

# IN THE SEYCHELLES COURT OF APPEAL

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

## **Criminal Appeal SCA 02/2016**

**(Appeal from Supreme Court Decision CR 54/2013)**

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Rashid Mohamed Liwasa

Appellant

Versu  
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The Republic

Respondent

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Heard: 30 April 2018

Counsel: Ms. Alexandra Madeleine for the Appellant

Mr. Hemanth Kumar for the Respondent

Delivered: 11 May 2018

## **JUDGMENT**

B. Renaud (J.A)

1. The Appellant, a Kenyan National born on 6<sup>th</sup> August, 1972, was convicted of the offence of importation of a controlled drug, contrary to section 3 read with section 26(1)(a) of the Misuse of Drugs Act Cap 133 and punishable under section 29(1) read with the second schedule of the same Act. On 25<sup>th</sup> August, 2013 the Appellant imported into Seychelles a substance weighing 683.7 grams which contained 287.1 grams of pure heroin (diamorphine).
2. He entered a plea of not guilty and after trial he was found guilty, convicted and sentenced to life imprisonment on 10<sup>th</sup> February, 2016.
3. The Appellant has now appealed against both the conviction and sentence, setting forth the following grounds of appeal:

### **Ground 1**

The learned trial judge erred in law and on the evidence in holding that the Prosecution had established all the elements of the offence as charged beyond reasonable doubt in that the element of exclusive knowledge of content of the tins were not proven beyond reasonable doubt.

### **Ground 2**

The learned trial judge erred in law in relying on the evidence of interrogation of the Appellant by prosecution witnesses Erica Marlene Dufresne and Elna Auguste to find the existence of strong evidence of the Appellant's knowledge of the contents of the tins he was carrying and that he was doing all that he could to avoid detection of the illicit drugs.

### **Ground 3**

The sentence of life imprisonment is –

(a) wrong in principle in that mandatory sentences offend the principle of proportionality of sentencing and imposition of sentence that meets the circumstances of a particular case is a judicial function;

(b) manifestly harsh and excessive having regards to all the circumstances of the Appellant's case.

4. The two grounds of appeal against conviction may be summarised as basically that the Prosecution has failed to prove that the Appellant had exclusive knowledge of the content of the tins he was carrying. The ground of appeal against sentence is in effect that mandatory sentences offend the principle of proportionality of sentencing, and that the sentence of life imprisonment is harsh and excessive.
5. Learned Counsel for the Appellant submitted that in convicting the Appellant, the Trial Judge had found that the Appellant's guilty knowledge had been proved by his lie. She added that a lie told by an accused, on its own, does not prove that a person is guilty of a

crime. She cited the case of *R v Strudwick (1993) 99 cr. App R326 at 331* in support of her submission but did not append a copy for reference.

6. Furthermore, Learned Counsel submitted that the learned trial judge did not give himself a **Lucas direction** before relying on the so called “lie” told by the Appellant to find exclusive knowledge of contents of the tins proved.
7. Further the Appellant’s Counsel submitted that it may be possible that there could have been an innocent motive for the Appellant to lie in the circumstances and agreeably, travellers may lie about whether they have been given anything to carry by anyone, even where they are carrying gifts and other packets from friends and relatives to be delivered at the place of destination. They may indeed lie not necessarily because they are carrying, or suspect, illicit drugs/other materials but because they want to overcome cumbersome custom formalities. But, is that the situation here in view of all the surrounding circumstances as the evidence revealed?
8. An analysis of the material evidence in the case regarding the issue of knowledge of the contents of the two tins found in the luggage of the Appellant established the following facts:
  1. The Appellant who was travelling light, confirmed to Mrs. Erica Marlene Dufrene, an experienced Immigration Supervisor who was on duty at the Airport on the material day and as shown in his passport, that he visited Seychelles for 4 days from 20<sup>th</sup> June, 2013 to 4<sup>th</sup> July 2013. He confirmed that he stayed at Berjaya Beau Vallon Hotel on that previous occasion and intended to do likewise for the second time. On the previous occasion he was here on honeymoon with his wife who had since passed away in Nairobi just after their honeymoon.
  2. After an initial interview by Mrs. Dufrene the Appellant was directed to the desk of the Customs Officer, Ms. Elna Marie Helene Auguste, for further questioning, and at some point in the presence of two NDEA Agents.
  3. Mrs. Dufrene corroborated the material evidence of Ms. Auguste regarding the search of Appellant’s luggage; the finding of a white plastic bag in his luggage; to

