Simeon v Republic

(2010) SLR 195

Elvis CHETTY for the appellant
Ronny GOVINDEN, Attorney-General with Beryl CONFAIT, Asst State Counsel for the respondent

Judgment delivered on 13 August 2010

Before Hodoul, Domah, Fernando JJ

This is an appeal against a conviction for trafficking in 2.44 grams of diamorphine (heroin) on the basis of the section 14(c) presumption and the minimum mandatory sentence of 10 years imposed by the trial Court.

According to the evidence of PW 1 Freddy Issac on 10 October 2008 at about 7 to 8 pm in the company of Sergent Souffe, Constable Labiche and S Jupiter, they raided a place called the 'Toll' at Plaisance. On seeing the police party, the people who were there ran and they found the appellant lying on the ground in the tall 'fatak' grass. He had a backpack marked 'Adidas' on his back. The appellant was arrested and brought to the Mont Fleuri police station as it was not possible to carry out a proper search of all the contents of the appellant's bag at the place of his arrest due to lighting conditions. On searching the bag at the Mont Fleuri police station amongst a mobile charger, a roll of bandage and a few other items, they had found a small red plastic bag. On opening the plastic bag they had found a brownish powder wrapped in cling film and some herbal material inside another small red plastic bag, which the police suspected to be controlled drugs. The controlled drugs were kept safely in the custody of PW 1 and taken to the Government Analyst two days later as the arrest and seizure took place during the weekend. A day after the drugs were taken to the analyst they were returned by the analyst and kept in the custody of PW 1 until their production in court.

PW 3 Sergent Maryse Souffe had corroborated PW 1 on all material particulars as regards the custody of the bag after its seizure from the appellant and its examination at the police station. The contradiction between PW 1 and PW 4 Serge Labiche as to the manner the appellant was hiding in the tall grass has been dealt with by the trial Judge at page 8 of the judgment and we have no reason to disturb that finding. The appellant does not deny that he was at the place where he was arrested or that the backpack was on his back.

The defence of the appellant, a former police officer, through the dock statement he made is to the effect that the drugs were planted on him. According to the appellant, he had been arrested at the place as narrated by the prosecution witnesses and PW 1 and PW 4 had told him that they had been looking for him for a long time and his name was on their list. The search of his bag at the scene of his arrest had not revealed anything. He was then taken to the Mont Fleuri police station where a further search of his bag was carried out. In the course of this search PW 1 had said "Here I have removed this from your bag". He had also told the appellant that when

the appellant was in the police force he had given them a hard time. The trial Judge came to the conclusion that the defence of the appellant that the drugs were "planted" on him was unacceptable. We have no reason to disturb this finding of fact of the trial Judge.

There was no challenge to the analysis of the drugs by PW 2 Dr Jakariya. This of course is in line with the defence of the drugs being planted on the appellant.

Section 14(c) of the Misuse of Drugs Act states –

> A person who is proved or presumed to have had in his possession more than 2 grammes of diamorphine (heroin) contained in a controlled drug, shall until he proves the contrary, be presumed to have had the controlled drug in his possession for the purpose of trafficking in the controlled drug contrary to section 5.

According to the interpretation section, "controlled drug" means a substance, preparation or product specified in the First Schedule. 'Diamorphine' is a controlled drug specified amongst Class A Drugs of Part 1 of the First Schedule to the Misuse of Drugs Act. 'Preparation' according to Part IV of the First Schedule means a mixture, solid or liquid, containing a controlled drug. It is clear from this definition that before a person can be convicted for trafficking on the basis of the section 14(c) presumption it must be proved that he had in his possession more than 2 grammes of diamorphine (heroin) in whatever preparation or mixture he was in possession of. This is what is meant by the words 'contained in a controlled drug'. In simple words there should be 2 grammes of heroin in the mixture and in this case in the 2.44 grammes of powder that the appellant was found in possession of.

