IN THE SEYCHELLES COURT OF APPEAL

COLLIN FORTE **APPELLANT**

versus

THE REPUBLIC **RESPONDENT**

Criminal Appeal No: 4 of 2002

[Before: *Ayoola. P, Pillay & De Silva JJ.A]*

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Mr. F. Ally for the Appellant
Ms. Fiona Laporte for the Respondent

JUDGMENT OF THE COURT

(Delivered by Ayoola, P)

The principal issue in this appeal is whether the Supreme Court was right in upholding the Magistrates' Court's finding that the appellant was in possession of controlled drug and therefore convicting him of trafficking in controlled drug, contrary to Section 5 read with Sections 14(d) and 24(1)(a) of the Misuse of Drugs Act as amended by Act No. 14 of 1994.

The facts as found by the trial Magistrate were that on 10th August 1999 at around 4 pm the appellant and another person (the 2nd accused at the trial charged with a similar offence in a different count) were seen involved in a scuffle in which they were struggling over a certain substance on the ground. They were seen by Marcel Fred (2nd PW) who arrested the accused and retrieved a substance beneath his own legs which the 2nd accused was trying to reach with his hands. Lance Corporal Jemmy Barra who was in patrol with Constable Barry Loze at the material time saw the two accused struggling and in the course the first accused threw a wrapped substance on the ground which was picked by

Marcel Fred (2nd PW). On analysis, the wrapped substance was found to be controlled drug, namely 789g 100mg of cannabis resin.

In the Supreme Court the findings were criticised on the grounds that the evidence against the appellant was insufficient and the conviction was unsafe and unsatisfactory. Rejecting both grounds the learned Judge stated that "*there was unchallenged evidence in the testimony of the eye-witness Jemmy Barra – PW5 – in that he saw the appellant while throwing the substance at the material time and place.*" He went on further to say that – "*a deliberate act of throwing an article from one's own ... possession evidently presupposes the fact of his knowledge and control over that article.*" He confirmed the finding of possession made by the trial Magistrate and confirmed the appellant's conviction.

On the appellant's appeal to this Court the two grounds raised were that the Supreme Court was wrong to have found on the evidence before the trial Court that, in law, the appellant was in possession of the controlled drug and that the Supreme Court should have found that the trial judge failed to exclude the possibility that the appellant was innocent, the 2nd accused who was involved in the scuffle with the appellant not having been charged with possession of the substance.

The substance of the arguments of Counsel for the appellant in this appeal is that the Magistrate did not make a detailed analysis of the evidence of the 2nd PW and compare it with the evidence of the 5th PW. It was argued that detailed evaluation of the evidence of the two witnesses would have revealed "*major discrepancies*" in their evidence. Counsel for the appellant submitted that the fact found that there was scuffle preceding a throwing of the drugs on the ground did not support a proper and reasonable finding by the Magistrate that the appellant was in possession of the drugs. He submitted that there was no custody and control of the drugs. It was argued that the possibility that the 2nd accused

in whose vehicle controlled drugs were subsequently found could have handed over or planted the drugs in the brown paper to or on the appellant should have been considered.

This appeal turns all on facts and about them there are concurrent findings of two courts, the Magistrates' Court and the Supreme Court. It is only in exceptional circumstances, such as where a finding of fact is perverse or not supported by any evidence at all that this court, a final appellate Court, will interfere with concurrent findings of two lower Courts. In this case the Supreme Court, as the Magistrate did, relied heavily on the evidence that the appellant was seen throwing the substance to the 2nd accused. The evidence of the 5th PW who saw him throw the substance was believed by the Magistrate. The 2nd PW did not see the appellant throw the substance. However, that one witness did not see an act such as throwing a wrapped substance of the nature described which another saw is not by itself an inconsistency. It may have been had the fact been elicited by cross-examination that if such an act had taken place the witness who did not see it done would have seen it or to elicit a categorical and direct statement that the act did not occur.

The inference made by the Supreme Court that the person who threw a wrapped substance must have been in possession with knowledge of that substance is reasonable and logical, in the light of Section 15(1)(a) of the Misuse of Drugs Act (Cap 133) which reads as follows:-

> "A person who is proved to have in his possession or custody or under his control –
>
> (a) anything containing a controlled drug;
>
> ...
>
> shall, until he proves the contrary, be presumed to have had the controlled drug in his possession." (the emphasis is ours)

The appellant could have raised a doubt on the fact of possession by giving evidence explaining his act of throwing the substance or suggesting that it was an instantaneous and immediate rejection of its possession. He could have led evidence, if such was the fact, that the 2nd accused had forced the substance on him and that he immediately rejected it by throwing it back to him. Such evidence would have been material from which the Magistrate could have considered whether there was doubt as to the appellant's possession of the substance. An accused has a right of silence and no inference of guilt should be drawn from his exercise of that right. However, if an accused exercising his right of silence left evidence which discloses a prima facie case unrebutted, a tribunal cannot be criticised for convicting on such evidence after duly evaluating it, nor can it be expected to speculate on facts which should have, but had not, been placed before it by the defence. Trying to fathom why the appellant threw the substance to the 2nd accused is not the function of the trial Court. While the burden of proof always rests on the prosecution in a criminal trial, failure of an accused to discharge the evidential burden which may rest on him may result in a verdict unfavourable to him. While the innocence of the accused is always presumed, the wisdom of putting before the trial Court materials from which it may entertain doubt on the guilt of the accused or which may provide a rebuttal of a presumption detrimental to him, cannot be over-emphasised.

In this case there is evidence from which a reasonable tribunal may find, as the two Courts below did, that the appellant was in possession of the controlled drug as charged. We find no substance in the appeal.

Accordingly, the appeal is dismissed.

E. O. AYOOLA	**A. G. PILLAY**	**G.P.S DE SILVA**
PRESIDENT	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**

Delivered at Victoria, Mahe this 19th day of **December** 2002.