IN THE COURT OF APPEAL OF SEYCHELLES

Robin Quatre APPELLANT

VS

The Republic RESPONDENT

CR SCA No: 25/2009

BEFORE: MacGregor,President; Fernando; Twomey; JJA

Counsel: Mr. B. Hoareau for the Appellant
Mr. D. Esparon, Principal State Counsel, for the Respondent

Date of Hearing: 21st August 2012
Date of Judgment: 31st August 2012

JUDGMENT

A.F.T.FERNANDO JA

1. The Appellant in this case was indicted before the Supreme Court on two counts, one of cultivation of 20 plants of cannabis of a total weight of 5.4 grams and trafficking in cannabis (herbal material) weighing 42.9 grams on the basis of the section 14 presumption. At the outset we wish to state that in view of article 19(2)(b) of the Constitution it was necessary for the prosecution to have made reference in the indictment, to the particular sub section in section 14, namely sub section (d), although we are of the view that the failure to do so did not cause any irregularity in the indictment in view of he Appellant's own admission that he was in possession of cannabis (herbal material).

2. The Appellant had been on the 21st of September 2009 convicted of both counts and sentenced to the minimum sentence of 10 years in respect of the offence of cultivation and the minimum sentence 8 years in respect of the offence of trafficking.

3. The Appellant at his trial was unrepresented and had defended himself.

4. The Appellant both in his hand written (dated, 5th October 2009) and typed (14th October 2009) letter forwarded from the prison had appealed against his conviction and the sentence.

5. However in the Notice of Appeal dated 21st June 2012 filed by his counsel it is stated that the appeal is against sentence only. The grounds of appeal are as follows:

    (i) The learned trial judge erred in law in imposing the minimum mandatory sentences, in that the trial judge fell bound to impose the minimum mandatory sentences.
    (ii) The learned trial judge erred in law in imposing the minimum mandatory sentences of 10 years and 8 years, in that the mandatory sentences, breached the proportionality principle and /or the Appellant's right to fair hearing, in all the circumstances of the case.

    By way of relief the Appellant had sought that his sentences be reduced to 2 years for each offence and for his sentences to run concurrently.

6. In view of what is stated at paragraphs 3,4 and 5 above and having perused the Court brief we had this case mentioned on the 8th of August 2012 to inform Counsel for the Appellant and the Respondent that we would wish to hear submissions also on the convictions for cultivation and trafficking, acting under the provisions of rule 18(9) of the Seychelles Court of Appeal Rules 2005 which reads as follows:

    "Notwithstanding the foregoing provisions, the Court in deciding the appeal shall not be confined to the ground set forth by the Appellant.

    Provided that the Court shall not, if it allows the appeal rest its decision on any ground not set forth by the appellant unless the respondent has had sufficient opportunity of contesting the case on that ground."

7. According to the evidence PW 1, while on patrol with three other police officers, they had gone in the direction of the house of the Appellant, on some information received. The witness states that on seeing them approach, the Appellant who was about 300-400 meters away from them and at a higher elevation, had gone inside his house, taken some

green plant which they suspected to be cannabis and run away. When the police party approached the house there was another person outside the Appellant's house. They had searched him and found nothing with him. At this stage the Appellant had come back towards them and he too had been searched and the search did not reveal anything. Outside the Appellant's house the police party had seen 10 'kabos' (small black plastic pots for planting) out of which 8 had contained, according to PW1, 15 small green cannabis plants and 2 were empty. <u>According to PW 1 these plants were not analyzed, although produced in court as an exhibit.</u>

