

DORASAMY v R
(2013) SLR 57

Fernando, Twomey, Msoffe JJA

3 May 2013

CR SCA 05/2011

B Hoareau for the appellant

D Esparon for the respondent

The judgment of the Court was delivered by FERNANDO JA

[1] The appellant appeals against his conviction by the Supreme Court for the offence of possession of a controlled drug namely heroin. There is no appeal against sentence.

[2] The appellant was indicted before the Supreme Court for trafficking in a controlled drug by virtue of having been found in possession of 2.45 grams of heroin, which gives rise to the rebuttable presumption under s 14(c) of the Misuse of Drugs Act for having possessed the said controlled drug for the purpose of trafficking. The trial Judge had rightly come to the conclusion as the pure quantity of the heroin found in the 2.45 grams was 16% namely 0.392 grams, the appellant cannot be convicted on the basis of the presumption in s 14(c) for trafficking but only of possession of the said controlled drug.

[3] The appellant had in his grounds of appeal stated that the trial Judge had erred in law in holding that the prosecution has proved its case beyond a reasonable doubt as he failed to attach sufficient weight to the following items of evidence and facts, namely:

- i) that the appellant did not attempt to ride away from the NDEA officers despite having the opportunity to do so;
- ii) that it was the appellant who assisted the NDEA agents in the search of his motorbike;
- iii) that the motorbike was such that any person could have easily placed the drug under the seat without the appellant's knowledge as displayed during the examination of the motorbike;
- iv) that PW 2 Mickey Barbe, was not very forthcoming in respect of his answer regarding the phones he possessed and the phone calls he received around the time of the arrest of the appellant.

It has also been urged as a ground of appeal that the trial Judge erred in law in holding that the provisions of s 18 of the Misuse of Drugs Act apply to a motorbike.

[4] The grounds of appeal in a nutshell are set out the prosecution case. The

prosecution case is that on the day of the incident around 12.30 pm, the appellant had been riding a Yamaha black motorbike when three police officers from the National Drug Enforcement Agency (NDEA) who were on patrol in a rented car had intercepted the appellant and signaled him to stop his motorbike near Fresh Cuts. The appellant had cooperated when signaled to do so and one of the officers, PW 2, had conducted a body search on him wherein nothing illegal was found on him. The appellant had then been requested to ride his motorbike in front of the NDEA vehicle to the NDEA office. This was after he had been told that a search on the motorbike will be carried out at the NDEA office. The appellant had as instructed ridden his motorbike to the NDEA office followed by the NDEA car. As per the evidence of PW 2 the appellant had not at any point in time tried to get away from the NDEA car and had been very cooperative. At the NDEA office when conducting the search of the motorbike they had found a white tissue underneath the small back seat of the motorbike which had fallen down when removing the seat. The appellant had said that it was not his and that he did not know what it was when questioned about it. The small tissue contained a light brown powder that was wrapped in a foil and a small plastic. The substance, according to the Government Analyst, has been identified as "illicit heroin (Diacetylmorphine) with a purity of 16%". There is no challenge to the expertise of the Analyst, his analysis, or the chain of evidence. The appellant had assisted the officers in the search of his motorbike in advising them how to remove its seats. He had been "very calm and collected", but looked "a bit frustrated" when the motorbike was being searched.

[5] In the Report on Locus in Quo where the Court had examined the motorbike which was parked outside the NDEA Office the trial Judge had reported that the defence counsel had demonstrated that a person can place his hand underneath the back seat of the motorbike where the drugs were found, which the Judge accepts. This was to show that the drugs could have been placed under the seat by a third party. It is the appellant's position that someone had placed the drug underneath the seat of the motorbike and had tipped off the police that he was carrying drugs in his motorbike. This was the reason that the NDEA officers decided to carry out a search of the motorbike at the NDEA office after having done a body search of the appellant. D1, a record of phone calls received by PW 2, produced by the defence shows that PW 2 had received a call from a payphone at Market Street, 25 minutes before the appellant was intercepted by the police. Both NDEA officers who testified for the prosecution have categorically denied receiving any calls concerning the appellant on the day of the incident. PW 2 has however admitted that he did receive calls on his mobile that day but has no recollection of who the callers were.

[6] Thus the crux of the defence is to the effect that the behaviour of the appellant after his interception by the NDEA officers is not consistent with his guilt and there was a possibility of the drugs having been placed underneath the seat by a third party without the appellant's knowledge.