The evidence of PW 2 Dr Jakariya, who examined the powder seized from the appellant is to the effect that he was given a sample of very light brown powder weighing 2.44 grammes for purposes of analysis. The quantitative analysis revealed that the light brown powder had a percentage of 4% heroin in it. I have set down below the entirety of the cross-examination of PW 2 because of its importance:

> Q: Only 4% of the 2.44 grams was actually pure heroin?
> A: Yes
> Q. Basically this was only heroin the 4% of that powder?
> A: That is correct.
> Q: Other 96% was not heroin?
> A: Definitely.
> Q: That 4% is one of the lowest I ever come across in case before the court?
> A: That will be true my Lord.
> Q: Generally it would be at least over 10%?
> A: Much over 10%."
> (Underlining is by us)

Thus in this case the entire mixture weighed only 2.44 grammes and in that mixture there was only 4% of heroin. When one converts the 4% into grammes it amounts to only 0.0976 grammes of heroin. Thus on the basis of the prosecution evidence the

appellant had in his possession 0.0976 grammes of diamorphine (heroin), which is less than even 0.1 grammes of diamorphine (heroin). This is 1.9024 grammes less than what is referred to in section 14 (c) of the Misuse of Drugs Act. According to PW 2 "the herbal material did not contain cannabis it was cheaply tobacco" (verbatim).

There is no evidence in this case as to the components of the other 1.9024 grammes of the powder. In the case of *Terrence Alphonse v Republic* SCA 6 of 2008 referred to later in this judgment the total weight of the powder found with the accused was 4.9 grammes, of which 25% was heroin. The "other components of the powder were mono acid morphin and acid codeine" which the Court of Appeal stated "both of which are controlled drugs and which are usually present in illicit heroin".

The trial Judge in rejecting the submission of defence counsel that only 4% of the 2.44 grammes was heroin and therefore section 14(c) did not apply has relied entirely on the decision and cited the case of *Terrence Alphonse v Republic* SCA Cr 6 of 2008, where Bwana J with the other two Justices of Appeal concurring held that in the case of heroin "The entire powder is taken and weighed together. It cannot be separated by weighing the different chemical components". This is particularly so in this case where, according to PW 1, other components of the powder in the plastic bag were monoacid morphin and acid codeine both of which are controlled drugs and which are usually present in illicit heroin. The law and the courts should not be moved to assume or adopt some arithmetical cum-scholastic exercise divorced from the realities of the underworld drug business. Morphine is classified as a class "A" drug and codeine a class "B" drug. Therefore even as to the composition of the powder there is a distinction between this case and that of *Terrence Alphonse v Republic*, for in this case before us there is no evidence as to what the balance 96% of the powder consisted of.

The trial Judge went on to state:

> However the evidence of Dr Jakariya does not show that in the instant case the product taken into custody was a preparation of *another product* containing Diamorphine. For all purposes the product was Heroin of 4% purity.
> [emphasis added]

We find it difficult to understand the words 'another product', namely as what was recovered from the appellant and analysed by Dr Jakariya was in his own words "a light brown powder" which certainly was a solid mixture, a preparation. Further this in no way has a bearing on the interpretation to be given to section 14(c).

In the case of *Terrence Alphonse v Republic* referred to earlier, the evidence indicated that only 25% of the 4.9 grams of the powder found in the possession of the appellant was heroin. The trial Judge in *Terrence Alphonse v Republic* did address the crucial issue as to whether the appellant ought to have been charged with 25% of the total weight of the heroin or the 100% total weight of the substance that is, with possession of 4.9 grams and concluded –

> A person when trafficking in illegal drug such as heroin does not

> differentiate whether the substance is 100% pure or it contains "cutting agents". When he dispenses one gram of the powder, he collects his money for that 1 gram. He does not collect a percentage of the money relative to the percentage of purity of the powder. He trafficked in the whole content. In my view, when the law refers to heroin, it should be interpreted in the context of that illegal trade...

The Court of Appeal in that case citing this part of the trial Court judgment states "We are of the settled opinion that the learned trial Judge was perfectly right." With all due respect to the trial Judge and the judges who heard that appeal the view expressed by the trial Judge has not considered the clear and unambiguous provisions of section 14(c), but rather sought to give an interpretation as stated by the trial Judge "in the context of that illegal trade". This is against all known rules of interpretation of statutes.

