

IN THE COURT OF APPEAL OF SEYCHELLES

ROBERT PASSENGI

APPELLANT

VS

THE REPUBLIC

RESPONDENT

SCA 12 of 2013

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Counsel: Mr N. Gabriel for the Appellants.
Mr A.Subramaniam, Assistant Principal State Counsel for the
Respondent

Date of hearing: 5th August 2014

Date of judgment: 14th August 2014

JUDGMENT

TWOMEY, MATHILDA.,

[1]. The appellant was charged with the offence of trafficking of controlled drugs contrary to section 5 as read with section 26(1) (a) of the Misuse of Drugs Act 1995. The prosecution's case was that on September 1 2007 the appellant was found in possession of 478.4 grams of cannabis resin giving rise to a rebuttable presumption that the accused possessed the same for the purpose of trafficking.

[2]. At the trial, evidence was led on behalf of the prosecution that two police officers, namely Police Constable Mathiot and Lance Corporal Labiche, saw the appellant, who had a blue object in his right hand, run into the Octopus Diving Centre as soon as he had sighted them approaching. Mathiot also testified that he saw the appellant put the package in a cupboard in the diving centre. Three other witnesses were called by the prosecution, the state analyst, Dr. Jakaria, who confirmed that the substance in the package was cannabis resin; Mr. Florent Lebian, the owner of the diving centre, who testified that the appellant was known to him, that although he was not an employee of the centre, he had access to the premises where he was allowed to store his boat engine and Lance Corporal Port Louis who took a statement from the appellant.

[3]. The appellant neither testified nor called any witnesses. His statement under caution was admitted in evidence without any objection. In that statement he states that he was asked by an employee of the centre to keep an eye on the place while she went to the shop. He states that on her return from the shop, the following events took place:

“a policemen called and asked me to come and he told me that he was going to conduct a search on me and whatever he found inside the Octopus Diving Centre I will (sic) be responsible. I told him no. I told the police officers that I don't know anything, I'm not responsible. A French man who was in charge came in. The police told me to sit outside. Then the police went inside the Octopus Diving Centre and searched. I saw a police officer came (sic) outside with a slab of hashish and told me that this is mine. I told the police officer that it isn't mine and the police officers insisted that it is mine...”(verbatim extract of statement of appellant dated 1 September 2007).

[4]. The trial judge in his decision of 5 April 2013 stated that he was fully satisfied that the prosecution had proved all the elements of the offence beyond a reasonable doubt and convicted the accused as charged. The appellant's court appointed legal aid counsel, Mr. Frank Elizabeth, was not present at much of the trial including the sitting at which the judgement was delivered. After judgement had been delivered and before sentence was passed, the appellant's present counsel, Mr. Nichol Gabriel, who was present in court on that day, commendably stepped forward as an officer of the court and after permission mitigated on behalf of the appellant before sentence was passed. The trial judge imposed the minimum sentence of 8 years imprisonment.

[5]. The appellant has now appealed against both this conviction and sentence. He has filed eight grounds of appeal which we have paraphrased as follows:

1. The learned judge erred in law and fact in convicting him of the charge of trafficking on insufficient and uncorroborated evidence.
2. The learned judge was biased and selective in accepting parts of the evidence against the appellant and ignoring those that were exculpatory.
3. The learned judge misdirected himself in making a finding that the appellant had assumed control of the cupboard and especially the plastic in which the drug was found.
4. The learned judge erred in law and fact in making a finding that the appellant had exclusive possession of the controlled drugs.
5. The learned judge erred in law and in fact in failing to give judicious consideration to the defence version that controlled drugs may have been planted by Mr. Lebian, the owner of the Octopus Diving Centre.
6. The learned Judge erred in law and in fact in failing to find special circumstances that would have resulted in the manifestly harsh sentence and minimum mandatory sentence not being imposed.
7. The learned judge erred in law and in fact in not giving any consideration to the fact that the appellant is a disabled person.
8. The learned judge erred in failing to order remission of the sentence of the appellant.

[6] Learned Counsel for the appellant, Mr. Gabriel has submitted that there was insufficient or uncorroborated evidence on which to find a conviction. He has pointed to a number of inconsistencies in the evidence given by the two police officers who apprehended the appellant. These refer to the inconsistency between the evidence of PC Mathiot when he stated that the wrapped packet of hashish was on top of plastic bottles of water in the cupboard and the evidence of Lance Corporal Labiche that the drug was found in a compartment under the drawer where the plastic water bottles were kept. Similarly he pointed to the inconsistency in their evidence in relation to whether the appellant actually stated that the drug was in the plastic bag.

