

BELLARD v REPUBLIC

(2011) SLR 373

K Domingue for the appellant
A Madeleine, Senior Counsel, for the respondent

Before Domah, Fernando, Twomey JJ

Judgment delivered on 2 December 2011 by Fernando J

This is an appeal against a conviction for cultivation of a controlled drug contrary to section 8 read with section 26(1)(a) of the Misuse of Drugs Act. As per the formal charge the appellant had on the 9 September 2009, at Copolia, Mahe, cultivated 29 cannabis plants. The appeal is only against the conviction, understandably because the Appellant had been sentenced to the minimum mandatory period of 10 years.

The grounds of appeal are to the effect that the trial judge erred in convicting the appellant in that he had failed to give due weight to the following factors, namely:

- I. Failure of the prosecution to prove an overt act on the part of the appellant.
- II. Failure of the Prosecution to prove the ownership of the property on which the cannabis plants were uprooted.
- III. The clear and demonstrated contradictions in the testimony of the Agents Naiken and Agent Sultan as compared to the testimony of the Agent Santache.
- IV. The evidence of the accused as given on oath.

The prosecution evidence is to the effect that at about 5.30 pm on the 9 September 2009, officers of the National Drug Enforcement Agency (NDEA) were on a routine patrol in the Copolia region when they had seen the appellant hiding behind some bushes. On being approached the appellant had run away and the NDEA party had to give chase with a police dog and had to struggle with the appellant before they apprehended him. The dog had bit him in the process.

On searching him they had found some leaves suspected to be cannabis in a plastic bag which was in his possession. On being questioned the appellant had admitted that the leaves were his and that he plants them in the mountain. On his admission that the leaves belonged to him, according to the prosecution witnesses the appellant had been informed of his rights to remain silent; the right to contact a lawyer and the reason for his arrest by PW 2. PW 2 had also stated that they did not use any threats, violence or inducements on the appellant and that he voluntarily took them to the plantation. He had agreed to take the officers to his plantation but stated that it was far away and high up in the mountain. It was a long and difficult trek, slippery and very difficult to find unless guided. It took the officers about three hours to reach the plantation from the place where they arrested the appellant.

On reaching the plantation the appellant had said that the plantation belonged to him. According to PW 3 K B Sultan: "When we got to the plantation he told us that this was the place where he cultivated cannabis." There were 15 big and 26 small plants in the nursery. The small plants were in plastic containers. Further they found that the ground had been prepared and some holes dug to grow plants. The ownership of the property is not known to the officers. The officers had then uprooted the plants and put them into a gunny bag and brought them to the Mont Fleuri Police Station along with the appellant.

The drugs were kept safely in the custody of the officer in charge of the patrol and on 14 September taken to the Government analyst. According to the report of the government analyst all plants were cannabis. There was no challenge either at the trial below or before us to the analysis or the chain of evidence in this case. The appellant's evidence is to the effect that on the day of his arrest the NDEA officers did take him to a plantation where plants were uprooted but denies that it was his plantation. The leaves seized from the appellant at the time of his arrest had fallen during the trek as the officer who seized them had fallen several times during the hike.

Under cross-examination PW 2 M Naiken had said that;

The way the place was you could that it is highly probable that only one person was using it. If a lot of people were using that path would have been wider with the plants and grass crushed. (verbatim)

The witness had further said;

He knew the way and we were following him. In fact several times I even had to ask him whether this was the right way and he said that he knows his way by heart.

PW 3 had answered in the affirmative to the question put to him under cross-examination, namely, "When the accused was leading you did he seem familiar with the place." Under cross-examination PW 3 had also stated: "Without his knowledge we would have never seen this plantation, like I have said before; it is very difficult and dangerous" and further "This man told us that this is his plantation; and he told me that he comes here everyday." What is noteworthy in this case is that the defence had never specifically challenged any one of the three NDEA officers testimony about the appellant's admission that the plantation belonged to him and of the fact that he had been informed of his rights prior to him making this admission, although much time had been taken and in fact wasted in cross examination over irrelevant matters.

The defence is that the prosecution case is one of fabrication. According to the appellant he was in his banana plantation near his house when the NDEA officers suddenly appeared before him around 5.30 pm. He had come to work about half an hour before the NDEA officers arrived. They had told him that they were searching for a thief and the appellant had responded that he was not a thief and was working in his property. They had then become aggressive and searched him. They had then told him that during a patrol they found a small cannabis plantation and inquired

whether it was for the appellant which the appellant had denied. The officers had then told the appellant that they would bring him to the plantation. At this stage according to the appellant he became aggressive and one of the officers had punched him in his face several times and unleashed the dog that was with them that bit him. The appellant had said that there was a small bag with him which contained a small bottle of water and some fried potatoes and eggs which he had brought to eat while working but denied having had any cannabis leaves with him. When questioned by defence counsel as to why he had a box containing food and a bottle of water when his house was nearby and the time being 5.30 in the evening his answer is unconvincing. Thereafter he was forced to follow the NDEA officers along a difficult terrain for a long time until they came to a plantation. The appellant had denied that the plantation belonged to him. The appellant in his examination-in-chief had said that

When I got there I saw some sort of a small nursery on the ground; I also saw some holes which had been dug and some cannabis plant which had been planted on the ground.

Later on in his examination-in-chief the appellant contradicting himself had said that he was not familiar with cannabis plants. The officers had then got him to uproot the plants, put them into a gunny bag and carry it down and by this time it had become really dark. The appellant along with the cannabis plants had then been brought to the Mont Fleuri Police Station. Later on he had been taken to the Central Police Station and placed in custody. His testimony before the trial court indicates that he had been treated well at the Mont Fleuri and Central police stations. According to the appellant his request to call his wife while at the police station was granted and when he informed his wife about his arrest she had asked him "whether they had arrested me with anything illegal in my possession" which he had answered in the negative.

