**IN THE COURT OF APPEAL OF SEYCHELLES**

Haron Ordicho Sagwe **APPELLANT**

VS

The Republic **RESPONDENT**

**CR SCA No: 03/2012**

BEFORE: Fernando, Twomey, Msoffe, JJA

Counsel: Mr. Nicole Gabriel for the Appellant
Mr. Kumar, for the Respondent

Date of Hearing: 31st March 2014
Date of Judgment: 11th April 2014

**JUDGMENT**

**A. F. T. FERNANDO. JA**

1. The Appellant appeals against his conviction by the Supreme Court for trafficking in a controlled drug namely, Heroin on the basis of the section 14(c) presumption. As per the particulars of offence the Appellant on the 27th of June 2011 at the Casualty of the Seychelles

Hospital was found in possession of 295.1 grams the total of which contained 155 grams of pure Heroin (Diamorphine).

2. The Appellant had been acquitted of the charge of aiding and abetting Leah Wanjiru Kungu, (referred to as 'Leah' later in the judgment for purposes of convenience) on the 26th of June 2011, in the importation of the drug referred to in paragraph 1 above at the Seychelles International Airport by the Supreme Court. The reasons given by the Learned Trial Judge for the acquittal is that "the accused (Appellant) was never in direct contact with Leah W.Kungu who was receiving her instructions from a person in Kenya." 'Leah' had pleaded guilty to the charge of importation of the said drug and had been convicted on the basis of her plea and sentenced to a period of 10 years. 'Leah' had not testified at the trial against the Appellant.

3. 'Leah' had arrived at the Seychelles International airport in the afternoon of the 26th of June 2011 on a Kenya Airways flight KQ 450 from Nairobi. On a search of her person 30 silvery colour capsules had been found concealed inside a pink and white handkerchief. The said capsules had consisted of a substance of 295.1 grams containing 155 grams of heroin according to the Forensic Analyst. There is no challenge to the analysis of the drugs or the chain of evidence, save the allegation that the exhibits were all marked as "recovered from one 'Leah Wanjiru Kungu' and not the Appellant..."

4. After the detection of 'Leah' at the airport, steps had been taken by the authorities to make arrangements, with the agreement of 'Leah', for a 'controlled delivery' of the drugs with the view to arresting the one expected to take delivery in Seychelles of the substance. 'Leah' was instructed to act according to the instructions given to her by her counterpart in Kenya. She had thus proceeded to Berjaya Hotel Beau Vallon in a vehicle as previously arranged by her Kenyan counterpart. There is no evidence placed before the court as to the persons

involved in making these arrangements or of the vehicle she travelled in or of what happened during her travel from the airport to Berjaya hotel.

5. On reaching the Berjaya hotel, 'Leah' had contacted her counterpart in Nairobi. 'Leah's conversation with her Nairobi counterpart had been in 'Kiswahili' and what was before the trial court is a translation of that conversation given by 'Leah' to the police witness who testified before the court. It had been the testimony of the police witness who testified before the court that 'Leah' had told her that her counterpart had been worried that she had been arrested at the airport and had been praying for her.

6. 'Leah' had checked into a room at Berjaya hotel and two officers of the National Drug Enforcement Agency (NDEA) had been with her in the same room throughout her stay there. We are surprised of this arrangement made by the NDEA, as this undoubtedly would have raised suspicion in the minds of any local counterpart expecting to take delivery of the substances from 'Leah' and following her movements. The following day, namely on the 27th of June 'Leah' continued to be in contact with her Kenyan counterpart in 'Kiswahili' who continuously instructed 'Leah' as to what she should do. What is before court pertaining to these conversations is the testimony of NDEA officers of what 'Leah' had allegedly told them after translating what she had been told in 'kiswahili'. The translation was by 'Leah' herself. There was no record made of these conversations or any attempt made to check the accuracy of the translations made by 'Leah'.

7. As per the evidence before the Court 'Leah' had been instructed to move to a nearby hotel, namely 'Cocodor' without checking out of Berjaya hotel. The controlled delivery in which one would expect to see 'Leah' playing the role of protagonist had then taken a very

