

IN THE SEYCHELLES COURT OF APPEAL

[Coram: S. Domah (J.A) , A. Fernando (J.A) , J. Msoffe (J.A)]

**Criminal Appeal SCA 17/2013
(Appeal from Supreme Court Decision 58/2011)**

Dean Lawrence

Appellant

Versus

The Republic

Respondent

Heard: 19 August 2015

Counsel: Mr. Nichol Gabriel for the Appellant

Mr. Hermanth Kumar for the Respondent

Delivered: 28 August 2015

JUDGMENT

J. Msoffe (J.A)

[1] The Appellant and Marie Cecile Leon (the second accused at the trial) were convicted of two counts, to wit:-

Count 1

Trafficking in a controlled drug contrary to section 5 read with 14(d) and section 26(1) (a) of the Misuse of Drugs Act Cap 133 and read with section 23 of the Penal Code punishable under section 29(1) of the Misuse of Drugs Act Cap 133 and the second schedule referred thereto in the said Act.

Count 2

Possession of a controlled drug namely heroin contrary to section 6(a) read with section 26(1) (a) of the Misuse of Drugs Act Cap 133 and read with section 23 of the Penal Code punishable under section 29(1) and the second schedule referred to in the said Act.

- [2] In the first count the particulars of offence alleged that they were found in possession of controlled drugs namely 4 kilograms and 12.7 grams of cannabis while in the second count it was alleged that they were found in possession of controlled drug having net weight of 0.12 gram of light brown paper substance containing heroin (diacetylmorphine).
- [3] Following the convictions they were each sentenced to concurrent terms of imprisonment for 15 and 5 years in the respective counts.
- [4] Aggrieved, the Appellant is appealing against both conviction and sentence. He has listed five grounds of appeal which read as under:-
- a) The Learned trial Judge erred in law and in fact in finding that the Appellant had knowledge of the controlled drugs at the house of the Appellant's mother.
 - b) The learned trial Judge erred in law and in fact in admitting the statement under caution of the Appellant despite the fact that its voluntariness was challenged by the Appellant's Counsel.
 - c) The learned trial Judge erred in law and in fact in his interpretation of the law on joint liability under section 23 of the Penal Code.
 - d) The sentence of fifteen years imposed on the Appellant was manifestly harsh and excessive and wrong in principle as it is equivalent to almost twice the minimum sentence provided by law.

- [5] Both the accused were arrested at a house owned by the mother of the Appellant. In the statements of both the accused as well as the prosecution evidence, it was not contested that the Appellant lived in the house with his mother alongside his co-accused (and girlfriend) and their one child. It was neither contested that the drugs were found in his bedroom.
- [6] The prosecution led the evidence of 4 witnesses. Three of the witnesses were officers of the NDEA. The 4th was a Government Analyst who analysed and confirmed that the material found at the house were actually controlled drugs.
- [7] It was the evidence of the prosecution that the NDEA received intelligence reports that the two accused had in their possession a large amount of controlled drugs, and that the drugs were stored in a house at Foret Noire, owned by the Appellant's mother, and where the two accused were staying. Officers of the NDEA had gone back to their offices and made plans to raid the scene, recover the drugs and arrest the suspects.
- [8] It was further the evidence of the prosecution that when the officers of the NDEA approached the house, they found a man outside the house who was talking to a lady inside the house. On noticing them, the man ran away. Agents had then broken the door to the house. It was the case of the prosecution that upon hearing the commotion, the Appellant moved from his bedroom and was at a corridor in the house when he was apprehended and handcuffed. His co-accused was still in their bedroom when officers reached the room; she had a baby sleeping on the bed. Herbal material suspected to be prohibited drugs had been recovered from the room. The two accused had been arrested. Both had given statements to the NDEA officers. The statement of the co-accused was not contested, but the Appellant contested the admission of his statement. The trial Judge however overruled the challenge and a *voire dire* was conducted. The court ruled that the statement was given voluntarily.

