(21)

IN THE SEYCHELLES

SHEHA JUMBE SHEHA APPELLANT

Versus

THE REPUBLIC RESPONDENT

Criminal Appeal No:18 of 1997

[Before: Goburdhun, P., Silungwe & Ayoola, JJ.A]

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Mrs. N. Tirant Gherardi for the Appellant
Mr. Romesh Kanakaratne for the Respondent

SUPREME COURT LIBRARY

REASON FOR DECISION

(Delivered by Ayoola J.A)

The appellant, Sheha Jumbe Sheha, was convicted at the Supreme Court (Alleear, CJ) on 27th June 1997 of the offence charged in Count 1 "Importation of a controlled drug contrary to Section 3 and read with Section 26(1)(a) of the Misuse of Drugs Act (Cap 133) and punishable under Section 29 and the Second Schedule of the said Act; and, of the offence charged in Count 2 of Trafficking in a controlled drug contrary to Section 5 of the same Act. He was sentenced to 20 years imprisonment in respect of each of the two counts with sentences to run concurrently.

The facts on which the prosecution relied are that on 18th February 1997 at the Seychelles Airport at Point Larue the appellant was found to have imported into Seychelles 14 kilogrammes 250 grammes of cannabis resin and at the same time and place was found in possession of the same quantity of cannabis resin.

The facts of the case as disclosed by the evidence have been succinctly stated by the learned Chief Justice. The appellant on 18th February 1997 arrived at the Seychelles International Airport at Point Larue at around 17.40 hours from Nairobi, Kenya together with his

wo[illegible], among other passengers. He and his companion presented themselves at the Immigration desk manned by the 4th prosecution witness, Jerry Bastienne, who on noting that the appellant had a valid passport and valid return ticket but had put on his disembarkation card a P.O. Box address, which was unacceptable, agreed to assist the appellant to look for a cheap guest house where the appellant could be accommodated for the duration of his 7 day stay in Seychelles. The 5th prosecution witness, Antonia Gabriel, a Trade Tax officer who had been keeping watch over the arriving passengers noticed the appellant and that he was carrying two plastic bags which appeared to be heavy with wooden frames protruding therefrom. Eventually, after he had been cleared by immigration, the appellant came to the customs desk. On being asked what was in the plastic bags, he removed four wooden frames therefrom, placed them on the custom officer's desk and declared that they were meant for a friend in Seychelles whose name he did not give. He also volunteered the information that the frames had been bought for 1600 shillings in the duty free shop in Nairobi, Kenya. He declared his readiness to pay duties on the picture frames and pictures and took a few hundred rupee notes from his pocket. Rene Charlette, a custom officer, started to prepare the payment voucher.

At that moment PW6 Lewis Tomking another trade tax officer came and picked up one of the picture frames and started examining it visually. He became suspicious when on knocking on the back of each of the picture frames he heard a hollow sound and decided to have the picture frames x-rayed. On the screen were dark shades and lines or marks indicating separations or partitions. After the frames had been x-rayed on a second machine with the same result, Tomking broke open all the wooden frames and found that in two of the wooden frames were four rectangular brownish gummy stuff and two of the other frames three identical bars of brownish gummy stuff. In all, there were 14 "brownish gummy stuff" packed individually in separate cellophane bags.

The customs officers suspected that the "brownish gummy stuff" could be controlled drug. Woodcock, the officer in charge that evening, contracted the Drug Squad Officers who arrived about 30

minutes later. The appellant [illegible] suspected substance with [illegible] frames were taken to the Central Police Station where, after preliminary formalities, the appellant was informed by ASP Mousbe that he was being arrested. ASP Mousbe, assisted by customs officer, Lewis Tomking, then put each of the picture frames with its contents in bin liners and sealed them in the presence of ASP Quatre to whom they were handed and who kept them in the exhibit store room.

At 1 am the appellant was taken to the office of ASP Quatre to be interviewed. ASP Quatre before interviewing the appellant told him of his right to remain silent and of his right to counsel of his choice. He was told the reason for his arrest. The interview was conducted in English. The appellant was alleged to have held ASP Quatre's right hand and said the following words "I am dead. I am finished" The appellant who appeared to be pleading with the officer stated – "I have a family, father, mother, wife and children." After the interview the appellant was asked if he was prepared to give a statement in writing. He replied in the affirmative. He was cautioned. He requested ASP Quatre to record his statement and the latter obliged. The recording of the statement commenced at 1.23 am and ended at 2.30 am. During the period he was being interviewed the appellant went to the toilet six times and was given water at his request.

At the appellant's subsequent trial counsel for the appellant objected to the admissibility of the statement on the ground that it was involuntarily given by reason of oppression. After a voire dire, the statement was admitted, the learned Chief Justice having found that the statement was voluntarily given.

The substance allegedly found in possession of the appellant after the normal procedures had been observed was found by the Government Analyst Dr. Gobin to be cannabis resin. However, the entire exhibits could not be produced at the trial as after the analysis and return of the substance to the police, but before the trial, the exhibit room of the police had been broken into and a substantial portion of the exhibits removed by persons unknown.

In his judgment the learned Chief Justice was satisfied that the drugs found in the picture frames were brought into the country by the appellant and not by anyone else. He found him guilty of the offences charged and convicted him accordingly.