There is no doubt that one cannot find 100% heroin or morphine as they are always found in a stereoisomeric form of a substance, preparation (mixture, solid or liquid) or product. It is common knowledge that heroin is an opiate drug that is produced from morphine, a naturally occurring substance extracted from the seed pod of the Asian opium poppy plant. But the wording in section 14(c) is very clear for if a person is to be convicted of trafficking on the basis of the presumption in section 14(c) it must be proved that there was more than 2 grammes of diamorphine (heroin) contained in the mixture the person was in possession of. It is for this reason that the Legislature when referring to heroin or morphine in section 14 of the Misuse of Drugs Act has sought to use the words; "contained in a controlled drug" unlike when referring to opium, cannabis or cannabis resin [underlining is by us]. The two cases cited and relied on by the Republic, namely *Stephen Francis v The Queen* (Privy Council Appeal No 35 of 1990) and the case of *Muktar Ali v R* (1988) MR 117 have no relevance to the issue raised before us in this case.

In the Privy Council case of *Stephen Francis v The Queen* the Privy Council had said "Heroin remains heroin notwithstanding that it is mixed with other substances..." There is no dispute in the case before us that the 4% substance found with the appellant is heroin. The dispute is as to its weight and whether it comes within the definition of section 14(c) to attract the presumption of trafficking.

In the case of *Muktar Ali v R* the Supreme Court of Mauritius had to interpret section 28(2) of the 1986 Dangerous Drugs Act of Mauritius which was to the effect that every person who unlawfully imports any heroin or any preparation of which heroin forms the base or esters, ethers isomers, salts or salts of esters, ethers, isomers of heroin commits an offence. The appellant's argument in *Muktar Ali* was to the effect that if an accused were to be convicted under section 28(2)(b) the Crown had to necessarily prove that the article found on him is 'pure heroin'. It was in answer to this submission that the Mauritius Supreme Court held as quoted in the judgment of *Terrence Alphonse*:

> Where someone is accuses under section 28 (2) (b) [of the Dangerous Drugs Act 1986]
>
> … the Crown can only succeed if it proves that the article found on the

> person is pure heroin. If that submission is correct, it would follow that a person found in possession of preparation containing heroin could not be prosecuted at all unless heroin formed the base thereof. This would have startling consequences. Firstly because everyone knows that,..., pure heroin is practically non-existent in the drug trade. And secondly because, as the word 'base' in this context cannot but have its chemical meaning, that is a substance which combines with an acid to form a salt, the result would be that a person could freely import any preparation containing heroin provided the heroin had not combined with an acid to produce a salt... [emphasis provided].

Section 14(c) of our Misuse of Drugs Act is completely different to section 28(2)(b) of the Mauritius Dangerous Drugs Act and the issue in *Muktar Ali* is different from the issue before us in this case. In *Muktar Ali* the issue before the court was what constitutes pure heroin whereas in the case before us the issue is, is it possible to say that there are two grammes of heroin in a mixture, where the total weight of the mixture is only 2.44 grammes and out of that, the actual heroin content of such mixture is only 0.0976 grammes. Therefore section 28(2)(b) of the Mauritius legislation has no relevance to our section 14(c) and cannot be considered as an aid to the interpretation of our section 14(c).

'Heroin' can be interpreted "in the context of the illegal trade" as a substance, mixture or product. This has already been done by the Misuse of Drugs Act. But one cannot interpret the words "2 grammes of diamporphine(heroin)" in section 14(c), without an "arithmetical calculation" and doing so is not a "scholastic exercise". The confusion that has crept into this case and that of *Terrence Alphonse* was mixing up the issues as to what constitutes 'heroin' with that of its weight.

