

IN THE SEYCHELLES COURT OF APPEAL

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

Criminal Appeal SCA CP 02/2015

(Appeal from Supreme Court Decision CP 07/2014)

Haron Ondicho Sagwe

Appellant

Versus

The Republic

Respondent

Heard: 01 August 2016

Counsel: Mr. Nichol Gabriel for the Appellant

Mr. Hemanth Kumar for the Respondent

Delivered: 12 August 2016

JUDGMENT

J. Msoffe (J.A)

[1] The determination of this appeal poses no difficulty. Its determination rests on the construction of, or meaning to be given to, the words “a serious miscarriage of justice” in Article 19(13) of the Constitution of the Republic of Seychelles (Cap 42) (hereinafter to be referred to as the Constitution). For ease of reference the sub-article reads:-

[13] Every person convicted of an offence and who has suffered punishment as a result of the conviction shall, if it is subsequently shown that there has been a serious

miscarriage of justice, be entitled to be compensated by the State according to law.

[Emphasis added].

- [2] Briefly, at the trial the prosecution evidence disclosed, *inter alia*, that, a Kenyan lady known as “Leah” was stopped and searched by custom officers at Seychelles International Airport and found to be in possession of 30 capsules containing heroin. She was taken to the National Drug Enforcement Agency (NDEA) for further investigation. The NDEA agents decided to identify and arrest the person in Seychelles who would collect the drugs from her. Kathleen Belle was substituted for Leah for purposes of delivery of the drugs. A plan was devised for delivery of the drugs at the Casualty Department of Victoria Hospital. A meeting took place between Belle and the Appellant who arrived and approached her. According to Belle she gave a plastic bag containing the capsules to the Appellant who checked the contents and decided to leave the scene. Belle pursued him and in the process the Appellant dropped the bag containing the drugs.
- [3] On the other hand, the Appellant’s version was, *inter alia*, that he was at the hospital to meet a Kenyan national who was sick where Belle, identifying herself as Leah, handed the plastic bag to him, pulled out her firearm and told him that he was under arrest. He agreed that he ran away from the scene, etc.
- [4] The trial Judge considered both versions of the respective cases. Ultimately, the prosecution case was upheld resulting in the Appellant’s conviction for trafficking in a controlled drug contrary to section 14(c) of the Misuse of

Drugs Act and he was sentenced to imprisonment. Aggrieved, the Appellant appealed.

- [5] In its Judgment dated 11th April 2014 this Court held, *inter alia*, that the evidence of Leah should not have been admitted in evidence since its admission was in breach of the hearsay rule. The appeal was accordingly allowed. Thus, the Appellant was acquitted after having spent 3 years of a 12 years sentence.
- [6] By a letter dated 21st May 2014 the Appellant's Counsel wrote to the Attorney General claiming compensation. The Respondent Republic rejected the claim.
- [7] In the result, the Appellant petitioned the Constitutional Court of Seychelles claiming that in all the circumstances of the case there had been a breach of Article 19(13) of the Constitution, specifically that there was "a serious miscarriage of justice". He, therefore, sought compensation in the amount of SR6,000,000. In its Judgment dated 28th July 2015 the Constitutional Court dismissed the Petition, hence this appeal.
- [8] In the notice of appeal the Appellant has canvassed the following grounds of appeal:-
1. The Learned Judges of the Constitutional Court erred on their interpretation of the provision of the Constitution in relation to a serious miscarriage of justice.
 2. The Learned Judges of the Constitutional Court erred in finding that there was no serious miscarriage of justice in the conviction of the Appellant before the Supreme Court.

3. The Learned Judges of the Constitutional Court erred in applying the test in the case of the Queen on the Application of Ismail Ali, Ian Lawless, Barry George, Kevin Dennis, Justin Tunbridge and Secretary of State for Justice (2013) EWHC 72 (Admin) (hereinafter referred to as the “Ismail Ali case”).
4. In all circumstances the findings of the Constitutional Court was wrong and faulty and was devoid of all merits.”

