(4)

IN THE SEYCHELLES COURT OF APPEAL

MAX PADAYACHY ***APPELLANT***

VERSUS

REPUBLIC ***RESPONDENT***

SCA No. 1 of 2003

*[**Before:** Ayoola, P., Silungwe and De Silva JJ.A.]*

SUPREME COURT LIBRARY SEYCHELLES

Mr. B. Georges for the Appellant
Mr. R. Govinden for the Respondent

JUDGMENT OF THE COURT

(Delivered by G.P.S. De Silva, J.A.)

The appellant was convicted of the offence 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 and punishable under section 29 and the second schedule to the Act. He was sentenced to a term of 8 years imprisonment.

The case for the prosecution briefly was that on 12th May 1998 the appellant was detected by two police officers, namely, Dufrene and Amelie, as having in his possession 26 grams and 900 milligrams of cannabis resin. The case against him rested upon the testimony of Dufrene and Amelie who deponed that on the day in question they were on mobile patrol duty in the "town area" of Mahe at about 11.25 p.m. They observed the appellant seated in the front passenger seat in a parked car with a box of cigarettes in his hand. As they were approaching the car where the appellant was seated,

they saw him drop the box of cigarettes on the ground and kicking it under the car. The box of cigarettes was later retrieved from under the car and found to contain cannabis resin. As lucidly and concisely stated by the learned trial Judge in his judgment, *"the case for the prosecution rests upon an overt act done by the accused in letting a box of Mahe Kings cigarette which he had held in his left hand drop to the ground and in kicking the said box under the car."*

At the trial both police officers were cross-examined at length on the "contradictions" between their testimony in court and their "out of court statements". The fact that the statements made by the two police officers were identical, word for word, was also emphasized in cross-examination. The cross-examination on the above lines was directed to show that the prosecution was a "frame-up" which was indeed the defence taken by the appellant in his testimony in court. Adverting to the "contradictions" the learned trial Judge reached the finding that "the testimony of the two witnesses in court is not contradictory with their out of court statement, but rather more elaborate". (The emphasis is ours). On a consideration of the defence taken up by the appellant in his evidence, the learned trial Judge relevantly concluded, "... the accused himself offered no explanation as to why the two police officers would come up with a plot to 'frame' him... I find the version of the accused that he had been 'framed' to be without substance." These then were crucial factual matters which were in issue at the trial and on those questions of fact the trial court had reached clear and precise findings which were amply supported by the evidence. No submission was made before us in appeal that the learned Judge misdirected himself on the important questions of fact which were raised at the trial.

At the hearing of the appeal before us, learned counsel for the appellant raised a pure question of fact which was characterized in his "skeleton submissions" as an "ancillary matter" (the emphasis is ours). To place the matter in proper focus, it is best to quote the relevant passage in the "skeleton submissions" of the appellant. It reads as follows: "*This appeal focuses on an ancillary matter, namely the presence or otherwise of a penknife at the scene. Apart from the material found in the cigarette packet under the vehicle, a penknife with traces of cannabis on the blade was also taken by the police. The appellant says so...but denies ... that it was on his person. The analyst was given the penknife to analyse and returned it. Yet the police officers on the scene cannot place it at all... . The appellant will ask the court to infer from the state of the testimony on this issue that the evidence on the possession of the cigarette packet and ... as to how the appellant allegedly disposed of the cigarette packet should not have been relied upon by the court to convict the appellant.*"

In contrast to the "ancillary matter" convassed in appeal before us, it is significant that in the closing address at the trial the focus was on entirely different matters which were carefully considered by learned trial Judge. In his final address learned counsel for the accused stated as follows: "*The only real issue in this case is the question of possession. Did Max Padayachy (i.e. the appellant) have the box on him at the material time and did he dispose of it when he saw the police. That is really the central question to be decided. ... the biggest and most fundamental problem in the prosecution case namely that in his pretrial statement he said the man threw the box under the car. There was no explanation where it was held, how it was held,*

that it was dropped, and that it was kicked, whereas in this court on oath all of this was explained. ... for this reason and for this reason alone I submit there is at the very least a very real doubt as to whether in this case the box was there at all and if it was, was this with the accused." It is scarcely necessary to stress that in the closing address made on behalf of the appellant at the trial, there was no reference at all to "the presence or otherwise of a penknife at the scene."

On a consideration of the case presented at the trial by both the prosecution and the defence, we are of the view that it is not open to the appellant to raise for the first time in appeal an admittedly "ancillary matter" which relates to a pure question of fact. The learned Judge (Juddoo J.) has given congent reasons for his findings on all relevant factual matters which were raised at the trial. Indeed he could not have done more.

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

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

Dated at Victoria, Mahe, this ... 5 ... day of December ... 2003