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MALIK HASSANI SULEIMAN *v.* S.M.Z.

COURT OF APPEAL OF TANZANIA AT ZANZIBAR

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(Lubuva, Mroso and Msoffe, JJ.A.)

CRIMINAL APPEAL No. 77 OF 2004

F (From the Judgment of the High Court of Zanzibar at Vuga, Dourado, J., dated 19 February 1998 in Criminal Appeal No. 2 of 1998)

Civil Practice and Procedure – Exhibits – Handling of exhibits – Exhibits handled

G *in a way that makes tampering with them possible – Effect thereof.*

Civil Practice and Procedure – Search – Mandatory conditions to observe in conducting a search – Section 114 (1) and (2) of the Criminal Procedure Decree Chapter 14 of the Laws of Zanzibar.

H *Civil Practice and Procedure – Functus officio – When a judge becomes functus officio.*

After calling one respectable inhabitant of the locality to attend and witness a search, the appellant's house was searched. In the search four packets of bhang were found.

I The appellant was charged in the regional magistrate's court with being in possession

of bhang, and was convicted and sentenced to 15 years imprisonment, the minimum sentence for such offence being 20 years imprisonment. The handling of the bhang was such as might raise doubts as to whether or not it was the bhang that was seized at the appellant's house that was admitted in court as exhibit. The appellant's appeal to the High Court was not successful; instead his sentence was enhanced to 25 years imprisonment. Upon the appellant's application to the High Court for review of sentence, the first appellate judge reduced the sentence to one of 20 years imprisonment. The appellant, aggrieved by the decision of the High Court, appealed to the Court of Appeal against both conviction and sentence. The Court of Appeal considered the propriety of handling the bhang, the manner the search was conducted and the jurisdiction of a judge to review his own decision.

Held: (i) Given the manner in which the bhang was handled by the police, the Government Chemist, and eventually the court, anybody could have tampered with it in the process and thus it could not be safely said and concluded that the alleged four packets of bhang seen in the appellant's jacket were necessarily the bhang that was examined and certified by the Government Chemist;

(ii) In executing a search warrant under section 114(1) and (2) of the Criminal Procedure Decree, Chapter 14 of the Laws of Zanzibar, the following conditions are mandatory: the search must be witnessed by two or more respectable inhabitants of the locality and a list of all things seized in the search must be prepared and signed by the witnesses; in the instant case the search was irregular for being witnessed, and the list being signed, by only one inhabitant;

(iii) A court becomes *functus officio* when it disposes of a case by a verdict of guilt or by passing a sentence or making orders finally disposing of the case; in this case the learned judge became *functus officio* when he passed the judgment of 19 February 1998 and he was not clothed with the necessary jurisdiction to review his own decision subsequently.

Appeal allowed

Cases referred to:

(1) *John Mgaya and four others v. Edmund Mjengwa and six others*, Criminal Appeal Number 8A of 1997 (unreported)

(2) *Kamundi v. Republic* [1973] EA 540

Statutory provisions referred to:

(1) Criminal Procedure Decree, Chapter 14 of the Laws of Zanzibar, sections 114(1) and (2) and 61(1) and (2)

(2) Civil Procedure Decree Chapter 8 of the Laws of Zanzibar, Order L, rule 5

Uhuru Khalfan, for the Appellant

Salma Ali Hassan, State Attorney, for the Respondent

JUDGMENT

(Dated 26 November 2004)

Msoffe, J.A.: In the Regional Court for Zanzibar at Vuga, the appellant was convicted of unlawful possession of bhang contrary to sections 17(2) and 32(3) of the Pharmaceuticals and Dangerous Drugs Act Number 6/86 as amended by the relevant provisions of the Written Laws (Miscellaneous Amendments) Act Number 6/91 of the Laws of Zanzibar. Following the conviction, he was sentenced to serve a fifteen year period at the Education Centre. Dissatisfied by the conviction and sentence he appealed to the High Court of Zanzibar. The High Court, Dourado, J., in a seven line typed judgment dismissed the appeal and enhanced the sentence to twenty five years. The judgment reads as follows:

JUDGMENT

> The learned RM adequately dealt with the evidence which conclusively show that the accused was in possession of 4 pkts of bhang. This court is unable to upset his findings. As regards sentence the minimum is 20 years. He was sentenced to 15 years. A deterrent sentence is called for. The sentence is raised from one of 15 years to 25 years. In addition he will receive 12 strokes which will be administered today.
>
> Sgd. W. Dourado
>
> Judge

19 February 1998

On 2 March 2001 the appellant lodged an application at the High Court seeking review of the sentence. On 4 June 2001 the High Court, Dourado, J. granted the application and reduced the sentence to the statutory minimum of 20 years. Again, the "judgment" to that effect read as follows:

