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IN THE SEYCHELLES COURT OF APPEAL

PETER BOUCHEREAU — **1ST APPELLANT**
FRANK SOPHA — **2ND APPELLANT**

VERSUS

THE REPUBLIC — **RESPONDENT**

Criminal Appeal Nos. 12 and 13 of 1997

(Before: Goburdhun P, Silungwe & Adam JJA)

Mr. F. Elizabeth for the First Appellant
Mr. B. Georges for the Second Appellant
Mr. R. Kanakaratne for the Respondent

REASONS OF THE COURT
(Delivered by Adam JA)

The appeal by both Appellants against convictions and sentences were dismissed by us and these are now our reasons.

The record of proceedings discloses in the Formal Charge that both Appellants were charged with four counts. The proceedings commenced before the Chief Justice at which time the First Appellant pleaded guilty to the first count and not guilty to the other three counts so the prosecution withdrew the charge on the second count. Thereafter the trial proceeded against both Appellants with two prosecution witnesses giving evidence before the First Appellant applied to withdraw his guilty plea. This application was granted by the Chief Justice who directed that the trial would have to be started afresh before another Judge of the Supreme Court. The trial re-commenced before Perera J and the record of proceedings show that the Formal Charge was read to both Appellants and both Appellants pleaded not guilty to all the four counts. After calling six prosecution witnesses, the First Appellant alleged oppression and fabrication of two pre-trial statements made by him to the police so a voire dire was held at which the prosecution called three witnesses and the First Appellant testified. In his Ruling admitting both statements Perera J referred to Ajodha v The State (1981) 2 All ER 193 (PC) and said that in the instant case there was both a repudiation and a retraction so a trial within

conducted and the First Appellant was heard in rebuttal. Thereafter two further prosecution witnesses gave evidence in the main trial. There was an application on behalf of the First Appellant that there was no case to answer on the first count. Also an application was made on behalf of the Second Appellant that as there was only one count charged that is the first count there was no case to answer too. In his Ruling rejecting both applications Perera J relied on R v Stiven (1970-71) 5 SLR 137 where Sauzier J referred to the Practice Direction reported in (1962) 1 All ER 448. The trial continued with the First Appellant making a statement from the dock (which Perera J said was not evidence) and the Second appellant giving evidence under oath and calling two defence witnesses.

The First Appellant's grounds in his Memorandum of Appeal against conviction were that the trial judge erred in finding that the prosecution had not proved the "overt act" of cultivation under the first count beyond a reasonable doubt; that the trial judge erred in finding that he possessed the cannabis found in the hut since the prosecution had not proved "exclusive possession" and "knowledge" of the existence of it under the second count; that the trial judge erred in his finding that the loaded AK47 rifle was within the First Appellant's reach at time of his arrest as the prosecution failed to prove that the AK47 rifle was in the "possession" or under the "control" of the Appellant and that the Appellant had the intention to use it in a manner or for a purpose prejudicial to public order under the third count; that the trial judge erred in his findings that the First Appellant had "possession" or control of dynamite crackers, hand grenades, bullets and magazines under the fourth count and that the two charges of the contravention of Section 84 (1) of the Penal Code were prejudicial to him; that the trial judge erred in law by admitting in evidence the First Appellant's confessions; that the trial judge was wrong to rely on the First Appellant's pre-trial statements after there was evidence before the Court that the pre-trial statements were a pack of lies and that taking all the above circumstances cumulatively it was dangerous and unsafe for the trial judge to rely on the First Appellant's pre-trial statements and to base his convictions mainly on them.

The Second Appellant's grounds in his Memorandum of Appeal were that the charge of cultivation was bad in that the Second Appellant was being charged on a presumption that was not particularised; that the trial judge erred in accepting the evidence of the identification of the Second Appellant in face of the major discrepancy in the evidence of the two prosecution witnesses and that the trial judge erred in his finding that the Second Appellant had not rebutted the presumption of cultivation in that he failed to give sufficient

weight to the fact that he was barely in the Plantation, that he erred in placing weight on the fact that as the Second Appellant had not accounted for his presence but instead opted for the defence of alibi; that he erred in inferring guilt from the fact that the Second Appellant ran away from the police officers, that his erroneous and unsupported finding that the Second Appellant carried manure to the hut in the Plantation coloured his judgemnt and that he gave insufficient consideration to the fact that the presumption of cultivation was to trap a person in the Plantation without actually doing anything overt.

It should be noted that where two or more persons are jointly charged and multiple counts are involved the Formal Charge must clearly specify with which count or counts each accused person is being charged. In this case the Formal Charge shows clearly that both Appellants were being charged with four counts when the Second Appellant was only being charged with one count.