- [9] After the prosecution closed its case, the Appellant, in defence, chose to remain silent and under Article 19 (2) (h) of the Constitution, no adverse inference may be drawn against him for exercising such right. The co-accused however, in her defence, gave evidence on oath.
- [10] It has not been contested that the Appellant lived in the room in which the drugs were found. In his Heads of Arguments, he confirms that one of the reasons he should be considered to have been under stress when he was arrested was that he had been arrested late at night and had left behind his child and mother. This goes on to confirm that he was arrested at home, where he lived with those he cared for.
- [11] The evidence of the prosecution was corroborated by the co-accused who was also living with the Appellant as his girlfriend. We take notice that the co-accused was staying at the room where the drugs were found, not as tenant of the Appellant's mother, or her social visitor, but as a long-term girlfriend of the Appellant.
- [12] The statement of the 2nd accused was not contested. Her evidence under oath from the dock corroborated the evidence of the prosecution. She explained that she had been aware that the Appellant dealt in drugs. She told the arresting officers that the drugs belonged to the Appellant. We have no reason to believe that she incriminated the Appellant maliciously. Once the evidence of the statement of the co-accused was admitted, the case against the Appellant becomes overwhelmingly strong. That statement has not been challenged in this appeal.
- [13] In the case of **Duval v R [2013] SCCA 20** this court held that –

the evidence given by a prosecution witness is used by the prosecution, to prove the elements of the offence and to corroborate the evidence of another prosecution witness; and by the defence to contradict the evidence of another prosecution witness or corroborate the defence evidence and thereby cast a doubt on the

*prosecution case. The evidence given by a defence witness is used by the defence, to cast a doubt on the prosecution case and to corroborate the evidence of the accused or another defence witness; **and by the prosecution to contradict the evidence of the accused or another defence witness or corroborate the prosecution evidence.***

- [14] As was held in the case of **L. Assary v Republic [2012] SCCA 33**, there should always be a safeguard in law in dealing with the evidence of an accomplice. It is in the Judge's discretion whether any corroboration is required in a case where the evidence of the prosecution is that of an accomplice or a co-accused. As has been shown, the statement of a co-accused, was not a confession but one admitting a number of facts pointing to her complicity and that of the Appellant, in the criminal conduct of drug trafficking. A confession is generally described as 'an unequivocal acknowledgement of guilt, the equivalent of a plea of guilty before a court of law'. On the other hand an admission is referred to as "a statement or conduct adverse to the person from whom it emanates."
- [15] She was aware that the Appellant dealt in drugs. She was aware that there were drugs in their bedroom. No doubt a large amount of Cannabis herb as was found in their room would smell and attract even an innocent girlfriend to enquire what was in the plastic bags.
- [16] But how reliable would be the statements made by the co-accused, in as far as proving the case as against the Appellant? Asked in another way, what will the statement of the co-accused prove if admitted? And will it do so reliably? In the present case, the guarantees of reliability are high. The most compelling justification for admitting the statement in the present case is the numerous pointers to its truthfulness. The onus is on the prosecution to prove its case as against an accused beyond reasonable doubt.

[17] In the case of **Beehary v Republic [2012] SCCA 1**, this court held that –

Nonetheless, once the prosecution has established a prima facie case, as has been done in the present case, the defence runs a serious tactical risk in not calling evidence to rebut it, not because the defendant is called upon to prove his innocence (which would be contrary to the rule in Woolmington’s case cited (supra) but because the court may exercise its entitlement to accept the uncontroverted prosecution evidence. ... and although the prosecution must in all cases prove the guilt of the defendant, there is no rule that the defence cannot be required to bear the burden of proof on individual issues such as whether the drugs could have been planted by the police to foist a false case against the defendant, (ie the appellant in this matter) ... This does not require the appellant who stood charged with trafficking in drugs to prove his innocence, but only to show reasons as to how and why it was possible, but not in the least probable that the drugs were planted. And, of course, the appellant need not prove even this unless and until the prosecution establish a prima facie case that the defendant in fact had such drugs with him in his bedroom.