8. After they had discovered the 'kabos', PW 1 had gone in the direction from where the Appellant had come from, when the police party came to the Appellant's house. He along with another police officer had walked along a footpath where PW 1 claims, the Appellant's water hose was, and seen 5 big plants on the ground, which according to PW1 were cannabis plants. This was about 30 meters from the Appellant's house. PW 1 had been unable to state whether the plants were found on the Appellant's land. According to PW 1 they "were the plants we had seen him running with earlier on." When asked by the Prosecuting Counsel: "How did you know that these were the same plants?" his answer had been: "The path was right in the direction where we had seen him run and we could see that it was slippery and it looked freshly walked on because the same grass on the ground were flattened on the ground indicating that someone had just walked over it."(verbatim.) We find it hard to believe and almost improbable that PW 1 or anyone could have seen the Appellant running away with a green plant at a distance of 300-400 meters, and this despite some trees that obstructed his view. According to PW 1 when questioned about the 5 plants the Appellant had told them that they were for his own consumption. But the Appellant had denied this both in his statement made to the police and statement made from the dock. The police had not made any attempt to ascertain from where the 5 cannabis plants had been uprooted. There was no evidence before the Trial Court as to who had cultivated or where the 5 plants were cultivated. Even at its best, the admission alleged to have been made to PW 1 does not prove that it was the Appellant who had cultivated the 5 plants.

9. The Appellant had thereafter assisted them in searching his house. According to PW 1 "Whilst searching in his living room, under a table we found a piece of khaki paper containing some herbs in it. When I asked him again and he said that he used for his own consumption…"

10. Thereafter PW 1 had brought the exhibits seized, namely the 5 big plants and the herbal material found in a khaki paper inside the Appellant's house; to the Analyst with two separate Letters of Request. The Letter of Request pertaining to the 5 big plants describes

them as "Some leaves of herbal material…" The testimony of PW 1 pertaining to the 5 plants that were examined is noteworthy:

"Q. Why does it say to examine some leaves?
A. That is the procedure for cultivation cases, we do not take the whole plant to the doctor to be analyzed we usually take some leaf samples and take it to the analyst.
Q. Where did you take those leaves from?
A. I took some leaves from each of the plants I had seized.

When the Prosecution had sought to produce the two letters the Appellant had objected by stating: "My Lord I have the letters of request that he is talking about but there is none for the five plants or the plants in the 'kabos'. The 5 plants however had been photographed, brought to Court, and produced as exhibits. The Appellant had also in cross-examination of PW 1 had remarked that the photographs of the plants had not been done in his presence, to which PW 1 had agreed. The Appellant had also in his cross-examination of PW 1 raised the issue as to the certainty of the exhibits produced in Court as those seized from him and the likelihood of the exhibits being mixed up with other substances seized from others.

11. According to the Analyst the leaves examined by her were cannabis leaves from the main plant. We are of the view that in a prosecution for 'cultivation of cannabis plants' the entire plant should have been submitted to the analyst for examination and not merely the leaves from the plants. It is also clear from the testimony of PW 1 as referred to at paragraph 6 above, that the 15 plants found in the 'kabos' in the compound of the Appellant had not been analyzed. What had been analyzed are the leaves from the 5 big plants recovered from the land adjacent to the house of the Appellant and the herbal material found in a khaki paper inside the Appellant's house. The Respondent in his Heads of Argument has conceded that the charge on cultivation cannot be sustained. There is no evidence whatsoever that those 5 plants had been cultivated by the Appellant. Therefore the charge as to cultivation of drugs must necessarily fail and we quash the conviction on cultivation.

12. As regards the herbal material found in the living room of the Appellant there is no challenge to its analysis or the chain of evidence.

13. The police had also recovered Seychelles Rs 5,500, Euro 45 and USD 4 from underneath some clothes in the wardrobe in a bedroom of the house of the Appellant. The Learned Trial Judge in regard to this money had said in his judgment: "Apart from merely recovering money from the accused's bedroom and tendering same in court as an exhibit

no connection at all to this case was established and as such the said money (PE8) should immediately be returned to the accused." We do agree with this finding.

14. The Appellant in his statement to the police tendered to Court as part of the Prosecution case had said: "…..Police Officers picked up a piece of brown paper in the living room and they informed me that there are certain quantity of herbal materials in it, which they suspected as cannabis drugs. I wish to say to the Police that those herbal material they seized belongs to me, because I placed them there myself and the house is my own……while I was assisting the Police in my house, I noticed one amongst the officers come with some plants of cannabis drugs, coming from the forest. Regarding those plants of drugs, I have nothing to say and I wish to add that those small "cabooses" regarding the small plants of cannabis, which the police had seized on my compound belongs to me, because they were on my compound. I wish to point out that those materials of cannabis drug, which the police had seized and those plants of cannabis drugs, which had been seized in the cabooses I use them for my own consumption, such as making my tea with it, put it in the food to eat and use it for smoking." (verbatim and the underlining by us). Even according to the evidence of PW 1, as referred to at paragraph 8 above, the Appellant when questioned soon after the detection of the herbal material that were found in his living room, had said that he used them for his own consumption. There has thus been a consistency in his version.

