

IN THE SEYCHELLES COURT OF APPEAL

DAVE MOSES

APPELLANT

Versus

THE REPUBLIC

RESPONDENT

Criminal Appeal No:21 of 1997

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

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Mrs. A. Antao for the Appellant

Mr. Romesh Kanakaratne for the Respondent

JUDGMENT OF THE COURT

(Delivered by Silungwe J.A)

The appellant was tried and convicted by Alleear, C.J., on a single count of trafficking in a controlled drug contrary to Section 5 read with Section 14 and 26(1)(a) of the Misuse of Drugs Act 1990 as amended by Act 14 of 1994 and punishable under Section 29 and the Second Schedule referred thereto in the Misuse of Drugs Act 1990 as amended by Act 14 of 1994. The particulars of offence alleged that on August 31, 1997, at Beau Vallon, Mahe, the appellant was trafficking in a controlled drug by virtue of the fact of having been found in possession of 56 grams and 190 milligrams of cannabis resin which gives rise to the rebuttable presumption of having possessed the said controlled drug for the purpose of trafficking. The conviction attracted the mandatory minimum sentence of 8 years' imprisonment. This appeal is against conviction only.

The evidence on which the appellant was convicted shows that on August 31, 1997, at about noon, members of a Police Drug Squad were patrolling Beau Vallon on the occasion of an annual Regatta. Among such members were Lance Corporal Vevers Rose (PW1) and Sergeant Norbert Isnard (PW2). These police officers were in close proximity to Coral Stand Hotel when they both saw the appellant about 100 metres away standing at the rear end of a fishing boat which was on the beach. As they walked

towards the appellant and were some 12 feet and 10 feet respectively from him, they observed him remove something from his right hand side trousers' pocket which he then dropped inside the boat. Consequently, Lance Corporal Rose and Sergeant Isnard approached the appellant who, on being asked by Lance Corporal Rose what it was that he had thrown inside the boat, replied: "nothing". The appellant was trembling. He was subjected to body search but this yielded nothing of significance to the police.

However, when Lance Corporal Rose carried out a search of the spot inside the boat where the appellant had shortly before been seen dropping something, he retrieved a plastic bag containing a tablet container and two other clear plastic bags. An examination of those items revealed that there were 23 pieces of a black substance in the tablet container whereas one clear plastic bag contained 25 and the other 33 pieces of similar substance. When the said pieces were shown to the appellant and he was asked: "what are these?", he professed ignorance of the nature of the substance. Lance Corporal Rose suspected the substance to be a controlled drug and the appellant was told so. Accordingly, the appellant was arrested and taken to Beau Vallon Police station. Lance Corporal Rose maintained that there were no people inside the boat at the material time. This evidence was confirmed by Sergeant Isnard.

In the appellant's free and voluntary statement to the police - exhibit P8A - which was admitted without any objection, the appellant stated:

"They found in the boat a small container red and blue in colour and also two small packets of drugs which was wrapped in a clear plastic. The police showed me what was in the container and also in a small packet wrapped in plastic. All these contents were hashish drugs."

It is not in dispute that the substance in question was subsequently examined by Dr. Gobin - an expert drug analyst - and certified as cannabis resin whose aggregate weight came to 56 grams and 190 milligrams.

The appellant's version was that whilst he awaited the arrival of his German girlfriend, Petra, he stood leaning against the rear part of the boat

and had in his possession a plastic bag containing two T-shirts and two cigarette lighters. Upon hearing a voice saying: "members of the task force are approaching", he went behind the boat and saw the approaching police about 100 metres away from him. When some police officers came to where he was standing, one of them asked him: "What have you thrown on the ground?" He denied he had thrown anything down. He said he was at the time wearing a black pair of trousers without side pockets, the same pair he wore at his trial. According to him, several people were sitting inside the boat. The appellant saw Lance Corporal Rose take out a plastic bag from inside the rear part of the boat and was told he would be taken to the police station. He denied having thrown drugs into the boat. He further denied having said in his statement to the police that the contents of the clear plastic bag and the tablet container were hashish.

The appellant's story was corroborated by his witness – Georges Ah-Time who testified, inter alia, that he never saw the appellant throw anything into the boat.

Although three grounds of appeal had been filed, the second and third grounds were abandoned, leaving only the first one which reads:

"That the Chief Justice erred in law in failing to consider the case for the defence adequately or at all."

Mrs. Antao, learned counsel for the appellant, argues that there is nothing in the judgment to indicate that the appellant's evidence was considered neither was any reference made thereto. She goes on to say that had the learned Chief Justice considered the appellant's evidence, he might have found that "a reasonable doubt had been created in this case."

The prosecution of this appeal finds anchorage in the following points: (1) the appellant's evidence shows that the pair of trousers he wore at the material time had no side pockets; (2) the appellant denied having thrown anything into the boat and was supported in this by his witness, Georges Ah-Time; and (3) the appellant and his witness testified that there were some people in the boat at the material time.

