

IN THE SEYCHELLES COURT OF APPEAL

[Coram: A. Fernando (J.A) , M. Twomey (J.A) , J. Msoffe (J.A)]

**Criminal Appeal SCA 08/2013
(Appeal from Supreme Court Decision 01/2011)**

Leonard Celestine

Appellant

Versus

The Republic

Respondent

Heard: 17 August 2015

Counsel: Mr. Anthony Juliette for the Appellant

Mr. Hermanth Kumar for the Respondent

Delivered: 28 August 2015

JUDGMENT

J. Msoffe (J.A)

[1] Essentially at the trial three charges were preferred against the Appellant and the co-accused (Mrs. Mary Tirant), to wit:-

1. Conspiracy to import drugs.
2. Conspiracy to traffic in drugs (by selling, giving, transporting, sending, distributing, or offering to do any such acts).
3. Importation of drugs.

[2] This was a duplicity of counts. This issue was raised at the trial but unfortunately it was not made out.

- [3] A look at Archbold 1 – 216: will show that the general principle is that the indictment must not be double, that is to say, no one count of the indictment should charge the defendant with having committed two or more separate offences.
- [4] Briefly, PW4 Corine Clarisse who was working with Hunt Deltel and was in charge of DHL at the material time, testified and stated that in the late afternoon hours of 13th December 2010 he called Mrs. Mary Tirant (the first accused at the trial) and told her to come to the office and collect her parcel shipped from Kenya.
- [5] In the meantime, on 14th December 2010 at around 08.00 hours PW2 Kathleen Belle and PW3 Winsley Francoise went to the DHL office for observation duty as they had received information that a lady was arriving to collect a parcel. At around 09.30 hours a white “Subaru” vehicle registration No. S7267 arrived and the first accused disembarked therefrom. The “Subaru” was being driven by the Appellant. The first accused went into the DHL office. After dropping the first accused the Appellant drove away and came back for another round and while the first accused was still inside he passed by again for the second time.
- [6] After about 15 minutes the first accused came out with a cartoon box underneath her arms and went towards the traffic lights, crossed the road, went towards Market Street and then to Quincy Street and eventually stood at the ex-Air Seychelles office. In the meantime, PW2 and PW3 were following her quietly and secretly. At the ex-Air Seychelles PW2 and PW3 introduced themselves to the first accused and asked her to go with them to the NDEA office. On the way to the NDEA office the first accused received a mobile phone call. She told PW2 and PW3 that the call came from the Appellant. At around 11.30 hours while in the NDEA office the Appellant made yet another call to the first accused. At the request of the NDEA agents the Appellant went to the NDEA office.

- [7] In the presence of both the first accused and the Appellant the carton box was opened. Inside it there were some wooden crafts of elephants, rhinoceros, etc. In the middle of the big “elephant” there was a piece of foil and a clear plastic containing a substance they suspected to be heroin. The substance, which was in two foils, was sent to the Government Analyst for chemical analysis and report. PW1 T. Purmanan examined the substance, and as per Exhibit P1, the total heroin content was 80.80 grams.
- [8] On the basis of the above evidence the first accused and the Appellant were charged with four counts of conspiracy to commit the offence of importation of a controlled drug, conspiring to commit the offence of trafficking in a controlled drug, importation of a controlled drug and trafficking in a controlled drug, respectively, contrary to the relevant provisions of the Misuse of Drugs Act.
- [9] In their defence, both the first accused and the Appellant elected to remain silent. In terms of Article 19(2) (h) of the Constitution no adverse inference should be drawn for the exercise of their right to remain silent.
- [10] In the end, both were acquitted of the first and third counts. They were convicted of the second count. The first accused was also convicted of the fourth count. The Appellant was sentenced to 10 years imprisonment.
- [11] Aggrieved, the Appellant is appealing. The single ground of appeal is that the Judge erred in finding that there was an agreement between the two accused persons to traffic in a controlled drug, namely heroin, in that such a finding is not and cannot be supported by the evidence adduced at the trial.
- [12] The Appellant and the co-accused were charged under section 28(a) read with section 5, section 2 and section 26 (1) (a) of the Misuse of Drugs Act and punishable under sections 28 and 29 of the Misuse of Drugs Act and the second Schedule referred therein.

- [13] Under the above stated law the essential ingredient of the offence of conspiracy is an agreement between persons to do an unlawful act. In this case, the unlawful act would be to traffic in heroin. The central issue in this case is whether or not the evidence established that there was an agreement between the Appellant and the co-accused to traffic in heroin.
- [14] Halsbury's Laws (5th Edn) para 73 describes that the offence of conspiracy is committed where two or more persons agree to pursue a course of conduct which, if carried out in accordance with their intentions, will necessarily amount to or involve the commission of an offence by one or more of the conspirators, or would do so but for the existence of facts which render the commission of the offence impossible.
- [15] The conspiracy arises and the offence is committed as soon as the agreement is made; and the offence continues to be committed so long as the combination persists, that is until the conspiratorial agreement is terminated by completion of its performance or by abandonment or frustration or however it may be. The *actus reus* in a conspiracy is therefore the agreement for the execution of the unlawful conduct, not the execution of it. It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose.
- [16] The central feature of a conspiracy is that the parties agree on a course of conduct that will necessarily amount to or involve the commission of an offence by one or more of the conspirators.
- [17] Thus, a mere association of two or more persons will not constitute a criminal conspiracy. The main elements of conspiracy are a specific intent, an agreement with another person to engage a crime to be performed, and the commission of an overt act by one of the conspirators in furtherance of the conspiracy.

- [18] Archbold: 33-8-33-14 spells out circumstances from which one might presume an apparent criminal purpose between conspirators. Furthermore, **R v Taylor [2002] Crim. L. R 205** at page 37 states that what must be proved is that the accused knew the course of conduct agreed upon. The accused must agree to a course of conduct which involves an act or omission by at least one of them which is prohibited by the law.
- [19] In effect, therefore, the decision in **Taylor** (supra) is clear that where a conspiracy count identifies in the particulars of offence a particular controlled drug, it must be proved against each defendant not merely that he knew that the agreement related to the importation, supply, etc. of a controlled drug, but also that either (i) to have known that it related to the particular drug mentioned in the indictment, or (ii) to have known it related to the drug of the same class. (See also the following Seychelles cases, **R v Mohamad Zaki Shah and Philip Vital [1979] SLR 1**, **R v Pillay [1993] SLR 48**, **R v Moumou** (unreported (No.2) SC 2/1999, 9 June 1999. See Fernando JA at parags 32-34 in **Dugasse & Ors v R [2013] SLR (Vol. 1) 67** and Msoffe J in **Assary v R [2012]** as to the necessary ingredient in relation to an agreement: there must be evidence to show that there was an agreement between two or more persons to do an unlawful act. If it cannot be found that they have combined to commit an offence there can be no conviction).
- [20] Very briefly, therefore, in the circumstances of this case, the only evidence against the Appellant was that he drove the co-accused to the DHL office and circled the office twice while the latter collected the parcel and then phoned her. The only other evidence was that his phone 2507543 had received calls from Kenya. With respect, these two aspects of the prosecution case did not establish conclusively and beyond reasonable doubt the existence of an agreement between him and the co-accused to commit the offence in question.

[21] For the above reasons, the prosecution case against the Appellant was not proved beyond reasonable doubt. He was entitled to an acquittal. His appeal is accordingly allowed, conviction quashed and sentence set aside. He is to be released from prison unless lawfully held.

J. Msoffe (J.A)

I concur:.

A.Fernando (J.A)

I concur:.

M. Twomey (J.A)

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