

A conclusion. It is unfortunate that the deceased lost his life in the accident.

In the case of *Daya v. Republic* (3) it was held as under:

B A Court cannot convict a person of dangerous or careless driving when the finding of dangerous or careless driving is based solely on opinion evidence about his speed, where such opinion is arrived at on quite insufficient data.

C In view of what has been stated hereinabove, it is my finding that the prosecution has failed to prove the case beyond reasonable doubt.

I therefore find the appeal to have merit and it is hereby allowed. The conviction is quashed, the sentence of 3 years imprisonment as
D a result of the conviction is hereby set aside accordingly. The appellant, who has been released on bail pending the appeal, should continue to enjoy his liberty unless restrained for any other lawful reason.

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ABDUL-ABDUL-BAAD TIMIM v. SMZ

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COURT OF APPEAL OF TANZANIA AT ZANZIBAR

(Ramadhani, Lubuva and Munuo, JJA)

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CRIMINAL APPEAL No. 185 OF 2005

(From the Decision of the High Court of Zanzibar at Zanzibar, Mbarouk, J., dated
H 13 June 2005, in Criminal Appeal number 24 of 2004)

*Evidence – Witness – Expert witness – Whether opinion of an expert witness
can override credible and trustworthy evidence of an eye witness.*

*Evidence – Medical evidence – Adverse medical evidence – Whether conclusive
I as against the evidence of a credible eye witness.*

The appellant who was coming from Pakistan was suspected of being in possession
of dangerous drugs. He was arrested at the Zanzibar Airport, taken to hospital for x-
ray. When taken to the Police Headquarters he passed from his bowels a total of 70
pellets of heroine. Eye witnesses testified to the effect that the appellant was found in
possession of 70 pellets of heroine. However, the x-ray report was not produced in
evidence. The Regional magistrate's Court convicted the appellant and sentenced
him to 20 years imprisonment. On appeal to the High Court he was not successful. In
this appeal to the Court of Appeal he charged that the Lower Courts did not consider
expert medical opinion, namely that the x-ray report was not tendered in evidence
thereby entitling the Court to make adverse inference, which in turn should have
overridden eyewitness evidence.

Held: (1) When the evidence of the eye-witness is found to be credible and trustworthy,
medical opinion pointing to alternative possibilities is not accepted as conclusive;

(2) Once credibility is settled, then even adverse medical evidence will not be
taken to be conclusive as against the evidence of an eyewitness;

(3) Where there is no medical evidence at all, as in this case, then there is nothing
to challenge the evidence of the eyewitness.

Appeal dismissed

Statutory provisions referred to:

(1) Dangerous Drugs Act, 1986, sections 23, 32(1)

Mr. Ussi for the appellant

Mr. Khamis for the respondent

JUDGMENT

(Dated 8 December 2005)

Ramadhani, JA: The appellant, Abdul-Abdul-Baad Timim, was coming
from Pakistan on 27 February 2001 when he was stopped at the Zanzibar
Airport and was searched. He was not found with anything in his
bags. So, he was taken to hospital for x-ray whose results were not
disclosed. Eventually he was taken to the Police Headquarters where

- A he passed from his bowels a total of 70 pellets of heroine. That is the gist of the evidence of D/C Mosi Madafu (PW 4), D/C Hamad Fikira (PW 6) and D/C Ramadhani (PW 7). The three witnesses gave the 70 pellets to Sgt. Mwaka Mrisho (PW 8) who took them to the Government Chemist, Abdalla Musa Juma (PW 1), and he testified that the pellets were heroine.

- The learned Regional Court Magistrate was satisfied with that evidence and he convicted the appellant with the offence of possession of dangerous drugs contrary to sections 23 and 32(1) of the Dangerous Drugs Act, 1986, as amended by Act number 6 of 1997. The appellant was sentenced to imprisonment for a term of 20 years. His appeal to the High Court of Zanzibar (Mbarouk, J.) was dismissed. This is his second appeal. He was advocated for by Mr. Ussi Khamis Haji, while the respondent/ DPP was represented by Mr. Khamis Kombo, assisted by Mr. Rashid A. Fadhil, learned State Attorneys.