JUDGMENT

> On review this Court is prepared to alter sentence. There will be no corporal punishment. The sentence is reduced from 25 years to the minimum 20 yrs.
>
> Sgd. W. Dourado, J.
>
> 4 June 2001

On 10 March 2004 he filed an application at the High Court seeking leave to appeal to this court against the above conviction and sentence. On 24 June 2004 the High Court, Mshibe A. Bakari, J. granted leave reasoning, *inter alia*, as follows:

> The court having heard the ground of the application and the reply from the respondent is of the view that the Applicant has got no good grounds of applying for leave to appeal to the Court of Appeal but it seems that there is a point of law whether the Appellate Judge can increase the sentence from what passed by the trial court without any complaints from the prosecution/respondent that the sentence passed is lenient.

Having been granted leave, the appellant filed the appeal on 13 July 2004. Mr Uhuru Khalfani, learned advocate, appeared and argued the appeal before us on behalf of the appellant. On the other hand, Ms Salma Ali Hasan, learned State Attorney, appeared and resisted the appeal on behalf of the respondent, the Revolutionary Government of Zanzibar.

Briefly stated, the prosecution case against the appellant was that on 11 May 1995 at around 8.30 a.m. the appellant was at his home. His home is at Jambiani, Kikadini, Zanzibar South. While

A there, PW1 CPl. Ali and PW2 ASP Ali Muno came in and met him having his breakfast. The two policemen told the appellant that they wanted to search his house. The appellant did not resist the desire by the policemen to search his house. PW6 Sulemani Hafadhi was
B called to witness the search. In the search four packets of bhang weighing 17.670 grams were found in one of the pockets of the appellant's jacket. The appellant was arrested and taken to Makunduchi police station where a charge was framed against him. On 15 May
C 1995 he appeared in court to answer the charge in question. At the same time, the bhang was sealed and taken to the Government Chemist for examination and analysis. The Government Chemist, Abdala Musa (PW5), examined it and certified that it was bhang. He then wrote a
D report to that effect and gave it to PW1 with the bhang in issue.

The appellant's defence was a general denial of guilt. He basically stated that the police witnesses (PW1 and PW2) came to his home on the above date and time and said that they were looking for stolen
E properties. He allowed them to search the house in the presence of PW6. After the search, the two policemen told him that they had seen four packets of bhang in one of the pockets of his jacket. He denied any knowledge of the bhang in question. Thus, according to
F him, he had nothing to do with the said bhang.

The Memorandum of appeal has seven grounds of appeal. In arguing the appeal Mr Uhuru Khalfani abandoned the second, fourth, sixth and seventh grounds.

G The complaint in the first ground is that there was a possibility that the bhang was, at some stage, tampered with in the course of handling by the police, the Government Chemist and the court. We are of the view that this complaint has merit for a number of reasons.
H One, PW1 and PW2 did not say how and where the alleged bhang was preserved before it was given to PW3 and PW4 for onward transmission to PW5.

Second PW5 stated that he received the bhang on 12 May 1995,
I yet he did not go further to say when he examined it. Indeed, PW5

did not even say when he gave the bhang and his report to PW1. And neither did PW1 say whether he received the bhang, if at all, from PW5; and assuming he did, when he received it! A

Third, it is in evidence that the bhang was produced and admitted in evidence on 13 February 96, a period of nine months after the appellant's arrest. We wonder why it took all that long period of time to produce it in evidence. B

Given the above manner in which the bhang was handled by the police, the Government Chemist and eventually the court, we agree with Mr Uhuru Khalfani that anybody could have tampered with it in the process. Since there was that possibility it could not be said safely and concluded that the alleged four packets of bhang seen in the appellant's jacket were necessarily the bhang that was examined and certified by the Government Chemist. This being a criminal matter, we think this doubt should have been resolved in favour of the appellant. C D

The third ground is an attempt at highlighting some shortcomings in the prosecution case. For example, while PW1 said the appellant was met outside his house, PW2 stated that they met him taking breakfast. While PW3 said he sealed the Exhibit (bhang) on 11 May 1995, PW4 stated that he sealed it on 26 May 1995. The point being made here on the issue of sealing of the exhibit is two-fold: One, it is not clear when the exhibit was sealed. Two, it is also not clear who, as between PW3 and PW4, actually sealed it. E F

Another shortcoming mentioned by Mr Uhuru Khalifani was the failure to comply fully with the provisons of section 61(1) and (2) of Act 6/86 which reads: G

> 61(1) In every case in which a sample is delivered to the Government Analyst under section 56, the Analyst shall cause it to be analysed as soon as is practicable and shall give to the person who reques'ts the analysis to be made a certificate specifying the resut of the analysis in the form prescribed in the Third Schedule to this Act and such certificate shall judicially be noticed. H I

(2) A certificate or the result of analysis given by the Government Analyst under subsection (1) shall be signed by him, and the analysis may be made by any person acting under his instructions. [Emphasis Supplied.

