

IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGregor (PCA) , A. Fernando (J.A) , M. Twomey (J.A) **]**

Criminal Appeal SCA 28/2013

(Appeal from Supreme Court Decision 49/2012)

Kelson Alcindor

Appellant

Versus

The Republic

Respondent

Heard: 06 April 2015

Counsel: Mr. Nichol Gabriel for Appellant

Mr. George T. Thachett for Respondent

Delivered: 17 April 2015

JUDGMENT

F. MacGregor (PCA)

- [1] The appellant was charged at the Magistrate's Court with the offence of Possession of Controlled Drug contrary to section 6(a) as read with section 26 (1) (A) of the Misuse of Drugs Act. He was convicted and sentenced to prison for 6 years.
- [2] Unsatisfied, the appellant approached the Supreme Court and appealed against both his conviction and sentence. The Supreme Court upheld the conviction, but reduced the sentence from six years to five years. The appellant has now appealed to this Court against the legality of his sentence by the Supreme Court.

- [3] The appellant has argued that the Supreme Court failed to consider that he was sentenced by the Magistrate's Court at a time when the Misuse of Drugs Act had been amended to remove the five year mandatory minimum sentence. It is the position of the Appellant that while the law provided for a minimum mandatory sentence of five years when he was arrested in October 2010, the law was amended in July, 2012 and the minimum mandatory sentence for the offence he was charged with was removed. It is the argument of the appellant that when he was convicted and sentenced in November 2012, the trial magistrate declined to accept that there were now more favorable terms prescribed in the amendments.
- [4] The appellant further argues that he should benefit from the amendment of the Misuse of Drugs Act on the basis of Article 48 of the Constitution as read with Article 15 of the International Covenant on Civil and Political Rights of 1966 which provides that *"No one shall be held guilty of any criminal offence on account of any Act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the offence was committed. If subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby."*
- [5] It is however the argument of the Respondent that the amendment of the Misuse of Drugs Act in July 2012 did not reduce the punishment for the offence of unauthorized possession of controlled drugs and that the sentence given to the Appellant would still fall below the maximum sentence provided by the Act.
- [6] The Respondent further argues that the International Covenant on Civil and Political rights is partly excluded in the Republic as it has not been ratified by the National Assembly.

Determination.

- [7] Once the Appellant was convicted of the offence of possession of controlled drugs contrary to the Misuse of Drugs Act, Cap 133, the Court was guided on the punishment to impose on him by, among other factors, section 29(2) (d) of that Act.
- [8] We agree with the Appellant that as at the time he was arrested, the Misuse of Drugs Act imposed a minimum mandatory jail term of five years on conviction. It is also correct that before the Appellant was convicted, the law was amended and the minimum mandatory term of sentence was removed. The removal of a minimum mandatory sentence did not prescribe a lesser sentence. The maximum sentence for the offence for which the Appellant was charged remained 15 years imprisonment. Therefore, at the time of conviction of the Appellant, the law allowed the trial court to sentence the convicted to a sentence of no more than 15 years.
- [9] This is an appeal against a decision made by the Supreme Court, sitting as an appeal court on a decision from the Magistrate's Court below. Section 326 of the Criminal Procedure Code provides grounds upon which an appeal from the Magistrate's Court may be brought to the Court of Appeal. The Magistrate's Court imposed a sentence of six years upon his conviction. The Supreme Court reduced the sentence by a year and therefore imposed a sentence of five years imprisonment. We should at this point indicate that the long and short of this appeal is severity of the sentence meted on the Appellant. His arguments have however skirted severity and this court has been called upon to consider whether the sentence imposed by the *court aquo* was legal or not legal.
- [10] The main purposes of punishment are deterrent, preventative, reformatory and

retributive. This was also the position taken by the Court in **S v Rabie** 1975 (4) SA 855 (A) at 862 AB and **Godfrey Mathiot v Republic** SCA 9/1993.