strange and unprecedented twist when Agent Belle, an Officer from NDEA had decided to play the role of 'Leah'. There is no evidence before the Court as to any resemblance of agent Belle to 'Leah' or any comment by the learned trial judge in respect of this. There is also no specific evidence that agent Belle resembled a Kenyan. Agent Belle had checked into Cocodor hotel with 'Leah's passport, leaving room for further suspicion for anyone who was waiting to get in contact with 'Leah'. 'Leah' who continued to stay at Berjaya hotel had then been instructed to take a bus and proceed to the Catholic church in Victoria and to keep praying until a 'fat lady' was to meet and retrieve the substances from her. Agent Belle was conveyed this information and she had then proceeded to the Catholic church in Victoria. 'Leah' had then been instructed to move out of church and proceed to the 'Yellow Roof' section of the Victoria hospital in Mont-Fleuri, where a 'Fat Lady' would meet her to take delivery of the substances. 'Leah' had also been asked to describe the clothes she was wearing, which she had done. This information had been conveyed to agent Belle who acted on such instructions. 'Leah' had then got further instructions to move from the 'Yellow Roof' and proceed to the 'Casualty Department', where a man wearing a pair of brown shoes would come to meet her to get the parcel. She had been instructed to speak to the man in 'Swahili'. This information was again conveyed to agent Belle who acted on such instructions. All instructions to agent Belle came via an NDEA officer called Nicette, with whom the NDEA officer who was with 'Leah' at Berjaya hotel had been communicating, of what 'Leah' was telling her. As mentioned 'Leah' was never called and Nicette had passed away before the trial commenced. We are surprised how this double-hearsay evidence came to be admitted by the Court.

8. It had been the evidence of agent Belle, the main witness for the prosecution, that when she was seated at the 'Casualty Department' of the Victoria hospital the Appellant had come inside, looked at her

then gone outside to take a phone call. He had then returned shortly, sat beside her and asked her whether she was 'Leah'. She had answered in the affirmative and then the Appellant had spoken to her in a language that she could not understand. When Belle asked the Appellant if he can speak in English, he again had spoken to her in a foreign language that she could not understand.According to Belle the Appellant had asked her for a second time whether she was 'Leah' and no sooner she said "Yes", the Appellant had told her in English that he had come to collect his items. The Appellant had then told her to move to another area in the corner of the room. Having moved to another area the Appellant had insisted that that he be given the items in a hurry. Agent Belle had then opened her handbag taken out the red plastic bag which contained the 30 silver coloured pellets enwrapped in the handkerchief. According to Belle she had handed over the plastic bag to the Appellant who had opened it, looked inside, said OK and then left. She then goes on to say: "When he left, I also stood up and I followed him. When we were outside the casualty, he started to run I shouted police. When I shouted police, he turned and looked at me and then I grabbed hold of him. He started to struggle……..and escaped. When he started running he threw down the red plastic on the ground." She had then picked up the plastic bag and entered the hospital.

9. Despite this being somewhat of a 'Trap case' there is no witness to corroborate the evidence of Agent Belle in relation to her testimony from the stage of the Appellant approaching her and the Appellant taking to his heals. No one had heard the conversation between agent Belle and the Appellant and agent Belle would not be in a position to say what the Appellant told her in the language she claimed she could not understand.

10. The challenge to her testimony comes from the Appellant by his dock statement. According to the Appellant he had been working as a Teacher in the Seychelles since 10 years prior to his arrest and no police complaints have ever been recorded against him. He had also been the Chairman of the Kenyan Association looking after the interests of the Kenyans here as Kenya does not have an Embassy or a Consulate in the Seychelles. On the day of his detection he had taught 8 periods at the Pointe Larue school where he was then working. After school had ended, he had received a call from a lady called 'Monica' from Kenya, who was personally known to him. She is married to a Seychellois and was a business woman, who earlier had a shop in the Seychelles. Monica had told the Appellant that a Kenyan woman who had come to the Seychelles on a visit had fallen ill and was at the Victoria hospital and requested his assistance. Monica had told him that the woman was at the Casualty. The time had been around 3 pm. The Appellant had got a lift up to the hospital in a car belonging to one of the parents of a student of the school. While proceeding towards the hospital Monica had called again and given a description of the clothing the Kenyan woman was wearing and requested the Appellant to give a description of his clothing to be conveyed to the Kenyan lady so that the two of them could identify each other. On reaching the Victoria hospital he had assisted another friend of his who wanted to borrow SR 100 from him. When he was about to enter the Casualty, Monica had called the Appellant again to find out whether he had seen the Kenyan lady. By that time he had identified a person by the description of the clothing earlier given to him by Monica. He had then greeted the lady, (whom he did not know was agent Belle, pretending to be 'Leah'), in Swahili and said that he was sorry about her being sick. The Appellant had also been told by Monica that that the lady would have some items to give him. When he mentioned the word 'items" the lady stood up, moved close to the door and removed a plastic bag. When he tried to get hold of the plastic bag, the lady had held him by the shirt and

taken a pistol and said she was from the NDEA and was going to arrest him. He had then managed to release himself from her grip and run out of the hospital jumping off a window and escaped through the Botanical gardens which is adjacent to the hospital. In the process he had dropped his mobile phone in the hospital which was later picked up and produced as an exhibit in this case. Reaching his home he had tried to call Monica to find out what she had done to him, but failed to make contact with her. Up to the date of his testimony in Court he had failed to contact Monica. The next day he had reported for work at the Pointe Larue School when officers from the NDEA had arrested him.