[9] In the interests of justice since, as already stated, the determination of the appeal depends on the interpretation of the words “a serious miscarriage of justice”, we propose to dispose of the appeal generally instead of addressing the grounds verbatim.

[10] It is elementary that constitutional interpretation is the process by which meanings are assigned to words in a constitution. This is done in order to enable legal decisions to be made that are justified by the interpretation.

[11] It is also elementary that constitutional controversies are about whether an official act is consistent with, and authorised by, a Constitution or a constitutional statute or a court decision. The Constitution is a law. It is the supreme law within its domain. Therefore, in Seychelles the Constitution is the supreme law of the land. Hence, since a Constitution is a law the principles of constitutional interpretation are essentially the same as the principles of statutory interpretation.

[12] G. P. Singh in his book **Principles of Statutory Interpretation**, Tenth Edition, 2006, has this to say on the interpretation of a statute:-

*When the question arises as to the meaning of a certain provision in a statute, it is not only legitimate but proper to read the provision in its context. The context here means, **the statute as a whole**, the previous state of the law, other statutes in pari materia, the general scope of the statute and the mischief that it was intended to remedy.*

[Emphasis added].

[13] In interpreting the words in a statute it is always important to look at the intention of the legislature in enacting the statute. The traditional wisdom is that the search for legislative intent is normally ascertained from the words it has used. The words used may be found in the title, preamble, chapter headings, marginal notes, punctuations, definitions, etc. of a statute. In such a situation it is easy to discern the intention of the legislature because when a statute is clear and unambiguous the inquiry into legislative intent ends at that point.

[14] However, when a statute could be interpreted in more than one fashion the legislature's intention must be inferred from sources other than the statute. In this sense, there are other "Aids" which are not contained in the statute but may be found elsewhere. According to Justice A. K. Srivastava of the Delhi High Court in his persuasive Article titled **Interpretation of Statutes** [J. 1. R. 1. Journal – First Year, Issue 3-July–September, [1995] the other "Aids" may be as follows:-

1. Historical background;
2. Statement of objects and reasons;

3. The original bill as drafted and introduced;
4. Debates in the legislature;
5. State of things at a time a particular legislation was enacted;
6. **Judicial construction**
7. **Legal dictionaries**
8. **Common sense**

[Emphasis added].

[15] Article 6 of the Constitution read together with paragraph 8 of the Second Schedule thereto provide very useful guidance on the interpretation of the provisions of the Constitution. The paragraph reads:-

8. *For the purposes of interpretation –*

- (a) *the provisions of this Constitution shall be given **their fair and liberal meaning.***
- (b) *this Constitution shall be read as a whole, and*
- (c) *this Constitution shall be treated as speaking from time to time.*

[Emphasis added].

[16] It is to be emphasized here that paragraph 8(a) (supra) enshrines one of the cardinal principles of interpretation that courts should give a legislation its plain meaning. In this regard, Article 19(13) has to be looked at as a whole;

and in the process the words “a serious miscarriage of justice” have to be given their fair and liberal meaning.

- [17] Applying **Srivastava** (supra) under item 7 thereof, it is to be noted that **Black’s Law Dictionary**, 9th Edition, defines “miscarriage of justice” as:-

*A grossly unfair outcome in a judicial proceeding, as when a defendant is convicted **despite a lack of evidence on an essential element of the crime.***

[Emphasis added].

- [18] As far as our research could go, the word “serious” is not defined in any legal dictionary. Nonetheless, Sarah Tulloch in **The Oxford Dictionary and Thesaurus**, 1996 at page 1410 defines the word, *inter alia*, as **grave, important, vital, weighty, significant, momentous, crucial, consequential, alarming, severe, precarious**, etc. [Our emphasis].

- [19] Yet again, taking guidance from **Srivastava** (supra) under **item 6** thereof, this brings us to “judicial construction” as an “aid” in the interpretation of the words “miscarriage of justice.”

