Valentin v R

(2013) SLR 659

Domah, Fernando, Msoffe JJA

6 December 2013 SCA 19/2011

Counsel N Gabriel for the appellant

V Benjamin, Asst Principal State Counsel, for the respondent

The judgment of the Court was delivered by

FERNANDO JA

[1] This is an appeal against a conviction for trafficking in a controlled drug, namely 100.7 grams of cannabis (herbal material) on the basis of the s 14(d) presumption in the Misuse of Drugs Act and the sentence of eight years imposed on such conviction. As per the formal charge the appellant on 4 November 2010, at Anse Aux Pins, was found in possession of 100.7 grams of cannabis (herbal material).

[2] The grounds of appeal are as follows:

a) The trial Judge erred on the evidence in not attaching great weight to the inconsistencies of the prosecution witnesses.

b) The trial Judge erred on the evidence in not attaching sufficient weight to the fact that the appellant's pocket

was not large enough to hold the packet containing drugs.

c) The trial Judge failed to objectively evaluate the evidence and failed to exercise his mind to the possibility that the drugs were found on the ground and not in the hand of the Appellant.

d) The sentence of eight years is manifestly harsh and excessive.

[3] According to the evidence of the two prosecution witnesses, PW1 and PW2, from the National Drug Enforcement Agency (NDEA), who were involved in the arrest of the appellant with the drugs in his hand, they were on patrol duty with other police officers at Anse Aux Pins around 10 pm when they saw the appellant walking along the Capuchin secondary road. On bringing their vehicle to a halt next to the appellant, the police officers had identified themselves as NDEA officers and said that they were going to carry out a search on him. The appellant had then taken to his heels. The two police officers had then given chase behind the appellant. From the lights from the jeep and a torch one of the police officers was carrying they had seen the appellant removing a blue coloured plastic bag from his right side trouser (shorts) pocket, while still on the road. The appellant had then jumped over a small wall by the side of the road and fallen into the gutter. One of the police officers had then jumped on the appellant and arrested him after informing him of his rights. The plastic bag was in the right hand of the appellant when he was handcuffed. On opening the plastic bag the police found that it contained some herbal material which they suspected to be drugs. The police had on their way to the NDEA taken the appellant to the hospital as the appellant had sustained

some bruises when he fell into the gutter and in the process of being arrested. The appellant had refused to be examined by a doctor.

[4] In his skeleton heads of argument the appellant in relation to ground (a) has listed the inconsistencies in the evidence of PW 1 and PW 2 with regard to their police statements and between them as follows:

a) *PW 1 has not mentioned in his statement about the appellant jumping over a wall before he fell into the gutter*. However in court he had stated that it was a little wall and that he did not consider it important to mention it in his statement and his evidence to court was more detailed. The trial Judge in dealing with this matter in his judgment had stated:

> Agent Charles stated that the wall was a small wall which you usually get on either side of a public road and it is apparent by his description that it is more like a ledge rather than a tall boundary wall. I cannot come to a conclusion that the witness evidence should be disbelieved merely because he has failed to mention same in his statement and proceed to accept the explanation given by him.

b) *The discrepancy as to how many police officers were in the vehicle when they accosted the appellant on the road*. Here the matter being contested by counsel appellant is that in answer to one of his questions both PW 1 & PW 2 had failed to mention the presence of a fourth police office in the vehicle. But it is clear that both these witnesses had referred to the presence of four police officers in the vehicle in their examination-in-chief.

> Counsel for the appellant has not pointed out to us how these inconsistencies, even if they are to be treated as such, cast a doubt on the prosecution case.

[5] The quotation cited by counsel for the appellant from *Beeharry v R* (2010) SLR 470 goes against his submission as regards inconsistencies, namely in that case this Court stated:

> In all criminal cases discrepancies in the evidence of witnesses are bound to occur. The lapse of memory over time coloured by experiences of witnesses may lead to inconsistencies, contradictions or embellishments. The Court however on many occasions is called upon to assess whether such discrepancies affect the very core of the Prosecution case; whether they create a doubt as to the truthfulness of the witnesses and amount to a failure by the prosecution to discharge its legal burden.

[6] Counsel for the defence at the hearing of the appeal conceded that the above-mentioned inconsistencies did not "affect the very core of the Prosecution case". Counsel should refrain from coming up with such frivolous arguments.

[7] In relation to grounds (b) and (c) we wish to state that it had been suggested under cross-examination to one of the prosecution witnesses that the blue plastic bag was behind the wall where the appellant was arrested. It was also suggested by the defence that the bag containing the herbal material could not have been pulled out from the pocket of a pair of shorts as it was too big to be put into the pocket of a pair of shorts. The trial Judge in dealing with this suggestion had stated in his judgment:

> Agent Ricky Charles testified even though it was a pair of shorts the pockets were the size of the trouser he was wearing and proceeded to clearly demonstrate how it could be put in and be pulled out from the pocket when the packet was folded.

[8] We also take note that the appellant was in possession of 'herbal materials and seeds' and not a solid substance like cannabis resin. The trial Judge had gone on to state that "the corroborated evidence of the prosecution which was tested by cross examination far outweighs the evidence contained in the unsworn statement of the accused…". We are not prepared to disturb these findings of fact which the trial Judge had reached having had the benefit of seeing the demeanour of the prosecution witness before the trial court.

[9] The appellant in his dock statement had said:

> On that day whilst I was coming from the shop I came purchasing some goods from Marc Didon on the Anse Aux Pins road, upon going down a red vehicle stopped next to me and I ran and jumped on the side of the road I felt something hit me in the head … and they put me in … the vehicle and they took me and went to another road at Anse Aux Pins at Chetty Flat. … Then they brought me to the hospital and I refuse to see the doctor and they took me to the NDEA base …
>
> [Verbatim]

[10] The appellant had not stated that the drugs were found on the ground and not in his hand nor had he spoken of a possibility of the drugs being found on the ground. The appellant by his dock statement had corroborated the evidence of PW 1 and PW 2 as to the

manner he was accosted by the police and his arrest. We therefore dismiss grounds (b) and (c) of appeal.

[11] The drugs seized from the appellant had been kept in the custody of PW1 who had taken it to the Government Analyst for purposes of analysis on 16 November 2010. PW 1 had testified that from the moment of the seizure of the drugs up to the time it was handed over to the Analyst it was in his custody and no one could have had access to it. At the police station it was in a locker where PW1 alone had the key to it. We are satisfied that there are no doubts in regard to the chain of evidence, the expertise of the Analyst and the analysis of the drugs as cannabis herbal material. There was also no challenge by the appellant to the chain of evidence.

[12] The trial Judge in imposing the minimum mandatory sentence of eight years had taken into consideration that the appellant is "a first offender and that he is a familied individual who has come up the hard way in life as he has been an orphan at a young age". His counsel before the Supreme Court had pleaded for the court to "consider the minimum that is provided under the Misuse of Drugs Act which is 8 years". We do not find on record any exceptional reasons for the trial Judge not to have imposed the minimum mandatory term of imprisonment. We are also of the view that the sentence imposed does not breach the proportionality principle and/or the appellant's right to a fair hearing as expounded in the case of *Poonoo v Attorney-General* (2011) SLR 423, in view of the facts and circumstances of this case.

[13] We therefore have no hesitation in dismissing the appeal both on conviction and sentence.