

**Duval v R**  
**(2013) SLR 543**

Fernando, Twomey, Msoffe JJA

6 December 2013

SCA 16/2011

**Counsel**      B Hoareau for the appellant  
                    K Karunakaran for the respondent

**The judgment of the Court was delivered by**

**FERNANDO JA**

[1]        This was as per the notice of appeal, an appeal against a conviction for trafficking in a controlled drug, namely 39.7 grams of cannabis resin, on the basis of the presumption in the Misuse of Drugs Act and the sentence of eight years imposed on such conviction. As per the formal charge the appellant on 24 August 2007, at Bel Ombre, Mahe, was found in possession of 39.7 grams of cannabis resin.

[2]        The appellant in his notice of appeal had raised five grounds of appeal, four of which are against the conviction and one against sentence. The grounds of appeal against conviction revolve around a challenge to the trial Judge's assessment of the evidence of defence witness Esterilla Napoleon (DW 1), the wife of the appellant, in view of the failure of the prosecution to cross-examine her and thus tacitly accepting her evidence which resulted in denying her the opportunity of explaining any contradictions or alleged issues in her evidence. It was also his complaint that there was no proper evaluation of her evidence in that her evidence was used by the trial Judge to contradict the evidence of the appellant but not that of the prosecution. On

sentence the appellant had argued that the minimum mandatory sentence of eight years imposed was manifestly harsh and excessive and was in contravention of the Constitution as it was an interference with the independence of the Judiciary and also amounted to cruel, inhumane and degrading treatment. The appellant had prayed that his conviction be quashed or in the alternative that the sentence imposed be reduced.

[3] According to the main prosecution witness PW 1, he, along with a few other police officers were on routine foot patrol in the Bel Ombre area around 2 pm on 24 August 2007, when he saw the appellant at a distance of about 15 metres come running out of his house with a red plastic bag in his left hand in a suspicious manner. He and PW 2 had then followed the appellant at a distance. The appellant had gone behind the house and hid the plastic bag that was in his hand under a rock that was about two to three metres from the house. When the two of them approached him he had run towards the house. The two of them had then apprehended the appellant at “the stairs” at the rear of the house and brought him back to the place where the plastic bag was hidden by the appellant. PW 1 had thereafter removed the plastic bag from underneath the rock. On examination of the plastic bag in the presence the appellant and PW 2, PW 1 had found a small container which contained another red plastic bag. Inside that plastic bag were two clear plastic bags one containing 24 pieces and the other 10 pieces of a dark substance, which PW 1 suspected to be controlled drugs. When questioned, the appellant had “claimed that he knew nothing about these drugs.” The appellant was then arrested and a search of his house was conducted. Nothing illegal had been found inside the appellant’s house. Thereafter the appellant was taken to the Beau Vallon police station. Under cross-examination it had been suggested to PW 1 that on a tip-off police found the drugs

underneath the rock and since it was found in the yard of the appellant, he was arrested. PW 2 had corroborated the evidence of PW 1 in all material particulars. The only issue being raised by the defence in this case as stated at page 148 of the brief is “whether there was anything seized on the accused.”

[4] The dark substances that were hidden underneath the rock by the appellant on analysis by the Forensic Chemist were found to be cannabis resin with a total net weight of 39.7 grams. There is no challenge in this case to the chain of evidence, the expertise of the Forensic Chemist or the analysis of the drugs.

[5] The appellant in his dock statement had stated:

It was on the 24<sup>th</sup> of August 2007, at around 2.30 pm, I was at home. I just came from work, I saw a Constable searching but not at my home, it was my neighbour’s house, and I was in my home, in the kitchen near the step, when I later saw a police officer coming with a gun near the river near the house. I do not know what he was doing there. And then there was a lady Constable and she came near the steps, I was near her. The man who was with the gun had a bag with him, he handcuffed me and there were some officers and I did not speak to them and I saw them searching my house. And then they told me let’s go and it was then when I came to court that I saw the drugs with them and that was it ... [verbatim].

He had claimed that he had not seen any drugs while at his house and does not know to whom they belong.

[6] DW 1 Esterilla Napoleon, wife of the appellant, testifying for the defence had stated that she was sitting in the living room with the appellant and her daughter. At a certain stage the appellant had gone to look for tea in the kitchen when two police officers entered their house through the kitchen and handcuffed her husband. She had at one stage said that when the police officers entered the house the husband was in the sitting room and moments later that he was in the kitchen. She does not make reference to having seen a bag in the hands of the police officer who arrested the appellant as narrated by the appellant. Thereafter some police officers had conducted a search of their house. The following questions and answers in cross-examination (verbatim) are of relevance:

Q: And on that day you said your husband was sitting in the living room he got up. Did you see how long after he came with the police officers?

A: No I can't remember how long it took.

Q: So there was a possibility something had happened that did not see for that amount of time?

A: No I did not see.

Q: That day before you saw your husband coming in with the lady and the gentleman and the female police officer you did not go outside the house you were inside?

A: Yes I was inside the house.