which the Appellant said that it contained things he would need for his holiday; in that plastic bag there were two tins which appeared not new; the Appellant first told the Immigration Officer that he personally packed the bags and no one gave him anything to carry; the Appellant initially did not answer when asked what was the contents of the tins; he later on stated that the contents of the tins were milk products for his own use; when the tins were opened the contents of the tins were eventually established to be illegal drugs. The Appellant and the tins and its contents were handed over to the NDEA Agents. The Appellant was quite uneasy and totally uncomfortable, wanting to go to the toilet and was sweating profusely.

9. Mrs. Dufrene witnessed NDEA Agent Adelaide interviewing the Appellant. The Appellant then admitted that - one Mr. Babangida in Nairobi gave him the two tins to bring to Seychelles; on his first trip to Seychelles he had also brought two tins with the same contents; he stayed at the same hotel; he mentioned the name of one Mr. Maxwell who picked up the tins on the previous occasion; that Mr. Babangida paid his tickets to Seychelles and paid for his Hotel as well as gave him US\$1,466.00 as pocket money to bring the two tins.
10. Customs Officer Elna Marie Helence Auguste corroborated Mrs. Dufrene regarding luggage verification. She found the plastic bag underneath Appellant's luggage; the Appellant appeared uncomfortable when she held the plastic bag which was tightly tied. When asked to open the plastic bag the Appellant started trembling and sweating. The Appellant said that he had bought the tins in a supermarket in Kenya. After insistent questioning the Appellant said that somebody gave him the tins.
11. Both tins were eventually opened and their contents were found to be more than milk. She called for assistance from NDEA Agents Adelaide and Nichol. After further questioning the Appellant admitted that one Mr. Babangida gave him the two tins to bring to Seychelles; that he was given US\$1,000.00 with all expenses paid for by Mr. Babangida. Previously the Appellant said that he was here on holiday; he had emotional issues; last time he came with his wife; he had come for a second time because he liked the place. The Appellant was handed over to the NDEA Agents for further action.

12. NDEA Agent Adelaide materially confirmed the evidence of both Mrs. Dufrene and Ms. Auguste as to what transpired at the Seychelles International Airport with regard to the Appellant and the two tins found in his luggage, and about Babangida giving the tins to bring to Seychelles etc.; that he was going to stay at Berjaya Beau Vallon Bay Hotel; that Babangida had organised for someone to come and collect the tins here; it was the second time that he had brought a similar consignment here; he took US\$1466.00 which was found on the Appellant; he noticed the Appellant was panicking.
13. All these three witnesses were cross-examined and their material evidence remained unchanged.
14. The Appellant gave a statement under caution which he later did not admit in Court at the hearing. A “*voir dire*” was held and the Court ruled that the statement was inadmissible as it failed the test of voluntariness.
15. The Appellant gave an unsworn statement from the dock. He stated that he was coming to Seychelles on holiday when Mr. Babangida gave him 2 tins to deliver to his friend in Seychelles. Upon arrival here his luggage was searched, the 2 tins were found and opened and their contents were not as indicated on the outside of the tins. He did not have any knowledge about what was inside. He was taken to the NDEA Office and he cooperated with the NDEA Officers to enable them to deliver the tins to the person who was supposed to collect them. Nobody turned up and the control delivery failed. He maintained that he had no idea of the contents of those cans.
16. In this respect, we agree with the submission of Learned Counsel for the Appellant that there is no onus on an accused person to prove his innocence. The onus is on the prosecution to prove all the elements of the offence. Indeed, the prosecution must prove the crime beyond reasonable doubt. This requirement is a protection against the conviction of innocents. Obviously, the unsworn statement of the Appellant from the dock must be weighed along with the other evidence in the case. The crux of the unsworn evidence of the Appellant was the basis of the defence he took at the trial as well as in the instant appeal against his conviction.