[7] The trial Judge has relied on the presumption relating to vehicles in s 18 of the Misuse of Drugs Act which reads as follows:

Where a controlled drug is found in a vehicle, vessel or aircraft, other than a

vessel or aircraft referred to in section 17, it shall be presumed, until the contrary is proved, that the drug is in the possession of the owner of the vehicle, vessel or aircraft and of the person in charge of the vehicle, vessel or aircraft for the time being.

Section 17 states:

Where a controlled drug is found in any vessel or aircraft arriving from any place outside Seychelles, it shall be presumed until the contrary is proved, that the drug has been imported in the vessel or aircraft with the knowledge of the master or captain of the vessel or aircraft.

Knowledge can be inferred from the manner of the concealment of the substance and the manner of its packaging. In the instant case the drugs were concealed underneath the seat of the motorbike and placed in a plastic that was both wrapped in a foil and tissue.

[8] Where a rebuttable presumption of law applies, on the proof or admission of a fact, referred to as a primary fact, and in the absence of further evidence, another fact, referred to as a presumed fact, is presumed. Once the prosecution has adduced sufficient evidence on that fact, the defence bears an evidential burden to adduce some evidence to rebut the presumed fact. The standard of proof to be met by the defence seeking to rebut the presumed fact is determined by the substantive law in relation to the presumption in question.

[9] The burden resting on an accused under s 18 is heavy. The words “until the contrary is proved” make it clear that the presumption has to be rebutted by proof and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted.

[10] In the instant case the appellant seeks to rebut the presumption by asking the Court to consider his behaviour after he was stopped by the police, namely that he cooperated with the police in the search of his body and motorbike and also assisted them in searching the motorbike. He also relies on the fact that there was a possibility of a third party introducing the drug underneath the seat of his motorbike without his knowledge. If we are to go along with the first argument of the appellant, all that a person apprehended with drugs need do is to put on a bold front and cooperate with the police in the search of his body or vehicle and claim when drugs are found that they have been planted. That will be a precedent wrought with many dangers which this Court is unwilling to set. As regards the appellant’s second argument, namely, the suggestion of the possibility of the drugs being planted without an iota of evidence for such a basis does not suffice. The appellant’s dock statement leaves no room for a court to even consider the possibility of the drugs having been planted by a third party. His statement is to the effect that he lives opposite the Mont Fleuri police station and that he had not moved out of his house on the day of his arrest, prior to his riding his motorbike taking

the road to Providence, where he was arrested shortly after leaving his house. Had there been any evidence as to where the motorbike was parked at his house prior to the appellant riding it that day, namely at a place where others could have access, when he last rode the motorbike prior to his arrest on 26 August 2009 and for how long it had been parked there prior to his riding it; there would have been some material for the Court to consider. The appellant does not come up with the name or of a possible motive for someone to falsely implicate him by planting drugs under the seat of his motor bike. We are conscious that in applying the presumption under s 18 we have to take into consideration all the pertinent circumstances that may cast doubt on the guilt of the accused but the behaviour of the appellant after he was stopped by the NDEA officers and his argument that it was possible for a third party to slip the drugs under the seat of his motorbike alone does not suffice.

[11] We do not attach any significance to the phone call received by PW 2 from a payphone at Market Street, 25 minutes before the appellant was intercepted by the Police, as both NDEA officers who testified for the prosecution have categorically denied receiving any calls concerning the appellant on the day of the incident.

[12] We see absolutely no merit in the appellant's argument that s 18 of the Misuse of Drugs Act referred to at paragraph [7] above, does not apply to motorbikes. In *Blacks Law Dictionary* (9th Ed, 2009), 'vehicle' is defined as "an instrument of transportation or conveyance...." Under s 2 of the Road Transport Act (Cap 206):

"Vehicle" means any kind of wheel transport propelled or drawn by mechanical power, animal or persons and used or intended to be used for the conveyance of goods or persons on any road, and includes a rickshaw, a bicycle and a tricycle.

[13] We therefore dismiss the appeal.

[14] We wish to however bring to the notice of the Attorney-General that in the future in drafting an indictment in a case of this nature reference should be made to s 18 of the Misuse of Drugs Act in the statement of offence, in view of the fact that the drugs were found in the vehicle and not on the appellant's person. This becomes necessary in view of the provisions of art 19(2)(b) of the Constitution which states that "Every person who is charged with an offence shall be informed at the time the person is charged or as soon as is reasonably practicable, in, as far as is practicable, a language the person understands and in detail, of the nature of the offence." Since the appellant had not made this a ground of his appeal and also failed to place any arguments before us after the said omission in the indictment was brought to the attention of his counsel at the hearing of the appeal, we are satisfied that no prejudice had been caused to him as a result of the failure to refer to s 18. We are therefore of the view that this omission has not occasioned a failure of justice.