IN THE SUPREME COURT OF ZAMBIA SCZ Appeal No. 108 of 1995

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

DIGEN MWAKAJUMBA & MUHAMED JAMA SAIDI Appellants

VS

THE PEOPLE Respondent

CORAM: Chaila, Chirwa and Muzyamba JJ.S.

5th September, 1995 and 7th May, 1996

For the Appellants : Mr. L.P. Mwanawasa SC MP

For the Respondent : Mr. R.O. Okafor, Principal State Advocate

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J U D G M E N T

Chaila, J.S. delivered the judgment of the court.

Case referred to:

[1]. **Chetan D. Parmar vs The People** SCZ Appeal No. 111 of 1995.

The appellants faced three counts in the Subordinate Court. The first count was: trafficking in psychotripic substances contrary to section 6 of the Narcotic Drugs and Psychotropic Substances Act No. 37 of 1993.

The particulars of the offence were that they on the 27th of June 1994 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia jointly and whilst acting together trafficked in psychotropic substances namely 30.10 kilograms of Indian Hemp (Cannabis Sativa).

The second count was: Unlawful possession of Psychotropic Substances contrary to section 8 of the Narcotic drugs and Psychotropic substances Act No. 37 of 1993.

The particulars of the offence were that they on the 27th June 1994 at Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together unlawfully had in their possession 30.10 kilogrames of Indian Hemp (Cannabis Sativa).

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The third count was: unlawful use of property for psychotropic substance contrary to section 20 of the Narcotic Drugs and Psychotropic Substances Act No. 37 of 1993.

The particulars of the offence were that they on or about 27th June 1994 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia jointly and whilst acting together unlawfully used property namely one Grey and Red Fiat 682 Truck Registration No. AKA 8008 to conceal and convey from places unknown to George Compound in Lusaka, psychotropic substances namely 30.10 lilogrames of Indian Hemp (Cannabis Sativa).

The appellant's co-accused died before the prosecution was completed. The appellant was convicted on three counts and was sentenced on count one to 18 months I.H.L., on count two to 18 months I.H.L. and on the third count to 18 months imprisonment with hard labour. The sentences were to run concurrently. In addition, exhibits and the vehicles involved were forfeited to the State. He has appealed against conviction.

The grounds of appeal reads as follows:-

1. The learned Trial Magistrate and the Honourable Appellate Commissioner of the High Court erred in law in finding the Appellant guilty of both possession of Psychtropic Substances contrary to Section 8 of the Narcotic Drugs and Psychotropic Substances Act No. 37 of 1993 and of trafficking in Psychotropic substances contrary to Section 6 of the said Act. The Appellant could only be convicted of only one of the two offences but never of the two offences involving the same transaction.

2. There was no evidence that the Appellant was "trafficking" in Psychotropic Substances and that being the case, his conviction on the first count was unlawful.

3. There was no evidence that the truck Registration No. AKA 8008 was used "to conceal and convey from places unknown to George Compound in Lusaka, Psychtropic Substances" and the Learned Trial Magistrate erred in convicting the Appellant of the 3rd count and in ordering forfeiture of the said truck.

4. There was no evidence or no credible evidence to the effect that the Appellant was found in possession of the Psychotropic Substances for which he was convicted and it was a misdirection for the Appellant to have been found guilty of the first and second counts.

5. The Learned Trial Magistrate and the Appellate Commissioner of the High Court erred in convicting the appellant on the uncorroborated

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evidence of his co-accused when it was found that the first and second accused were pointing at each other as the owner of the Psychotropic Substances.

6. The manner in which the substances were taken and examined at the UTH Laborotory was unsatisfactory and suspect and the Learned Trial Magistrate ought to have rejected the report.

Mr. Mwanawasa argued that the learned trial magistrate has excluded the application of sub section (a) in the Act. He argued that the appellant was found guilty of possession. The prosecution should choose one type of offence that is either possession or trafficking but not both. The court should dismiss the appeal on this ground.

Mr. Okafor, Principal State Advocate in supporting the conviction, has argued that Section 2 of the relevant Act defined what trafficking means. He drew our attention to the provisions of the Act. He argued that the learned trial magistrate was entitled to make the finding which he did. He argued that marijana which were 30 kilograms were found by Drug Enforcement Commission officer at a garage. The quantity found was excessive and it came within the definition of trafficking. There was ample evidence to justify trafficking. The garage in question is near or in George compound. The evidence showed that the appellant was the driver of the truck. The deceased was the owner of the garage. The bags were off loaded by the appellant and the deceased person. There were no other persons in the garage. Possession was proved.

