IN THE HIGH COURT OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT DAR ES SALAAM

ECONOMIC CASE NO. 4 OF 2020

REPUBLIC

VERSUS

1. **ABDUL ISSA NSEMBO**
2. **SHAMIMU OMARI MWASHA**

JUDGMENT

Abdul Issa Nsembo (first accused) and Shamimu Omari Mwasha (second accused) are jointly indicted for: first count-trafficking in narcotic drugs contrary to section 15(1)(a) of the Drugs Control and Enforcement Act, No. 5 of 2015 as amended, read together with paragraph 23 of the First Schedule to, and sections 57(1) and 60(2) both of the Economic and Organized Crime Control Act (Cap. 200 R. E. 2002) as amended; second count-trafficking in narcotic drugs contrary to section 15A(1) and (2)(a) of the Drugs Control and Enforcement Act, No. 5 of 2015 as amended.

In the particulars of offence, Abdul Issa Nsembo and Shamimu Omari Mwasha are accused that on 1/5/2019 at Mbezi Beach area within Kinondoni District in Dar es Salaam region, jointly and together trafficked in narcotic drugs of heroine hydrochloride weighing 232.70 grams (first count) and

heroine hydrochloride weighing 42.70 grams (second count). The accused persons denied an information.

Mr. Cosntantine Kakula learned State Attorney was acting for republic, Mr. Juma Nasoro learned Advocate and Mr. Josephat Mabula learned Counsel was defending the first accused person, while the second accused was represented by Ms. Hajra Mungula learned Advocate.

Both the defence and prosecution had filed closing submission which shall be referred to in the course of deliberation in the due course as the need will arise.

Having heard both parties, there is no dispute that the duo accused are husband and wife cohabiting under the same roof house No. 9 Mbezi Beach "B" Upendo street. There is no dispute that a motor vehicle registration No. T 817 BQN make Land Rover Discovery (exhibit P5) is owned by the first accused (as per a report exhibit P6) and also used by the second accused, as per her concession on defence. There is no dispute that the said house and motor vehicle above mentioned were subject to search conducted by officers from the Drugs Control and Enforcement Authority (DCEA) on 1st May, 2019 just before 02.00 hours.

It was contended by the prosecution that in the course of search aforesaid, inside the bed room of the accused persons particularly in the bathroom cum toilet, they seized four small transparent plastic cans which had flour and in a motor vehicle registration No. T 817 BQN Land Rover Discovery they seized a bag of cloth material white in colour at a rear of driver's seat (at a pouch), wrapped by a transparent nylon bag which contained flour. On defence, the accused persons denied this fact, the first accused (DW2) introduced a theory that a search was conducted randomly, officers were searching unsystematic others searching this side others on the other side, officers used to enter and exit during search. A later facts was supported by the second accused (DW3), who put that she used to see people entering and exiting outside here and there during search. Essentially the accused persons were portraying a message that those things were possibly planted by DCEA's officers, as submitted by the learned Counsel for first accused in the closing arguments, who asserted that the alleged narcotic drugs were fraudulently planted. Nonetheless, the accused persons were not particular and specific as to whom was searching where simultaneously or else who used to move suspiciously during search. As such the accused persons are taken to have been merely alleging. Another theory by the first accused is

that a search was conducted and nothing was found in the toile/bathroom inside their bed room including in the motor vehicles. Although later DW2 said while at DCEA he saw a small bag which was small in comparison to exhibit P3(a) and had flour of khaki colour contained in the piece of paper which was not nylon like exhibit P3(a). The first accused disowned seeing exhibit P3(b) to (e), on explanation that what he saw at DCEA were small cans like exhibit P3(c) and P3(e) which had yellow flour, while in exhibit P3(d) there is a white flour. On the other hand, the second accused (DW3) stated that nothing was found in a motor vehicle T 817 BQN. That she doesn't know what transpired upstairs (first floor), as she descended on the ground floor to take care of her children who were crying, but she used to see people entering and exiting outside here and there, as aforesaid. DW3 disowned seeing exhibit P3(a), (b), (c) and (d) to have been found/impounded at their home, but DW3 stated that she used to have products like those exhibits, which she used as cosmetics of Rona brand yellow in colour. DW3 stated that exhibit P3(b) is yellow flour which its colour looks the same like the one she used as cosmetics and were kept at the bathroom at her cosmetics, but were not narcotic drugs.

