

IN THE SEYCHELLES COURT OF APPEAL

[Coram: A. Fernando (J.A), M. Twomey (J.A), F. Robinson (J.A)]

Criminal Appeal SCA26/2018

(Appeal from Supreme Court Decision CO 75/2017)

Michael Julienne

Appellant

Versus

The Republic

Respondent

Heard: 08 August 2019

Counsel: Mr. N. Gabriel for the Appellant

Mr. H. Kumar for the Respondent

Delivered: 23 August 2019

JUDGMENT

A. Fernando (J.A)

1. The Appellant has appealed against his sentence of 5 years imprisonment imposed on him after his conviction for trafficking in a controlled drug, namely Heroin having a net weight of 17.7 grams, which contain a pure heroin substance of 10.5 grams. At his trial before the Supreme Court, the Appellant had also been sentenced to a period of 3 months imprisonment after his conviction for possession of a controlled drug, namely Cannabis Resin having a net weight of 2.4 grams. The Appellant had been convicted on his own plea of guilt. Both sentences had been ordered to run concurrently and with a pronouncement that the Appellant shall be entitled to remission on the sentences. The learned Sentencing Judge had also ordered that the Appellant be placed on a drug rehabilitation programme.

2. According to the agreed facts, at the time of his arrest the Appellant was found with in addition to the drugs; a digital scale, a penknife, a piece of partly burnt glass and money amounting to SR 17, 106.00; all indicative that he was in the act of trafficking.
3. The grounds of appeal are:
 - a) The sentence of five years involving a charge of trafficking in a Class A drug was above the prescribed recommended sentence of the new Misuse of Drugs Act 2016 (referred to as MODA hereafter in this judgment),
 - b) That the said sentence was not justified in law and in principle as the Appellant was a first offender and had pleaded guilty at the first opportunity, and
 - c) That the learned Trial Judge failed to adequately take into account the content of the probation report which specifically stated that the Appellant was a drug dependant person and should have benefitted under the provisions of MODA.

By way of relief the Appellant had sought that the sentence be quashed and varied accordingly.

4. In his Skeleton Heads of Argument the Appellant has not drawn our attention to how the sentence of five years is above the prescribed recommended sentence of MODA, save for repeating his first ground of appeal referred to at paragraph 2 (a) above. The prescribed sentence for trafficking in Class A drug is life imprisonment and SCR 750,000 with an indicative minimum sentence of 20 years for aggravated offence. The recommended sentence for trafficking in more than 10 grams up to 50 grams of Class A drugs is a sentence of 5 to 8 years imprisonment. This suffices to dispose of ground 1 of appeal.
5. It is clear on a reading of MODA that anyone charged with and convicted of 'trafficking', is not identified as drug dependant person or drug user, under section 36(1) of MODA and makes reference only to those charged with cultivation, possession, purchase or use of a controlled drug. Also a court may decline to identify a person as a drug user where that person is charged with another offence under MODA. In this case the Appellant had been charged and convicted of two offences under MODA. Thus issues as to assessment of drug dependency, the manner of dealing with drug dependant persons, as set out in sections 37, 38, 39, 40 and 41 of MODA do not apply. Further, according to section 42 (1) (c) of MODA the indicative quantity of heroin to be regarded as indicative of personal

consumption for purposes of section 36 and 41, is 0.1 grammes or one dose of heroin or cocaine, which is far above the quantity the Appellant was charged with.

6. The learned Sentencing Judge had in his Sentencing Order taken into consideration that the Appellant is a first time offender and that he “pleaded guilty and thereby saved the precious time of the court and thereby showing remorse for his action.” (verbatim)
7. According to the Appellant’s version as recorded in the Probation Report, the Appellant had claimed to be a drug dependant person. He had been unemployed for three years and it is due to his unemployment status that lead him to commit the offences. He had claimed that some of the drugs was for his own consumption but admitted that the rest was for sale. He had said he would collect SR 500 for every one gram of heroin sold and that the street value of the drugs that were found with him was SR 17,000. He had said that the money he gets from the sale of the drugs he contributed towards the household. He had admitted that he sells drugs whenever he does not have money. The Appellant has not challenged the contents of the Probation Report, called for by Court at his request, especially that, part of the drugs were for sale and that he does that on a regular basis. The Probation Officer had recommended an imposition of a fine followed by a drug rehabilitation programme.
8. It is clear from the Probation Report and the provisions of MODA referred to at paragraph 4 above that the Appellant cannot be treated as a drug dependant person or drug user. His admission that part of the drugs was for sale and that he does that on a regular basis makes him a ‘trafficker’. The items found on him at the time of his arrest as referred to at paragraph 2 above confirms that even at the time of his arrest he was in the business of trafficking in drugs.
9. The learned Sentencing Judge had taken several other mitigating factors into consideration in passing sentence, namely, that the Appellant is 45 years old and a father of a 15 year old child, that he cooperated with the police when apprehended and assisted with investigation, suffers from spondylosis i.e. lower back pain which requires regular physiotherapy, and that he is taking care of his mother who is asthmatic.
10. It is to be noted that the Appellant’s admission that part of the drugs were for sale and that he does that on a regular basis to the Probation Officer, makes him a ‘trafficker’. This brings in the presence and degree of a commercial element in the offending, which is treated as an aggravating factor under section 48(1)(a) of

MODA, which called for an indicative minimum sentence of 20 years imprisonment. The Appellant has been fortunate that the learned Sentencing Judge has not invoked this provision in passing sentence against him.

11. The cases cited by the Appellant's Attorney at the hearing of the appeal before us, where lower sentences had been imposed by the 'Sentencing Court', can be distinguished from the facts of this case on the basis that the quantities of drugs involved in some of the cases were very much less, the very young ages of some of the accused, that most of them had some form of employment, and that the accused had been imposed with fines in addition to the sentences. In none of those cases was there evidence that the accused had been arrested with paraphernalia used for trafficking in drugs and admissions from the accused that they were trafficking in drugs on a regular basis. For this Court to interfere with the sentence passed by the Sentencing Court there should be a valid basis. I do not find any such.

12. I therefore have no hesitation in dismissing this appeal.

A.Fernando (J.A)

I concur:

M. Twomey (J.A)

I concur:

F. Robinson (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 23 August 2019