According to Mr Uhuru Khalifani, the certificate mentioned under section 61(1) ought to have been produced in evidence for purposes of being judicially noticed. He maintained this view before us inspite of the fact that PW5 testified in court. We agree with him only to the extent that production of the certificate would have helped in advancing the prosecution case. Otherwise, a strict interpretation of section 61(1) does not suggest to us that it was mandatory to produce the certificate in court even after PW5 had testified. In our view, the certificate could have only been judicially noticed if and when produced in court. Once PW5 testified there was no need to produce it in evidence.

On a broader scale though, we agree with Mr Uhuru Khalifani that the shortcomings mentioned in the first limb of the third ground of appeal were material only to the extent of showing that the prosecution case was not necessarily established to the expected standard.

The fifth ground is very clear. It seeks to show that the search conducted at the appellant's house was not done according to law, specifically section 114 of the Criminal Procedure Decree, Chapter 14 of the Laws of Zanzibar. section 114(1) and (2) reads as follows:

114(1)Before making a search under section 112 or section 113 the officer or other person about to make it shall call upon two or more *respectable inhabitants* of the locality in which the building or other place to be searched is situate to attend and witness the search, and may issue an order in writing to them or any of them so to do.

(2) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the court as a

witness of the search unless specially summoned by it [emphasis supplied]

It occurs to us that in executing a search warrant under section 114(1) and (2) the following conditions are mandatory: one, the search has to be witnessed by two or more respectable inhabitants of the locality. Two, a list of all things seized in the search must be prepared and signed by the witnesses. It will follow that in the instant case the search was irregular for being witnessed, and the list signed, by only one inhabitant. Indeed, Ms Salma Ali Hassan, learned State Attorney, on reflection readily conceded before us that the search was unlawful to that extent.

We wish to make a brief observation about the mode of the judgment of the High Court dated 19 February 1998, the subject of this appeal. With respect, we do not think this judgment is in conformity with the normal format and style of writing judgment. Generally a judgment should contain the point or points for determination, the decision thereon, and the reasons for the decision. The above judgment did not meet those standards. Indeed, a look at the proceedings in the first appeal will show that the appeal was argued quite extensively. In the circumstances, it was expected that, as a matter of courtesy and expedience, a reasoned judgment would be written and delivered in the process.

It will also be recalled that pursuant to the application for review, on 4 June 2001 the sentence of 25 years was altered and reduced to the statutory minimum of 20 years. In the same vein and spirit, the sentence of corporal punishment was set aside. One question has vexed our minds to a certain extent. This is whether the learned judge on first appeal was clothed with the necessary jurisdiction to review his own decision. Unfortunately no provision in the Laws of Zanzibar could be cited to us on this specific point. At best, Ms Salma Ali Hassan cited to us section 8(1) of The High Court Act 1985 which vests the High Court of Zanzibar with power, jurisdiction and authority to review proceedings from Subordinate Courts of Zanzibar. Thus,

A section 8(1) is not of any assistance to the point being made here. However, in the absence of a specific provision on the point, Mr Uhuru Khalfani and Ms Salma Ali Hassan, were at one in consensus that the action taken by the judge was not correct both in law and
B practice. We think they were correct in maintaining that view. We say so because once the judgment was pronounced on 19 February 98 the learned judge became *functus officio*.

In order to answer the question as to when does a court become
C functus officio the decision of this court in the case of *John Mgaya and four others v. Edmund Mjengwa and Six others* (1) is very instructive. In *Mgaya's case* this court cited with approval the decision of the Court of Appeal for Eastern Africa in *Kanundi v. Republic*
D (2) where it was stated as follows:

> The court becomes *functus officio* when it disposes of a case by a verdict of guilty or by passing a sentence or making orders finally disposing of the case [Emphasis Supplied].

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In the instant case, it is clear that the judgment of 19 February 98 finally disposed of the case. The learned judge was therefore *functus officio* when he passed the "judgment" of 4 June 2001. Of course, we are aware that in a proper an deserving case review is allowed
F under Order L, rule 5 of the Civil Procedure Decree, Chapter 8 of the Laws of Zanzibar. However, this was not a case in which Order L, rule 5 could apply.

G For the above reasons, we are satisfied that there is merit in the appeal. The appeal is accordingly allowed, conviction quashed, and sentence set aside. The appellant is to be released from the education centre unless he is held therein in connection with a lawful cause.

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