11. A Court of Appeal is generally reluctant to disturb the finding of a Trial Judge on the credibility he has attached to witness testimony. It only interferes when the inferences drawn by the Trial Judge from witness testimony is found to be faulty. But where a reasonable doubt arises as to the probability of a version given by the witness in view of the attendant circumstances of a given case an appellate court should not hesitate to ascertain whether that casts a doubt on the guilt of the convict. In the case of **Akbar VS R (SCA 5/1998)** this Court stated that an appellate court will accept findings of facts that are supported by the evidence believed by the trial court unless the trial judge's findings of credibility are perverse. In **Beeharry VS The Republic (SCA 28/2009),** this Court took the view that while an appellate court will not generally interfere in the perceptive function of the judge, it could exercise its evaluative function, as well as the trial judge. One such question that arises in this case is,would the Appellant had continued to talk to agent Belle in english and gone ahead as claimed by agent Belle, to ask for the 'items', which he had knowledge were dangerous drugs, when it was clear to him that Belle did not understand Swahili? Or is it possible that he was simply acting on the instructions that he had received a few hours before from 'Monica' without giving any thought to what he was doing and with

the sole intention of helping out a fellow Kenyan who was said to be sick? Again Belle's testimony, that the Appellant who had walked up to her at the Casualty, taken possession of the parcel having examined its contents, walked out of the Casualty without any commotion, had suddenly started to run when he got out of the Casualty, even before she shouted out police or had identified herself as an NDEA officer, casts a serious doubt as to the probability of her version on this matter as being truthful. The same can be said in regard to her evidence that the Appellant who had started to run, even before she shouted police; had turned to look at her, when she shouted police. This is more so, as there is no corroboration of agent Belle's evidence on these matters, and is challenged by the Appellant both in his police statement and dock statement.

12. There is no evidence to suggest that the Appellant knew of the arrival of 'Leah' in the Seychelles, the day previous to his arrest, namely on the 26th of June 2011 or of any of the happenings thereafter until he received his call from Monica about 2 hours before the incident at the Casualty. The Appellant's uncontroverted testimony that he had taught 8 periods that day, gone to the hospital at the request of Monica, helped out another friend of his, before entering the Casualty, is not indicative of the behavior of a person who was preparing to commit a serious offence and thus casts a doubt as to whether he had knowledge of the contents of the parcel he was going to collect from 'Leah'.

13. On the issue of 'knowledge' of the contents of the parcel the sole evidence of agent Belle is to the effect that "I opened my handbag, I took out the red plastic bag and in that there was the handkerchief that had the 30 silver coloured pellets, the handkerchief was partly opened because the fact that I put in my handbag and there were few pellets that had fallen in the red plastic. I took out the plastic, handed over to the man; he opened it, looked inside, he said okay,

he stood up and then he left." According to agent Belle the time she transacted with the person was "very short". Two doubts arise on this testimony. Firstly whether a person who had come specifically to collect a parcel which he knew to be drugs; and in a hurry as claimed by agent Belle to get away, would care to open the parcel, look inside and say OK, before he leaves. We are conscious of attempts by investigators to bolster their cases by supplementing facts to prove knowledge, but when such attempts conflicts with reason the prosecution case is put in serious doubt. Secondly even if we go along with the prosecution version that the Appellant opened the plastic bag and looked inside, it cannot be safely said that in the admittedly shortness of time attributed to the whole transaction, the Appellant could have made out from the partly opened handkerchief and the few pellets that had fallen inside the red plastic, that he was taking over a parcel containing drugs. For according to the Appellant he had been asked by Monica to collect some 'items'. The Appellant's apparent failure to check with Monica as to what these items were, cannot by itself be taken against him to prove his guilt. Again it is not unusual for a person living in a foreign country to collect a parcel from one of his countrymen who has travelled to that country.

14. The basis for the conviction of the Appellant as set out in the judgment is to the effect, that the Appellant "went to the casualty unit of the Victoria hospital on that day, following several contacts that day with a person in Kenya". This is admitted by the Appellant and is also consistent with his innocence when one examines his dock statement set out in paragraph 10 above. 'Several', as per the evidence has to be taken as three calls.

15. The Learned Trial Judge had also stated that: "The prosecution has also established that the same telephone number that was in communication with the accused that day was also on the same day at the relevant time in communication with Leah Wanjiru Kungu who

at the time was under supervision and control of the NDEA" (emphasis added by us). If this was correct it would certainly have been a strong item of evidence against the Appellant, but we are unable to see this on the record. At the hearing of the appeal Counsel for the Respondent admitted that there was no such evidence. Had the learned Trial Judge not been under this misconception his final decision would necessarily have been different.

