

IN THE SEYCHELLES COURT OF APPEAL

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

Criminal Appeal SCA 42/2014

(Appeal from Supreme Court Decision CR 46/2013)

Eric Njue

Appellant

Versus

The Republic

Respondent

Heard: 12 April 2016

Counsel: Mr. Anthony Juliette for the Appellant

Mr. Jayaraj Chinnasamy for the Respondent

Delivered: 22 April 2016

JUDGMENT

J. Msoffe (J.A)

- [1] The Appellant was charged with four counts namely, importation of a controlled drug, trafficking in a controlled drug, conspiracy to traffick in a controlled drug, and possession of a controlled drug, respectively. He pleaded not guilty to the first three counts.
- [2] He was convicted on his own plea of guilty to the fourth count relating to the offence of possession of a controlled drug of class A contrary to section 6(a) of the Misuse of Drugs Act Cap 133. He was sentenced to a term of imprisonment for five years and four months with an order for the time spent in custody to be taken into account.

- [3] Aggrieved, he is appealing against sentence pursuant to section 342(1) (a) (iii) and (b) of the Criminal Procedure Code where in a conviction on a plea of guilty an appeal is allowed against sentence only with leave.
- [4] There is only one single ground of appeal which is to the effect that the above sentence is harsh and excessive in all the circumstances of the case and is inconsistent and in disparity with other sentences for similar offences.
- [5] Briefly, on 31st July 2013 at approximately 15.25 hours the Appellant, a Kenyan national, arrived in Seychelles on an Ethiopian Airline flight ET 879. His luggage was searched with a negative result. He was arrested and taken to the NDEA Headquarters for further questioning and investigation. In his cautioned statement he stated that he had flown from Kenya to Addis Ababa, Ethiopia, where he contacted a lady called Abeba. The latter gave him an “item” for delivery to one Isaac in Seychelles.
- [6] He swallowed the “item”. On 1st August 2013 at 11.55 hours he went to the toilet and excreted the “item” (an oval shaped object) which was seized by the NDEA agents.
- [7] The Appellant was convicted prior to the trial of his co-accused, Anthony Eugene Morrel. He gave evidence for the prosecution in respect of the co-accused pursuant to a conditioned offer by the Attorney General made under section 61(a) of the Criminal Procedure Code, as amended. Consequently the prosecution added the above mentioned fourth count and dropped all three previous charges against him.

- [8] At the end of the prosecution case the court ruled that there was no sufficient evidence to support a *prima facie* case against the co-accused and upheld a no-case to answer submission by the defence.
- [9] The drug subject of the above conviction and sentence weighed 3.39 grams of heroin.
- [10] The main purposes of punishment are deterrent, preventive, reformatory and retribution. 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. And in the case of **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*”
- [11] In deciding what would be a just sentence Holmes JA in **S v Sparks** 1972 (3) SA 396 (A) at page 410 H provides useful guidance 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.
- [12] The general principle is that unless the law prescribes the statutory minimum, the court has discretion to impose a sentence it deems fit. However, the discretion must be exercised judiciously.
- [13] In Seychelles the law, as propounded by Souyave, A.C.J, in **Dingwall v R [1966] 205** and followed in many other subsequent decisions on the point, is settled that:-

(i) *an appeal court will only alter a sentence imposed by the trial court if it is evident that it has acted on a wrong*

principle, or overlooked some material factor, or if the sentence is manifestly excessive in view of the circumstances of the case.

(2) an appeal court is not empowered to alter a sentence on the mere ground that if it had been trying the case, it might have passed a somewhat different sentence.

[14] In deciding the appropriate sentence it is trite law in many jurisdictions that the court should be guided by a number of principles, i.e –

- (i) The public interest.
- (ii) The nature of the offence and the circumstances under which it was committed.
- (iii) For a first offender the emphasis should be on reformative aspect.
- (iv) The gravity of the offence.
- (v) The prevalence of the offence.
- (vi) The damage caused i.e. seriousness of injury caused in an assault, rape, in a case of drugs its impact on society, etc.
- (vii) The mitigating factors.
- (viii) The age and previous record of the accused.
- (ix) The period spent in remand custody.
- (x) The accused's cooperation with law enforcement agencies.

[15] Once the Appellant was convicted on his own plea of guilty the court was to be guided by among others, section 29(2)(d) of the Misuse of Drugs Act, on the punishment to be meted on the said Appellant. The punishment to be meted falls at the discretion of the court. And, as already observed

particularly in **Dingwall's** case (supra), it is a discretion which should not be lightly interfered with.

- [16] The legislature in its wisdom amended the Misuse of Drugs Act and deleted the minimum sentence that had to be imposed. It left the discretion on sentence to the trial court and set the maximum sentences that could be imposed. In a case of this nature the maximum is 15 years imprisonment.
- [17] Admittedly, several cases before the court since the amendment of the Act seem to show a trend of fewer than 8 years for a similar offence. In the case of **Kelson Alcindor v Republic** [2015] SCCA 7, a similar offender was imprisoned for 3 years. In the case of **Danny Rose v Republic** [2015] SCSC 515, a similar offender was sentenced to 3 years imprisonment. In the case of **Republic v Patricia Dine**, SC Cr. 2/2012, a similar offender was sentenced to three years imprisonment. However, it should be pointed out that the circumstances under which the offences were committed in the above cases were different from the present one. And to add to this general statement, it should again be mentioned that in deciding the appropriate sentence ultimately the facts of each case have to be considered on their own merit because not all cases have similar facts.
- [18] We have given very careful thought to this appeal. We are inclined to agree that as the Appellant may be considered as a first offender, he pleaded guilty, he cooperated with the law enforcement agencies, the weight of the drug, the sentence is a bit severe, but taking inspiration from **Dingwall's** case we are not empowered by law to alter on the mere ground that if we had been trying the case we might have passed a somewhat different sentence.

[19] Taking into account all the circumstances of the case, particularly the circumstances under which the offence was committed, the fact that the maximum sentence is 15 years imprisonment and the Appellant got five years and four months only, and as held by Holmes, J.A. (supra) on the need to balance punishment to fit the criminal as well as the crime, fairness to the State and to the accused and the requirement to blend the sentence with a measure of mercy, we are unable to say that the sentence of five years and four months imprisonment passed on the Appellant is harsh and excessive in all the circumstances of the case.

[20] The sentence passed on the Appellant is maintained and the appeal is dismissed.

J. Msoffe (J.A)

I concur:.

F. MacGregor (PCA)

I concur:.

A.Fernando (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 22 April 2016