- Mr. Ussi had six grounds of appeal but he argued five grounds. He started with ground two which states that as the x-ray investigation did not disclose any foreign body in the appellant's stomach, then the appellant could not have discharged the pellets (Exh. P3). We better point out here that Mr. Ussi conceded that there is no prosecution witness who said that the x-ray did not disclose any foreign body in the appellant's stomach. That was said by the appellant. However, the failure to produce the x-ray report could raise an adverse inference.

- Mr. Khamis responded by saying that expert opinion cannot override eyewitness evidence. We agree with him and with the authority he referred to us of **Sarkar on Evidence** by Sudipto Sarkar and V.R. Monohar, (1999, 15 ed.) at page 908:

- When the evidence of the eye-witness is found to be credible, and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive.

- The vital issue is the credibility of the prosecution witnesses. We shall turn to this shortly. Once credibility is settled then even adverse medical evidence will not be taken to be conclusive as against the evidence of the eyewitness. We hold that where there is no medical

- evidence at all, as in this case, then there is nothing to challenge the eyewitness evidence.

- Admittedly, there is an issue of adverse inference that the prosecution was hiding something by not producing x-ray report. But we say that the prosecution does not have to produce all the evidence in their possession unless non-disclosure would operate injustice to the accused person. In the present case we are of the decided opinion that no injustice was occasioned to the appellant. Any x-ray report would only have indicated whether or not there was a foreign body in the appellant's bowels but would not have specified whether or not that foreign body was heroine.

- We might as well deal here with the third ground of appeal which attacked the introduction of matters not contained in evidence Mbarouk, J. said:

- After all I am of the view that direct evidence is much more reliable compared to x-ray expert evidence. This is because experience has shown that there is great possibility that x-ray machines especially at Mnazi Mmoja Government Hospital do break down or have some defects.

- Now, there was no evidence of that at all and we do not agree with Mr. Khamis that the learned Judge was just taking judicial notice. However, we are at one with the learned judge that direct evidence is much more reliable and as we have already said it all depends on the credibility of the eyewitnesses. Mr. Ussi has not challenged the trustworthiness of PWs 4, 6 and 7, the key witnesses here.

- In ground four Mr. Ussi averred that PWs 4, 6 and 7 failed to identify the pellets in Court. That is correct as Mr. Khamis also conceded. PW 4 said that the pellets did not have any distinguishing marks and that if other pellets of similar colour were produced he would not have differentiated them. However, identification in Court is not important at all in this case. What is crucial to this case is the chain of the handing over of the pellets from the delivery from the appellant's bowels to the Government Chemist, PW 1. That was unbroken and Mr. Ussi conceded that far.

A in the custody of such officer or at any stage of the proceedings before such Court to give bail, such person may be admitted to bail [emphasis is ours].

B That provision prohibits bail where a person is charged with "armed robbery". The Regional Court refused to grant bail because of that provision. It was the duty of Mwampashi, SRM (Ext Juris), to determine whether or not there is an offence of "armed robbery" in the penal law of Zanzibar. So, when Mwampashi, SRM, decided that there was no such offence then that determined finally the charge against the respondent. So, according to Mwakibete the only remedy for the DPP was that of appeal.

D However, in *Mwakibete* this Court also said

E The Court of Appeal can be moved to use its revisional jurisdiction under section 2(3) of the Appellate Jurisdiction Act 1979 only where there is no right of appeal, or where the right of appeal is there but has been blocked by judicial process, and lastly, where the right of appeal existed but was not taken, good and sufficient reasons are given for not having lodged an appeal. [emphasis added]

F So, revision can be resorted to even where there is a right of appeal if there is a good and sufficient reason. Was there such a reason in this case?

G Mr. Msemu said that at the time the application was made there was an unprecedented wave of armed robbery in Zanzibar and the DPP was of the opinion that there was a sheer need for a speedy determination of the matter. So, the DPP made this application under a Certificate of Urgency which was granted by the Honourable the Chief Justice. Mr. Mbwezeleni countered that by saying that the reason advanced is an afterthought as the same is not contained in the affidavit in support of the certificate of urgency.