17. The learned trial judge at paragraph 18 of his Judgment addressed his mind as to the *mens rea* when he stated –

*“A general rule concerning all criminal cases is that a person has to have a “guilty mind” if he is to be convicted. If someone was carrying drugs without knowing it, he should, if believed, be found not guilty of possession. Knowledge includes deliberately or recklessly disregarding the obvious fact that the item in one’s possession is illicit substance and there is no requirement to know exactly what type of illegal drug is involved”.*

18. The learned trial judge continue to address the issue of whether the Appellant had knowledge of what he was carrying at paragraphs 19, 20, 21 and 22 of his judgment. It is evident that he concluded and believed that the Appellant was lying when he was answering material questions by the Immigration Officer; Customs Officer and NDEA Agents. The judgment of the learned trial judge is clear that he also did not believe the unsworn evidence of the Appellant.

19. At paragraph 23 of his judgment the learned trial judge stated that –

*“In order to determine whether the accused had knowledge or not of the contents of the tins, the Court must look at the circumstances surrounding the action of the accused and his demeanour and conduct as observed and testified to in Court. From the evidence adduced, the prosecution has established that the accused did not tell the truth **when asked whether he had been given anything to carry by anyone.** He also maintained that he had bought the tins in a supermarket for his own use. It was only after the tins were opened and the drugs removed that he told the truth. This is strong evidence that the accused had knowledge of the contents of the tins he was carrying and he was doing all that he could to avoid detection of the illicit drugs”.*

20. At paragraph 24 of his judgment, the learned trial judge concluded as follows –

*“I am therefore satisfied that the prosecution has established all the elements of the offence as charged beyond reasonable doubt. I reject the contention of the*

*accused that he did not have knowledge of the contents of the tins in his possession. Consequently, I find the accused guilty of the offence of importation of 683.7 grams of powder containing a net weight of 287.1 grams pure heroin, (Diamorphine) into Seychelles on 25<sup>th</sup> August 2013, and I convict the accused accordingly as charged.”*

21. Learned Counsel for the Appellant, in support of her submissions cited the case of ***Pool v R (1982) SLR 4***. In that case the Appellant was charged with the offence of receiving stolen property knowing or having reason to believe the same to be stolen contrary to section 309(1) of the Penal Code. The Court held that –

*“In a charge laid under Section 309(1) of the Penal Code, it is necessary for the prosecution to prove that when the accused received the property she actually knew that it had been stolen, in other words, that she was aware of the theft. Such proof may consist of direct or circumstantial evidence.*

*The explanation of an accused as to how he came to be in possession of an article is evidence upon which the trial court may, in proper cases, rely to infer guilty knowledge. However, the trial court must always weigh such explanations subjectively, bearing in mind that it is the guilty knowledge of the particular accused that matters.”* (emphasis added).

22. Learned Counsel for the Appellant also cited the foreign case of ***R v Lucas [1981] QB 720, CA*** but did not append a copy of that judgment for our reference.
23. From our analysis of the evidence in line with the applicable principles of criminal law we find that the learned trial judge cannot be faulted for the conclusion he reached in the circumstances. In the instant case we find that the trial judge did exactly that and came to the correct conclusion. The several and different explanations given by the Appellant concerning the 2 tins containing the drugs that were found in his luggage and led the trial court to objectively conclude that the Appellant had imported the drugs with the knowledge that the two tins contained drugs or he had reason to suspect that they contained drugs for him to deliver to a person in Seychelles.

24. In the light of the foregoing facts as established by evidence we find that the finding of learned trial judge that Appellant had knowledge that he was importing into Seychelles two tins knowing that those tins contained illegal drugs, cannot be faulted.

25. We now turn to the issue of the sentence of life imprisonment meted to the Appellant for that offence.

26. In sentencing the Appellant the learned trial judge *inter alia* stated that –

*“I have considered the sentence (submissions) of the learned counsel in mitigation but I find that the law as it stands does not give the Court much discretion to impose a sentence lower than that prescribed particularly as no specific special circumstances have been set out which can be interpreted in favour of the Convict.”*

27. A sentence of life imprisonment was provided for by **Misuse of Drugs Act 2012** (the old MODA) which repealed the earlier maximum sentence of 30 years with a fine of SR500,000.00 and minimum of 10 years. Under the new MODA the offence of importation of a Class A drug carries a **maximum** sentence of life imprisonment, a fine of SR1million and the indicative **minimum** sentence for aggravated offence involving a class A drug is 20 years imprisonment.