[7]. We are unable to agree with him that these are material inconsistencies. We bear in mind that the incident happened on 1 September 2007 and that the two police officers were called to give evidence on 16 July 2009 and 18 January 2012 respectively. We cannot disregard the effect of the passage of time (2 years in one case and 4 ½ years in another) on their ability to recall events that took place such a long time ago with great accuracy. If anything, the small discrepancies point to the veracity of their testimony. We would have been more concerned if they recounted the incidents in the exact same way. In any case we do not regard the inconsistencies as material. The two police officers observed the appellant running after he had sighted them on patrol in the vicinity of Cote d'Or beach, Praslin. Both police officers also observed the appellant with a blue object in his hand. The both saw him enter the Octopus Diving Centre with the blue object in his hand. Lance Corporal Labiche was not cross-examined at all on any of these issues. Nor was any evidence tendered by the appellant to contradict the evidence of the police officers.

[8]. Similarly, Mr. Lebian was not cross-examined by the appellant. That being the case the rule in *Browne v Dunn* (1893) 6 R. 67 has direct application, namely, that if the only evidence on a material fact in issue in the case emanates from a particular witness, the failure to cross examine such a witness may amount to a tacit acceptance of the evidence of such witness on such material fact. Lord Morris put it as follows:

"...the witnesses having given their testimony, and not having being cross-examined, having deposed to a state of facts which is quite reconcilable with the rest of the case...it was impossible for the plaintiff to ask the jury at trial, and it is impossible of him to ask any legal tribunal, to say that these witnesses are not be credited." (p. 79).

A decision not to cross examine a witness at all or on a particular point is tantamount to an acceptance of the unchallenged evidence as accurate unless the testimony of the witness is incredible. We cannot exclude undisputed facts (see *Wood Green Crown Court exparte Taylor* [1955] Crim L. R. 873.)

[9]. Further, learned counsel for the accused in the course of cross-examining a different witness (PC Mathiot) presented the defence that Mr. Lebian was a drug trafficker who had offered or given money to the police officers to presumably say that the drug found was the appellant's. Hence, defence of a set up was raised but no evidence was adduced to substantiate it. We are therefore unable to find any substance to the defence of 'planting' by Mr. Lebian. In any case we fail to understand how such a defence could counter the unchallenged testimony of the police officers, or how it could be argued that the evidence

against the appellant was insufficient or uncorroborated. We therefore find no substance in grounds 1 and 5 of the appeal.

[10]. We are aware that the appellant's counsel failed to turn up, leaving the appellant to fend for himself at crucial times of the trial, most noticeably when both LC Labiche and Mr. Lebian were testifying. It may well have been the reason why these two witnesses were not cross-examined properly or at all despite the coaxing of the appellant by the trial judge. The failure of counsel to provide a proper defence for the appellant or that the appellant was denied a fair trial in that his representation was defective is not canvassed before us. We cannot therefore consider the matter except to point out that we find this state of affairs deplorable and that we will report this matter to the Chief Justice who may take appropriate action under the Legal Practitioners' Act 2013.

[11]. The second ground of appeal to the effect that the trial judge is biased against the appellant is also without foundation. We are of the view that he came to his decision on the uncontroverted evidence adduced by the prosecution. We are unable to find instances of bias.

[12]. We consider grounds 3 and 4 together as they relate to the concept of possession. Possession is not defined in the Misuse of Drugs Act. There is no need however to refer to English cases where the concept has been defined as there is rich and copious jurisprudence on the matter in our own jurisdiction. In R v Albert (1997) SLR 27, the Supreme Court stated that possession of a controlled drug may be established through a continuous act that either involves physical custody or the exercise of control. R v Marengo (2004) SLR 116 clarified that a person has possession of whatever is to their own knowledge physically in their custody or under their physical control. In R v Laira (2008) unreported SC 16/2008, Gaswaga J stated that

“possession which incriminates must have certain characteristics. The possessor must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it. Without these characteristics possession raises no presumption of mens rea. Without mens rea possession cannot be criminal except in certain cases created by statute.”

Noel v R (1992) SLR 152 established the principle that when drugs are found in a house in which there are several occupants, it has to be proved beyond reasonable doubt that the person charged was in exclusive possession of them.

[13]. It makes logical sense to state that there is both a factual and a mental element to possession. The factual element involves the control of the drug – hence, the drug might be in someone else's handbag or cupboard but if it was placed there by the accused person, then it is the accused person who has effective control of it although the owner of the handbag or cupboard has custody of it. The mental element is of course, that of knowledge. It is knowledge that the item is a controlled drug.

