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| Case Number: | Criminal Appeal 53 of 1991 |
| Date Delivered: | 21 Oct 1992 |
| Case Class: | Criminal |
| Court: | Court of Appeal at Nairobi |
| Case Action: | Judgment |
| Judge: | Johnson Evan Gicheru, Richard Otieno Kwach, Abdul Majid Cockar |
| Citation: | Young Kibae v Republic [1992] eKLR |
| Advocates: | - |
| Case Summary: | **Young Kibae *v* Republic**<br><br>**Court of Appeal, at Nairobi October 21, 1992**<br><br>**Gicheru, Kwach & Cockar JJ A**<br><br>**Criminal Appeal No 53 of 1991**<br><br>(Appeal from a conviction and sentence of the High Court of Kenya at Nairobi (Justices Porter and Mbaluto) dated 20th July, 1990 in HCCRA No 881 of 1991)<br><br>***Criminal Law****-trafficking in drugs-possession-whether proof of legal title is necessary to prove possession.*<br><br>***Criminal Law****-evidence-agent provocateur-whether evidence of such a person requires corroboration.*<br><br>The appellant was tried, convicted and sentenced to five years imprisonment with a deportation order thereafter after he was found guilty of being in possession of heroin contrary to section 14(1)(c) of Dangerous Drugs Act. |

His appeal to the High Court was dismissed hence an appeal to the Court of Appeal. On second appeal he contended that when the police arrived in the flat where he lived he was not in and that no evidence was led to show that he had legal title to the drugs in issue. He therefore contended to prove that police failed to prove possession.

The appellant further argued that the police reservist who set a trap for him to be arrested was an accomplice hence his evidence required corroboration.

**Held:**

1. A moveable thing is said to be in the possession of a person when he is situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons.

2. The drug was in physical control of the appellant. He entered into a deal to sell it, he produced a sample from his own stock and he undertook to pack it in such a manner that it could be carried through customs without being detected.

3. The police reservist was an agent *provocateur*, not an accomplice and his evidence therefore did not need corroboration.

*Appeal dismissed.*

**Cases**

1. *Hussein Salim v Republic* [1976-80]1 KLR 1671

2. *R v Mealey and Sheridan* (1975) 60 Crim App Rep 59; (1975) Crim LR 154

3. *R v Mullins* (1848)3 Cox CC 526

4. *R v Bickley* (1909) 2 Cr App Rep 53

5. *Sneddon v Stevenson* [1967] 2 All ER 1277; [1967] 1 WLR 1051

**Texts**

1. Stephen, J (1894) *Stephen's Digest of the*

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| | *Criminal Law,* New York: 1st Edn Wharton<br><br>2. Cross, R; Tapper, C (Eds) (1985) *Cross on Evidence* London: Butterworths & Co Ltd 6th Edn p 217<br><br>3. Elliot, D (Ed) (1987) *Manual of the Law of Evidence* London: Sweet & Maxwell 12th Edn<br><br>**Statutes**<br><br>Dangerous Drugs Act (cap 245) section 14(1)(c) |
| Court Division: | Criminal |
| History Magistrates: | - |
| County: | Nairobi |
| Docket Number: | - |
| History Docket Number: | - |
| Case Outcome: | Appeal dismissed. |
| History County: | - |
| Representation By Advocates: | - |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |

**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: Gicheru, Kwach & Cockar JJ A)**

**CRIMINAL APPEAL NO 53 OF 1991**

**BETWEEN**

**YOUNG KIBAE.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Appeal from a conviction and sentence of the High Court of Kenya at Nairobi (Justices Porter and Mbaluto) dated 20th July, 1990**

**in**

**HCCRA No 881 of 1991)**

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**JUDGMENT**

Young Kibae (the appellant), was convicted by the Chief Magistrate, Nairobi, of being in possession of heroin contrary to section 14(1) (c) of the Dangerous Drugs Act (cap 245). He was sentenced to 5 years imprisonment and ordered to be deported after serving sentence. His appeal to the High Court against conviction and sentence was dismissed.

On the concurrent findings arrived at by the courts below, the police raided a flat in Westlands in Nairobi where the appellant and his girlfriend were living and arrested both of them, and two other persons, after finding a small quantity of heroin in a black brief case under a bed in the bedroom. Also found were paraphernalia for weighing and packing drugs.

The evidence upon which the appellant was convicted was given by a Kenya Police Reservist called Bhatti. Two days before the raid, Bhatti had been taken to the flat by the 3rd accused and there he met the appellant who agreed to sell to him 4Kg of heroin at Kshs 500/= per gram. The appellant also advised Bhatti how he could get the drug through customs in Nairobi and Heathrow under a false bottom of a brief case. It was agreed that Bhatti would give the third accused the money for the purchase of 2 brief cases and this was done. It was agreed between the appellant and Bhatti, that the latter would return to the flat on Monday, 10th April, 1989 at 9.30 am to make payment and pick up the order.

