

IN THE SEYCHELLES COURT OF APPEAL

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

Criminal Appeal SCA03/2013

(Appeal from Supreme Court Decision 78/2010)

Collin Ignace

Appellant

Versus

The Republic

Respondent

Heard: 07 April 2015

Counsel: Mr. Nichol Gabriel, for Appellant

Mr. Benjamin Vipin, for Respondent

Delivered: 17 April 2015

JUDGMENT

J. Msoffe (J.A)

- [1] The appellant was charged with and convicted of the offence of trafficking in a controlled drug contrary to section 5 of the Misuse of Drugs Act as read together with sections 14 (d) and 26 (1) (a) of the same Act as amended by Act No. 14 of 1994 and punishable under the second schedule to the said Act read together with section 29 of the same Act.
- [2] The particulars of offence alleged that on the 24th day of November, 2010 at Cascade he was trafficking in a controlled drug by virtue of having been found in possession of 33.3 grams of cannabis which gave rise to the rebuttable presumption that he possessed the controlled drug for the purpose of trafficking.

- [3] Upon conviction by the Supreme Court of Seychelles the appellant was sentenced to a term of eight years imprisonment. He is aggrieved, hence this appeal against conviction and sentence.
- [4] The prosecution led evidence to the effect that on 24/11/2010 Pierre (PW2) and Brian Dogley (PW3) were on duty at NDEA. Pierre Servina was in the company of Lance Corporal Barbier and Sgt. Brian Dogley. At around 19.30 hours while on routine duty at Cascade they received information that the appellant was trafficking in drugs at his residence.
- [5] The agents decided to investigate the matter. On the way, they spotted the appellant sitting under a bus shelter at Cascade opposite the St. Andre flat. They stopped close to him and identified themselves. PW2 searched him but nothing suspicious was found. PW2 informed him that he should assist the agents to conduct a search at his residence.
- [6] After arriving at the appellant's residence a search was conducted inside and outside the said residence. The search was conducted by PW2, Lance Corporal Barbier and PW3. Outside the back door on the wall facing the mountain side, some herbal material suspected to be a controlled drug, namely cannabis, was found on a black plastic bag by Pierre Servina in the presence of the appellant, Lance Corporal Barbier and PW3. The drug had been kept open as though for the purpose of drying.
- [7] The appellant was taken to the NDEA station for further formalities. PW2 testified that he kept the exhibit in his safe custody under lock and key and nobody had access to it nor was it ever interfered or tampered with by anyone. On 29/11/2010 PW2 at around 10.40 hours handed over the exhibit to Mr. Purmanan (PW1) for chemical analysis and report. On 1/12/2010 at 09.10 hours the exhibit was returned to NDEA where it was handed over to Sgt. Seeward, the Exhibit Store Officer.
- [8] Mr. Purmanan testified that, upon examination and analysis he was satisfied that the exhibit contained herbal material certified to be cannabis with a net weight of 33.3 grams.
- [9] The appellant's defence was a general denial of guilt contending in effect that he did not possess the cannabis in question.

[10] The appellant's conviction was grounded on three aspects of the prosecution evidence:-

- (1) The appellant's statement under caution,
- (2) The Analysis report, and
- (3) The testimonies of Pierre Servina and Brian Dogley

[11] In his memorandum of appeal filed on 30/1/2015 the appellant raised three grounds which read as under:-

- (a) The learned judge erred in law and in fact in finding that the Appellant had knowledge of the controlled drugs at the house of the Appellant.
- (b) The learned trial judge erred in law and in fact in accepting the contradictory evidence of the prosecution witnesses.
- (c) The learned trial judge erred in law and in fact in disregarding the evidence of the Appellant from his dock statement.

[12] On 31/3/2015 the appellant filed an amended memorandum of appeal containing grounds (a) and (c) above only. As shown in the Heads of Argument filed by learned Counsel, ground (b) was abandoned. The Heads of Argument introduced a new ground on sentence — a ground which did not feature in both memoranda. Nevertheless, we will rephrase and address the grounds raised in the amended memorandum of appeal and the ground relating to sentence in a manner that will be apparent hereunder.

GROUND 1

[13] In this ground of appeal the trial judge is sought to be faulted in finding that the appellant had knowledge of the controlled drug found in his house.

