

IN THE SEYCHELLES COURT OF APPEAL

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

CriminalAppeal SCA04/2011

(Appeal from Supreme Court DecisionCR 49/2009)

Janice Dupres

Appellant

Versus

The Republic

Respondent

Heard: 07 December 2015

Counsel: Mr. Nichol Gabriel for the Appellant

Mr. Jayaraj Chinnasamy for the Respondent

Delivered: 17 December 2015

JUDGMENT

A.Fernando (J.A)

1. The Appellant appeals against her conviction on two charges for importation of 537.3 grams of heroin and 186.0 grams of cannabis resin on the 22nd of October 2009 at the Seychelles International Airport and two charges for trafficking in respect of the same controlled drugs on the basis of the section 14 presumptions in the Misuse of Drugs Act and the sentences of 14 years imprisonment imposed separately for the importation and trafficking charges in relation to heroin and the sentences of 12 years imprisonment imposed separately for the importation and trafficking charges in relation to cannabis resin. All four sentences imposed in respect of the 4 charges had been ordered to run concurrently.
2. The Appellant had been charged in relation to the four counts along with one Jeffrey Bernard Jumaye on the basis of common intention. At the conclusion of the trial Jumaye had been acquitted of all charges.

3. The Appellant had raised the following grounds of appeal:
 - i. The learned Judge erred in fact and in law in convicting the Appellant on the two charges of importation in the absence of the element of common intention as contained in the charge of importation.
 - ii. The learned Judge erred in fact and in law in convicting the Appellant on the two charges of trafficking in the absence of the element of common intention as contained in the charge of trafficking.
 - iii. The learned Judge erred in law and in fact in finding the Appellant guilty on the charges of importation and trafficking despite the fact that the control delivery of the drugs was conducted by the second accused in the case namely one Jeffrey Jumaye who was subsequently acquitted.
 - iv. The learned Judge misdirected himself in making a finding that the Appellant had knowledge of the content of the items seized at the airport and later discovered to contain controlled drugs.
 - v. The learned Judge erred in law and in fact in convicting the Appellant on insufficient and uncorroborated evidence and in total disregard of the dock statement made by the Appellant.
 - vi. The sentence of 14 years imposed on the Appellant was manifestly harsh and excessive and wrong in principle.
 - vii. The learned Judge erred in law and in fact in failing to uphold the circumstances of the Appellant stated in mitigation to be special and therefore awarding a manifestly harsh sentence.
4. The prosecution evidence, as borne out by the evidence of NDEA Agent Nichole Fanchette, had been to the effect that on the 22nd of October 2009, NDEA officers were on duty at the Seychelles International Airport observing passengers who had disembarked from the Kenya Airways flight that had come in from Nairobi at 1300 hours, when they spotted the Appellant and Jeffrey Jumaye. On conducting a search of Jumaye's baggage nothing suspicious had been found and thus he had been permitted to leave. While carrying out a search of the Appellant's luggage they had noticed three cans that were amongst 16 other cans in the Appellant's luggage was abnormal, namely on removing the labels of those cans they had found that the cans were cut on the side. Two of the labels had the words 'pork in gravy' while the other had the words 'mini bites in beans'. Thereafter they had opened the cans and found that there were in all 54 capsules and 4 pieces of dark brown substances in the three cans. The Appellant had admitted prior to the

opening of the cans that they “are for her”. The Appellant had been arrested as the contents looked suspicious.

5. It appears that the evidence of NDEA Agent Nichole Fanchette has been corroborated by Agent Tania Lozaique, whose evidence has been summarized in the judgment. In this case part of the proceedings of the Trial Court, are missing and the evidence of Tania Lozaique is one such. We therefore have to rely on the judgment for her evidence. There is no challenge by the defence in this appeal to the reference to her evidence in the judgment and further it has been admitted by the Counsel for the defence that controlled drug was found in the luggage of the Appellant. In the judgment it is stated: “Agent Tania Lozaique testified that she was on duty at the International Airport when the 1st Accused and Jeffrey Bernard Jumaye were stopped and searched. Nothing was found with Jeffrey Bernard Jumaye and he was allowed to leave. The 1st Accused had a plastic bag that contained several items. When questioned, the 1st Accused maintained that the items were hers and she had bought them in a supermarket.” The rest of her evidence as set out in the judgment is identical to that of Nichole Fanchette as regards the finding of the controlled substances and the arrest of the Appellant.
6. Later the contents in the three cans were taken for analysis by the Government Analyst who in his Report had stated that the 54 capsules were of the substance heroin and weighed 537.3 grams and the 4 pieces of dark brown substances were cannabis resin and weighed 186.0 grams. There is no challenge before us as to the analysis or the chain of custody.
7. In her confessional statement to the police which had been admitted after a voire dire as exhibit P6, and which has not been challenged in this appeal before us, the Appellant had stated:

“I know one (edited), for sometimes. (edited) lives at St. Louis. We have started a relationship since two months ago. During the month of September 2009, he told me that he is going for a visit in Kenya and he wanted to take me with him. He told me that he would pay my ticket and I agree to go. He told me that during the visit in Kenya, there are some drugs to be brought to Seychelles and he wanted me to put those drugs in my luggage to bring to Seychelles. He did not tell me the type and the amount of drugs it has. He even told me that if everything went well, I would receive Sr 100,000/- as a reward for the job. He told me that we would not travel together, for them not to notice, and I accepted. Then I make procedure to get a passport because I didn’t have one. (edited) left Seychelles during the month

of October 2009, for Kenya, but I do not remember the date. I left Seychelles on 15th October 2009, for Kenya, for me to meet (edited). It was a Thursday. (edited) came to meet me at the airport when I arrived in Kenya. We went to stay at the Greeton Hotel in Nairobi. When (edited) came to meet me at the airport in Kenya, he was alone. While we were in Kenya we have stayed more or less in hotel. We went out from time to time to do shopping. Whilst we were at the hotel nobody came to visit us and we did not go out to visit anybody. But (edited) had gone out from time to time alone, at night. I did not know where he went. The three boxes that contained the bullets, that are suspected to contained Heroin, two (2) are marked “Farmer’s Choice Pork in gravy” and the other box are marked “Farmers choice Mini Bites with beans”, that officers of Customs and NDEA had seized from me at the airport after my arrival from Kenya. It was (edited) who gave me, in the hotel room in Kenya, for me to bring. I want to point out that in one of those boxes that are marked “Farmers Choice Pork in gravy” also contained four (4) pieces of brown substances that are suspected to be controlled drug. I have spent eight (8) days in Kenya. I also wanted to point out that I don’t know to whom (edited) was going to give those drugs, in Seychelles. Me, I have just been used to go to Kenya to transport those drugs to Seychelles. I don’t know the associates of (edited), here in Seychelles. (Edited) does not live at my place we only met on the road. It is the first time that I travel. I want to point out that in the hotel in Kenya when (edited) had brought those cans of food he told me that those cans of food are “loaded”. I told that I would not bring those. He told me not to be afraid, everything is correct. I would not be discovered. Then I did not know when he had put those cans in my white plastic bag marked “Tusky”.

8. In her dock statement to Court the Appellant had stated:

“I knew Jeffrey Jumaye for sometimes, he lives at St. Louis. For two months in the year 2009 Jeffrey told me that he is going to visit Kenya and he told me that he wants to bring me along with him. He said that he would pay for my ticket and I agreed. He told me that there were drugs to bring to Seychelles but he did not tell me the quantity and what kind of drugs. Then I made all the necessary procedures for my passport. Jeffrey left Seychelles in October 2009 but I do not recall the exact date and I left Seychelles the 15th October 2009.

Arriving on Kenya Airport Jeffrey came to meet me. He was alone when he met me. We stayed at Griton Hotel, Nairobi and while we were there in Nairobi most of the time we stayed in the room. There were times we came out of the room to go shopping both of us. There were some occasions at night whereby he would go alone. I did not know where he went. In Nairobi Jeffrey told me that he would put the drugs in my luggage, but I told him no, he said to me not to be afraid and that nobody would know and it would not be recovered and I said not to him.

I would like to state to the court that it was not my intention to bring any illegal things like drugs to Seychelles. I was just being used by Jeffrey. I did not know when he placed the drugs in my luggage because I stated to him that I do not want to bring the drugs to Seychelles. When I gave the statement to the NDEA Agents there were Ms. Tania Lozaique who was present and Winsley Francoise also. And this statement I did not give it voluntarily, I was forced to give the statement. They took it in writing but they did not record it. And then I signed the statement when I finished giving it to the Agents. That is all.”

The learned Trial Judge had in making reference to the dock statement in his judgment had stated: “I note and warn myself that the right to remain silent is a fundamental right of an Accused person and no inference could or should be made to the exercise of that right by an Accused.”