[7] It is clear that the evidence of DW 1 is in clear contradiction to the dock statement of the appellant as to where her husband was at

the time of his arrest and as to what he was doing. The inability of DW 1 to give a time period from the time the appellant left to go to the kitchen and him coming back with the police officers and her evidence that she did not see what happened during that period and that she did not go outside the house but remained inside leaves room for a court to accept the prosecution version as being uncontradicted. Further her version of the incident had not been put to the prosecution witnesses by counsel for the defence.

[8] The trial Judge had in his judgment stated that he rejected the defence put forward by the accused and accepted the evidence of the prosecution witnesses as there were no material contradictions or major inconsistencies despite their being subjected to rigorous cross-examination. These are findings of facts which this Court will be reluctant to disturb unless there is cause to do so. We see no cause to do so in this case.

[9] The appellant's statement that the prosecution had failed to cross-examine DW 1 is not correct as evidenced by page 142 of the brief. The purpose of cross-examination of a witness, in a case like this is not to "allow a witness the opportunity of explaining any contradictions or alleged issues in the witness's evidence" as argued by the appellant but in fact to highlight the contradictions in the witness's own evidence and that of other witnesses who testified for the same side as that of the witness. To allow a witness the opportunity of explaining any contradictions or alleged issues in the witness's evidence is the purpose of re-examination. A prosecutor knows best on what matters he needs to cross-examine a witness and his decision not to cross-examine on all the matters as deposed by a witness does not amount to a tacit acceptance of the entirety of that witness's evidence. The evidence given by a prosecution witness is

used by the prosecution, to prove the elements of the offence and to corroborate the evidence of another prosecution witness; and by the defence to contradict the evidence of another prosecution witness or corroborate the defence evidence and thereby cast a doubt on the prosecution case. The evidence given by a defence witness is used by the defence, to cast a doubt on the prosecution case and to corroborate the evidence of the accused or another defence witness; and by the prosecution to contradict the evidence of the accused or another defence witness or corroborate the prosecution evidence. The cross-examination of DW 1 referred to at paragraph [6] above is an illustration of this. In our view there was no reason to cross-examine DW 1, in the way argued by counsel for the defence as her evidence in examination-in-chief was in clear contradiction of the appellant's dock statement. Although a prosecutor for the Republic is a quasi-judicial officer and is duty bound to bring out any material or clarify any matter which is favourable to the defence, it is not his function to prove the defence case. In *R v Lovelock* (1997) Crim LR 821 it was stated that it is not always necessary to put to a witness explicitly that he is lying, if the overall tenor of the cross-examination is designed to show that his account is incapable of belief. In *Browne v Dunn* (1893) 6 R 67 (HL) it was stated that the story told by a witness may be so incredible that the matter upon which he is to be impeached is manifest, and in such circumstances it is unnecessary to waste time in putting questions to him upon it. The position would be different if the only evidence on a material fact in issue in the case emanates from a particular witness. In such a case failure to cross-examine such witness may amount to a tacit acceptance of the evidence of such witness on such material fact. This was not the position in relation to the evidence of DW 1. Further we take note of the fact that DW 1 is the wife of the appellant who had been living with him for 25 years.

We therefore have no hesitation in dismissing all the grounds of appeal pertaining to the conviction and the appeal on the conviction itself.

[10] As for the appeal on sentence, the relevant portion of the plea in mitigation made by counsel for the appellant, who was also counsel for the accused before the Supreme Court is of relevance:

My Lord, this accused person is a first time offender and he is 57 years old. Relatively middle age he regrets what he has done, by committing the offence and at his age I believe *the court should give the most lenient sentence this court is able to give under the law which is 8 years minimum mandatory ... So I would submit my Lord, that the minimum mandatory would do justice in this case so I would urge your Lordship to impose the minimum mandatory.*”

[Emphasis added]

[11] It is inconceivable that counsel for the appellant having submitted before the Supreme Court “that the minimum mandatory would do justice in this case” had decided to prefer a ground of appeal to the effect:

that the minimum mandatory sentence of 8 years imposed is manifestly harsh and excessive and is in contravention of the Constitution, as it is an interference with the independence of the judiciary and also amounts to cruel, inhumane and degrading treatment

without urging any reasons as to his change of mind or any new ground on behalf of the appellant. The trial Judge in imposing the minimum mandatory sentence of eight years had taken into consideration that the appellant is a first offender, that he is 57 years, that he is a family man and the type and quantity of drugs involved, all the factors urged by his counsel in mitigation of sentence. We do not find on record any exceptional reasons for the trial Judge not to have imposed the minimum mandatory term of imprisonment. We are also of the view that the sentence imposed does not breach the proportionality principle and/or the appellant's right to a fair hearing as expounded in the case of *Poonoo v Attorney-General* (2011) SLR423, in view of the facts and circumstances of this case. It was therefore prudent on the part of counsel for the appellant, although late, to have abandoned the appeal on sentence in his skeleton heads of argument, filed four days before the hearing of the appeal. Counsel should however be more cautious in filing grounds of appeal and not file them for the sake of filing and withdraw them at the last moment.

[12] We therefore have no hesitation in dismissing the appeal.