[14] The complaint in this ground has a bearing on that portion of the judgment where the judge stated:-

.... further, the accused in his statement under caution admits that he had kept two branches of cannabis plant on the wall near a window. He admits he had left the cannabis to dry on the wall on a black plastic. It is trite law that as the statement had been retracted that the material facts pointing to guilty of the accused must be corroborated by independent independence. The manner in which the herbal material was placed at the time of detection and the place as mentioned in his statement is corroborated by the evidence of the detecting officers who too state the herbal material was on a wall and placed on a black liner bag as if to dry. The evidence of the defence witness Josephine affirms the fact that the accused was living alone in the house where the cannabis was found...

- [15] In the above passage the judge was making reference to, *inter alia*, the cautioned statement (exh. P6a) in which the translated English version reads:-

“I have been living alone at Cascade for about 29 years. My profession is a farmer. Yesterday, 24th November 2010, at around 1300hrs, I went to my cannabis plants; there I picked one or two branches. I took that along with those branches which I had put inside a plastic at my house. There I put those cannabis branches on the wall near a window facing the mountain and I felt it there. Later at around 1930hrs I left my house and went down to the main road. There I sat under the bus-stop opposite the St. Andre Flat. Within 15 minutes later I was under the bus stop, the NDEA stopped next to me, identified themselves as NDEA agents, then invited me to go with them to my place. Arriving at my place the NDEA informed me that a search for drug will be conducted at my place. I accepted and showed them those branches of cannabis plant which I had left to dry on the wall on the black plastic. That was seized by them, and then I was informed that I was being arrested for possession of a controlled drug, caution and informed me my Constitutional Rights, then brought me down to NDEA.”

[16] At the trial the appellant objected to the admission in evidence of the above statement. In a Ruling dated 10/1/2012, after a *voire dire*, the judge was satisfied that the statement was given voluntarily and accordingly admitted it in evidence.

[17] In his judgment, the trial judge quoted with approval the English decision in **DPP v Brooks** [1974] AC 862 on the need to prove, *inter alia*, the element of knowledge in a case involving drugs. Thereafter, the judge reasoned as follows:

“with regard to the element of knowledge on considering the facts of the case that the herbal material at the time of detection was placed outside to dry and on considering the corroborated facts as set out in the statement under caution of the accused, it could be inferred from these facts and the relevant circumstances of this case that the accused had the necessary knowledge that he was in fact in possession of a controlled drug namely Cannabis (herbal material). The quantity detected in the possession of the accused on which the charge is based attracts the rebuttable presumption that the accused was trafficking in the controlled drug. The accused has failed to rebut the said presumption.”

[18] With respect, we are in entire agreement with the judge in his reasoning and we propose not to say much on the point. We are satisfied that the circumstances under which the cannabis was found in the custody and possession of the appellant proved that he had knowledge of the same. In brief, as already alluded to, the evidence shows that he lived alone in the house. On the material day and time he led the NDEA agents to his house. In his own statement he said, *“...and showed them those branches of cannabis plant which I had left to dry on the wall on the black plastic...”* True to his own words, the NDEA agents seized the cannabis after he had shown it to them. Surely, in the midst of the evidence on record there is nothing to fault the trial judge in his finding that the appellant possessed the herbal material and that he knew that it was cannabis. The cannabis was more than 25 grams. Indeed, to be exact, it was 33.3 grams. The presumption was, therefore, that it was being used for trafficking. On the available evidence, the presumption was not rebutted.

[19] After all, if we may add by way of emphasis, the evidence of PW3 in examination-in-chief somewhere at pages 57 and 58 of the record went on as follows:-

“Q *What happened next?*

A: *Arriving at his residence, I asked Mr. Ignace if there is any illegal substance or drugs at his residence before we conduct the search. **He answered me and said yes I have some herbal materials which I have put dry for my own consumption.***

Q: *What did you do thereafter?*

A: *We entered into his house and he lead us to where he has place a black plastic bag, it is like a bin liner on a small wall which is level with the earth and the house. It is like to level the ground. On his property **he showed us this plastic and the herbal materials which was put to dry on it.***

[Emphasis added.]

[20] Seriously speaking, the above aspects of the prosecution evidence were not contested or contradicted in cross-examination or in the appellant’s line of defence. If so, it will be fair to say that the prosecution’s version that the appellant had possession and knowledge of the controlled drug remained uncontested.

GROUND 2

[21] It is contended in this ground that the judge erred in law and in fact in disregarding the evidence of the appellant from his dock statement.