[18] We consider that the prosecution led strong evidence to prove that the Appellant was in control of his bedroom, and the drugs stored therein. He had knowledge of the drugs in his bedroom. The house may have been owned by his mother, it had his bedroom, it was his home, and he lived there with his family, girlfriend and child.

[19] In the statement that was given to the arresting officers of NDEA, the Appellant owned up that he owned the drugs found in his bedroom. He voluntarily stated he owned it at the house and he stated so in his statement to the officers. At trial, the

Appellant however denied that he was duly cautioned before he gave his statement to the arresting officers. He claimed that his constitutional rights had been breached. A *voire dire* was conducted and the trial Court ruled that the statement of the Appellant was given voluntarily and therefore was admissible. At this Court, the Appellant argued that it was wrong for the court *a quo* to admit the statement. We do not accept the Respondent's argument that there was nothing wrong with the officers taking the statement at 2.13 am. As the Appellant Counsel argued, if the Appellant had wanted to have legal counsel, certainly, at that hour, it would have not been possible. There was no proper ground why the statement could not be taken the next morning. There was little possibility that the Appellant would not be available as he was already in their custody. These are some of those circumstances where arresting officers are over enthusiastic and end up mixing their work with actions that might not be necessary at the material time(s).

[20] The Appellant does not however disown the statement, and has not indicated that he made the statement under duress or threats to violence. He has not indicated that he wished to have his Counsel, or family members and that right were denied. The case he relies on to argue his case is that of **Andy Mondon v Republic, [2006] SCCA 3**. Granted, the court did not admit the statement in that case. The difference with the case at hand is that in the quoted case, the accused had been arrested when intoxicated. He made the discarded statement while still under the stupor of alcohol. That is not the case here. The Appellant in this case was sober at all times relevant to his claim. The statement was properly admitted.

[21] The Appellant has argued that the omission to include section 23 of the Penal Code in the charge sheet should invalidate the charge. We do not agree. As was held by this Court in the case of **Mohammed Hassan Ali & Ors v The Republic [2014] SCCA 34**, "*the omission of section 23 from a charge sheet does not render the charge faulty or bad in law ...*". It would make for better clarity but does not

invalidate the charge. No prejudice was suffered by the Appellant for the non-inclusion of the section and therefore; we do not find merit in the argument. The appeal herein is an attempt to wrinkle out by the Appellant. It must fail.

[22] The Appellant was sentenced to 15 years imprisonment in count one and to 5 years in count 2. Both sentences were ordered to run concurrently. In the case of ***Godfrey Mathiot v Republic SCA 9/1993I*** (unreported), it was held that the Court of Appeal may only interfere with the discretion of the Supreme Court in sentencing if the sentence is wrong in principle, was either harsh, oppressive or manifestly excessive, was so far outside discretionary limits or some matter had been improperly taken into consideration or the trial court had failed to take into consideration something which should have been; or the sentence was not justified by law.

[23] The Appellant was arrested at the middle of the night from his home. He left his mother behind alongside his one child. He was incarnated alongside his girlfriend. The NDEA officers took a statement from him at 2.13 am, which this court considers to have been uncalled for in the circumstances of the case.

[24] Once convicted by the trial Court, we have been advised that probation on the Appellant and his co-accused report was prepared. The report was however not shared with the appellant. His counsel was not aware of its contents and has not been afforded a copy up to now. It would defeat logic that a probation report is commissioned for an accused person, and the Court does share it with neither the prosecution nor the defence.

[25] We have considered the factors in paragraphs 23 and 24 above and the existing trends in sentencing for the similar crimes. We opine that the Judge should have taken note of the same. For this reason, the sentence of the Appellant for count

one is reduced to 10 years. The sentence meted for count two shall remain unchanged. Both sentences shall run concurrently.

J. Msoffe (J.A)

I concur:.

S. Domah (J.A)

I concur:.

A.Fernando (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 28 August 2015