In evaluating the evidence led in this case the trial judge had this to say:

I have had the opportunity to diligently evaluate the evidence as adduced by all the prosecution witnesses as well as the accused. Their demeanor too was carefully and closely observed. *Having tested the entire evidence in this case on the touchstone of reliability, credibility and trustworthiness I found the testimonies of Bouzin, agents Naiken, Santache and Sultan to be truthful and cogent.* The inconsistencies that were pointed out by the defence were minor and of no consequence as they do not go to the root of the case, *On the other hand I found the accused's testimony to be tainted with falsehoods.* (emphasis by us).

The first two grounds of appeal are based on the failure of the prosecution to prove an overt act on the part of the appellant and to prove the ownership of the property on which the cannabis plants were uprooted. The trial judge in convicting the appellant had made reference to *Alcide Bouchereau v Re* SCA 11 of 2008, *R v Far* 1982 Crim LR 745, *Rep v Jean Gill* 1983 SLR 22, *Rampersad v The Queen* 1975 MLR 5, *Rep v Marie-Nanette Julie* Crim Side 46 of 2006 and *Rep v Matatiken* Crim Side 3 of 2009 and said the Supreme Court had dismissed the charges of cultivation in these cases on the basis that there was no evidence of tilling, manuring, watering,

or doing any act, namely an overt act to connect the accused with the cultivation. He had said -

With the greatest respect I beg to differ with this position. *In my view, doing any act to connect him with the offence of cultivation covers a person who has not only the knowledge of existence and location of the cultivation but also leads and shows the officers the plantation which is in the middle of such a thick and far away forest abandoned or not belonging to anyone unknown to the authorities.* He had the option to remain silent or not even take the agents to the plantation. In such circumstances ownership of land is immaterial. Illegal cultivation could be done on one's land without their knowledge and/or permission (underlined by us).

We do not agree that a person can be convicted as the trial judge had argued on the basis of mere knowledge of the existence and location of cultivation or the fact that he could show the officers the plantation which is in the middle of a thick forest not easily accessible. Many of those who go on hikes and come across such cannabis plantations would be reluctant to inform the necessary authorities of their discovery for fear of being convicted for cultivation. But the most important item of evidence which links the appellant to the cultivation and establishes the case against the appellant is the evidence of the prosecution witnesses which was not challenged by the defence and which the trial judge had accepted as being truthful and cogent, of the voluntary admission of the appellant that the cultivation is his. The failure of the defence to cross-examine any of the the prosecution witnesses as regards the appellant's admission as to cultivation, amounts to a tacit acceptance of their evidence in regard to this matter. In *R v Storey* (1968) 52 Cr App Rep 365 the police having found a large quantity of cannabis in the accused's flat, she explained that it belonged to a man who had brought it there against her will. The Court of Appeal upheld the Judge's rejection of a submission of no case to answer, at the close of the prosecution case, on the ground that the statement was admissible because of its vital relevance as showing the reaction of the accused when first taxed with the incriminating facts. In this case it appears that the appellant had volunteered the information in respect of him cultivating the cannabis even before he was accused of cultivation. The evidence of the appellant's admission, coupled with the fact that as found by the trial judge that "unless one knew the existence and actual location of the garden there was no way a person could easily find it as it was shielded by thick surroundings bushes and a boulder" is as potent as proof of an overt act. This disposes off the first ground of appeal.

As regards the second ground of appeal we are in agreement with the trial judge that proof of ownership of land is immaterial in proving a case of cultivation like in the circumstances of this case. There are many who carry out these illegal cultivations in thick forests in abandoned or state owned lands far away from their normal place of abode to avoid detection.

In connection with ground three, we are in agreement with the trial judge that the inconsistencies that were pointed out by the defence are minor and of no consequence as they do not go to the root of the case. The exact number of persons involved in the raid, whether some of the officers gave up half way along the track, whether they received a phone call while on routine patrol in Copolia about a burglary, whether or what type of weapons the NDEA officers carried with them

when they went up to the plantation whether the officers came across a passer-by when going up to the plantation and whether the size of the plantation is half the size of the court room or bigger, in our view are matters which are of no significance to this case in view of the appellant's own admission that he accompanied the NDEA officers to a cannabis plantation in the thick jungle up the mountain in the late evening of 9 September 2009.

The fourth ground of appeal was that the trial judge had not given sufficient weight to the appellant's evidence given under oath. We find that the trial judge had at paragraphs 11 to 15 of the judgment dealt with at length with the appellant's testimony and at paragraphs 22 to 25 set out why he found the appellant's testimony to be tainted with falsehoods. As correctly stated by the trial judge we do not find on record any reason for the NDEA officers to pick on the appellant who was working in his garden as he had claimed and take him on a three hour trek up the mountain on very difficult terrain, late into the evening and to force him to accept ownership of a cannabis plantation and fabricate a case of cultivation of cannabis against him. The appellant's counsel had argued in her skeleton heads of argument and before us that the appellant had accompanied the NDEA's agents to the plantation 'under duress' with a gun pointed at his back and after he had been bitten by NDEA's dog. We do not find on record that the appellant had said that he accompanied the NDEA officers 'under duress'. In fact to a question posed in examination-in-chief to the effect as to "What happened thereafter being bitten by the dog?" the appellant's answer was "They told me that we were going to this small plantation I had but I told them that I was not going to any plantation with them." We see no merit on ground 4 of appeal. In view of our findings set out above we have no hesitation in dismissing the appeal.