28. It is evident from the record that the Appellant sought a review of his sentence before the Sentence Review Tribunal (the Tribunal) and the latter declined to allow the Appellant’s application as the crime was aggravated in nature in that he had imported a considerable amount of Class A drug into Seychelles.

29. Section 51 of the new MODA provides for the appeal of a decision of the Tribunal. We reviewed some cases of a similar nature and the sentences that were imposed.

30. The Appellant imported into Seychelles of 683.7 grams of substance containing 287.1 grams of pure illicit heroin (Diamorphine). He was sentenced to life imprisonment. The recommended sentence set by the Tribunal under the new MODA is 12 to 15 years for more than 200 grams up to 400 grams.



31. In the case of ***Republic v Natasha Breugelmans SLR 9 of 2009***, the 1<sup>st</sup> Accused was charged with the offence of importation of a controlled drug, contrary to Section 3 of the Misuse of Drugs Act 1994 whereby she had carried in her body and brought into the Seychelles 112.3 grams of pure Heroin. She pleaded guilty and was sentenced 10 years imprisonment.
32. In the case of ***Kevin Barbe v Republic (SCA 24/2009) [2010] SCA 11***, the accused was convicted of importation of 402.49 grams pure Heroin and was sentenced to 11 years imprisonment.
33. In the case of ***Dupres v Republic SCA 04/2011***, was convicted for the offence of importation of 537.3 grams of Heroin (purity not stated) and 186.0 grams of cannabis on 22<sup>nd</sup> October, 2009 and sentenced to 14 and 12 years to run concurrently.
34. In the case of ***Eric Njue v the Republic CR No.6 of 2013***, upon the convict being found guilty of importing 3.39 grams of pure Heroin drug into Seychelles, he was sentenced to 5 years and 4 months imprisonment.
35. In the case of ***Natasha Nosipho Mavuso v The Republic criminal slide 62 of 2013 [2016] SCSC 724*** the convict pleaded guilty to an alternative count of trafficking. After considering all the mitigating and aggravating factors including the serious nature of the offence of trafficking of the amount of 335.1 grams of Class A drug, ***Mavuso*** was sentenced to an imprisonment of 10 years.
36. From a perusal of the above-cited judgments as well as the sentence of the Appellant in the instant case it reveals that before passing sentence the learned trial judge took into consideration various mitigating factors including that the Appellant is a first time offender and that he is a family man. Such factors were likewise taken into consideration in all the other cases aforementioned and yet none received a life sentence. From an analysis of cases abovementioned, the trend seems to fall within a range of 10 - 14 years imprisonment
37. In the case of ***Ponoo v Attorney General (2011) SLR 423***, it was held that - sentencing is an inherent judicial power which involves the human deliberation of the appropriate

conviction to be given to a particular offender in the circumstances of the case. It is not the mere administration of a common formula. As such the learned trial judge has a discretion to give a sentence appropriate to the present case from case although such sentence may have been lower than the recommended mandatory sentence, taking into consideration the quantity and type of drugs involved, and all circumstances surrounding the case as well as other aggravating and mitigating factors.

38. This Court will only interfere with a sentence if it is evident that the learned trial judge - has acted upon a wrong principle and the sentence cannot be justified in law; or, has allowed extraneous or irrelevant matters to guide or affect him or failed to take into consideration relevant matters; or the sentence is harsh, oppressive and manifestly excessive.
39. Mitigating factors in the instant case include that the Appellant is a first time offender and he cooperated with the NDEA Agents by giving certain information for them to mount a 'controlled delivery' albeit unsuccessful. He is 43 years old and the sole breadwinner of the family with 4 underage children. He is a foreign national, namely a Kenyan.
40. Having considered all the grounds of appeal, we hereby uphold the conviction of the Appellant. The appeal against conviction is accordingly dismissed.
41. With regards to the sentence, having considered all the aggravating and mitigating factors as well as sentences imposed in other similar cases and the regime under the new MODA, we are of the view that the sentence of life imprisonment imposed on the Appellant is harsh, oppressive and manifestly excessive in the circumstances. We therefore allow the Appeal and set aside the sentence of life imprisonment and in its stead impose a sentence of 14 years imprisonment.
42. If the possibility exists the Appellant may be repatriated to his country to serve the balance of his sentence.
43. The Appeal is therefore partly allowed.

B. Renaud (J.A)

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

A.Fernando (J.A)

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

M. Twomey (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 11 May 2018