

**IN THE SEYCHELLES COURT OF APPEAL**

**[Coram:** A. Fernando (J.A), M. Twomey (J.A), B. Renaud (J.A)]

**Criminal Appeal SCA 19/2016**

**(Appeal from Supreme Court Decision CR 23/2016)**

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Benedict Otar

Appellant

Versus

The Republic

Respondent

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Heard: 28 November 2017

Counsel: Mr. N. Gabriel for the Appellant

Mr.G. Thachett for the Respondent

Delivered: 07 December 2017

**JUDGMENT**

**A.** Fernando (J.A)

1. The Appellant has appealed against the sentence of six years imposed on him on the 12<sup>th</sup> of September 2016, after his conviction by the Supreme Court for trafficking in 1.707 KG of Cannabis (Herbal Material), on his own plea of guilt, on the 11<sup>th</sup> of July 2016. He had been charged on the basis of the rebuttable presumption under section 14 (1) (e) of the Misuse of Drugs Act, 1990 (Cap 133), which was repealed when the **Misuse of Drugs Act 5 of 2016**, that came into operation on the 1<sup>st</sup> of June 2016.
2. Although charged under the Misuse of Drugs Act of 1990 the Appellant had been convicted and sentenced after the coming into force of the Misuse of Drugs Act 2016. **Section 55 of the Misuse of Drugs Act 5 of 2016**, which provided for the repeal of the Misuse of Drugs Act, 1990 had specifically stated that the repeal of the 1990 Act “*shall not affect the previous operation of the repealed Act or anything duly done...under it, affect...any liability incurred under the repealed Act*” or “*affect any investigation, legal proceedings or liability*”. **Section 51(2) of the 2016 Act**, states that “*an offender who is serving a sentence of imprisonment for an offence under the repealed Act may apply to*

*the Tribunal constituted under the 2016 Act for review of the outstanding portion of that sentence in accordance with the 2016 Act.*” This according to the learned Sentencing Judge “includes sentences not yet imposed on the Accused person though charged under the old Act. This appears to be in line with the Court of Appeal judgment in Cousin VS R, 21/2013 and Kelson Alcindor VS R, Seychelles Court of Appeal Reports, 2015. It was held in those cases that the Accused should benefit from the change of the law in his favour”. I am in agreement with the Sentencing Judge.

3. Section 51 of the Misuse of Drugs Act 5 of 2016, which is a transitional provision, made provision for the constitution of a Tribunal for review of sentences passed under the Misuse of Drugs Act 1990 to the benefit of those who had been sentenced under the 1990 Act, wherein the sentences were much stiffer than the 2016 Act. **Section 51 (2) of the Misuse of Drugs 2016** states: “*Notwithstanding anything in this Act or any other law, an offender who is serving a sentence of imprisonment for an offence under the repealed Act may apply to the Tribunal constituted under subsection (1) for review of the outstanding portion of that sentence in accordance with this Act.*”(emphasis added)
  
4. According to **section 7 (4) of the Misuse of Drugs Act 5 of 2016**, “*Where a person is convicted of an offence of trafficking in more than 1.5 kilogrammes of cannabis or cannabis resin or more than 250 grammes of any other controlled drug, the Court shall treat the offence as aggravated in nature.*” **Section 47 (5)** of the said Act states: “*In sentencing a person convicted of an offence under this Act in circumstances where the offence is aggravated in nature, the Court shall have due regard to the indicative minimum sentence for aggravated offence of that kind.*” In addition, **section 48** of the said Act makes reference to other aggravating factors that support a more serious sentence for offences under the said Act. None of those factors apply in this case.
  
5. **Section 49** of the Misuse of Drugs Act sets out the mitigating factors that support a reduction in sentence for offences under the Act. Factors that have a bearing on this case are:
  - 1) The offender’s admission of the truth of the charge through a guilty plea, particularly an early guilty plea;
  - 2) The absence of prior convictions or prior formal cautions under this Act;
  - 3) The fact that no other person was involved in or directly harmed by the offence; and
  - 4) The absence of any commercial element in the offence.

6. The **Second Schedule** to the Misuse of Drugs Act 2016 which deals with penalties under the Act, have, while prescribing the maximum sentence for offences under the Act, prescribed the indicative minimum sentence for aggravated offences under the Act. The maximum sentence prescribed for trafficking in cannabis or cannabis resin, which is a class B drug (as per First Schedule – Part II), is 50 years imprisonment and fine of SCR 500,000. The indicative minimum sentence for aggravated offence in a class B drug, is 15 years imprisonment.
7. The learned Sentencing Judge had in his Ruling on Sentence in accordance with **section 47 (2)** of the Misuse of Drugs Act 2016 expressly stated the aggravating factor and the mitigating factors identified by him and given weight to them in considering the appropriate sentence. The learned Sentencing Judge had stated that the only aggravating factor against the Appellant is the weight of the drugs. On the other hand he had set out the following mitigating factors:
  - a) That the Appellant had pleaded guilty to the charge showing a degree of repentance, for which the court reduces 20% of the sentence,
  - b) That the Appellant is a first offender.
8. The learned Sentencing Judge has also had regard to the proportionality in sentencing in accordance with **section 47 (1) (c)** when he said: “We must also consider the principles in Fredrick Ponoo that the Court is to be concerned on a case-to-case basis while imposing the sentence and must look at the circumstances of the individual attributes of the offender and the facts of that particular case before it imposes the sentence...”. The learned Sentencing Judge had also considered the Probation Officer’s Report.
9. It is to be noted that under the Misuse of Drugs Act, 1990 of which the Appellant had been charged and could have been sentenced; in view of the provisions of **section 55 (2) (c) the Misuse of Drugs Act, 1990**; the penalty prescribed for unauthorized traffic in a controlled drug where the quantity is more than 250 grammes was life imprisonment. I am however in agreement with the learned Sentencing Judge, as stated at paragraph 2 above for having had recourse to section 51 (2) of the Misuse of Drugs Act 2016 in passing sentence.
10. The Tribunal constituted under section 51(1) the Misuse of Drugs Act 2016 had adopted guidelines when reviewing of outstanding portions of sentences passed under the Misuse of Drugs Act 1990, in consultations with the Attorney-General and the Bar Association of Seychelles. Therefore for purposes of consistency we are obliged to consider them.

11. Counsel for the Appellant had before the Supreme Court suggested that 6 years imprisonment is an appropriate sentence and the learned Sentencing Judge had in his Ruling on Sentence stated: “I will oblige and impose a sentence of 6 years imprisonment on the Accused”, noting the submission made by the Counsel for the Appellant. However Counsel for the Appellant submitted to us at the hearing of this appeal, that both he and the Court were not aware of these guidelines at the time the Appellant was sentenced. The recommended sentences as per the guidelines for trafficking of cannabis herbal material or resin, for first offenders, where the weight was more than 1.5 and less than 5 kilogrammes was 3-5 years, and for more than 5 and less than 10 kilogrammes was 5-8 years.
  
12. We are therefore of the view taking the above mentioned factors into consideration and the recommended sentences as per the guidelines, a sentence of 4 years imprisonment would have been more appropriate.
  
13. For the reasons stated above we allow the appeal, quash the sentence of 6 years passed by the learned Sentencing Judge and substitute in its place a sentence of 4 years imprisonment.

A.Fernando (J.A)

**I concur:.** .....

M. Twomey (J.A)

**I concur:.** .....

B. Renaud (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 07 December 2017