

IN THE SEYCHELLES COURT OF APPEAL

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

Criminal Appeal SCA 15/2011

(Appeal from Supreme Court Decision CR 47/2009)

John Sifflore

Appellant

Versus

The Republic

Respondent

Heard: 09 December 2015

Counsel: Mr. Anthony Juliette for the Appellant

Mr. Jayaraj Chinnasamy for the Respondent

Delivered: 17 December 2015

JUDGMENT

J. Msoffe (J.A)

[1] The Appellant was charged with two counts of aiding and abetting in the trafficking of controlled drugs contrary to section 5 of the Misuses of Drugs Act as read with Section 2, Section 27(a) and Section 26(1)(a) as amended by Act 14 of 1999 and punishable under Section 29 as read with the 2nd Schedule of the Misuse of Drugs Act as amended by Act 14 of 1994 and two counts of conspiracy to commit the offence of trafficking in a controlled drug contrary to Section 28(a) of the Misuse of Drugs Act and punishable under Section 28 of the same Act as read with the 2nd Schedule to the Misuse of Drugs Act.

[2] In the third and fourth counts, the Appellant and Kevin Lesperance (the second accused at the trial) were charged with conspiracy to commit the offence of trafficking in a controlled drug contrary to Section 28(a) of the Misuse of Drugs

Act and punishable under Section 28 of the same Act as read together with the 2nd Schedule of the Misuse of Drugs Act.

[3] After a full trial, the Appellant was acquitted of the first and second counts and convicted of the third and fourth counts and sentenced to concurrent terms of ten years imprisonment. The second accused was acquitted of these counts.

[4] Aggrieved, the Appellant is appealing against both conviction and sentence. In the notice of appeal, he has canvassed the following grounds:

i) Having acquitted the 2nd accused in the case and having found that the prosecution had failed to prove beyond reasonable doubt that the 2nd accused had agreed with the 1st accused (Appellant), Marvelous Nobuhle Khumalo or Lawrence Nnabuife to pursue a course of conduct that if pursued will necessarily amount to or involve in the commission of the offence of trafficking in a controlled drug namely 129.8 grams of cocaine and heroin, the learned trial judge then erred in convicting the Appellant of the same offence.

ii) The learned trial judge erred in his finding that “the pattern of evidence adduced is more consistent with the 1st accused (Appellant) having agreed to convey Lawrence Nnabuife to wherever he was instructed to go in the course of the performance of an illegal transaction” in that such a finding is not supported by the evidence, which was lacking and discredited and does not support the contention of the prosecution that both accused persons were involved in the agreement with Marvelous Khumalo and Lawrence Nnabuife to commit the offence of trafficking in controlled drugs.

[5] In view of the position we have taken on the appeal, it is instructive to state the facts in fairly sufficient detail.

- [6] Marvelous Nobuhle Khumalo, a Zulu lady from South Africa, in testifying for the prosecution explained that while she was in South Africa, a friend by the name of Martha asked her to travel to New Delhi in India where she met two men by the names of Ben and Chris. The two men gave her 80 “bullets” to swallow and US\$1460 to come to Seychelles via Dubai. Khumalo swallowed 75 “bullets” and threw away the rest. On the 2nd of October 2009, she arrived in Seychelles in flight EK 707 from Dubai where she was stopped and searched by agent Nichol Franchette and agent Tania Lozaique. There arose suspicion that she might be concealing illicit drugs inside her body. She was thus taken to Victoria hospital for a CT scan where the “bullets” were seen. She agreed to cooperate with the NDEA agents, and was taken to the NDEA Headquarters and then to Villa Des Roses guest house.
- [7] In the night of 2nd October 2009, Khumalo excreted 75 “bullets”, 14 of which had black markings on them, leaving a remnant of 61 without the black marks. She cleaned the “bullets” in the presence of agent Masandra Georgette Botsoie and handed them over to agent Wilby Jumeau who were the NDEA officers assigned with the duty of guarding her. The “bullets” were taken to a forensic chemist, Mr. Jeremy Bouzin for chemical analysis and report. The report confirmed that they were controlled drugs, the 14 “bullets” with black marks were cocaine with a purity of 35% and the remaining 61 “bullets” were heroin with a purity of 67%. After the analysis, the exhibits were sealed and returned to agent Jumeau, with a certificate stating the result of the analysis.
- [8] Khumalo further agreed to cooperate with the NDEA agents and made communications with Martha and Ben assuring them that she had arrived safely and that all was going according to plan. Ben directed her to give 60 “bullets” to a man in a car registration number S15025 wearing a red T-shirt and a black cap, referred to as JP. Agent Wilby Jumeau gave Khumalo the 61 “bullets” to take to the person named JP in the car park near La Perle Noire restaurant. Khumalo went

to the Sun Coco car park as instructed and saw two people, the Appellant being the one at the steering wheel and the person wearing the red T-shirt and black cap being the passenger referred to as JP. She got into the car but as it was driven away it was stopped by the NDEA agents and they were all taken to Villa Des Roses guest house.