I Admittedly, the affidavit does not contain a paragraph couched so explicitly as what Mr. Msemu articulated in his submission before us. But it is our considered opinion that that submission was required

A at this stage when the Court has to make a decision whether or not revision is the proper remedy. The propriety or otherwise of revision is not decided by the Hon. Chief Justice. The affidavit was sufficient enough to persuade the Chief Justice that there was a need for determining the matter urgently and that is all that was required before him.

B We are of the decided opinion that a good and sufficient reason has been given for preferring revision to appeal as the former venue is speedy and that is what was aimed at. So, we agree with the learned State Attorney. However, that speed was not realized because on the day the application was set for hearing in Dar es Salaam, 6 April 2005, the respondent could not afford the expenses of attending that session, so, the application, was adjourned for six months to this session of October here in Zanzibar.

C Now, does the offence of "armed robbery" exist in Zanzibar? Mr. Msemu argued that section 285 of the Penal Act, 2004, defined the offence of robbery and that section 286 prescribes punishment for robbery which is made stiffer where "the offender is armed with any dangerous or offensive weapon or instrument". This couples with the categorical prohibition of bail in case of armed robbery by section 150(1) of the Criminal Procedure Act, 2004, leads to the irresistible inference that there is an offence of "armed robbery" but that it has not been so articulated. He referred us *Michael Joseph v. R.* (2). Mr. Mbwezeleni, on the other hand, argued that section 285 of the Penal Act, 2004, creates the offence of robbery and that section 286 (2) merely enhances the punishment where arms are used but that does not mean that an offence of "armed robbery" has been created.

H It is abundantly clear to us that section 285 of the Penal Act, 2004, defines robbery and so creates that offence. Then section 286(2) enhances the punishment of those convicted of robbery and who in executing their crime were "armed with any dangerous or offensive weapon or instrument". That cannot be stretched to mean that a new offence of "armed robbery" has been created. It is our considered

A opinion that those two sections, even when read together, cannot be said to create the offence of "armed robbery".

B Mr. Msemo submitted that section 162(3) of the Criminal Procedure Act, 2005, takes care of the situation where the law has not given a specific name to an offence. Mr. Mbwezeleni said that that section is inapplicable. Section 162 deals with the content of a charge. We better cite all the relevant provisions of that section:

- C 1. Every charge under this Act shall state the offence with which the accused is charged with brief particulars of the offence.
2. If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.
- D 3. If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter he or she is charged.
- E 4. The charge shall state the law and section of the law against which the offence is said to have been committed.

F It is obvious that the Penal Act, 2005, does not give a name of the offence where an accused person was "armed with any dangerous or offensive weapon or instrument" as required by subsection (2). That is why Mr. Msemo sought to apply subsection (3).

Our reading of subsection (3) is that there are three factors:

- G (i) There must be a law creating an offence.
- (ii) That law does not give a specific name for that offence.
- (iii) Then, so much of the definition of that offence has to be used in the charge sheet to enable the accused person to know the charges against him.

H We have not seen any law which creates the offence of "armed robbery" so the first requirement is absent. Since the offence has not been created then a name cannot be given to a non entity. The third requirement I also is not available. Mr. Msemo was not able to tell us from which

A law can we get the definition of armed robbery. Section 287(2) of the Penal Act, 2004, merely provides for enhanced punishment in the case of aggravated robbery. So, we agree with Mr. Mbwezeleni that section 162(3) does not apply at all in this case.

B This Court in *Michael Joseph* provided a definition of 'armed robbery' in the following terms:

C Though there is no express and specific definition of what constitutes 'armed robbery' it is clear that if a dangerous or offensive weapon or instrument is used in the course of a robbery such constitutes 'armed robbery' in terms of the law as amended by Act number 10 of 1989.

D This Court was very careful in that it did not say that there is no express and specific definition of the offence of 'armed robbery'. But it dealt with what constitutes 'armed robbery' and in terms of Act number 10 of 1989 which is the law that has enhanced punishment for robbery in the case where arms have been used. This law is equivalent of section 286(2) of the Penal Act, 2004.

F In that appeal, this Court was emphatic that "Otherwise, the basic definition of robbery still remains as provided for under the Penal Code". That is what is provided in section 285. We do not think that decision can be taken as an authority for establishing the offence of "armed robbery". In fact section 286(2) providing enhanced punishment for aggravated robbery does not at all use the phrase "armed robbery". That phrase is used in section 150(2) in refusing bail to that offence which does not exist.