Also, with regard to pre-trial statements, Lord Hailshem in the Director of Public Prosecution v Ping Lin (1975) 3 All ER 175 (PC) pointed out what a judge has to do at 182 – 183:-

> "The trial judge should approach his task by applying the test enunciated by Lord Summer (in Ibrahim v R (1914-15) All ER Rep. 874 at 877) in a common sense way to all the facts in the case in their context ... In the light of all the facts in their context, he should ask himself this question, and no other: 'Have the prosecution proved that the contested statement was voluntary in the sense that it was not obtained by fear of prejudice or hope of advantage excited or held out by a person in authority or ... by oppression?'"

Turning to the grounds of appeal of the First Appellant against conviction the trial judge found on the totality of the evidence the "overt act" in the first count of cultivation in that two witnesses saw the First Appellant tilling the soil inside the Plantation, that one witness said he had with him a "marmite jar" containing cannabis seeds, that in his pre-trial statements and sworn evidence at the voire dire he admitted being inside the cannabis Plantation digging and watering. These acts according to the trial judge, pointed irresistibly to an inference of cultivation.

However, in R v Brophy (1981) 2 All ER 705 (HL) Lord Bridge had this to say about incriminating admissions made at voire dire at 709-710:

> "Where, as in this case, evidence is given at the voir dire by an accused person in answer to questions by his counsel, and without objection by counsel for the Crown, his evidence ought in my opinion to be relevant to the issue at the voire dire, unless it is clearly and obviously irrelevant. ... of course, if the accused, whether in answer to questions from his own counsel or not, goes out of his way to boast of having committed the crimes with which he is charged ... his evidence so far as it relates to these matters will almost certainly be irrelevant to the issue at the voire dire, ... Once it has been held that the material part of the respondent's evidence was relevant to the issue at the voire dire, a necessary consequence is, in my opinion, that it is not admissible on the substantive trial ... If such evidence, being relevant, were admissible at the substantive trial, an accused person would not enjoy the complete freedom that he ought to have at the voire dire to contest the admissibility of his previous statements. It is of the first importance for the administration of justice that an accused person should feel completely free to give evidence at the voire dire of any improper methods by which a confession or admission has been extracted from him, for he can almost never make an effective challenge of its admissibility without giving evidence himself. He is thus virtually compelled to give evidence at the voire dire, and if his evidence were admissible at the substantive trial, the result might be a significant impairment of his so-called 'right of silence' at the trial. The right means 'No man is to be compelled to incriminate himself; nemo tenetur se ipsum prodere?; See R v Sang (1979) 2 All ER 1222 at 1246 (1980) AC 402 at 455 Lord Scarman. The word 'compelled' in that context must, in my opinion, include being put under pressure. So long as that right exists it ought not to be cut down, as it

> would be if an accused person, who finds himself obliged to give evidence at the voire dire, in order to contest a confession extracted by improper means, and whose evidence tends to show the truth of his confession, were liable to have his evidence used at the substantive trial. He would not receive a fair trial, as that term is understood in all parts of the United Kingdom.
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> I do not overlook or minimise the risk that accused persons may make false allegations of ill-treatment by the police, some of them undoubtedly do. But the detection of dishonest witnesses on this, as on other matters, is part of the ordinary duty of the courts and should be left to them. The possibility, indeed the practical certainty, that some accused will give dishonest evidence of ill-treatment does not justify .. their freedom to testify at the voire dire."

In taking into account what the First Appellant said at the voire dire Perera J erred. However, in our view, there was other evidence besides the First Appellant" admissions at the voire dire. There was in his firs pre-trial statement of 20t[h] August 1996 the following: "Its about or over seven months since I am cultivating cannabis in the forest" ... "In that forest I cultivated chili, cassava and drugs namely cannabis." ... "I was in the forest where I farmed when the police came." In his second pre-trial statement of 21[st] August 1996 he asserted as follows: "During the time I know Dugasse we've talked on drugs namely cannabis. One day we went in the forest towards Cat Terney... from there Dugasse and I have agreed to work together and plant cannabis ... We've planted more cannabis" ... "It is around two months that Dugasse came with a dark rasta man ... where we've cultivate and prepare cannabis"... " No other people came to where we are cultivating in the forest at Cap Terney since we are cultivating apart from Dugasse, Frank Sopha and myself." These pre-trial statements were admitted as having been made freely and voluntarily by the First Appellant after a voire dire by Perera J. In his statement from the dock the First Appellant stated as follows: "I was tired and I was fetching water. I was not arrested inside the Plantation I was arrested outside ... I never planted any drugs. I just helped." The foregoing constituted corroboration of the evidence led for the prosecution that the First Appellant was there at the relevant time of his arrest and that he was cultivating cannabis, the trial judge having correctly rejected his self-serving exculpatory explanation from the dock

that he was not arrested inside the cannabis Plantation and that he never planted any drugs. Further, in light of the evidence adduced the First appellant assertions in that statement from the dock that he "never planted any drugs, I just helped", indicated that he was admitting being accessory in the commission of the offence of cultivation.