To narrow down scope of concentration, it will be prudent to deliberate on the testimony of the chemist (PW1). According to PW1 exhibits which were submitted to her for laboratory analysis, include a white bag of cloth material wrapped by a transparent nylon containing white flour packed and sealed in envelope "A" exhibit P3(a); a small plastic can packed and sealed in envelope "B" exhibit P3(b); a small plastic can packed and sealed in envelope "C" exhibit P3(c); a small plastic can packed and sealed in envelope "D" exhibit P3(d) and a small plastic can packed and sealed in envelope "E" exhibit P3(e) all containing flour. PW1 stated that only exhibit P3(a) weighing 232.70 grams and exhibit P3(d) weighing 42.70 grams were found to have narcotic drugs category of heroin hydrochloride, as per the report of laboratory analysis exhibit P1.

This forms a central point of contention as to whether a white bag of cloth material wrapped by a transparent nylon containing flour of heroin hydrochloride (exhibit P3(a) was seized in a motor vehicle T817BQN Land Rover Discovery and small plastic can containing flour of heroin hydrochloride exhibit P3(d) was found inside the accused persons' bathroom in their bedroom.

According to the evidence tendered by prosecution witnesses in particular A/Insp Paschal Didas Daud (PW4) explained that they got four cans containing flour inside accused persons' bed room and a white bag of cloth material wrapped by a transparent nylon containing flour was found in a pouch of a seat cover at a rear of driver's seat of a motor vehicle T 817BQN. This evidence was corroborated by the testimony of Nassoro Athuman Mgaywa (PW7) and Insp. Msangi (PW8), who consistently explained that they found inside a toilet of accused persons' bed room four transparent cans like a shape of a container for packing baobab nut (two small and two large one), where two cans (one large and one small) had yellow flour and two cans (one large and one small) had white flour. Thereafter saw a transparent nylon bag inside had white cloth bag which had flour in a pouch of a seat cover at a rear of driver's seat of a motor vehicle T 817BQN. This evidence was supported by a certificate of seizure exhibit P4.

Therefore an argument by the learned defence Counsel for first accused that prosecution testimony create doubts on account that the alleged flour was not tendered for reason that the chemist tendered only envelopes, is unmerited. The records reflect clearly that the chemist (PW1) had laid a foundation in respect of each envelope, to start with envelope "A" PW1

explained it to be a white bag of cloth material wrapped by a transparent nylon containing white flour packed and sealed in envelope "A" which was received as exhibit P3(a) and a small plastic can containing flour packed and sealed in envelope "D" was admitted and marked exhibit P3(d). Indeed the record reflect clearly that before tendering, PW1 demonstrated and exhibited what was contained inside each sealed envelope by way of opening each packing material by cutting through scissor, and the court records speak loudly and boldly over this aspect. Now to say only envelopes were tendered and received without flour, is a misconception. Actually court records should not be read one aspect in isolation of other pieces of facts or evidence, as court proceedings forms a conjunction of facts or circumstances.

The learned defence Counsel attacked an exercise of search, that rules were flawed for PW4 to allow PW7 who was the stranger to participate. However, the argument of the learned Counsel fall short, as he did not cite any provision of law or precedent which preclude other people to witness search. A mere fact that PW7 had resurfaced after a search had commenced at the dining room, on itself cannot said to have diluted the whole exercise. On similar vein, an argument by the first and second accused (DW2 and DW3 respectively) who disowned seeing PW7 in the course of search, is baseless.

To my opinion PW7 who introduced as commander for community security was an independent agent or witness for all purpose and intent and therefore his testimony is credible. My undertaking is grounded on a fact that no tenable cause was made to misbelieve or create doubts against him. An issue as to who summoned him, whether he was invited by one Jafari Adinani, is immaterial. Basically a phrase that an invitee cannot invite is inapplicable in the circumstances of this case.

The learned defence Counsel argued that the prosecution failed to summon the cell leader one Jafari Adinani. It is true that the said cell leader one Jafari Adinani was not summoned by prosecution. However, the evidence tendered by PW4, PW7 and PW8 including a certificate of seizure exhibit P4, was cogent in so far as an exercise of search is concerned. Actually no gap was created for non-summoning of the alleged ten cell.

