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IN THE SEYCHELLES COURT OF APPEAL

DAVID GREEN

APPELLANT

versus

THE REPUBLIC

RESPONDENT

Criminal Appeal No: 9 of 2002

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

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Mr. F. Ally for the Appellant

Mr. R. Govinden for the Respondent

JUDGMENT OF THE COURT

(Delivered by De Silva, JA)



The appellant was convicted of the offence of unauthorised possession of foreign currency, contrary to Section 1 (3A) of the Exchange Control Act, as amended, read with paragraph 1(1) of Part II of the Second Schedule and punishable under paragraph 1(3), read with 1(4) of Part II of the Second Schedule to the said Act.

Section 1(3A) of the Exchange Control Act reads thus:-

“Except with the permission of the Minister, no person, other than a bona fide tourist, shall have any foreign currency in his possession unless such foreign currency has been obtained in accordance with sub-section (1)” (the emphasis is ours).

Sub-Section (1) of the said Act provides that:-

“Except with the permission of the Minister, no persons, other than an authorised dealer, shall, in Seychelles, buy or borrow any gold or foreign currency from, or sell or lend any

gold or foreign currency to any person other than an authorised dealer."

It is also relevant to note that the Exchange Control Amendment Act No. 5 of 1999 places the burden on the appellant to prove that he had bought the foreign currency from an "*authorised dealer*" or had obtained "*the permission of the Minister.*"

The case for the prosecution briefly is that on the evening of 25th April 2002 at the Seychelles International Airport, the appellant who was about to take a flight to Dubai was stopped by Constable Hoareau, an officer attached to the Adam Unit of the Foreign Exchange Control Department. He searched the appellant's bag and he found the following foreign currencies:-

- 6710 U.S. Dollars in currency notes;
- 5915 Euro in currency notes; and
- 835 Pounds Sterling in currency notes.

When questioned as to the provenance of the currency notes the appellant replied that the notes belonged to him and showed his British Passport. Mondon, another officer attached to the Adams Unit, who was present at the time the currency notes were discovered asked the appellant whether he had "*any receipt for the money*". The appellant replied in the negative. Thereafter the currency notes were seized by Mondon.

The ingredients of the offence in respect of which the appellant was convicted are:-

- (1) that he was in possession of the foreign currency set out in the charge;
- (2) that he had not obtained the foreign currency from an authorised dealer

nor had he received permission from the Minister to be in possession of the foreign currency; and

- (3) that he was not a bona fide tourist in Seychelles.

Admittedly, the appellant was in possession of the foreign currency notes seized from his bag. In his statement from the dock he clearly stated – *“the money that had been seized belongs to me. I brought them over from England to Seychelles.”* The burden of proving item (2) set out above, is on the appellant, as provided for in the Exchange Control Amendment Act No. 5 of 1999. In any event, there is the uncontroverted evidence of witness Munguno from the office of the Exchange Controller, who stated that the appellant *“at no point of time had the permission of the Foreign Exchange Controller to be in possession of foreign currency.”* There is the further admission of the appellant, when questioned by Mondon at the Airport, that he had no receipt for the money.

The crucial question therefore which arose for consideration by the trial Court was whether the prosecution has proved beyond a reasonable doubt that the appellant was *“not a bona fide tourist”* in Seychelles. The principal submission of Mr. Ally for the appellant was that the trial Court was clearly wrong in arriving at the conclusion that the appellant was not a bona fide tourist in Seychelles. In support of this submission, Mr. Ally emphasised the following matters:-

- (a) that since 1971 the appellant always resided in England;
- (b) that he derives all his income from England and that he has no income in Seychelles;
- (c) that he has no intention to reside in Seychelles;
- (d) that he comes to Seychelles on holiday and while in Seychelles he visits other countries.

On the other hand, Mr. Govinden, Senior State Counsel, rightly contended that the salient and undisputed fact in this case is that the appellant is a citizen of Seychelles by birth. He came to Seychelles to see his mother who is 93 years old, as stated by the appellant in his statement from the dock. There is no definition of the expression "*bona fide tourist*" in the Exchange Control Act. Therefore, the expression has to be given its ordinary and natural meaning. The ordinary meaning of the word "*tourist*" is "*a holiday traveller*". On a consideration of the totality of the facts and circumstances, the inference is irresistible that the appellant was in Seychelles not as a "*bona fide tourist*" but as a citizen of Seychelles, the land of his birth. Indeed it is difficult to conceive of a situation where a citizen will be in his own country and be a bona fide tourist at the same time. We accordingly hold that the finding of the learned Chief Justice that the "*accused is a Seychellois in Seychelles and not a bona fide tourist*" is amply supported by the evidence on record.

Finally, Mr. Ally referred us to Sections 2 and 3 of the Foreign Earnings (Regulation) Act 1996 and submitted that the appellant "*was not a resident of Seychelles and by virtue of Sections 2 and 3 of the Foreign Earnings Act he could in law possess foreign currencies which renders him a bona fide tourist under the Exchange Control Act.*" The Foreign Earnings (Regulation Act) 1996 was not cited before the trial Court, and we do not have the benefit of the findings of the learned Chief Justice on those statutory provisions. In any event, the definition of the expression "non-resident" is for the purposes of that Act which was "*to regulate foreign earnings of persons.*" It has no relevance to the issues that arise on the appeal before us.

There is an appeal against the sentence as well. The foreign currencies found on the appellant were forfeited and a term of 3 months imprisonment suspended for a period of 18 months was imposed on him. Mr. Ally submitted that the forfeiture of foreign currencies was wrong and

unwarranted in the circumstances. In this connection it is relevant to note the observation made by the learned Chief Justice in the course of his judgment:-

"In the present case since the accused also lives in England he would have discharged that burden by adducing evidence of the legitimate source of those currencies from England or elsewhere."

It is trite law that an appellate court would not lightly interfere with the discretion vested in the trial judge on the question of sentence, unless the sentence is manifestly excessive or there has been an improper exercise of the discretion. None of these considerations apply to the appeal before us.

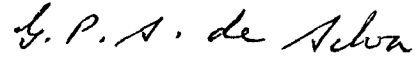
For these reasons, the conviction and sentence are affirmed and the appeal is dismissed.



E. O. AYoola
PRESIDENT



A. G. PILLAY
JUSTICE OF APPEAL



G. P. S. DE SILVA
JUSTICE OF APPEAL

Delivered at Victoria, Mahe this 16th day of December 2002.