As for the conviction under count two, it was established that 108 grams and 180 milligrams of cannabis were found in the small hut in the Plantation when searched by the police in the presence of the First appellant. The First Appellant was in a squatting position tilling the soil 150 feet from that hut and there was no one else there at around 1:45 p.m. The First Appellant admitted that the cannabis found belonged to him. The trial judge found that the First Appellant had not rebutted the presumption that he had that quantity of cannabis for the purpose of trafficking in it under Section 14(2) of the Misuse of Drugs Act (Chapter 133). The trial judge could not take into account what the First Appellant said in evidence at the voire dire.

The conviction on count three was established since the First Appellant was seen in a squatting position digging the soil some 30 – 35 feet away from where the AK47 rifle was hanging on a branch of a tree at the height of 5-6 feet. A search of the small hut revealed under a bed a military bag in which were found hand grenades, dynamite sticks and magazines of bullets. In his answers to the police after his arrest the First Appellant said the AK 47 rifle belonged to him. In the First Appellant's statement from the dock he indicated that the rifle found hanging in the tree and explosives were not his but belonged to Dugasse. The trial judge found that the First Appellant had under his control those weapons, explosives and firearms which raised a reasonable presumption that these were intended to be used in a manner or for a purpose prejudicial to public order. Having rejected his evidence the trial judge of necessity concluded that the First Appellant had not rebutted the presumption. There was no substance in the other grounds of appeal including those against the sentence imposed on the First Appellant.

The evidence against the Second Appellant was from three police officers who knew him previously and positively identified him as he stood in the Plantation about 92 meters away from where they were. When looking straight at his direction and when the Second Appellant saw that they were looking at him he turned and ran so the police officers went after him. He ran away and they were unable to apprehend him so they returned to the hut in the Plantation. They spent the night in the Plantation. The Second Appellant was arrested the next day at around 11:30 a.m. at Le Chantier Road. In his first pre-

trial statement to the police of 20th August 1996 he said he was at his grandmother's place at Beau Vallon and denied that he ever heard Bouchereau's name or he ever knew Bouchereau or a cannabis Plantation at Mare Aux Chochon belonging to Bouchereau. In his second pre-trial statement to the police of 24th August 1996 he said Dugasse indicated that he was to get a job only to convey manure, that Dugasse and Bouchereau gave him a hand to convey the manure and that he had never been in the forest at the Plantation. In his evidence under oath he said that at 3:45 p.m. he was with Steve Samson at Beau Vallon Beach, that as he was going home past the Beau Vallon beach when he met Jerris Hermitte who prescribed some herbal remedy for his feet. Steve Samson testified that he recalled speaking to the Second Appellant around 3;30 p.m. to 4:00 p.m. on one day but he could not remember the exact date. Jerris Hermitte recalled the day the Second Appellant told him of his sore feet but he was unable to indicate the date he met the Second Appellant. In his second statement the Second Appellant also disclosed that he was aware of the cannabis Plantation which the First Appellant jointly cultivated with Dugasse but he still denied that he was there on 19th August 1996. Perera J referred to Vel v The Republic (1978-1982) SCAR 579 in considering whether lies told by the accused amount to corroboration. Perera J was satisfied that the Second Appellant was lying as regards his alibi which was rejected by him. He found that the case against the Second Appellant rested on the identification made by Vel and Esparon. He gave himself the warning of the danger involved in evidence of visual identification but he had, on the basis of evidence heard by him, no doubt that the Second Appellant was the person in the cannabis Plantation around 5:15 p.m. on 19th August 1996. Since the burden lay on the Second Appellant under Section 16(3) to rebut the presumption of cultivation, the Second Appellant chose to rely on his alibi. His second statement shows that he was aware of the cannabis Plantation so he was not an innocent passerby. Further, on seeing the police officers he ran away. The prosecution relied on the presumption under Section 16(3) of the Misuse of Drugs Act. The onus of rebutting the presumption was on the Second Appellant. Perera J found that the Second Appellant chose to rely on an alibi, that he did not fall in the category of an innocent passerby and when he saw the police he ran away and escaped. His escape was more consistent with guilt than innocence. Perera J said that there was evidence showing that he was involved in the Plantation cultivating cannabis and that his presence in the Plantation was not accidental.

In light of the foregoing it could not be said that Perera J erred in convicting the Second Appellant. The sentence imposed by him was appropriate.

Accordingly it was for the above reasons that the convictions of and sentence imposed on the First and Second Appellants were upheld and their appeals dismissed.

Dated at Victoria, Mahe this 9th day of April 1998.

H. GOBURDHUN	**A. M. SILUNGWE**	**M.A. ADAM**
PRESIDENT	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**