Equally an argument that prosecution failed to tender a CCTV server which PW4 said was among items seized, is untenable. This argument has no merit at all. Non-tendering of CCTV server is immaterial, as evidence on records prove beyond doubt an information levelled against the accused persons. Above all, the alleged CCVT server was tendered by defence side (DW1) and was received as defence exhibit number two. But it added no value to the

defence, as efforts by DW1 to login was abortive and therefore failed to display any picture or image for what DW1 explained that probably the user might have forgot password or password/pattern was entered repeatedly more than once (the system blocked), password is incorrect or hard drive was changed. But all these were mere assumptions.

Regarding chain of custody, I cannot ascribe to the proposition by the learned Counsel for defence that the prosecution failed to depict custody and control of the alleged narcotic drugs. To my opinion, chain of custody for handing over exhibits was not broken anywhere from seizure to the point when were tendered in Court. It is true that the prosecution did not tender receipt or exhibit register by exhibit keeper PW2. However, the current position of the law, paper trail is no longer a requirement for proving chain of custody. Paper trail is just one of the form or modality of proving chain or handing over of narcotic drugs. In absence of paper trail does not connote that chain is broken. PW4 explained that after seizure, at 07.00 hours he took exhibits suspected to be narcotic drugs to his office where he locked in a cupboard and retained a key. Later at 08.00 hours he handed over to A/Insp Johari (PW2). PW2 packed into envelopes, sealed with sealing wax and preserved in exhibit room. On 2.5.2019 at 13.50 hours she handed over

to Sgt. Juma Seleman (PW6) who submitted to the chemist (PW1). PW1 took samples, conducted a preliminary test then handed over back to PW6 who in turn took back to PW2. PW2 preserved in exhibit room till when were tendered in court.

The defence Counsel raised an argument that there is a discrepancy of testimony between PW4 who said he had a bag and he personally used to walk around with the seized exhibits alleged to be narcotic drug and PW7 said were carried by the lady police officer who descended with them down stairs to the ground floor until when she put where other items were assembled. Even if that discrepancy is there, is taken as a minor one as did not have the effect of denting chain of custody depicted above.

Therefore, the first issue is ruled in the affirmative against the first and second accused, that indeed a white bag of cloth material wrapped by a transparent nylon containing flour of heroin hydrochloride (exhibit P3(a) was seized in a motor vehicle T817BQN Land Rover Discovery and small plastic can containing flour of heroin hydrochloride exhibit P3(d) was found inside the accused persons' bathroom in their bedroom. My finding is also attributed by the first accused person conduct going into hiding on the ceiling or roof upon seeing police officers (through CCTV camera) had surrounded

his compound. Also the second accused lied to police officers that her husband was not there, on what she explained in her defence that her statement was in line with invented procedures at their home and she did not want to fall in trouble. At any rate, the accused persons conduct was not consistence with an innocent person.

Now, so far a white bag of cloth material wrapped by a transparent nylon containing flour of heroin hydrochloride (exhibit P3(a) was seized in a motor vehicle T817BQN Land Rover Discovery and small transparent plastic can containing flour of heroin hydrochloride exhibit P3(d) was found inside the accused persons' bathroom in their bedroom. Therefore, the first and second accused are taken to have been trafficking in narcotic drug.

Having premised as above, I rule that the prosecution has managed to prove an information in respect of two counts levelled against the accused persons. The first and second accused are convicted for: first count-trafficking in narcotic drugs contrary to section 15(1)(a) of the Drugs Control and Enforcement Act, No. 5 of 2015 as amended, read together with paragraph 23 of the First Schedule to, and sections 57(1) and 60(2) both of the Economic and Organized Crime Control Act (Cap. 200 R. E. 2002) as

amended; second count-trafficking in narcotic drugs contrary to section 15A(1) and (2)(a) of the Drugs Control and Enforcement Act, No. 5 of 2015 as amended

E. B. Luvanda
JUDGE
31/3/2021

Date: 08/03/2021

Coram: E.B. Luvanda, Judge

For Republic: Absent

For accused: Absent

1st Accused: Absent

2nd Accused: Absent

Court: So far typed proceedings were belatedly supplied to parties, after time for filing closing submission had elapsed.