15. We wish to state that the admission by the Appellant that those small "cabooses" regarding the small plants of cannabis, which the police had seized on my compound belongs to me, because they were on my compound does not amount to an admission as to cultivation. The position may have been slightly different had the 15 plants been found cultivated on the ground near the Appellant's house.

16. The Appellant in his dock statement had denied that he was trafficking in cannabis, that the 5 big plants seized were for him and that they were near his house.

17. The Learned Trial Judge in convicting the Appellant of the offence of trafficking had said: "There is just (sic) overwhelming evidence to prove that the accused was in exclusive possession of the drugs at his house and had control over it, which fact he does not deny but only states that the drugs were for his own consumption by way of putting same in his food and tea and smoking some of it. This possession is incriminating and therefore outlawed as it exceeds the prescribed limits by the relevant legislation yet the accused was well aware of the nature of drugs he kept in the house and also cultivated on his property. No evidence was led to rebut 'the presumption of trafficking' which leaves the evidence in support of count 2 standing unchallenged." (underlining by us).

18. The Appellant in this case was charged in count 2 for "…..trafficking in a controlled drug by virtue of having found (sic) in the (sic) possession of 42.9 grams of cannabis (Herbal material) which gives rise to the rebuttable presumption of having possessed the said controlled drug for the purpose of trafficking," contrary to section 5 of the Misuse of Drugs Act. Section 14 (d) states: "A person who is proved or presumed to have had in his possession more than 25 grammes of cannabis or cannabis resin, 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.

19. We are surprised to note that the Learned Trial Judge having quoted the Appellant of having said "that the drugs were for his own consumption by way of putting same in his food and tea and smoking some of it" , yet goes on to state that "No evidence was led to rebut 'the presumption of trafficking'" What the Appellant said is certainly evidence capable of rebutting the presumption and the Learned Trial Judge should necessarily have deliberated and pronounced upon it before convicting the Appellant of trafficking on the basis of the section 14 (d) presumption. His failure to do so makes the conviction of the Appellant for trafficking unsafe.

20. Section 26(2) of the Misuse of Drugs Act states: "Where a person is charged with an offence under section 5 (*trafficking*) and the court is of the opinion that he is not guilty of the offence but is guilty of an offence under section 6 (*possession*), the court may convict him of the offence under section 6 although he was not charged with the offence." (The words in italics, by us). We therefore quash the conviction of the Appellant for the offence of Trafficking and convict him of the offence of Possession in cannabis (herbal material) weighing 42.9 grams.

21. The offence of possession of more than 25 grammes of cannabis carries a minimum mandatory sentence of 5 years for the first offence as per column 7 of the Second Schedule. Section 29(3) of the Misuse of Drugs Act states: "In the case of a first offence in relation to section 6 the court may, if it considers that there are exceptional reasons for not imposing the minimum term of imprisonment specified in column 7 of the Second Schedule, impose such other term of imprisonment, as it thinks fit." We do not find on record any exceptional reasons for not imposing the minimum term of imprisonment specified in column 7 of the Second Schedule nor do we accept the argument by Counsel for the Appellant in his Heads of Argument, that the minimum sentence of 5 years that we have decided to impose on the Appellant in accordance with the Misuse of Drugs Act, breaches the proportionality principle and/or the Appellant's right to a fair hearing as expounded in the case of **Jean Fredrick Poonoo VS The Attorney General** SCA 38/2010; in view of all the circumstances of this case.

22. We impose the minimum mandatory sentence of 5 years on the Appellant for the offence of possession of cannabis (herbal material) weighing 42.9 grams. The period spent on remand before conviction and the sentence already served shall be counted as part of the sentence.

A.F. T. Fernando
Justice of Appeal

I agree

F. MacGregor
President, Court of Appeal

I agree

M. Twomey
Justice of Appeal

Dated this 31st day of August 2012, Victoria, Seychelles