N S Bindra in his book on *Interpretation of Statutes* (10th edition, LexisNexis, 2007), making references to several English, Australian, Indian and American cases has this to say:

> When it is said that all penal statutes are to be construed strictly, it only means that an offence falls within the plain meaning of the words used and must not strain the words. The rule of strict construction requires that the language of a statute should be so construed that no case shall be held to fall within it which does not come within the reasonable interpretation of the statute. It has been held that in construing a penal statute, it is a cardinal principle that in case of doubt the construction favourable to the subject should be preferred (*Ishar Das v State of Punjab* 1972 SCD 262; *WH King v Republic of India* AIR 1952 SC 156). To determine that a case is within the intention of a statute, its language must authorize the court to say so. It would be dangerous indeed, to carry the principle, that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerate (*Boni v Columbia* 12 L Ed 2d, 894, *Yates v United States* 1 L Ed 2d 1356). Where an enactment entails penal consequences, no violence should be done to its language to bring people within it but rather care must be taken to see that noone is brought within it, who is not within the express

> language. In criminal cases which entail conviction and sentence, liberal construction of the law with the aid of assumption, presumption and implications cannot be resorted to for the purpose of roping in the criminal prosecution, such persons who are otherwise not intended to be prosecuted or dealt with by the criminal court. Clear words of an Act of legislature, conveying a definite meaning in the ordinary sense of the words used, cannot be cut down or added to as to alter that meaning (*Hari Singh v Crown* 1925 1 LR Nag 358). Words and phrases in a penal statute cannot be strained beyond their ordinary meaning in order to confer penal jurisdiction (*Nairn Molvan v Att-Gen* AIR 1948 PC 186; *Macleod v Att-Gen for New South Wales* 1891 AC 455). Nor can the judges add sections of their own to penal statutes with a view to improve them by some fancied completeness or consistency (*Emperor v Jaffur Mahommad*, (1913) 14 Cr U 204). It is not merely unsound but unjust to read words and infer meanings that are not found in the text (*P Venkatanarayana v Sudhakar Rao* AIR 1967 AP 111). In *Re Wainwright* (1843) 12 LJ Ch 426) Lord Lyndhurst LC, observed: "It is not the court's province to supply an omission in an Act, and if any such correction would extend the penal scope of an Act, still less will the court be inclined to correct".

Another well recognized cannon of construction is that the legislature speaks its mind by use of correct expression and unless there is any ambiguity in the language of the provision, the court should adopt the literal construction if it does not lead to an absurdity. We must not lose track of the maxim *'absoluta sententia expositore non indiget'*, which means that language that is unequivocal and unambiguous does not require an interpreter, in other words, plain words need no explanation. "Nothing" said Lord Denman, in *Everard v Poppleton* (1843) 5 QB 181, "is more unfortunate than a disturbance of the plain language of the legislature, by the attempt to use equivalent terms". *Maxwell on Interpretation of Statutes* (9th ed, London, 1946) says:

> When the language is not only plain but admits of but one meaning, the task of interpretation can hardly be said to arise. It is not allowable, says Vattel, to interpret what has no need of interpretation.

The Court cannot, while applying a particular statutory provision, stretch it to embrace cases, which it was never intended to govern. In interpreting a statute, the Court cannot fill gaps or rectify defects. Undoubtedly, if there is a defect or an omission in the words used by the legislature, the Court would not go to its aid to correct or make up the deficiency. The Court would not add words to a statute or read words into it which are not there, especially when the literal reading produces an intelligible result. The Court cannot aid the legislature's defective phrasing of an Act, or add or mend, and by construction, make up deficiencies which are there (*K B Asbe v State of Maharashtra* (2001) AIHC 1271).

A further factor that needs emphasis is that section 14(c) of the Misuse of Drugs Act is a derogation from article 19(10)(b) of the Constitution of the fundamental right of being treated as innocent until the person is proved or has pleaded guilty. Any interpretation of section 14(c) should therefore be in accordance with articles 19(10)

and 47 of the Constitution. Article 19(10) reads:

> Anything contained in or done under the authority of any law necessary in a democratic society shall not be held to be inconsistent with or in contravention of –
>
> …clause (2) (a), to the extent that the law in question imposes upon any person charged with an offence the burden of proving particular facts or declares that the proof of certain facts shall be prima facie proof of the offence or of any element thereof;

This construction of the right to be treated as innocent should also be read in consonance with article 47 which states:

> Where a right or freedom contained in this Charter is subject to any limitation, restriction or qualification, that limitation, restriction or qualification-
>
> (a) shall have no wider effect than is strictly necessary in the circumstances; and
> (b) shall not be applied for any purpose other than that for which it has been prescribed.
> [emphasis is by us].