[9] Khumalo further testified that later on she was given some “bullets” to take to the car park in the company of JP, where a white car came and parked next to their vehicle and then quickly moved away again before she made any contact with the driver of that vehicle but the car was intercepted by NDEA agents as it was moving away and the driver was arrested. It was only until later that she came to know that the vehicle was driven by Kevin.

[10] Agent Melissa Malbrook and agent Johnny Malvina in further bolstering the prosecution case testified to have made observations as follows. Agent Melissa Malbrook, from her observation post at the vicinity of Villa Des Roses at Beau Vallon, stated that she saw a person who she identified as Kevin Lesperance driving a yellow mini moke registration number S9471. His vehicle parked near another vehicle registration number S15025 driven by the Appellant at the car park next to Sun Coco. A dark man in the mini moke with Kevin disembarked and entered the car driven by the Appellant. The car left the car park after about five minutes and that at about 3:45 pm the car returned and parked in the car park with two black men inside. A lady walked towards them and got in the car after speaking to them and arrested the men in the car. Agent Malbrook admitted that she was not able to hear what they spoke about from her observation post.

[11] In his testimony, agent Johnny Malvina said that from his observation post close to the Beau Vallon clinic, he saw Kevin driving a yellow mini moke registration number S9471 towards Beau Vallon. He was alone. Later on at around 2:50 pm,

Kevin drove the same mini moke again towards Beau Vallon with a black male passenger who was later identified as Lawrence Nnabuife.

- [12] Lawrence Nnabuife testified for the prosecution that he is a Nigerian who was acquainted to the Appellant and he (**Lawrence**) is also a friend of Ben who he explained to be a Nigerian living in India. Lawrence testified that Ben had informed him that there was a lady heading to Seychelles and Lawrence had to collect the drugs that the lady carried for John (identified as the Appellant) and Rasta (identified as the 2nd accused at the trial). Lawrence was to identify himself as JP.
- [13] On 3rd of October 2009, Lawrence, wearing a red T-shirt and a black cap, was picked up by the Appellant at Les Mamelles and they went to an apartment at Beau Vallon where they met Kevin. He then went with the Appellant to collect the drugs but were arrested and taken to Villa Des Roses guest house where he agreed to cooperate with the NDEA agents. He called Kevin asking him to bring US\$3000 for the lady to clear her expenses. On arriving at the car park, Kevin did not disembark but drove away immediately. In cross examination, Lawrence further admitted that he had lied to the police when he told them that Ben called him from India and as it was indeed him who called Ben and sent him several texts. Lawrence also explained that the only time he communicated with Kevin was when he asked him to bring the US\$3000 and had not called him before the arrest.
- [14] Finally Sergeant Seeward testified for the prosecution that as an investigation officer, he requested and received telephone records for telephone numbers 512137 belonging to Kevin and 567570 in his possession amongst other records, and seized a sum of 814 Euros, US\$440 and Rs2200. He produced in court the telephone records of Kevin and Lawrence Nnabuife as exhibits and the same were

admitted accordingly. He also testified that he knew Kevin as an acquaintance to the Appellant.

[15] At the trial, the Appellant opted to exercise his constitutional right to remain silent and did not call any witnesses. Kevin had one witness.

[16] Leslie Anna Lesperance, the defence witness testifying for Kevin as his wife stated that she had lived with him at Cote D'Or, Praslin, where they have numerous businesses. She said that they come to Mahe regularly for business and that they are regular clients of Coral Strand Hotel. She further testified that on 2nd October 2009, Kevin was supervising renovation work on their property at Beau Vallon and was staying at Coral Strand Hotel.

[17] The above grounds of appeal are inter-linked. So, in disposing of the appeal we will address them generally.

[18] As stated in **Halsbury's Laws** (5th Edn) at para. 73, 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.

[19] 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.

[20] 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 ad idem* to affect an unlawful purpose.

[21] Yet again, as stated in **Archbold** 2012, 33—1 — 33—20, 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.

[22] The main elements of conspiracy are a specific intent, an agreement with another person to engage a crime to be performed. An unlawful agreement is an element of a criminal conspiracy.

[23] For purposes of a fair decision in this matter the following questions need to be asked and answered:-

What was the agreement entered into by the Appellant and his accomplices-turned-witnesses? Asked in another way, Was there an agreement between them to commit the offence of trafficking in controlled drugs? Who did the Appellant have an agreement with? Was it Lawrence or Khumalo or both?

