inference: see, for instance, **MSWAHILI MUHUGARA v R** (1997) **T.L.R 25, NDUNGURI v R**, a Kenyan Court of Appeal decision (unreported), among many others.

To demonstrate his uncertainty on whether or not the appellant was a party to this criminal atrocity, PW24 Mgassa, the lead investigator and key prosecution witness, had this to say while under cross-examination:-

> *"... It is not an offence to hire once's vehicle. If he knows that his vehicle is being used for illegal purposes, then the accused was involved in the manufacture of mandrax ...."*

Within the same breath, he said:-

> "... It is not a criminal offence to be friendly with a criminal."

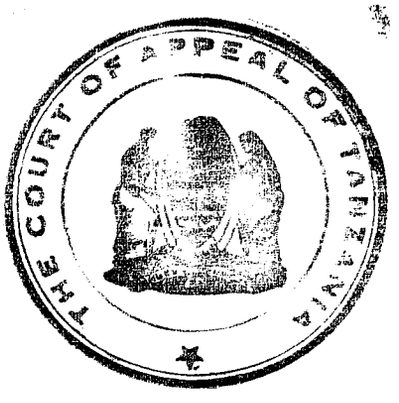
All this tell it all. As Mr. Vitalis correctly contended, no scintilla of evidence is on record to show that the appellant's vehicles were being used in illegal trafficking in mandrax or that the two machines he had

Even PW9 Ali Amanzi, Dausen Munisi's gardener who was living at the very premises during the relevant period, never mentioned the appellant in his evidence. The importance of PW9 Amanzi's evidence lies in the fact that he witnessed the container which was seized in Romania being offloaded at the premises, being "stuffed" with illicit drugs for two consecutive days and being taken away ready for shipping. He never saw the appellant at the scene.

It is for these reasons that we are constrained to conclude that had the learned trial judge considered the appellant's evidence in any way and also critically evaluated the evidence of PW24 Mgassa and PW25 Afuile Mponi, he would not, in our respectful opinion, have convicted the appellant at all. As we have tried to demonstrate, the appellant's conviction was predicated upon speculations, hearsay and suspicions. It is now trite law, that a suspicion however strong cannot be a basis of a criminal conviction. We accordingly find merit in the second reframed ground of appeal.

In fine, we allow this appeal in its entirety. The conviction of the appellant and the prison sentence as well as the order confiscating his properties are hereby quashed and set aside. The appellant is to be set at liberty forthwith unless he is otherwise lawfully held. All his seized properties which were received in evidence as exhibits should be restored to him.

DATED at DAR ES SALAAM this 10th day of December, 2010.



E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

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

J.S. MGETTA
DEPUTY REGISTRAR
COURT OF APPEAL