- [20] Article 19 (13) must be considered as the domestication of clause 14(6) of the International Covenant on Civil and Political Rights-1966. Seychelles acceded to the Covenant on 5th May, 1992, barely a year before the Constitution of Seychelles was promulgated.

- [21] Article 14(6) of the ICCPR (supra) provides that –

“When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been

*reversed or he has been pardoned on the ground that **a new or newly discovered fact** shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law...*

[Emphasis added.].

- [22] The provision in the Constitution differs slightly, but on an important point, with clause 14(6) of the ICCPR. The latter speaks of a conviction reversed on ground of “a new or newly discovered fact” which shows conclusively that there has been a miscarriage of justice. The former is quiet on what may subsequently drive the conclusion that a miscarriage of justice occurred.
- [23] Apart from this general provision, there is no statutory scheme for claiming compensation for miscarriage of justice. In a fit and ideal case, the court is therefore left with the task, to interpret what constitutes “a serious miscarriage of justice” as well as to determine what compensation would be appropriate.
- [24] Reading Article 14(6) of the ICCPR, and Article 19(13) of the Constitution, for a successful claim for compensation, a petitioner would need to prove several elements, as required by the provision:-
- i. That he was convicted of an offence;
 - ii. That he has suffered punishment;
 - iii. That, subsequently, it has been shown that there was a serious miscarriage of justice.

In this case, the first two questions are answered in the affirmative. The task remaining is what constitutes “miscarriage of justice”. There is no clear

description of the term. Judges in different jurisdictions have tried to define it, *albeit* with no ease.

[25] In 1927, Justice Dundedin of the Privy Council wrote in **Robins v National Trust Co.** [1927] 2 DLR:

"... Miscarriage of justice ... means such departure from the rules which permeate all judicial procedure as to make that which happened not in the proper use of the word judicial procedure at all."

[26] In **Lin v Tang**, 147, DLR (4th) 577 1997, Justice Huddard of the British Columbia Court of Appeal opined:

*"Miscarriage of justice is a difficult concept. It is not simply unfairness as viewed by the party who perceives himself the victim of an unfair process.... In my view, miscarriage of justice means that which not justice is according to law. **A miscarriage of justice will almost always be procedural.** The blemish must be such as to make the judicial procedure at issue not a judicial procedure at all."*

[Emphasis added].

[27] The Constitutional Court in this matter relied, in part, in the description given in the case of **Ismail Ali & Ors v Secretary of State for Justice** [2013] EWHC. The Court in the **Ali** case was interpreting the term *miscarriage of justice*, in relation to section 133 of the English Criminal Justice Act 1988. The section provides that;

"(1)...when a person has been convicted of a criminal offence

and

*when subsequently his conviction has been reversed or he has been pardoned **on the ground that a new or newly discovered fact** shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction...”*

The English provision is clearer than Article 19(13), here. It clearly envisions a new or newly discovered fact that precedes the conclusion of a miscarriage of justice.

[28] Article 19 of the Constitution is, in general, concerned with the right to a fair trial. Most of its provisions relate to procedure. One might conclude that Article 19(13) is therefore concerned with the consequences of shortcomings in procedure. It would not be enough to say that every successful criminal appeal should result in compensation. Lord Philips, reading the majority judgment in the case of **R (Adams) v Secretary of State for Justice [2011] UKSC 18** held that –

*“...I think that the primary object of article 14(6), is clear. It is to provide entitlement to compensation to a person who has been convicted and punished for a crime that he did not commit..... compensation should not be paid to a person who has been convicted and punished for a crime that he did commit. The problem with achieving both objects is that the **quashing of a conviction does not of itself prove that the person whose conviction has been quashed did not commit the crime of***

which he was convicted. Thus it is not satisfactory to make the mere quashing of a conviction the trigger for the payment of compensation (Our emphasis).

[29] Last but not least, there is the question of **common sense** under **item 8** in **Srivastava** (supra).