[22] The evidence of the appellant in connection with this point is found at pages 126-129 of the record. He denied possession and knowledge of the herbal material found at his residence. In his further evidence, the case against him was a frame-up by NDEA agents because his neighbour, Sheila Albert, had phoned and told him that on the material day she saw NDEA agents going to his house.

[23] It is a canon and general principle of law that in a criminal case the prosecution has the duty of proving its case beyond reasonable doubt. The only obligation on the part of the defence is to cast a reasonable doubt on the prosecution case.

[24] In the dock statement the appellant had tried to raise a doubt in the prosecution case by stating that he was not responsible for the plastic bag found at his house. According to him, the NDEA agents were responsible and were seen by his neighbour Sheila.

[25] Unfortunately Sheila was not called by the defence to testify. On 10/4/2012 the appellant's Counsel informed the court that he was not going to make a submission of no case. Thereafter, it is on record that the appellant was to make a statement from the dock and call **"a witness"**. Then the appellant gave a statement from the dock and the case was adjourned for hearing on 27/4/2012. On this date, the case was called again for defence hearing. On this day, the defence counsel told the court that they would call **"two witnesses."** Thereafter, one of the said two witnesses, i.e. Josephine, testified. After she gave her evidence, the defence counsel told the court thus:-

"My lord at this stage the defence will closed (sic) its case we are not calling any further evidence."

[26] In order to re-assure himself about the defence counsel's submission the trial judge turned on to the appellant and asked him whether it was true they were not calling any other witness. The appellant's response was in the affirmative that they were not calling any other evidence.

[27] As it is, for all that could be worth, Sheila could have probably been a material witness for the defence on the appellant's alleged story that she told him about the NDEA agents visiting his residence. Yet, she was not summoned!

[28] It is a trite principle of law that an adverse inference may be drawn against a person or persons where, for no apparent reason, a material witness who is within reach is not called to testify. In this case no reason was given to explain the absence of Sheila. If so, it will be too late in the day for the appellant to appear to intimate that the evidence of

Sheila could have lended credence to the defence case and thereby cast doubt on the prosecution case.

GROUND 3

- [29] It is alleged in this ground that the sentence of eight years is manifestly harsh and excessive.
- [30] It is contended in the Heads of Argument that while being tried for this offence the appellant was convicted and sentenced to seven years imprisonment in an unrelated offence of sexual assault and that in the warrant of commitment the sentence of eight years was made to run consecutively with the sentence of seven years, meaning that he will serve fifteen years in prison.
- [31] Wherefore, it is prayed that an order be made that the sentence of eight years in this case be made to run concurrently with the sentence the appellant was already serving.
- [32] Unfortunately the information relating to this ground was not brought to the attention of the trial judge. Nevertheless, in the interests of justice, we will address the ground.
- [33] We have checked the record. On 5/12/2011 the appellant was convicted of sexual assault and sentenced to seven years imprisonment by the Magistrates' Court. The date of the sentence and indeed the warrant of commitment is 5/12/2011.
- [34] On appeal the Supreme Court upheld the conviction and sentence.
- [35] A question has arisen on this appeal as to whether the sentence should run concurrently or consecutively. We hold that section 9(1) of the Criminal Procedure Code cannot be invoked in such a situation.
- [36] Section 9(1) of the Criminal Procedure Code reads:-

*9(1) When a person is convicted at **one trial** of two or more distinct offences the court may sentence him, for such offences, to the several punishments prescribed therefore which such court is competent to*

impose, such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the court may direct, unless the court directs that such punishments shall run concurrently.

[Emphasis added.]

- [37] Section 9(1) (*supra*) may only be invoked in a **trial**, which is not the case here. At any rate, by virtue of this provision the Magistrates' Court could not have ordered the sentences to run consecutively or concurrently because it was not involved in a **trial of two or more** distinct offences.

[Underlining ours.]

- [38] In the circumstances, the best we can say is that the sentence of eight years meted on the appellant in this case is upheld and shall run from the date of the conviction, that is on 28/1/2013. It would have been otherwise if the Supreme Court had ordered that the sentence should run from the date of any sentence the appellant may have been serving.
- [39] Except for what we have stated above on sentence the appeal is otherwise dismissed.

J. Msoffe (J.A)

I concur:.

S. Domah (J.A)

I concur:.

M. Twomey (J.A)

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