[14]. In the present appeal, the appellant has made the argument that there was no evidence that the appellant had assumed control of the cupboard and especially the blue plastic bag in which the drug was found. He has also claimed that the appellant did not have exclusive possession of the drug as it was found in premises not owned by himself. We are

unable to agree with him. He was seen with a blue item in his hand by two witnesses. He was seen entering the dive centre with the blue item in his hand. He was seen placing the blue item in the cupboard. He was seen outside the dive centre without the blue item. The blue item was found in a cupboard in the centre. It was therefore a logical inference that he had control of the blue item despite the fact that the cupboard and the dive centre did not belong to him. There is a direct link between the blue item that was seen in his hand and the drug contained in a blue plastic bag that was discovered in the premises.

[15]. *R v Accouche* (1982) SLR 120 established that knowledge could be inferred from the facts of the case. In this case, knowledge that the contents of the blue packet were drugs is evidenced by the flight of the appellant as soon as he sighted the police officers and also, as pointed out by the trial judge, evidenced by his statement immediately afterwards that “the police officer came outside with a slab of hashish.” Much was made of the physical disability of the appellant. A medical certificate produced states that he has *arthrogryposis multiplex congenita* but it neither states that he cannot walk or run. We observed the appellant walking in the court room unassisted. It is not contested that he can walk or run. It may well be that he walks or run in a different manner to able bodied persons. The evidence of the two police officers as to the fact that he ran a short distance of ten metres remains uncontroverted. Grounds 3 and 4 therefore have no merit and are rejected.

[16]. The remainder of the grounds relate to sentence and we consider them together. The offence of possession of more than 25 grammes of cannabis resin, a Class B drug when in this form, carried a minimum mandatory sentence of 8 years for the first offence as per column 7 of the Second Schedule when the appellant was charged in 2007. 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.”

Counsel for the appellant has argued that there were exceptional reasons for not imposing the minimum term of imprisonment as specified in column 7 of the Second Schedule. He has argued that the trial judge did not take into account the appellant’s disability. We do not agree. It is undeniable that the appellant is disabled but his physical disability neither prevented him from committing the offence or influenced him to commit the offence. We resist the attempt by the appellant to use his disability as a crutch to escape the penalty for his actions. This was not a case of being caught with a trifling amount of drugs. As the appellant pointed out himself this was a ‘slab of hashish’, over a pound’s worth in weight. The minimum sentence imposed, given the quantity of the drug, was if anything lenient compared to similar cases. The sentence, in our view, also does not breach the proportionality principles as expounded in *Poonoo v AG* (2011) SLR 423.

[17]. The appellant has argued that the trial judge should have ordered that the appellant’s sentence be subject to remission for good behaviour. Remission of sentences in cases of drug offences was removed by section 2 of the Prisons Amendment Act 2008. The constitutionality of the amending legislation was challenged (*Bouchereau & Anor v Superintendent of Prisons & Anor* (2013) unreported SCC 1 and 2/2013) but was rejected by the Constitutional Court which found that the differentiation of persons convicted of

offences under the Misuse of Drugs Act and those other persons committing less serious offences is reasonable and not discriminatory in nature as the objective of the amendment is to serve as a deterrent to persons dealing in drugs. The learned Chief Justice in *Bouchereau* added:

“It was decided in the case of Roy Bradburn & Anor v The Superintendent of Prison & Anor CC No 9 of 2010 that remission was not a penalty. Penalty is a punishment as envisaged under Chapter VI of the Penal Code, whilst remission is a concession as an incentive for good behaviour. Further remission is not an absolute right.”

We fully agree with this view. There cannot be an expectation of being entitled to remission of a sentence when one commits an offence. Further, remission cannot be granted prospectively. It is an exercise carried out by the prison authorities, which is no longer applicable in the case of sentences relating to drug offences. The argument that the amendment to the Prison Act was not in force at the time of the commission of the offence and could have resulted in the award of remission on the sentence prospectively by the trial judge is therefore devoid of merit.

[18]. Finally, we have to consider whether the fact that one is disabled should militate against the imposition of a custodial sentence. The appellant has produced a doctor’s report which indicates that he is congenitally physically handicapped with deformed arms and legs necessitating assistance with daily activities. Nothing indicates that this precludes the imposition of a prison sentence. We can opine that he should be accorded humane facilities adapted to meet his needs. If these facilities are not available or if their absence impinge adversely on the appellant, it is open to him to bring a case before the court indicating that his basic constitutional rights are not being met whilst in prison. At the end of the day, in terms of this case, the argument should be to have an adapted unit to meet his needs not that he should be spared prison or punishment for his actions.

[19]. For these reasons the appeal is dismissed in its entirety.

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A. FERNANDO	M. TWOMEY	J. MSOFFE
JUSTICE OF APPEAL	JUSTICE OF APPEAL	JUSTICE OF APPEAL

Dated this 14th August 2014, Ile du Port, Mahé, Seychelles.