On the second ground, Mr. Mwanawasa argued that there was no evidence that the appellant was involved in selling or buying prohibited articles. There was only speculation. There was no evidence that the appellant was in any act. Mr. Okafor for the State argued that both acts of transaction and both acts have different penalties. One is minor offence.

On ground three of appeal which we have already cited Mr. Mwanawasa argued that there was no evidence that the truck Registration No. AKA 8008 was used. He argued that the accused must know which offences they were facing. The only evidence adduced by the prosecution was that drugs were found along Mumbwa road in George Compound. There was no evidence that the truck was being used for carrying drugs. The learned counsel referred the court to section 4(1) of the Act. Mr. okafor argued that there was conveyance. The learned trial magistrate was right. The officers saw the truck arrive.

On ground four Mr. Mwanawasa argued that there was no evidence that the appellant was found with any drugs for which he was convicted. He has argued that the learned trial magistrate believed the prosecution witnesses purely on hear-say evidence. We have been invited to consider the evidence of PW2 and PW7. Mr. Mwanawasa has further argued that the appellant was not the occupant of the yard in question. Mr. Okafor for the State submitted that there was trafficking involved and that the learned trial magistrate was perfectly correct in finding there was trafficking.

On ground five, the learned counsel submitted that the learned trial magistrate erred in convicting the appellant on uncorroborated evidence by his co-accused. He has invited us to look at page 41 of the record. He submitted that the court had warned itself against the dangers of convicting on the evidence of the co-accused. There was no credible evidence to the co-accused, they accused each other. The appellant was not even cross-examined. Mr. Okafor submitted that the matter rested on the question of credibility. There was evidence that the accused person was confronted about the cargo but he did not answer.

On ground six, the learned counsel has argued that the substances were taken in unaccepted manner. They were examined at UTH laboratory and the examination was unsatisfactory and was suspect. The laboratory report was suspect and unsatisfactory. He submitted that the provisions of section 192(1) of the C.P.C. required the analyst to be called to have the report in form of an affidavit. In this particular case the report which was produced was fatal. The report must have a resemblance of an affidavit. The learned Principal State Advocate submitted that the substances were properly analysed. Section 192(1) of the C.P.C. is clear. The report does not need to be like an affidavit. He further argued that the defence should have called an analyst to give oral evidence. The question of affidavit does not arise, the document is well maintained and was properly received.

Mr. Mwanawasa in reply on the analyst report maintained that there should be a distinction between a medical report and analyst report.

We have carefully considered the submissions by both Advocates and the evidence on record. The issue raised by ground 6 on section 192(1) of the C.P.C. was considered by the Supreme Court recently in the case of

Chetan D. Parmar vs The People [1]. Our decision and reasoning in that case will also apply to this case. Although the analyst report was not expressed in the affidavit form, it was neitherless admissible. The defence did not object to its production; and if they had any objection to the report they should have asked for the analyst to give evidence. The appeal would not therefore succeed on the basis that the prosecution did not produce the report as required by section 192(1) of the Criminal Procedure Code.

Mr. Mwanawasa has complained about the charges. We have considered the relevant provisions of the law and we are fully satisfied that the two offences were created and the prosecution was perfectly entitled to prepare the two charges. The prosecution's evidence showed that the Drug Enforcement Officers saw the vehicle AKA 3008 being driven into the garage. They stood some distance away. Later they confronted the appellant and his colleague. They did search them but did not find anything in the car as well as on the persons. They did not find anything in the offices and that they found the exhibits some where beneath abandoned vehicles. When the appellant and his colleague were confronted they each blamed each other and attributed possession of the drugs to each other. The learned magistrate considered the evidence before him and concluded that there was sufficient prosecution evidence adduced against the appellant. We have considered this evidence and we have been wondering why the Drug Enforcement Officers waited when they saw the vehicle go into the garage having been tipped about it. Why did they stay away and waited until the appellant had off loaded the goods? Why didn't they confront the appellant before the goods were off loaded. We have some serious doubts as to whether the goods belonged to the appellant or the deceased person. The evidence showed that the garage was not the appellant's. We feel that the learned magistrate should have entertained some doubt in favour of the appellant. It will be dangerous on the evidence adduced by the prosecution to conclude that the goods belonged to the appellant. On this ground the appeal would be allowed. The appeal is therefore allowed. The conviction in respect of the three counts is quashed and the sentences of 18 months imprisonment with hard labour are set aside. The lower court ordered forfeiture of the motor vehicle and drugs. We order that the motor vehicle be given back to the appellant but the forfeiture of drugs stays.

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M.S. Chaila
SUPREME COURT JUDGE

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D.K. Chirwa
SUPREME COURT JUDGE

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W.M. Muzyamba
SUPREME COURT JUDGE