H What was before this Court in *Michael Joseph* was whether a knife is one of such weapons which, if used would call for sterner punishment for robbery. This Court said at page 281 "In the instant case, the weapon used was a knife which as already indicated is a dangerous or offensive weapon".

I This Court has said in a number of times that the enhanced punishment for aggravated robbery under Act number 10 of 1989 of Tanzania is

A Cases referred to:

(1) *Moses J. Mwakibete v. The Editor, Uhuru and Shirika la Magazeti ya Chama and National Printing Co. Ltd.* [1995] T.L.R. 134

B (2) *Michael Joseph v. R.* [1995] T.L.R. 278

Statutory provisions referred to:

1. Penal Act, 2004, sections 285, 286 & 287.

C 2. Appellate Jurisdiction Act 1979, as amended by Act 17 of 1993, section 5(2)(d) .

3. Criminal Procedure Act, 2004, sections 150 (1) and 162(3).

D *Mr. Msemu S. Mavare and Mohamed H. Hamad* for the appellant

Mr. Mbwezeleni for the respondent

RULING

E (Dated 13 December 2005)

F **Ramadhani, JA:** The respondent, Salum Ali Juma, who was charged with armed robbery contrary to sections 285 and 286(2) of the Penal Act, 2004 (Act number 6 of 2004) in the Regional Court at Vuga, Zanzibar, was refused bail because section 150(1) of the Criminal Procedure Act, 2004, (Act number 7 of 2004) prohibit bail in cases of armed robbery. So, he went to the High Court where Mwampashi, **G** SRM (Ext. Juris.) held that there is no offence of "armed robbery" under the Penal Act, 2004.

H Being aggrieved by that holding, the DPP has sought this application for revision and he was represented by Ms. Salma Ali Hassan, while the respondent was in person. As there are legal considerations involved, we adjourned the matter and gave a Court brief to Mr. Hamidu Mbwezeleni, learned advocate. We directed the learned State Attorney and Mr. Mbwezeleni to come and address us whether this should not have **I** been an appeal instead of an application for revision.

When the matter came up again, the DPP was represented by **A** Mr. Msemu S. Mavare, learned State Attorney, who was assisted by Mr. Mohammed H. Hamad, learned State Attorney. He submitted that the Ruling of Mwampashi, SRM, is both appellable and subject **B** to revision. He argued that the ruling was interlocutory and did not determine the matter finally and, so, it is not appellable under section 5(2)(d) of the Appellate Jurisdiction Act, 1979, as amended by Act number 17 of 1993, which prohibits appeals against interlocutory **C** decisions. So, he submitted, the only venue open to the DPP was revision.

Mr. Msemu also said that even if it is taken that the decision of Mwampashi, SRM, was not interlocutory and, therefore, the remedy was an appeal, the DPP, he argued, is invoking revision *in lieu* of **D** appeal under the authority of *Moses J. Mwakibete v. The Editor Uhuru, Shirika la Magazeti ya Chama and National Printing Co. Ltd.* (1) because there is a good and sufficient reason for doing so.

Mr. Mbwezeleni in reply said that the decision of Mwampashi, **E** SRM (Ext. Juris) was not interlocutory but that it finally determined the matter. The learned advocate said that when the learned Magistrate ruled that the Penal Act does not provide for an offence of "armed robbery" that was the end of the proceedings. What is now before **F** the Regional Court is another charge of "robbery". So, Mr. Mbwezeleni submitted, only an appeal is open to the DPP and not revision.

It is our well considered opinion that the ruling of Mwampashi, **G** SRM (Ext Juris) that the crime of "armed robbery" is not in the statute books of Zanzibar, was not interlocutory but finally determined the matter before him and the Regional Court.

Section 150(1) of Criminal Procedure Act, 2004, prohibits bail **H** in the following terms:

When any person, other than a person accused of murder or treason or armed robbery or possession of firearms or drugs trafficking, is arrested or detained without warrant by an officer- in-charge of a police station, **I** or appears or is brought before a Court, and is prepared at any time while