(14)

IN THE SEYCHELLES COURT OF APPEAL

JAMES JUMAYE APPELLANT

versus

THE REPUBLIC RESPONDENT

Criminal Appeal No: 8 of 1998

[Before: Goburdhun, P., Venchard & Adam, JJ.A]

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For the Appellant: *Mrs. N. Tirant-Gherardi*
For the Respondent: *Mr. R. Kanakaratne*

JUDGMENT OF THE COURT

(Delivered by Adam J.A)

The appellant was convicted by Perera J of trafficking in a controlled drug being 1kg 100g of cannabis contrary to Section 5 read with sections 14 and 26(1)(a) of the Misuse of Drugs Act, as amended. He was sentenced to 10 years imprisonment.

In the Memorandum of Appeal his grounds were that Perera J erred in law in admitting the appellant's statement to the police and finding that it was made voluntarily; that he erred in law and fact that the appellant was in possession of the drug on the basis of the evidence adduced and that Perera J failed to give due consideration to the material discrepancies in the evidence of the prosecution witnesses. His grounds against sentence were that the sentence was manifestly harsh and excessive having consideration to all the circumstances of the case.

At the hearing it was accepted by both counsel that this appeal hinged on the one ground that is whether Perera J erred in admitting the appellant's confession as having been made voluntarily in the voire dire. Mrs. Tirant-Gherardi tried valiantly to show us that the appellant's statement was obtained under duress in that the detention of his sister and

of her being charged with the offence of trafficking would have been a factor that played on the appellant's mind to the point that it sapped the free will of the appellant. Perera J failed to consider this. It is clear from Perera J's Ruling that the reason given by the appellant in his evidence at the voir dire was that Lance Corporal Payet told him that his sister, Marjorie, whom the appellant believed was arrested and released would be arrested again if he did not admit. But in his evidence the appellant testified that (a) Payet inquired from him if he knew that his sister had been arrested to which he responded that he knew this as his Nicole, his sister's 18 year-old daughter, told him; (b) Payet told him that he was going to arrest his sister who had been arrested earlier but appellant believed she had been released and that Payet was going to arrest her again with her children; (c) Payet told him that if he did not admit he was going to arrest his sister and children; and (d) Payet told him that his sister had already been placed under arrest and that if he did not admit she would remain under arrest. The statement from the appellant had been recorded by Payet at 6.10pm by which time his sister and her daughter were at home. It is clear that the appellant knew that his sister had been taken by police. Perera J did not believe that Payet threatened to arrest or re-arrest his sister if the appellant did not confess. He distinguished **Otar v R** 1987 SLR 26 on the basis that the accused in that case was not aware of the arrest of the elderly couple until the accused was confronted with them at the Police Station. Here the appellant, according to his evidence, knew that his sister was arrested but did not know where she was. He believed Payet that the statement was made by the appellant voluntarily without any threat or duress.

We are satisfied that Perera J's acceptance of the evidence of Payet, the only witness on behalf of the prosecution in the voir dire as against the only witness for the appellant, himself, cannot be faulted. He did not misdirect himself in any way and did not err in admitting the appellant's confession as having been made voluntarily. Perera J considered the appellant's statement which was retracted by him and there was evidence adduced which corroborated that statement. In his statement he mentioned that the plastic bags and drugs had been separated by him into two portions and placed another portion in another black plastic and put it in a travelling bag that was placed in the cupboard. The police found in the cupboard a

travelling bag with two plastic bags one of which was black in which drugs were found and another white plastic bag in which was found another black plastic bag. In the statement he said the police showed him a travelling bag which was his and also the two portions in the black plastic bag which were drugs. The police showed him the bag with the drugs recovered by them.

It was conceded by both counsel that if this Court upheld Perera J's Ruling in the voir dire then the confession along with the recovery of the travelling bag with the drugs in the black plastic bag meant that the appellant had possession of 1kg 100g of cannabis which raised the presumption that it was for the purpose of trafficking. That presumption had not been rebutted by the appellant.

As for the sentence Mrs. Tirant-Gherardi submitted that 10 years imprisonment for possession of 1kg 100g of cannabis crushed leaves and not cannabis resin was harsh and that Perera J should have imposed the minimum sentence prescribed in the Misuse of Drugs Act (Chapter 133) for trafficking in cannabis of 8 years imprisonment. She compared the sentence imposed **Gary Albert v The Republic**, Criminal Side No. 45 of 1997 where a sentence of 10 years imprisonment was upheld by this Court for trafficking in 1kg 30g of cannabis resin and in **Ricky Chang Ty Sing v The Republic** Criminal Appeal No. 10 of 1997 for trafficking in 220g 270mg of cannabis resin a sentence of 15 years was upheld by this Court. The Misuse of Drugs Act provides for trafficking in cannabis a maximum sentence consisting of 30 years imprisonment and a fine of SR500,000 and a minimum sentence of 8 years imprisonment for a first offence and a minimum of 10 years imprisonment for a second offence. A person charged with possession of 25g or more of cannabis who cannot rebut the presumption of trafficking will be sentenced to 8 years imprisonment as a first offender. Perera J considered the submission that the cannabis had been given to the appellant free of charge and he had not benefited but he, nevertheless, held that since section 5 of the Misuse of Drugs Act provides that a person shall not, on his own behalf or on behalf of another person traffic in a controlled drug, there were no mitigatory circumstances. He mentioned the two cases referred to by Mrs. Tirant-Gherardi and indicated that quantity alone was not to be considered as a guiding factor. He intimated that the Supreme Court had

maintained consistently high sentences for trafficking in controlled drugs. He, on a consideration of all the circumstances of the case, imposed a sentence of 10 years imprisonment.

This Court has held that the sentence is a matter for the trial judge unless it can be shown that he either erred in principle or the sentence he imposed was manifestly excessive to the extent that it induced a sense shock. It must not be forgotten that a trial judge must approach the question of sentence by taking into account the particular circumstances of each case. In so doing he is not precluded from taking into consideration sentences imposed in cases that are not very different.

There is nothing to indicate to us that Perera J erred in any way in the sentence he imposed on the appellant.

Accordingly the appeal against conviction and sentence is dismissed.

Dated at Victoria, Mahe this 4th day of ***December*** 1998.

H. GOBURDHUN	**L.E. VENCHARD**	**M. A. ADAM**
PRESIDENT	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**