16. We are unable to agree with the inference drawn from the evidence by the learned Trial Judge to the effect: "Generally if one is going to assist a person in whatever way, it is unlikely that one would take the precautions that the accused did including agreeing on the language to be used and giving description of the clothes each was wearing" (emphasis by us). There is no evidence before the Court of the Appellant "agreeing on the language". The only evidence in this regard is to be found in the police statement of the Appellant to the effect that he had spoken to her in Kiswahili "because Monica have told me she is Kenyan". Speaking to one's own countryman in her native language cannot in the given circumstances be treated as a precaution taken. Again the Appellant giving a description of what he was wearing so that 'Leah', who was a stranger to him, could identify him cannot be said to be a precaution taken by the Appellant. It had been the Appellant's position in his dock statement that he had told Monica "If I cannot see her, tell her I am putting on a brown shirt, a white trouser and brown shoes." There is no evidence on record of any other precaution that was taken by the Appellant.

17. The other inference drawn by the learned Trial Judge from the evidence is to the effect: "Secondly, the fact that the accused took the bag from agent Belle is not consistent with his assertion that the only reason he went to Victoria Hospital was to assist a sick person. I am satisfied that the accused went there to collect something and

hence he was not being truthful as to the reason he went to Victoria Hospital casualty." (emphasis added by us). Nowhere had the Appellant said that the only reason he went to Victoria Hospital was to assist a sick person. Both in his police statement and dock statement he had maintained that Monica had told him about an item that 'Leah' would give him at the Victoria hospital. Here again the learned Trial Judge had drawn an inference based on an incorrect assumption of facts and we are of the view that had he not done so, his conclusion would have been different.

18. One cannot infer guilt from the mere fact that the Appellant had run away from the hospital when agent Belle had pulled a pistol at him and tried to arrest him.

19. Another issue that arises from the testimony of the prosecution witnesses is what became of the 'Fat Lady' who was to have come to collect the items from 'Leah' at the Yellow Roof' building at the Victoria hospital? It had been the evidence of agent Belle: "I sat on the bench outside, the instruction that I was given by Mr. Nicette that there would be a fat lady that would be coming to pick up the exhibit with me". The following dialogue between agent Belle and Defence Counsel is important:

"Q: As you sit here today to testify, can you rule out the possibility of the existence of a fat lady coming to take the substance from you at Yellow Roof?
A: I do not know because at first I was told that there would be a fat lady but I do not know.
Q: A man came according to your evidence and there is a possibility that there would be a fat lady and something changed.
A: Yes" (emphasis added)

Is it possible that the Kenyan counterpart of 'Leah' having become suspicious of what was happening sent forward the unsuspecting Appellant, who was the representative of the Kenyan community in the Seychelles as a guinea pig in order to check whether everything was going according to the plan and assuming he will not get into difficulties?

20. This case is full of anomalies. All information provided by 'Leah' had been admitted in breach of the rule against hearsay. What is before the Court are conversations allegedly made between 'Leah' and her Kenyan counterpart in Swahili, translated into English by 'Leah, narrated to court by agent Belle as having been conveyed to her by Nicette after obtaining the information from Tania Lozaique, who was keeping watch over 'Leah" and to whom 'Leah' was communicating the information received from her Kenyan counterpart. 'Leah' and Nicette had not testified before the Court. Thus the evidence led and admitted by the Court is double-hearsay. The manner the controlled delivery took place is unprecedented. The version given by agent Belle as to the receipt of the items by the Appellant defies reason. The story of the 'Fat Lady' remains unexplained. The assumptions made by the learned Trial Judge in regard to the evidence led are incorrect and the inferences drawn by him are faulty.

21. In the Australian case of **Davies and Cody V The King (1937) HCA 27** as quoted in **Gipp V R (1988) HCA 21**, it was held "that the duty imposed on a court of appeal to quash a conviction when it thinks that on any ground there was a miscarriage of justice covers not only cases where there is affirmative reason to suppose the appellant is innocent, but also cases of quite another description. For it will set aside a conviction whenever it appears unjust or unsafe to allow the verdict to stand because some failure has occurred in observing the conditions which, in the court's view, are essential to a satisfactory

trial, or because there is some feature of the case raising a substantial possibility that, either in the conclusion itself, or in the manner in which it has been reached, the jury may have been mistaken or misled." In the case of **R V Cooper (1969) 53 Cr. App R 82** it was said, an appeal court "must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the Court experiences it." In this case there is more than a lurking doubt and a general feeling in our minds as to whether an injustice has been done.

22. We therefore have no hesitation in allowing the appeal and acquitting the Appellant forthwith.

A.F. T. Fernando
Justice of Appeal

I agree

M. Twomey
Justice of Appeal

I agree

J. Msoffe
Justice of Appeal

Dated this 11th of April 2014, Victoria, Seychelles