IN THE SEYCHELLES COURT OF APPEAL

CLEBERT TIRANT

V

THE REPUBLIC

Cr. Appeal No.5 of 1991

JUDGMENT

Clebert Tirant was convicted by a magistrate of unlawfully having in his possession on September 17, 1989 2 gms 179 mgs of cannabis without duly being authorised to possess the same. He was sentenced to the mandatory term of 3 years imprisonment. He appealed to the Supreme Court of the Seychelles. His appeal to that Court was dismissed, hence this appeal.

The evidence accepted by the trial magistrate was that the appellant had been seen at a fair in Anse Boileau on September 17, 1981, at about 8.30 pm; and from information received he and another man had been taken to the police station to be searched. A piece of newspaper containing herbal material, subsequently established to be cannabis, had been found in his pocket. The appellant was asked about the item and said it belonged to his friend Egnoe, the other person who had been taken to the station to be searched. Egnoe in the presence of the appellant denied this and stated that it belonged to the appellant himself.

There was evidence from Cpl Jean Paul Ernesta that he had seen the appellant at the Anse Boileau police station at about 9.24 am. He had interviewed the appellant who had

elected to make a statement which he recorded. PC Pierre had been present and had witnessed the statement. The statement was tendered. The record reads:

> "Advocate: No objection
> Court: Accepted as Exhibit P1 (collectively)"

Advocate for the appellant stated that he did in fact object. He moved the Supreme Court to have the record amended. He swore an affidavit in support of the motion and also produced an affidavit by the prosecution confirming his account of events. The motion was granted.

The position as a result was that a statement to which objection had been taken on grounds that it had not been voluntarily made had been admitted without a voir dire being held to determine admissibility.

Although the record noted that there had been no objection the record shows that PC Ernesta was cross-examined as to whether the appellant had been questioned and as to whether he had been forced to give a statement. PC Ernesta stated that PC Pierre had signed as a witness. PC Pierre was cross-examined on this. He said he did not know PC Ernesta. He did not meet him and he did not know whether he had signed a statement. There appears to have been an unstructured enquiry into admissibility.

In his judgment the magistrate made a specific finding that the statement was admissible though his approach to the issue was plainly faulty. He found there was "enough evidence to show that the accused wrote the statement voluntarily". Thereafter after considering the defence he was of the view that "there is more than enough evidence to show that the confession was voluntarily recorded". In conclusion he stated:

> "Therefore this gives me an impression, that the statement was recorded without threats, promises, inducements or anything similar to that."

The language is totally inappropriate. A confession can be admitted only if the magistrate was satisfied beyond doubt that it was voluntary. It is not a matter of impression. On the record there were internal inconsistencies in the evidence of Ernesta and inconsistencies between the evidence of Ernesta and Pierre which needed comment and resolution. The issue was not clear.

In any event the failure to hold the voir dire made the statement inadmissible. The case of Jean Gobine v The Republic Cr. App. 14 of 1983 establishes that where there is an objection as to voluntariness a voir dire must be held.

The judge on appeal thought that the failure was an irregularity which could be dealt with under s. 331 of the Criminal Procedure Code (Cap 45). We do not think that section covers wrongful admission of evidence which is what in effect this was.

The matter was considered by Souyave J. in Jumeau v R [1964] Sey. L.R. 92 - though obiter. He related at p. 95

> "As the learned Magistrate failed to follow that procedure, I hold that the statement was wrongfully admitted in evidence.
>
> What is the effect on a conviction in a case where a statement has been wrongfully admitted by reason of the failure of the trial judge to follow. The procedure of holding 'a trial within a trial' is fully discussed in M'Murairi v R. (1954) L I E.A.C.A. 203. It appears that the conviction would stand if the irregular reception of the statement has not led to an injustice."

We endorse this approach.

The trial judge considered that there had been no injustice because the magistrate had directed his mind to the issue of the voluntariness of the statement and had decided that it was voluntary. This approach seems misconceived. The question of admissibility of a retracted confession can only be decided in a voir dire. It cannot be considered as part of the general issue. This is a serious breach of a procedural safeguard. The accused would not have had the opportunity of testifying on the issue of admissibility alone. In this case there was also apparent on the face of the record a confusion in the mind of the trial magistrate as to the burden of proof in a voir dire.

The issue as to whether or not there has been an injustice must be decided on a consideration of whether apart from the wrongly admitted confession there is sufficient evidence to prove beyond reasonable doubt the case for the prosecution.

The judgment of the trial magistrate indicates that he relied on the confession of the appellant to help establish the element of knowledge in the charge.

He states that:-

> "The evidence of prosecution witness 3 and prosecution witness 4 (police officers who searched the accused was well corroborated by the statement of the accused which he wrote at the police station."

The statement of the accused could not corroborate the evidence of the police officers. It was at best a retracted statement in need itself of corroboration and incapable of being corroboration. The judge found that considering the entirety of the judgment what the trial magistrate had meant to say was that the evidence of the police witnesses corroborated the statement. The statement on the face of it

is plain enough, our attention has not been drawn to anything in the judgment which could say that there had been a slip or error. It was a patent misdirection.

The crucial issue was knowledge because there was clear evidence of physical custody. Mr Lucas urged emphatically that the magistrate had not evaluated the credibility of the police witnesses who testified as to the search and that accordingly there was no clear finding that their evidence was accepted.

The magistrate stated in his judgment -

> "As regards the issue whether or not the accused was found in possession of exhibit P1 (dangerous Drugs) I believe that the accused on the material day was found with folded paper which contained dangerous drugs that is exhibit P2."

There is a regrettable confusion of the exhibit numbers. P1 was the statement and P2 the drugs. In a case as brief as this acceptance of the evidence of the police witnesses involves a finding as to their credibility which need not be explicitly stated. The accused in evidence did not directly deny possession. He stated that the "police told me that they removed it from my pocket."

In cross-examination, however, he is noted as saying -

> "I told the police the herbal material was my friend."

The emphasis in his evidence was that he had been drinking and not fully aware of all that was going on.

There is a strong presumption that a person is aware of the contents of a package found in that persons's pocket. That presumption becomes stronger when the package is in no way secured or sealed but merely wrapped in newspaper. When

discovered, the appellant did not deny knowledge of the contents but merely stated that it was for his friend. There was no evidence to weaken the strength of the presumption and knowledge could be inferred beyond a reasonable doubt.

Mr Lucas complained that the appellant's defence of intoxication had not been considered. He submitted, buttressed by authority, that any defence put forward by an accused person must be considered even though patently weak. As Mrs Twomey pointed out the offence with which the appellant was charged was not a crime of specific intent. Intoxication, therefore, would not be defence unless it was at a level which made the appellant completely unaware of what he was doing. There was no evidence that this was the case and consequently that defence did not need to be considered.

Apart from the wrongly admitted statement, there was evidence which the trial magistrate accepted which established beyond a reasonable doubt the offence with which the appellant was charged. Accordingly the appeal will be dismissed.

A. MUSTAFA
PRESIDENT .....

P GEORGES
JUSTICE OF APPEAL .....

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JUSTICE OF APPEAL .....

Dated this ...16th... day of October 1991.