[30] In allowing his appeal, the Court of Appeal expressed its reservations to the hearsay evidence given before the trial Court. It had its doubts on the way the police trap operation had been conducted. It gave the Appellant the benefit of doubt. Did that mean that he was innocent of the crime, or that the prosecution had been unable to prove that he was guilty of the crime? It is our view that the Court of Appeal found that the trial court should have concluded that the prosecution had not proved, beyond reasonable doubt, that the Appellant was guilty of the offence. The doubts expressed by the Court did not, in our view, mean that the Appellant was innocent, rather that the prosecution had not proved that he was guilty and the court could not have therefore convicted him. Circumstances that led to his arrest and prosecution remained uncontroverted. There were drugs brought into the country from Kenya. He walked up to the NDEA officer, in a police trap, and opened conversation, he escaped against orders of NDEA officers through a hospital window, he did not go back to the hospital to find out why he was being challenged to stop. At the trial, he claimed he was lured into a police trap by a lady friend, or acquaintance that he named "Monica". While he had no burden to prove his innocence at the trial, it would have advanced his chances in this case if he had called that lady to court to give her evidence, as to his relation to the crime. In our view, **common sense** dictates that the totality of the evidence against him points out to plausible suspicion

and therefore it becomes difficult to consider that his trial constituted “a serious miscarriage of justice”.

[31] At this juncture, in the light of the totality of the foregoing, we can safely say that:-

- (i) As correctly opined by the Constitutional Court, the words “miscarriage of justice” and “a serious miscarriage of justice” are not legal terms; there is no settled definition.
- (ii) In spite of the fact that **Black’s Law Dictionary** (supra) defines the words “miscarriage of justice”, that in itself does not necessarily make the definition a legal term.
- (iii) To amount to “miscarriage of justice” the test must be whether the alleged miscarriage is serious, substantial, weighty, sufficiently material, etc.
- (iv) A miscarriage of justice will almost always be procedural, it envisions a new or newly discovered fact.
- (v) The mere quashing of a conviction does not by itself prove that the person did not commit the crime of which he was convicted. Thus, the quashing does not automatically give rise to a payment of compensation.

[32] This brings us to the last aspect of the matter before us. This is in relation to paragraph 56 of the Judgment of the Constitutional Court. The paragraph reads:-

We find that the Petitioner, as the Claimant, has failed to establish beyond reasonable doubt that no reasonable jury or,

in our case, no reasonable trial Judge properly directing himself to the law, could convict on the evidence before him. We find that there was no serious miscarriage of justice either in the conduct of the prosecution prior to trial or during the trial proceedings.

Accordingly, we find that the Petitioner is not entitled to an award of compensation.

[33] With respect, by the above paragraph, the Constitutional Court erred in shifting the burden of proof to the Appellant. In a case, such as this one, the burden of proof is clearly borne out by the provisions of Article 46(8) of the Constitution which provides:-

(8) *Where in an application under clause (1) or where a matter is referred to the Constitutional Court under clause 7, the person alleging the contravention or risk of contravention establishes a prima facie case, **the burden of proving** that there has not been a contravention or risk of contravention **shall**, where the allegation is against the State, **be on the State**.*

[Emphasis added].

Therefore, all that is required of a Claimant, such as the Appellant in this matter, is to establish a *prima facie* case.

[34] In spite of the above shortcoming in the Judgment of the Constitutional Court, nevertheless on the available evidence, we are satisfied that there is

nothing to fault the court in its findings and conclusions to the effect that there was no “serious miscarriage of justice” within the ambit of Article 19(13) of the Constitution to warrant payment of compensation to the Appellant. We are equally satisfied that on the evidence on record any prudent prosecutor would have had reasonable and probable cause to prosecute the Appellant. In similar vein, although there were lapses in the trial as pointed out by the Court of Appeal when reversing the Appellant’s conviction, these did not occasion the sort of “a serious miscarriage of justice” envisaged by the above provision.

[35] In the end result, we hereby dismiss the appeal. As ordered by the Constitutional Court we too make no orders as to costs and immigration matters.

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 12 August 2016