IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

CRIMINAL APPEAL NO. 198 OF 2019

(Appeal from the Judgment of the District Court of Kwimba at Ngudu (Mtete, RM) Dated 16th of October, 2019 in Criminal Case No. 218 of 2019

THEREZA SHIJA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT OF THE COURT

11th May, & 8th June, 2020

ISMAIL, J.

This appeal arises from the conviction on a plea of guilty and sentence passed against the appellant by the District Court of Kwimba sitting at Ngudu. The appellant was arraigned in court on a charge of unlawful possession of 353 grams of narcotic drugs known as tetrahydrocannabinal, popularly known as bhangi. This offence was charged under the provisions of section 15A (1) (2) (c) of the Drugs

Control and Enforcement Act No. 5 of 2015 as amended by Act No. 15 of 2017.

Discerning from the flimsy record of the trial court, it is alleged that on 9th October, 2019, the appellant was at her home in Hungumarwa village in Kwimba district, Mwanza region. At around 19.10 hours she was visited by police officers who informed her that they were aware that the accused is dealing with narcotic drugs by the name of cannabis. She allegedly admitted that she, indeed was dealing in cannabis and she allowed them to effect a search into her house. The managed to locate and impound 353 grams of cannabis. The appellant was put under restraint and conveyed to Hungumarwa police station where she recorded a cautioned statement (exhibit PE1), in which she confessed that she was found in possession of the impounded narcotic drugs. Pursuant to all this, the appellant was arraigned in the District Court of Kwimba at Ngudu. On a plea of guilty to unlawfull possession of narcotic drugs, the appellant was convicted and sentenced to a statutory term of 30 years of imprisonment.

The conviction and sentence imposed on the appellant have not gone well with her. She has mounted a challenge through an appeal

instituted in this Court. she has six grounds of appeal which are paraphrased as follows: ***One***, that the trial court abdicated its fundamental duty when it failed to inform the appellant the meaning of a plea of guilty before it invited the appellant to plead to the facts; ***two***, that the appellant's conviction was wrong since it was based on an equivocal plea of guilty; ***three***, that in view of the inconclusive plea of guilty, the trial court ought to have tried the matter to its conclusive end; ***four***, that the plea of guilty was ambiguous, unfinished and that the proceedings were conducted in a perfunctory manner; ***five***, that the charged offence was not proved for want of an expert opinion from the government chemist to certify that exhibit 1 was a narcotic drug; and, ***finally***, that the imposed sentence was manifestly excessive in the circumstances where no proof was tendered on the substance which was recovered.

At the hearing of the matter, the appellant urged the Court to take cognizance of her grounds of appeal and allow her appeal, contending that she is innocent.

Ms. Gisela Alex, learned State Attorney who represented the respondent supported the conviction and sentence passed by the trial

court. Relying on section 360 of the CPA, the learned counsel argued that no appeals lie against a conviction on a plea of guilty. She contended that in this case the appellant pleaded guilty to the offence. Ms. Alex further contended that in terms of section 282 of the CPA, after the accused's admission, the court must convict. Revisiting the proceedings, the learned attorney argued that facts of the case were read and had ingredients of the charge. She asserted that the appellant's cautioned statement in which the accused confessed and the seized narcotics were tendered as exhibits PE1 and PE2, respectively. She contended that the plea was not equivocal.

While conceding that the cautioned statement was tendered but not read and no certificate of seizure was tendered for testimony, the learned attorney held the view that such omission does not infer that the appellant did not understand the charge. She was of the view that the consequence of all this is to expunge the whole testimony. Ms. Alex further asserted that, in case the Court finds that the procedure was flouted then the appropriate course of action is to have the matter remitted back for full trial.

On the 5th ground of appeal, the respondent's counsel held the view that, having pleaded guilty and no objection had been raised, the

conviction and sentence were both in order. With respect to the 6th ground, Ms. Alex took the view that in terms of amendment effected to the charging provision, the corresponding sentence for this offence is imprisonment for 30 years as imposed by the trial court. Overall, she prayed that this appeal be dismissed and the trial court's decision should be upheld.

In rejoinder, the appellant maintained her innocence, contending that charges against her were trumped up and that the alleged narcotic drugs were not hers.

I propose to dispose this appeal adopting the manner preferred by the counsel for the respondent. This will entail combining grounds one, two and four together, while the rest of the grounds, if necessary, will be argued separately and in seriatim.