9. We are in a difficulty to understand grounds (i) and (ii) of appeal raised by the Appellant. The principle of common intention is used, when an offence is committed by two or more persons in furtherance of the common intention of each one of them by enabling, aiding, abetting counselling or procuring another to commit an offence. The failure to prove the involvement of one of the persons charged in the commission of the offence does not absolve in anyway the liability of the other or others involved in the commission of the offence. That is sufficient to dispose of grounds (i) and (ii) of appeal.
10. Ground (iii) of appeal has no merit whatsoever as the Appellant became liable for importation and trafficking no sooner she set foot in the Seychelles after having alighted from the Kenya Airways flight. The control delivery that took place after the arrival of the Appellant in the Seychelles was to ascertain the others who were involved in this drug transaction. Thus the acquittal of the second accused has no bearing whatsoever on the guilt of the Appellant.
11. As regards grounds (iv) and (v) of appeal we wish to make reference to the following part of the judgment, with which we agree and which in our view answers the said grounds of appeal raised:

“As admitted by Learned Counsel for the 1st Accused, it is not in dispute that the drugs namely, 537.3 grams of diamorphine (heroin) and 186 grams of Cannabis resin were found in the luggage of the 1st Accused at the Seychelles International airport on the 22nd October, 2009. The only contention of the 1st Accused is that she did not consent to carry the drugs into the country and that she did not know when Jeffrey Jumaye placed the drugs in her luggage.....”

Considering the evidence adduced by the prosecution, I find that the 1st Accused was aware before she left Seychelles to go to Nairobi that the return trip involved carrying drugs into Seychelles. The 1st Accused had the opportunity to decline to participate in the scheme but instead she decided to get a passport and travel to Kenya. Again, according to the 1st Accused's own statement, she was told that she would be carrying drugs in her luggage before she left Kenya. Although the 1st Accused maintained that she did not want to carry the drugs she made no effort to remove her participation in the unlawful enterprise. Even at the Seychelles International Airport when she was questioned about the cans she told the Agents that she had bought them in a supermarket in Kenya, which shows that she was deliberately hiding the truth from the Agents. This is not the action of a person who was ignorant of the contents of the cans in her possession.

I therefore reject the contention of the defence that the 1st Accused had no knowledge of the prohibited drugs in her possession.

I accept the contention of the prosecution that the evidence against the 1st Accused is overwhelming and that the presumption of trafficking has not been rebutted.”

12. Further according to the confession of the Appellant, exhibit P6, Jeffrey Jumaye had told the Appellant that if everything went well, she would receive SR 100,000/- as a reward for the job. Jumaye had told her that the two of them should not travel together, for them not to be noticed, which suggestion she had accepted. The Appellant had said that in the hotel in Kenya when Jumaye had brought those cans of food, he had told her, that the cans of food were “loaded”. She was even aware and had given a description of the cans in which the drugs were concealed. The evidence of NDEA Agent Nichole Fanchette has been corroborated by the evidence of Agent Tania Lozaique, the confession of the Appellant which has been produced as exhibit P6 and her dock statement. Her saying “No” to Jumaye when he told her that he would put the drugs into her luggage and that it was not her intention to bring any illegal things like drugs to Seychelles as narrated to Court in her Dock Statement does not absolve her from having had the ‘knowledge’ that she was carrying drugs into the Seychelles.

13. ‘Knowledge’ as contrasted with ‘intention’ signifies a state of conscious awareness of certain facts or circumstances and although it will usually be relevant to the accused’s reason for acting may be separated analytically from the result which he intends. Crimes such as possession of a controlled drug require no result or conduct and the key element in such crimes is knowledge. On the other hand,

intention connotes a conscious state in which mental faculties are roused into activity and summoned into action for the deliberate purpose of being directed towards a particular and specified end which the human mind conceives and perceives before itself. Another difference between intention and knowledge as a fault requirement is that one can intend a result whether or not it actually occurs, for example to kill someone, but the same cannot be said of knowledge. In other words, one can intend something which does not materialize, but one cannot know something that does not exist in fact or in law. The approach to proof of intention is basically subjective, while proof of knowledge is objective.

14. As regards grounds (vi) and (vii) we find that the learned Trial Judge had taken into consideration all the mitigating factors submitted by Counsel for the Appellant in passing sentence, namely that she was a young woman of 25 years who had been misled by another to commit the offence, that she was a first time offender and that she had shown remorse. Taking into consideration the quantity of drugs involved and the fact that some of which were class ‘A’ drugs, we are of the view that the sentence of 14 years imposed on the Appellant was certainly not manifestly harsh and excessive and wrong in principle.

15. We therefore have no hesitation in dismissing the appeal on both conviction and sentence.

A.Fernando (J.A)

I concur:. M. Twomey (J.A)

I concur:. J. Msoffe (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 17 December 2015