In the Indian case of *Hamza v State of Kerala* (1999) 3 KLT 879 it was held that the percentage of morphine in the contraband is the important factor which makes the possession of the contraband culpable under the Act. It is incumbent on the prosecution to establish that the contraband had morphine contents above the percentage as mentioned in the definition and the possession of such opium alone could be culpable under the Act. Where the prosecution has failed to establish that the seized contraband article was opium with morphine contents more than 2% as defined in the Act, the prosecution must fail and the conviction cannot be sustained.

Similarly we are of the view where the prosecution fails to establish that there was more than 2 grammes of diamorphine (heroin) contained in a controlled drug the presumption under section 14(c) cannot be made use of to convict an accused of trafficking by adding on to its meaning or straining beyond its ordinary meaning in order to confer penal jurisdiction. If the Legislature had intended to give the meaning attributed to section 14(c) by the Court of Appeal in the case of *Terrence Alphonse v Republic*, they would have worded section 14(c) in the following way:

> A person who is proved or presumed to have had in his possession diamorphine (heroin) contained in a controlled drug which is more than 2 grammes shall, until he proves the contrary, be presumed to have had the controlled drug in his possession for the purpose of trafficking in the controlled drug contrary to section 5.

The Legislature would have taken into consideration "the realities of the underworld drug business" when it fixed the weight of the dangerous drugs enumerated in sections 14 (a), (b), (c), and (d). Even the subsequent amendment to section 14(d)

from 15 grammes to 25 grammes would have been "in the context of that illegal trade". It is the actual weight of the specified drugs referred to in section 14 (a), (b), (c), and (d) that brings the possession of them under the presumption of trafficking and not the total weight of the mixture in which the controlled drug is found.

If we are to go along with the reasoning of the trial Judge in this case we would have to convict a person of trafficking if he were to be found with a container of one kilogram of flour mixed with 0.0001% heroin. The Court posed this question to the Attorney-General and he was of the view that this is how it should be. He however stated that he may not consider indictment where the quantity is minimal. But this would then be purely at the discretion of the Attorney-General as there is no criteria laid down in the Act to decide as to what quantity may be treated as minimal. We find it difficult to agree with the submission of the Attorney-General. Further such an extended interpretation will fall foul of article 19(10) of the Constitution, for it will be difficult to visualize that such a law can be deemed "necessary in a democratic society". We have no hesitation in concluding that the appellant was in possession of heroin but to state that by being in possession of 0.0976 grammes of diamorphine (heroin) he is guilty of trafficking under the section 14(c) presumption leads to an absurdity and an injustice.

The Attorney-General argued in view of the provisions of paragraph 5 of Part 1 of the First Schedule to the Misuse of Drugs Act, the actual heroin content in the 'preparation' is irrelevant and what matters is the total weight of the 'preparation'. This argument loses its weight on an examination of the meaning attributed to the expression 'preparation' in Part 1V of the First Schedule. According to Part 1V 'preparation' means a mixture, solid or liquid, containing a controlled drug. Therefore when one examines section 14(c) along with the definition of "controlled drug" in section 2 of the said Act it is clear that there has to be 2 grammes of heroin in the mixture containing the substance, preparation or product. One can make use of the provisions of paragraph 5 of Part 1 of the First Schedule only to establish that what the appellant was found in possession of was 'diamorphine' heroin, of which this Court has no doubt. But the Attorney-General's argument that in view of the provisions of paragraph 5 of Part 1 of the First Schedule to the Misuse of Drugs Act the actual heroin content in the preparation is irrelevant and what matter is the ‘preparation’ is irrelevant and what matters is the total weight of the ‘preparation’ is too far-fetched.

We therefore acquit the appellant of his conviction of trafficking and convict him of possession of heroin contrary to section 6(a) of the Misuse of Drugs Act relying on section 26(2) of the said Act. We quash the sentence of 10 years imposed by the trial Court and substitute a sentence of 7 years. The period which the person has spent in custody before and after conviction shall be taken into account in assessing the length of the sentence to be served bearing in mind the amendment to section 30 of the Prisons Act by the Prisons (Amendment) Act 2008.

Record: Court of Appeal (Civil No 23 of 2009)