In respect of grounds one, two and four, the contention is that the appellant's plea of guilty was equivocal, imperfect and inconclusive. As such, it could not constitute the basis for conviction and sentence. Ms. Alex takes a serious exception to this contention, on the ground that the plea was made after the charge was read over, pleaded thereto and, upon declaring that facts read over to her were nothing but a perfect account.

She contends that there was no mistake or apprehension of facts in the process.

It is a well settled position, as rightly argued by Ms. Alex, that an appeal cannot lie against a conviction on a plea of guilty except where, upon the admitted facts, the accused could not in law have been convicted of the offence charged. This trite position is provided for under section 360 (1) of the CPA which states as hereunder:

> *"No appeal shall be allowed in the case of any accused person who has pleaded guilty and has been convicted on such plea by a subordinate court except as to the extent or legality of the sentence."*

Case law has developed circumstances under which a conviction on a plea of guilty may be challenged by way of appeal. These circumstances were propounded in the landmark case of ***Laurence Mpinga v. Republic*** [1983] TLR 166. The principles in the said case, which has stood the test of time, have been emphasized in a litany of subsequent decisions of the Court and the Court of Appeal of Tanzania. They include the decision in ***Msafiri Mganga v. Republic,*** CAT-Criminal Appeal No. 57 of 2012 (unreported), in which the Court of Appeal made the following observation:

"... one of the grounds which may justify the Court to entertain an appeal based on a plea of guilty is where it may be successfully established that the plea was imperfect, ambiguous or unfinished and, for that reason, the lower court erred in law in treating it as a plea of guilty. This goes to insist therefore that ***in order to convict on a piea of guilty, the court must in the first place be satisfied that the plea amounts to an admission of every constituent of the charge and the admission is unequivocal."*** [Emphasis supplied].

The question that arises in the instant matter is whether the appellant's plea falls in the realm of pleas which are predicated upon facts that are incapable of supporting the conviction. The answer to this question is discerned by glancing through the proceedings of the trial court dated 16th October, 2019. This is the date on which the appellant was arraigned in Court and was called upon to plead thereto. Her response was: ***"It is true I was found with 353 grams of bhangi".*** This expression was followed by reading of the facts of the case whose full version is reproduced with all its grammatical challenges as hereunder:

FACTS BY PROSECUTOR

The accused person Thereza D/O Shija aged 49 yrs of Hungumalwa.

On 9th October 2019 she was found with 353 grams of bhangi at Hungumalwa. After that on 9/10/2019 at 1950 hrs she was interrogated by detective sergeant Peter and she confessed. To have been in possession of the said bhangi.

And on 6th October 2019 she was brought before this court and when charge was read over she admitted the charge.

PP: *Your honour I have her cautioned statement and 353 grams of the seized bhangi I would like this court to see them and admit it in evidence.*

Court: *Cautioned statement and the said bhangi is seen and shown to the accused who is asked if she has any objection she replies.*

Accused: *I have no objection I send my child to schoolout of bhangi it is because of lack of money I sell bhangi.*

Court: *Cautioned statement and seized 353 grams of Tetrhydocannabinal (bhangi) are admitted and marked as exhibit PE1 and PE2.*

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Court: *Facts by prosecutor, bhangi and the contents of cautioned statement are well explained to the accused person who is asked if it is true and if she still admits she says.*

Accused: *Yes I admit I was found with bhangi it is true.*

Court: *The accused person admits that she was found with bhangi as charged.*

V.C. MTETE – RM

16/10/2019

While the record shows that facts of the case were read, the pertinent question is whether these facts constituted all ingredients of the offence with which the appellant was charged. The above question considers the crucial fact that an accused person's plea of guilty of does not, in any way, take away the duty of the prosecution to prove all the ingredients of the offence in respect of which the accused has pleaded guilty. What actually happens is that, in a plea of guilty, such proof merely changes in its modality. While in trial the prosecution would bring witnesses and tender exhibits if any, on a plea of guilty, the prosecution is only to adduce the facts of the case. The facts stand as a substitute of formal evidence that would have been adduced had the accused pleaded not guilty. Where proof of the ingredients requires that an expert analysis be conducted then the said analysis must be conducted and the findings of the said analysis should constitute part of the exhibits to be tendered. In

so doing, they become part of the facts to be read over and pleaded or admitted to.