Orders

i. Time for filing closing argument is extended up to 19/03/2021.

ii. Date for delivery of judgment remain undisturbed.

Sgd: E. B. Luvanda
Judge
08/03/2021

Date: 31/03/2021

Coram: Hon. E.B. Luvanda, J.

For Republic: Ms. Veronika Matikila SSA.

For 1st Accused: Mr. Juma Nassoro, Advocate

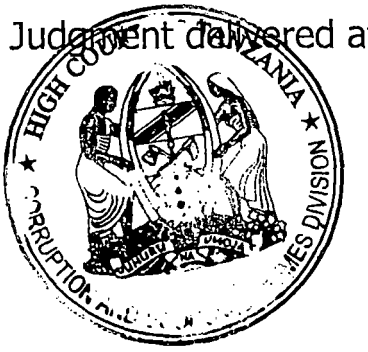
1st Accused: Present

For 2nd Accused: Ms. Hajra Mungula, Advocate

2nd Accused: Present

B/Clerk: Mr. Lukindo

Court: Judgment delivered at open Court. Right of Appeal is there.



E. B. Luvanda
Judge
31/3/2021

Court: The prosecutor is invited to address regarding Accused's previous records, and matters incidental thereto.

Ms. Matikila Senior State Attorney: The accused persons have been convicted for trafficking narcotic drugs under section 15(1)(a) of Act No. 5/2015, as amended, as reflected in the information, with leave of the Court I read section 15(1)(a) of Act No. 5/2015. It provided for life imprisonment. According to the evidence tendered PW1 and exhibit P2, we ask for the Court to consider it, as it was proved that heroin has significant effect to the community including addiction and long lunatic. In view of an amount of narcotic drugs which the accused persons have been convicted with, if could let to reach the community, youths could be affected who are manpower of

the Country. We therefore ask for the Court to impose a deserving sentence. We inform the Court that accused are first offenders. However, I am making a prayer under section 49A(1) of Act No. 5/2015 Cap 95 R:E 2019, we pray for a forfeiture of exhibit P3(a) and P3(d) for purpose of destroying as has been proved to be narcotic drugs. Also under the same provision 49A(1) Act No. 5/2015, we pray for confiscation of exhibit P5 which is a car make Land Rover Discovery No. T817 BQN because it was used as instrumentality for committing an offence, as proved by PW4, PW7 and PW8, which we ask for the Court to consider when deliberating it. With your leave, I read section 49A(1) Act No. 5/2015. If the accused will be convicted or acquitted for offence, the Court may make an order for confiscation of property used as instrumentally to commit an offence. Regarding exhibit P3(b) and P(c) which were proved to be not narcotic drugs, we have no intention to take them, if the defence will need them we have no problem, but if they don't need them, we ask for them to be combined to properties which will be forfeited to the republic. That is all.

Court: Defence counsels are invited to address mitigation, including a reply to the prayer by prosecutor.

Mr. Nassoro Advocate: I ask to consult my client.

Court: It is okay.

Mr. Nassoro Advocate: Before I make mitigation so far prosecution have made a request for confiscation order, I wish to inform the Court that the accused persons in particular the first accused are aggrieved against conviction and therefore we intend to file a notice to appeal. For that reason a prayer to confiscate, we pray that an order for confiscation should not be made, or if it pleases the Court should direct prosecutions to make a formal application for confiscation. Meanwhile we shall have already filed a notice of appeal including taking other necessary steps of appeal. In case an order for confiscation of exhibit P5 will be made and in case the accused persons will appeal successful and this decision quashed, the accused persons will suffer irreparable loss, as we don't know what will follow after confiscation of the said car. But it is a rule that justice should not seen to be done but be done, it is impossible where the accused are intending to appeal to make order which will affect that appeal. Assuming that an appeal is filed and the C.A.T order retrial, where the exhibit will be procured. We therefore ask for the court to make an order that exhibit P5 remain in custody of republic pending the intending appeal. Regarding disposal of exhibit found to be narcotic drugs and those not found to be narcotic drugs, there is no problem if a prayer will be granted. But I make a caution that, possibly those exhibits depending on the results of appeal those exhibits might be needed in future. I therefore ask the Court to consider either to grant or not to grant a prayer on the circumstance where we are intending to appeal.