Bhatti alerted the police who set a trap. When he arrived at the flat, the appellant told him he could not supply the full order as he only had one kilogram. Bhatti said he would take that. He also told the appellant he had a sample. The appellant asked him to produce the sample so that he could test it. He tested it and his verdict was that it was not pure. The appellant produced his own sample from a brief case and tried to impress upon Bhatti how refined it was. At this point Bhatti asked him to continue with

packing while he rushed to the hotel to collect the money. Obviously Bhatti was withdrawing so that he could give the police the signal to get into the flat and catch the appellant red-handed. The appellant had denied this version of events suggesting that he had left to go and buy cigarettes when the police arrived but the Chief Magistrate rejected this and rightly so.

This appeal raises two points of law. The first point is whether the prosecution proved that the appellant was found in possession of the drug and secondly, whether Bhatti, being a statutory accomplice, the appellant could properly be convicted upon his uncorroborated evidence.

Possession is defined in *Stephen's Digest of the Criminal Law* as follows:-

" A moveable thing is said to be in the possession of a person when he is situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in the case of need."

This definition was approved by this Court in the case of *Hussein v Republic* [1980] KLR 139, an appeal against conviction for possession of dangerous drugs, when the Court said: -

"We take this definition to mean, not that any legal title had to be proved, nor that access to the complete exclusion of all other persons to be shown, but that a possessor must have such access to and physical control over the thing that he is in a position to deal with it as an answer could to the exclusion of strangers."

In our view, the evidence in this case satisfied those requirements. The drug was in the physical control of the appellant. He entered into a deal to sell it to Bhatti; he produced a sample from his own stock after dismissing Bhatti's sample as impure; and he undertook to pack it in such a manner that it could be carried through customs without being detected. On the issue of possession, we are satisfied that the appellant was found in possession of the drug within the meaning of the Act.

We now turn to the issue of corroboration. If Bhatti was an accomplice, his evidence would, of course, require corroboration before the Court could act on it. On the other hand if he was an agent *provocateur* it would seem that the Court could act on his evidence without the need for corroboration. An agent *provocateur* is a person who entices another to commit an express breach of the law which he would not otherwise have committed and then proceeds to inform against him in respect of such an offence. (See *R v Mealey and Sheridan* (1975) 60 Criminal Appeal R 59 CA.

In *Cross on Evidence* (6th Edition) at page 217, it stated that an agent *provocateur* or a spy is not an accomplice. This statement of the law is also to be found at page 170 of *Manual of the Law of Evidence* by Elliot and Phipson (12th Edition). The learned authors of both works refer to the cases of *R v Mullins* (1848) 3 Cox CC 526; *R v Bickley* (1909) 2 Cr App Rep 53; and *Sneddon v Stevenson* [1967] 2 All ER 1277.

In *Sneddon v Stevenson,* the respondent, a police officer, one night drove his car past the appellant, a known prostitute, who was loitering in the street talking to a man, the respondent's colleague having previously alighted and begun observation on foot. The respondent turned the car round and stopped near the appellant in a manner which he knew from his experience would attract her attention. She went up to the car, opened the door and asked the respondent if he wanted "business". The respondent said "How much"", assented to the reply, and they got into the car. He drove her towards where his colleague was and she was arrested and charged with being a common prostitute soliciting for the purpose of prostitution and loitering for the purpose of prostitution.

On appeal against conviction, the appellant contended that the respondent had incited or encouraged the offence of soliciting, that, accordingly, he was guilty of the offence of aiding and abetting, that he was an accomplice and that there should have been some corroboration of his evidence.

It was held, dismissing the appeal, that the appellant had been rightly convicted, because the respondent did not commit any offence, since all that he did was to place himself and the car in such a position that, if the appellant desired to solicit, there was full opportunity to do so; and even if it could be said that the respondent was a party to the offence, he was certainly not an accomplice for the purpose of the doctrine of corroboration.

In the course of his judgment Lord Parker, CJ said:-

" We have been referred to *R v Mullins, R v Rickley* and *R v Heuser*. It seems to me that, on a true reading of these cases, it can be stated that, though a police officer acting as a spy may be said in a general sense to be an accomplice in the offence, yet if he is merely partaking in the offence for the purpose of getting evidence, he is not an accomplice who requires corroboration".

Waller, J agreed and said: -

" I would only add on the first point, namely the question whether corroboration is required, that it seems to me that, where a police officer is engaged in obtaining evidence and is thereby, perhaps, participating in the offence, the circumstances are entirely different from that of the true accomplice, being somebody who was intending to carry out an important part in the offence. The reason why the latter ought to be corroborated is that he may have a number of mixed motives when he comes to give evidence, for example, that he will be treated more leniently, and it is for that kind of reason that the Court has always thought it necessary to give a warning that corroboration should be looked for. In the case of the police officer, those considerations do not apply at all, and it seems to me that is why no corroboration is required, in the case of his evidence."

So, the position we have arrived at in this case is that Bhatti was an agent *provocateur*, not an accomplice, and his evidence therefore did not need corroboration.

For these reasons, this appeal fails and is dismissed.

**Dated and delivered at Nairobi this 21st day of October, 1992.**

**J.E GICHERU**

**.....**

**JUDGE OF APPEAL**

**R.O KWACH**

**.....**

**JUDGE OF APPEAL**

**A.M COCKAR**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**