In ***Josephat James v. Republic,*** CAT-Criminal Appeal No. 316 of 2010 (unreported), the Court of Appeal of Tanzania held as follows:

> *"(1) The expression "It is correct", used by the appellant after the charge was read to him, was insufficient for the trial court to have been unambiguously informed of the appellant's clear admission of the truth of its contents. In the circumstances, it is doubtful whether that expression by itself, without any further elaboration by the appellant, constituted a cogent admission of the truth of the charge.*
>
> *(2)* ***It is trite law that a plea of guilty involves an admission by an accused person of all the necessary legal ingredients of the offence charged.***
>
> *(3) The trial court was enjoined to seek an additional explanation for the appellant, not only what he considered "correct" in the charge, but also what it was that he was admitting as the truth therein. The trial court was not entitled by the answer given, "it is correct", to distil that it amounted to an admission of the truth of all the facts constituting the offence charged.*
>
> *(4) In view of the seriousness of the offence and sentence of life imprisonment imposable on conviction, this serious irregularity occasioned a failure of justice.*
>
> *(5) The statement of facts by the prosecutor, after the plea of guilty was entered by the trial court was a mere repetition of the charge. No facts were disclosed as to what the sole witness who reported the incident to the police actually witnessed or which of the facts she*

substantiated. In this case, this assumed importance because the victim, a boy aged two and a half years, could not possibly have testified, being an infant. Moreover, it is not known what medical evidence was available, if at all it was and what it had revealed.

(6) ***The duty is that of the prosecution to state the facts which establish the offence with which an accused person is charged. The statement of facts by the prosecution serves two purposes: it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence, and it gives the magistrate the basic material to assess sentence."***

See: ***G & S Transport Limited v. The Director of Public Prosecutions & 2 Others***, HC-Criminal Revision No. 1 of 2020; and ***Sikini Mhanuka & Another v. Republic***, HC-Misc. Criminal Application No. 31 of 2019 (both Kigoma-unreported).

The subject matter of the proceedings in the trial court was a substance which was believed to be narcotic drugs, known in technical terms as tetrahydrocannabinal (bhangi) that allegedly weighed 353 grams. The conclusion that the substance was bhangi or marijuana came from the prosecutor. No basis was given for the court to believe that that was indeed a narcotic drug of that description and weight. No evidence was adduced either, that after impounding, the said substance was conveyed to the government chemist for analysis whose findings would constitute part of the facts which would unravel the truth about it. Such analysis

would provide the required certainty that the impounded substance is nothing but bhang, as alleged by the prosecution.

The Drug Control and Enforcement (Amendment) Act, 2017 imposes a requirement that any seized substance, suspected to be a narcotic drug has to be submitted to the Government Analyst for testing and confirmation that the seized substance is a drug related substance. Section 48A provides as follows:

> *"(1) The Government Analyst to whom a sample of any narcotic drugs, psychotropic substance, precursor chemicals, controlled or any other substances suspected to have drug related effect has been submitted for test shall deliver to the person submitting it, a signed report in quadruplicate in the prescribed form and forward one copy thereof to such authority as may be prescribed.*
>
> *(2) Notwithstanding anything contained in any other law for the time being in force, any document purporting to be a report signed by the Government Analyst shall be admissible as evidence of the facts stated therein without formal proof and such evidence shall, unless rebutted, be conclusive."*

This requirement has bred Form No. DCEA 001, found in the Third Schedule to the Amendment Act, which provides for details on samples that may be submitted for testing after seizing the suspected substance

from a suspect. What I gather from this provision is that a substance will not be held to be of a drug related effect until it is so certified by a Government Analyst whose report is, in terms of sub-section 2, conclusive evidence. Such certificate would have a tremendous importance in proving that what the appellant was accused of being in possession of is bhang, as allegedly confessed by the appellant. It would constitute an ingredient of the charge levelled against the appellant, and be part of the facts read over to the appellant.