Lastly, as submitted by prosecutor, the accused persons have no criminal records. As stated they are husband and wife, and are parent's for three children. We pray for the Court to consider it and impose a lenient sentence considering those factors. We ask to be availed with a copy of this judgment as soonest so that we can take immediate steps to appeal.

Ms. Mungula Advocate: I ask to consult the second accused.

Court: It is okay

Ms. Mungula Advocate: After consulting the second accused, like the first accused she told me that she is aggrieved with conviction, so she intend to appeal. Without taking much time, regarding prayer by the republic on disposal of exhibits of narcotic drugs those which are and not narcotic drugs, the second accused have no objection, but she join hand on caution submitted by the first accused regarding results of appeal if those exhibits will be needed in future.

The second accused have no previous records but also she is the wife of the first accused who are parents of three minor children, who have not attained age of majority. A sentence will not affect the second accused alone but will also affect these children who are innocent. It is our prayer for the Court to consider these children, for being lenient to the second accused who is the mother of these children. That is all.

Ms. Matikila Senior State Attorney: I think my learned friend have messed up on management of exhibits tendered in Court, after finalization is under domain of trial Court including Counsel for both sides. Even section 49A(1) of Act No. 5/2015 provide and use the word shall. An argument that the Court should order exhibits to remain in custody of republic, has no base in law, and they are talking of anticipation to an intended appeal, but the accused persons have been convicted, they may decide not to appeal. And therefore those narcotic drugs and instrumentally should be confiscated.

The instrumentality was used to commit an offence which was committed by the accused persons and the first accused is the owner. This is a convenient way, as the Court had an opportunity to hear parties. The second mode of making an application, well can also be used, but in the circumstance where the owner of the property seems to be not aware of his property to be used in committing an offence, it is when we make a formal application to inform the owner intention of the republic to confiscate it.

The second mode proposed by defence side cannot be used in the circumstances of this case. An argument that the Court should take caution as there is an appeal, is not backed by any law. There is no dispute that exhibit P3(a) and P3(d) are narcotic drugs, to say the Court should make an order of custody to unknown destination, the question is who will foot cost of

custody for that car. We ask the Court to make order as prayed. I beg to submit.

SENTENCE

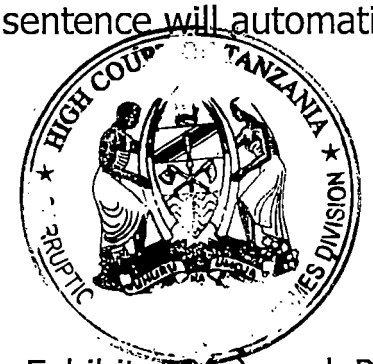
It is true that the first and second accused are first offender, and have no criminal record as elicited by the learned Senior State Attorney. However the penal for the offence committed is not discretionary. As such there is no room upon which I can entertain leniency.

Therefore the first and second accused are sentenced as follows-

For the first count, the first and second accused are sentenced to life imprisonment.

For the second count the first and second accused are sentenced to life imprisonment.

The sentence will automatically run concurrently.



E. B. Luvanda
Judge
31/3/2021

Order

1. Exhibit P3(a) and P2 (d) which are narcotic drugs to be disposed (burned)
2. Exhibit P3(b), P(c) and P3 (e) to be handed over back to the republic, as the accused does not claim ownership.

3. A motor vehicle registration No. T817 BQN make Land Rover Discovery (exhibit P5) where exhibit P3(a) was found, is confiscated to the government. This is because it was proved on evidence in particular PW5 who tendered a report exhibit P6 indicating that is a property of the first accused. In so far the first accused had participated in the proceedings, meaning were accorded the right to be heard, commencing for formal application it will be superfluous and amounting to entertaining double work. I also ascribe to the learned Senior State Attorney, that the alleged intended appeal which the learned defence Counsel have intimated informally, cannot be a bar to the Court to make orders against Court exhibits. The provisions of the law cited above by the Prosecutor provide on explicitly terms that an order for confiscation and disposal of exhibits ought to be made at this stage. Therefore a proposal by the learned defence Counsel is refused.

E. B. Luvanda
Judge
31/3/2021

Court

Right of Appeal against, Conviction, sentence and order for confiscation is there.

E. B. Luvanda
Judge
31/3/2021