On this appeal from the decision of the learned Chief Justice it was argued by Mrs. Tirant Gherardi, learned counsel for the appellant, first, that there had been no arrest and that if the court finds that there had been no arrest, the rest of the proceedings including the statement given by the appellant would have been illegal and that in the interest of justice the entire trial should be declared as based on faulty and illegal evidence and would be a nullity, secondly that having regard to the time the statement of the appellant was taken there should have been a real doubt that the statement may have been given under oppression. Thirdly, that as only the portion of the exhibits were produced in court there ought to have been an amendment of the charge, to charge offence only in relation to the quantity produced and finally that the drugs could have been the property of the other person.

There was really no substance in the ground that the appellant was not arrested or that there had been a contravention of Article 18 of the Constitution. There was clear evidence, accepted by the learned Chief Justice that the appellant was arrested by ASP Mousbe. ASP Mousbe and PC Appasamy gave evidence of the arrest. On the evidence the arresting police officer had followed the proper procedure.

We felt no hesitation in rejecting the contention that since only part of the drugs produced had been tendered in evidence the change had not been proved

The entire quantity of drugs recovered had not been produced as exhibit at the trial because part of the drugs had been stolen while in the custody of the police. There was, however, evidence of the analyst which, taken along with relevant evidence of other witnesses, was sufficient to show the nature of the substance found in possession of the appellant and its weight. It had not been suggested

[illegible] had been a break in the chain of custody of the drugs from the time they were recovered from the appellant up to the time the analyst examined them and issued his report or in the link between what was recovered and what was analysed. The Chief Justice was right in his conclusion that non-production of all exhibits was not fatal to the prosecution case. In the circumstances of the case the production as exhibits of the entire drugs recovered would have been a mere formality. The non-production of the exhibits did not affect the quality of the rest of the evidence nor did it lead to a failure of the prosecution to attain to the standard of proof required of the prosecution in the case. No miscarriage of justice had been occasioned by the appellant by non-production of the entire exhibits.

There may be cases in which a failure to identify, at the trial, the drugs recovered and analysed by the analyst by direct and best evidence may be fatal to the prosecution case. That had not been so in this case where the defence did not turn on the nature of the substance recovered or its weight and the prosecution had proved beyond reasonable doubt the recovery of the drugs and their nature upon due examination by the analyst whose evidence was believed.

The appellant made a statement which amounted to a confession. Upon his retracting the statement a trial within a trial was conducted. The Chief Justice came to the conclusion that the statement given by the appellant was given voluntarily and admitted the statement in evidence. On this appeal, it was argued that the statement had been given under oppression because it had been taken at 1.23 am from the appellant who had arrived at the airport from Kenya at 7.40 pm on the previous night. Oppression imports something which tends to sap and has sapped the free will which must exist before a confession can be said to be voluntary: R v. Priestly (1965) 51 CAR 1; Otar v The Republic 1987 SLR 26. The totality of the circumstances must be taken into consideration in deciding whether to infer from the circumstances in which a statement is taken that there had been a probability not only of a likelihood of oppression but also of actual oppression. In the instant case it was not sufficient to infer such probability merely from the fact that the appellant's statement had been taken in the early hours

of the morning. In R v Prager [1972] 56 Cr. App. R. 151 the English Court of Appeal described oppressive questioning as:

> "... questioning which by its nature, duration or other attendant circumstances (including the fact of custody) excites hopes (such as hope of release) or fears, or so affects the mind of the subject that his will crumbles and he speaks when otherwise he would have stayed silent."

The burden is on the prosecution to prove beyond reasonable doubt that there had been no oppression and the question for determination was whether the prosecution had proved that the statement had not been made as a result of oppression. (See Archibold, 39th Edition para. 1377).

In the present case, from the evidence which the learned Chief Justice had accepted, we could not say that oppression had not been negatived. The confession had been properly admitted in evidence. It is pertinent to observe that even if the evidence of confession had been excluded, there had been ample evidence on record, accepted by the learned Chief Justice to support the conviction of the appellant.

We did not find any substance in the rest of the argument advanced by learned counsel for the appellant in regard to the appeal against the conviction of the appellant. We agreed with the submission of the learned counsel for the Republic that the conviction of the appellant was based on cogent evidence adequately considered by the Chief Justice.

The appellant had been sentenced to terms of imprisonment as earlier stated. It was contended on his appeal against sentence by counsel on his behalf that the sentence was excessive and wrong in principle in the circumstances of he case. Several factors determine whether a sentence is harsh and excessive. These include the nature of the offence, the maximum penalty for which the accused is liable upon conviction and whether the accused was a first offender or not. It has not here been attempted to state the factors exhaustively. In

[illegible] the learned Chief [illegible] into consideration all relevant factors before he imposed sentence. In all the circumstances we do not consider the sentence imposed to have been excessive.

It was for these reasons that on 4th December 1997 we dismissed the appellant's appeal from conviction and sentence.

Dated at Victoria, Mahe this ..... day of ***April*** 1998.

H. GOBURDHUN	A. SILUNGWE	E.O. AYOOLA
PRESIDENT	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**