The importance of this legal requirement was a subject of discussion in ***Mwinyi bin Zaid Mynagatwa v. Republic*** [1960] EA 218 (HCZ). In addressing the matter, the High Court of Zanzibar (Horsfall, J.) held as follows with respect to adherence to a requirement similar to what is provided for in the provision cited above:

> *"(1) Though the Attorney-General was served with notice of the appeal, he was unable to be represented in court, but wrote: "With regard to Criminal Appeal No. 4 I cannot support the conviction. Apart the statement of P.W.1 who says that he knows bhang when he sees it, there is no evidence at all to prove that the substance handed over to him by the accused was bhang or that the liquor found in the bottle was tende. It is unfortunate because the rest of the evidence seems*

sufficient to convict. I realize that the learned magistrate has accepted that P.W. 1 knows what bhang is but in my submission this is not sufficient". I think that this is an accurate summary of the evidence so far as it goes, but it should be added that PW1 had asked the appellant to sell him bhang and also that the appellant did not challenge that what was produced in court (exhibit A) was bhang. The appellant's defence has consistently been that it was a police plant on him engineered by a police sergeant who hated him. In saying this I bear in mind that the onus remained on the prosecution throughout of satisfying the magistrate beyond reasonable doubt that the appellant was in possession of bhang.

(2) Section 34 of Cap. 64 and s. 9 of Decree No. 6 of 1942 are similarly worded "In any proceedings under this Decree the production of a certificate purporting to be signed by a Government chemist stating the ingredients of any substance submitted for his examination shall be sufficient evidence of facts therein stated." It is probably the omission of the prosecution to produce such a certificate that has influenced the acting Attorney-General in his decision not to support this conviction. I agree that it is safer for the prosecution in drug and native liquor cases to make it a rule to produce such a certificate as part of its evidence and that failure to do so may well be fatal where it is disputed that the substance is a dangerous drug or native liquor. The question is one of science

or art on which a court is being asked to form an opinion and s. 45 of the Evidence Decree is relevant.

(3) I refer to Gatheru s/o Njagwara v. R. which concerned the question whether a police inspector was competent to prove that a home-made rifle was a lethal barreled weapon within the terms of the definition of firearm in the Kenya Emergency Regulations. It was held that in deciding in what category the weapon fell, the court must have the assistance of expert opinion.

(1) It seems to me that section 34 of Cap. 64 and section 9 of Decree No. 6 of 1942 merely prescribe a convenient way of proving what are the ingredients of a substance examined by Government chemist without having to put the Government chemist in person into the witness box. It is usually expensive, inconvenient and unnecessary to call the Government chemist, but should the issue be disputed as to what were the ingredients of the substance examined by him the court would in a fit case adjourn the trial for his attendance. My point is that these sections do not preclude other methods of proving whether a substance is a dangerous drug or a native liquor.

(2) P.W. 1, P.C. 975 Shaaban Seif stated: "We opened the rolls paper, all four of them. All of them contained bhang. I know bhang when I see it. I have dealt with many cases of bhang." The witness does not how long has he served in the police nor in how many cases has he recognized bhang but

these are matters going to the weight of his eveidence. In his judgment the magistrate stated:

> *Shaaban (P.W.1) states that he knows bhang very well and can know it when he sees it, he having dealt with several cases. He has was cross-examined on the point and in any event I accept what Shabaan states as I do everything else he states in evidence.*

I consider that there was evidence in this case to make it safe for the magistrate to find that the substance was bhang. As regards the liquid found in the bottle there is no evidence given as to what experience P.W. 1 has had in relation to native liquor. Reluctantly I quash the conviction on the second count."

By skipping this key requirement and relying on the appellant's purported plea of guilty to the charge, the trial court relied on the weakness of the defence to convict and not the prosecution's weight of its allegation as it ought to have been laid bare in its exhaustive manner, and as pleaded thereto by the appellant.

Looking at the excerpts of the proceedings recorded on 16th October, 2019, the clear picture is that the same is a mirror image of the particulars of the offence as contained in the charge sheet. It is a reproduction of what the appellant already knew through a charge which was read over to

her on arraignment. While it was expected that the facts would provide detailed facts which, if read and admitted to, would make the plea perfect, finished, conclusive and therefore unequivocal, nothing closer to that can be gathered from the quoted excerpts. This imputes nothing but a brazen infraction that marred the impugned proceedings. It is an abhorrent conduct that does not sit well with the current legal holdings. In ***Samson Marco & Another v. Republic***, CAT-Criminal Appeal No. 446 of 2016 (Mwanza-unreported), was critical of a similar conduct when it held:

> *"What the prosecutor did was merely to repeat the same words appearing in the "Particulars of the Offence" of armed robbery without elaboration and relating to the ingredients constituting the charge facing the appellants.... We cannot on second appeal, say that facts narrated to support this ingredient of armed robbery, were clear to the appellants to support the position of the two courts below that there were unequivocal pleas of guilty. As this Court restated in Msafiri Mganga v. R, Criminal Appeal No. 57 of 2012 (unreported),* ***the narrated facts which an accused person admits to be true and correct, must in the eyes of the law, disclose the ingredients of the offence for which the appellant was charged with."***