We are, in the first place, inclined to dispose of the three points without which the grounds canvassed would be like a bone without marrow. There is no gainsaying the fact that all the three points raised fall within the sphere of principles that govern issues of credibility of witnesses. A close examination of all these points shows in clear terms that there was prosecution evidence to the contrary. Starting with the first point, both police eye witnesses testified that they had seen the appellant at close range remove a white and blue thing from the right pocket of his trousers and put it into the boat. The appellant's assertion that the trousers he wore at the time had no side pockets stands alone and, moreover, it was raised for the first time in his evidence under cross-examination. He, however, conceded that his relatives were visiting him in detention. The following questions and answers are illustrative:-

"Q: Even today your relatives would have on occasions come to see you?

A: Yes, until today I have visits from my relatives.

Q: They bring to you food, clothing for your basic needs?

A: My father and Petra brought some clothes for me."

When it was put to him that the pair of trousers he was wearing at the trial was not the same trousers he had worn on the day of his arrest, he refuted the allegation. Be that as it may, the fact that the two police eye witnesses were not cross-examined on the matter puts a question mark against the veracity of the appellant's assertions in his testimony.

With regard to the defence denial that the appellant had thrown something into the boat, this is perceptably in the teeth of the evidence proffered by the two police eye witnesses and thus falls within the realm of credibility. The learned Chief Justice accepted the version of the police witnesses aforesaid.

As to the last point, both the appellant and his witness maintained at the trial that there had been some people inside the boat. On the other hand, the two police eye witnesses resolutely asserted that there was nobody in the boat at the time and the defence efforts to shake their evidence under cross-examination were to no avail.

We now return to the substantive ground itself. This is a criticism against the learned Chief Justice's failure to consider, or to adequately consider, the defence side of the story. For easy reference, the impugned portion of the judgment is here reproduced:

"I have considered the whole of the evidence in this case with meticulous care. I have accepted the evidence of the two officers of the Drug Squad that after they saw the accused dropping something inside the boat they approached him, searched him and looked inside the boat and retrieved a plastic bag and a tablet container which contained black substances.

I am satisfied that Georges Ah-Time failed to see the accused when the latter dropped the plastic bag inside the boat when he turned to look at the approaching members of the Drug Squad. That is why he deposed that the accused had never dropped anything in the boat. I have rejected his assertion that there were people in the boat at that time and also that he had heard someone say the drug owner is leaving as untrue.

I do not think that in that respect Georges Ah-Time was speaking the truth. All he has been trying to do is to shield the accused. The fact that he took undue interest in the case is testimony of that fact.

In this case the evidence is clear that the accused had the drugs with him which he dropped inside the boat when he heard and saw the Drug Squad members coming in his direction. The evidence of the officers of the Drug Squad is credible and trustworthy. Of all the people at Beau Vallon on that day they would not have picked upon the accused if they had not seen him drop the bag inside the boat. The bag which was subsequently retrieved from the boat did contain cannabis resin. This was confirmed

by Dr. Philip Gobine after analysis of the said substances."

The quotation above came immediately after a clear and fair review of the respective prosecution and defence cases.

Clearly, the review of the prosecution case and that of the defence was unblemished and is thus not open to criticism. On the other hand, the analysis of the evidence on both sides was succinctly done. But this is not the same thing as stating that no consideration, or inadequate consideration, had been accorded to the defence case. To begin with, the learned Chief Justice declared in clear terms that he had "considered the whole of the evidence in this case with meticulous care." He then referred to his acceptance of the evidence of the police eye witnesses that they had seen the appellant dropping something into the boat which they retrieved and subsequently ascertained to contain cannabis resin. Having considered the entire evidence before him with "meticulous care", the learned Chief Justice accepted the prosecution case and rejected the defence. We are satisfied that there is no justification in the appellant's criticism of the judgment.

However, Mr. Kanakarathne, learned counsel for the respondent has rightly conceded in argument that there was no clear evidence to connect the appellant with the contents of the two clear plastic bags which concession effectively reduces the amount of cannabis resin found in the appellant's possession to 7 grams and 140 milligrams. This then disposes of the presumption of trafficking which arises under section 14 read with section 26(1)(a) of the Misuse of Drugs Act 1990 as amended by Act 14 of 1994 and punishable under Section 29 and the second Schedule referred thereto in the Misuse of Drugs Act 1990 as amended by Act 14 of 1994. In the result, the appeal against conviction (as charged) and sentence succeeds and accordingly, both conviction and sentence are set aside.

Instead, however, the appellant stands convicted of being in possession of 7 grams and 140 milligrams of cannabis resin, contrary to section 6 the Misuse of Drugs Act Cap 133 read with sections 15(1)(a) and 21(a) of the said Act.

On the question of sentence, Mrs. Antao has urged against imposition of custodial sentence for this type of crime which carries a maximum sentence of 10 years' imprisonment.

In sentencing the appellant, we take into account the fact that he is a first offender and a young man age 23 years. As being in possession cannabis resin is not only prevalent in Seychelles but also a serious offence, we consider that a custodial sentence is appropriate in this case. The appellant is,

therefore, sentenced to 4 years' imprisonment. The time spent in remand will be credited to him.

Dated at Victoria, Mahe this ^{9th}..... day of *April* 1998.



H. GOBURDHUN
PRESIDENT



A. SILUNGWE
JUSTICE OF APPEAL



E.O. AYoola
JUSTICE OF APPEAL

*Handed down.
Adam JA*