- [11] In **Poonoo v Attorney-General** (2010) SLR 361, Justice Domah held that “*Sentencing involves a judicial duty to individualize the sentence tuned to the circumstances of the offender as a just sentence...*” What then would be a just sentence?
- [12] In **S v Sparks** 1972 (3) SA 396 (A) at 410 H, Holmes JA held that punishment should fit the criminal as well as the crime, be fair to the State and to the accused, and be blended with a measure of mercy.
- [13] In **S v Van der Westhuizen** 1974 (4) SA 621 C, Baker J reaffirmed that consideration should be given to the crime, the criminal, society and the element of mercy. But it must also be borne in mind that the consideration of mercy must not be allowed to lead to the condonation or minimization of serious crimes. The sentence handed should be just and appropriate. It should not be too either be too harsh or too lenient as to meet the purposes of the punishment.
- [14] Article 64 of the Constitution gives the President of the Republic authority to execute treaties, agreements and conventions on behalf of Seychelles. It then proceeds to elaborate on how such treaties, agreements and conventions may bind the Republic. Article 48 of the Constitution defines the status of international human rights law in Seychelles domestic Law. It provides that Courts must interpret our charter of fundamental rights in such a way so as not to be inconsistent with any international obligations of Seychelles relating to human rights. We cannot therefore shy away from Article 48 of the Constitution, and neither can the court ignore the International Covenant on Civil and Political Rights of 1966 whenever it is applicable. Both are applicable in the instant case.
- [15] In determining this appeal, this court is guided by the principle that sentencing is a matter pre-eminently falling squarely within the purview of the trial court's

discretion, which should not lightly be interfered with. As held in **Nhlanhla Solomon Dlamini v the State North Gauteng, Pretoria, Case No. A885/12**, a sentence should only be interfered with on appeal where, (i) an irregularity occurred; (ii) the trial court materially misdirected itself on the question of sentence; or, (iii) the sentence could be described as so disturbing that it induces a sense of shock. The mere fact that any or all the judges sitting on an appeal would have imposed another sentence, be it heavier or more lenient, if he presided in first instance, is not enough reason for a court of appeal to interfere with the sentence imposed. See also the case of **R v Pasenji SCA 12 of 2013**.

- [16] While the amendment did not set a new minimum mandatory sentence, the basis for removal of the minimum mandatory sentence was partly informed by a large number of people imprisoned for possession of small quantity of drugs. The quantity of drugs for which the Appellant was convicted was 42 milligrams.
- [17] It was expected that without the minimum mandatory sentence, a trial court would have discretion to consider the age of the convicted, the quantity of drugs he had been arrested with among other factors, when imposing jail term. Ever since the Act was amended, there have been several convictions and imprisonment of people accused of possession of similar or almost similar proportionately small quantity of drugs. In this regard, the Appellant referred us to the criminal cases, *R v Travis Rapide Cr. case No. 669/2011*, *R v Hansel Reine, Cr. case No. 501/2012*, *R v. Jamal Marday, Cr. case No. 513/2012*, *R v. Jonathan Loizeau, Cr. case No. 10 of 2010*, *R v Franky Thelermont Cr. case No. 229 of 2012* and *R v Dereck Samson Cr. case No. 679/2011*. The punishment for all the cases referred showed a trend of lesser punishment than the one meted on the Appellant. The lowest being six months and the highest being three years.
- [18] Where two people are convicted of similar charge, it is wrong in principle to impose a particular form of sentence on one and then a different form of

punishment on the other. There should be parity in sentencing (see the case of *R v Berry*, 7 Cr. App. R (S) 392 CA).

[19] It would therefore be fair, and in the interest of justice not to punish the Appellant more harshly than those others convicted of similar offences. Taking into account the factors above, the age of the Appellant, the principle of parity in sentencing, I consider the sentence of 5 years to be harsh. In the circumstances, the sentence is reduced to 3 years.

[20] It is so ordered.

F. MacGregor (PCA)

I concur:.	A. Fernando (J.A)
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I concur:.	M. Twomey (J.A)
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Signed, dated and delivered at Palais de Justice, Ile du Port on 17 April 2015