

# IN THE SEYCHELLES COURT OF APPEAL

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

## **Criminal Appeal SCA 15/2012 (Appeal from Supreme Court Decision CR 35/2010)**

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Mohammed Issa Khudabin

Appellant

Versus

The Republic

Respondent

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Heard: 07 December 2015

Counsel: Mrs. Alexia Amesbury for the Appellant

Mr. Andy Asba for the Respondent

Delivered: 17 December 2015

### **JUDGMENT**

J. Msoffe (J.A)

- [1] It was common ground at the trial that the Appellant and Khadijah Salma Khudabin (the first accused) were, and presumably still are, husband and wife, respectively. On 14<sup>th</sup> May 2010 at around 18.40 hours or thereabout they were in a blue vehicle, jeep make, with reg. no. S10328 driven by the Appellant. As the Appellant reversed the vehicle out of V. E. Pillay's shop at La Louise he was stopped by NDEA agents, namely Kenneth Joseph and Servina and he was ordered to park it in the nearby car park.
- [2] As to what happened thereafter both the prosecution and the defence versions differed at the trial. According to agent Joseph when he told the Appellant he was going to conduct a search in the vehicle the latter agreed and told him something

to the effect that there were drugs in the vehicle and pleaded with him to let him free in return for a “payment” of Rs25,000.00. He told the Appellant to get out of the vehicle. On opening the door to the vehicle the first accused became aggressive and tried to escape. He held her arm and in the course of the struggle she removed something from her mouth with her right hand and kept it on the right hand. He tried to remove it from the hand and on opening her fingers he saw a transparent plastic which he suspected to contain drugs. He opened the plastic in her presence and saw the substance he suspected to be drugs. He drove the Appellant and the first accused to the NDEA Headquarters. A search was conducted in the vehicle but nothing suspicious was found. According to agent Joseph, inside the NDEA offices the Appellant told him to remove some drugs from the “consignment” so that in the event of future prosecution the offence could be reduced to one of possession only. In the meantime, on 17<sup>th</sup> May 2010 agent Joseph took the exhibit in a sealed envelope to Mr. Bouzin, the Government Analyst, for chemical analysis and report. On 19<sup>th</sup> May 2010 he went back to the Government Analyst and collected the exhibit which he eventually gave to Sergeant Seeward for custody.

- [3] In his evidence in court, the Government Analyst described the tests he conducted on the substance brought to him by agent Joseph and stated further that he detected heroin in the substance with a purity of 37.5%. (exhibit P1).
- [4] On the other hand, the first accused gave evidence and denied any involvement in the drugs in question. According to her, at the NDEA offices she saw agent Joseph taking out something from his pocket and placing it on the table.
- [5] The Appellant’s evidence was essentially a narrative of the scuffle that ensued at the time of arrest. He too denied involvement in the drugs in issue and stated that at the NDEA offices agent Joseph took out something from his pocket and placed it on the table.

- [6] The learned trial Judge analysed the evidence. In the end, he was satisfied that the drug was found with the first accused and accordingly convicted her of the first count of possession of a controlled drug contrary to section 6(4) of the Misuse of Drugs Act read together with section 26(1) (a) of the same Act and further read with section 23 of the Penal Code and punishable under section 29(1) of the Misuse of Drugs Act read with the Second Schedule thereto. He acquitted the Appellant of this offence. He however convicted the Appellant of the alternative second count of aiding and abetting in the possession of a controlled drug contrary to section 27(a) of the Misuse of Drugs Act read with section 6(a) of the same Act and further read with section 26(1) (a) of the same Act and punishable under section 29 of the said Act read with the Second Schedule thereto. The learned Judge also convicted the Appellant of the third count of communication with an NDEA agent to influence him not to initiate criminal proceedings contrary to section 16(3) of the National Drugs Enforcement Agency Act, 2008, (hereinafter the Act).
- [7] In the result, the first accused was sentenced to 5 years imprisonment on count one. The Appellant was sentenced to concurrent terms of five and two years imprisonment in counts two and three with an order for any time spent in remand custody to be reduced from the sentence of 5 years. Aggrieved, he is appealing against both conviction and sentence.
- [8] The appeal is premised on two grounds. **One**, there was no evidence to support the conviction in the second count. **Two**, the Judge erred in convicting and sentencing the Appellant in the third count for committing an offence under section 16(3) of the Act “as the section under which the Appellant was convicted does not apply to a Defendant or complainant in criminal proceedings or who believes that he is likely to be a Defendant in criminal proceedings.” It is further contended in this ground that there was insufficient evidence to support the conviction.

## GROUND 1

[9] The crucial question in the first ground of appeal is whether or not there was evidence to support the conviction for aiding and abetting in the possession of a controlled drug. The Appellant is of the view that there was no evidence to support this finding.

[10] In law it is generally accepted that a person who commits the main crime is the principal offender. However, situations may arise where another crime may be committed by friends, relatives, etc. around the principal offender. This is the crime of aiding and abetting the principal offender. Therefore, aiding and abetting means to assist or help someone in the commission of a crime. It is a legal doctrine related to the guilt of someone who aids or abets in the commission of a crime. It allows a court of law to pronounce someone guilty of aiding and abetting in a crime even if they are not the principal offender.