[24] To start with, it was the evidence of Lawrence that at all time relevant to the charge, the Appellant was aware of the transaction. However, as we held in the case of **L. Assary v Republic** [2012] SCA 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. Thus, in this case it was imperative upon the trial court to treat with care the evidence of Marvelous and Lawrence Nnabuife who, as pointed out above, were accomplice-turned-witnesses.

[25] From the above facts, it is discerned that it was the evidence of M/s Khumalo that she did not know the Appellant. She had not had communication with him. Her conspirators had not mentioned the Appellant to her at any time. Her evidence

was that after the trap had been laid, when she got into the car driven by the Appellant, he had uttered the question “*where is the stuff?*”. That was the communication that the prosecution had led to show that the Appellant was aware of what was happening. The other accomplice turned-prosecution-witness did not link the Appellant to the conspiracy to import drugs to the Appellant. The communication was always between him (Lawrence), Khumalo and a fictitious, if mysterious, Ben. The Appellant could not therefore be said to have conspired with Khumalo to traffick in controlled drugs. At the time of their meeting, Khumalo had no intention to traffick in drugs. She was already in police custody and was only released to meet the Appellant as a trap. In the evidence of the prosecution, Khumalo had been advised to go out and meet a man in a red t-shirt and a cap. That turned out to be JP. Khumalo was advised by her accomplices that she would be dealing with JP. There was no mention that JP would be accompanied. As she left the guest house, with the trap from the police/NDEA, she was not going to meet the Appellant, she was unaware he existed. She was hesitant to board the car when she realized there was another person, the Appellant. Further, the evidence did not establish conclusively that the Appellant had an agreement with Lawrence Nnabuife to traffick in drugs. As was observed in the case of **R v Harris** (1927) 48 NLR 330 (188), the Appellant may have had the necessary intention for conspiracy, but in the absence of a subjective agreement, the unlawful conduct for conspiracy was lacking.

[26] It may also be pointed out that in law apart from the agreement, parties must have the intent to commit the crime in question. In this case, although the Appellant may have had the *mens rea* to commit the crime of trafficking, but Khumalo never had, as she had already denounced the trade.

[27] This brings us to the other crucial aspect of the case which is borne out by the complaint in the first ground of appeal. The question is whether or not having acquitted the second accused of the third and fourth counts of conspiracy to

commit the offence of trafficking in a controlled drug the Judge was justified in convicting the Appellant of the same offence(s). The answer to this crucial question is simple.

- [28] From the available evidence, it would be suggestive that the Appellant was a friend of the second accused more than the other key witnesses, that is, Khumalo and Lawrence Nnabuife. If so, it seems contradictory that, having acquitted the Appellant of the first two counts of aiding and abetting and also having acquitted the second accused of the third and fourth counts, the trial court would still convict the Appellant of the latter two counts based on the same evidence subject of the said acquittals!
- [29] The second accused was acquitted for lack of sufficient evidence. Since the offence of conspiracy to traffick in drugs is usually committed by two or more persons acting in concert to execute a common intention it is a bit difficult to comprehend or see how the Appellant could have been convicted of the offence(s) alone!
- [30] At any rate, the prosecution did not produce tangible evidence, other than the line taken by Lawrence Nnabuife, that the Appellant was in conduct with either Khumalo, Ben or even his co-accused! There was nothing to connect the Appellant to the second accused except the evidence given by Lawrence Nnabuife — an accomplice-turned-witness — whose evidence ought to have been treated with great care and caution, as already stated above.
- [31] There is another feature of the case which is a bit unpleasant which has to be mentioned here. While the prosecution has the discretion to or not to charge anyone it seems a bit strange that the prosecution having built a case against Khumalo and Lawrence, both foreign Nationals, chose not to charge them but to use them as witnesses against the Appellant!

[32] The Principal State Attorney appearing on behalf of the respondent Republic in his Heads of Argument correctly stated the law — citing **Archbold Chapter 33** — that in a case of this nature the agreement may be proved in the usual way or by proving circumstances from which a presumption may be drawn from it. However, in our considered view ultimately it is correct to say that each case has to be decided on the basis of its own facts and circumstances. In the justice of this case, the evidence of the key witnesses ought to have been treated with great care and caution, as already observed above. In the circumstances, the evidence of Khumalo and Nnabuife ought not to have been believed wholesale in grounding the conviction.

[33] When all is said and done, there is doubt that the prosecution case against the Appellant was proved beyond reasonable doubt. The doubt ought to have been resolved in favour of the Appellant by giving him the benefit of doubt and thereby earn him an acquittal.

[34] In the event, and for the foregoing reasons, the appeal is allowed, conviction quashed and sentence(s) set aside. The Appellant is to be released from prison unless he is held in connection with a lawful cause.

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 17 December 2015