To make the waters more muddied, there is yet another irregular conduct with respect to the manner the said narcotics were recovered. Gathering from the cautioned statement (exhibit P1), seizure of the said narcotics was not preceded by essential requirements that govern search and seizure of the subjects of criminal undertakings. In this case, police officers visited the appellant and were allowed to enter into her house, search and seize the said narcotics. This is a wanton disregard of the law governing searches and seizures. In this respect, section 38 of the CPA, read together with Police General Order 226 (made under section 7 (2) of the Police Force and Auxiliary Services Act, Cap.322) ought to have guided their conduct. Both of these stipulate the requirements which ought to be observed in conducting search and seizure of property. These provisions read as follows:

Section 38 (3) of the CPA:

> *"Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, being the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any."*

Police General Order No. 226:

"Item 17 (b) The services of a local leader or two independent witnesses who should be present throughout the search, should be obtained. This is to ensure that he or they may be in a position to give supporting evidence if anything incriminating is found and to refute allegations that the search was roughly carried out and the property damaged."

"Item 18: On completion of the search, a search report will be made out at the scene, giving details of all articles seized, a copy of which shall be handed to the occupier."

Not a single one of these requirements was complied with in this case, as evidence of compliance would constitute part of the facts which were read to the appellant. This means that, what was tendered in court as exhibit P2 is a substance whose source is not ascertained, and it is not evident that such exhibit is the same as that which was seized on 9th October, 2019, when police officers stormed into the appellant's house. This is especially critical when we note that the appellant was arraigned in court a week after his arrest and seizure of the said exhibit. During that time, the said exhibit was still in the hands of the police and nobody knows if no tempering with it was done (See: ***Frank Michael @ Msangi v. Republic***, CAT-Criminal Appeal No. 323 of 2013 (Mwanza,

unreported); ***Ridhiki Buruhani v. Republic***, (HC) DC Criminal Appeal No. 40 of 2011 (Songea, unreported).

There is then the fact that the cautioned statement (exhibit P1) was not read in court when it was tendered in evidence. The respondent's counsel has conceded that this was an anomaly. The trite position is that failure to read the statement is a fatal omission which renders the statement inadmissible and liable to expunging (See: ***Juma Tumbilija & 2 Others v. Republic*** [1998] TLR. 139). Accordingly, I order that the said exhibit P1 be expunged from the record.

The totality of these fundamental flaws brings me to the conclusion that facts of the case, worth the name, were not read to the appellant before she admitted to their correctness. This implies that the purported plea of guilty recorded against the appellant was not based on any ingredients of the offence the appellant stood charged with. As such, such plea was nothing but equivocal, and it follows that the conviction and the eventual sentence were all a nullity, and the same are quashed and set aside as are the entire proceedings.

In consequence, consistent with the holdings in ***Paschal Clement Branganza v. Republic*** [1957] EA 152; and ***Fatehali Manji v.***

Republic (1966) EA 343, I order that the matter be remitted back to the trial court where the appellant will be tried on a plea of not guilty, before another magistrate.

See also ***Dominico Simon v. R.*** (1972) HCD 152; ***R v. S. S. Salehe*** (1977) HCD 15; and ***Ngasa Madina v. Republic***, Criminal Appeal No. 151 of 2005 (unreported).

It is so ordered.

DATED at **MWANZA** this 8th day of June, 2020.

M.K. ISMAIL

JUDGE

Date: 08/06/2020

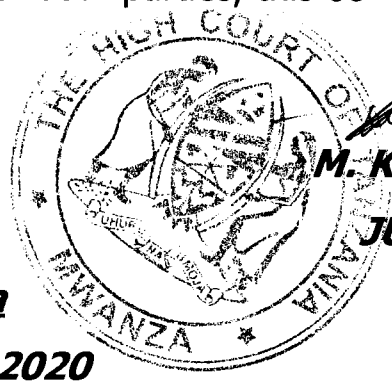
Coram: Hon. M. K. Ismail, J

Appellant:

Respondent: Present on line

Court:

Judgment delivered by audio – teleconference in the virtual attendance of both parties, this 08th June, 2020.



M. K. Ismail

JUDGE

At Mwanza

08th June, 2020