[11] There are three important elements to prove in a charge of aiding and abetting:-

- (i) That another person committed the underlying crime;
- (ii) The person charged had knowledge of the crime or the principal's intent; and
- (iii) The person provided some form of assistance to the principal offender.

[12] The principles underlying the offence of aiding and abetting are also well stated in **Dugasse v R** (2013) SCCA 6 where under paragraph 29 it is stated, *inter alia*, as follows:-

*One becomes liable on the basis of aiding and abetting in the commission of a crime when the offence is established and*

*where there is a principal offender. The actus reus of the offence of aiding the commission of an offence involves any type of assistance given prior to or at the time of the commission of the offence .... The important element being that there must be a connection between the assistance and the commission of the offence and should have helped the principal to carry out the offence ..... The secondary party thus should have had knowledge as to the essential elements of the type of offence committed although knowledge of the precise crime intended to be committed by the principal is not necessary .....*

[13] Also, the law in relation to aiding and abetting is stated in the case of **R v Vel and Others** (1978) SLR 29 which decided that for an accused person to be convicted of aiding and abetting there would be need to be evidence establishing beyond a reasonable doubt that tacit acquiescence or failure to prevent the crime or to apprehend the offenders was not sufficient; **but some participation in the act either by actual assistance or by countenance and encouragement was essential.** [Our emphasis]. Further, it is to be noted that “people can only be convicted for what they do, not the company they keep” — **R v Eliofo** (2002) OJ No.891 (C.A.) at para. 8 (Canada)).

[14] As already alluded to, the spouse of the Appellant with whom he was charged with was convicted of trafficking in controlled drugs. She did not appeal against the conviction and sentence. She has since fully served her sentence. Although the Appellant had been charged with the offence of trafficking he was acquitted of the offence. This was based on the fact that he was not in possession of the drugs.

- [15] Applying the law to the facts of this case the question that arises is whether there is any evidence that the Appellant had in fact participated or supported the possession of the controlled drug found in the possession of his wife.
- [16] On the face of it, the only tangible evidence connecting the Appellant to the controlled drugs was his statement to the NDEA agents that there were controlled drugs in the vehicle. Well, it is possible that he might have made that statement but as it is, there is no evidence that connects the Appellant to knowledge of the existence of the drugs. Knowledge was an important factor in this case and it ought to have featured clearly in the evidence. Further, the statement made to the NDEA agents relating to asking for some of the drugs to be removed would not go to the essential elements of aiding and abetting because the statement does not show that he had prior **knowledge** of the controlled drugs and that he supported, enabled or encouraged possession of the same.
- [17] Furthermore, assuming the Appellant had knowledge of the controlled drugs, however as conceded by the Respondent in his Heads of Arguments citing the case **R v Strong and Berry** (1989) L. S. Gazette, March 8, 41, C.A mere knowledge of the controlled drugs is not sufficient to constitute the offence of aiding and abetting. There ought to have been evidence that he supported, enabled or encouraged possession of the same. Apparently no such evidence was forthcoming in the case.
- [18] We appreciate that in his Heads of Argument (para. 1(c)) the State Counsel states *inter alia*,:-

*..... it is contended by the Respondent that the circumstances of this case goes beyond one of mere knowledge by the Appellant. This case is one that is centered not only Appellant's knowledge of control of the drugs but on the relationship between the two accused. They were after all*

*husband and wife and had been married for about 16 years. It is the case of the Respondent that the Appellant conveyed his wife around for a reason and whatever those reasons may be, it surely assisted her in her possession of the controlled drug.*

- [19] With respect, the above statement is based on an assumption. The fact that the parties had married for 16 years and that the Appellant drove his wife in the car on that day did not prove conclusively that the Appellant supported, enabled or encouraged possession of the drugs in issue.

## **GROUND 2**

- [20] In order to appreciate the gist of the complaint in this ground it is instructive to quote sections 16(3) and (5) of the Act as under:-

Sub-section (3) reads:-

*Subject to the provisions of this section, it shall be an offence to communicate with the Attorney-General or an officer of the Attorney-General, a member of the Police, an NDEA agent or a lawyer who acts on behalf of the Attorney-General in his official capacity for the purpose of influencing the making of a decision to withdraw or not to initiate criminal proceedings or any particular charge in criminal proceedings under this Act or any other Act.*

And sub-section (5) reads:-

*This section does not apply to —*

- (a) ***communications made by a person who is a defendant or a complainant in criminal proceedings or believes that he is likely to be a defendant in criminal proceedings; or***
- (b) *communications made by a person involved in the matter —*
  - (i) *either personally; or*
  - (ii) *as a legal or medical adviser to a person involved in the matter; or*
  - (iii) *as a social worker; or*
  - (iv) *as a member of the family of a person involved in the matter.*

[Emphasis added.]

[21] From the above quoted sub-sections it is clear that the Judge erred in convicting and sentencing the Appellant under section 16(3) because under sub-section (5) thereto he has a statutory defence. In other words, subsection 5(a) removes him from the blanket charge. Once the Attorney-General charged him with the offence of trafficking as well as aiding and abetting, he could not then be charged with the offence of trying to influence the NDEA agents not to charge him under sub-section (3).

[22] For the foregoing reasons, the appeal has merit. We accordingly allow the appeal, quash the conviction and set aside the sentence(s). The Appellant is to be released from prison unless he is held in connection with a lawful cause.



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 17 December 2015