

**IN THE SEYCHELLES COURT OF APPEAL**

**[Coram:** A.Fernando (President) , L. Tibatemwa-Ekirikubinza (J.A),  
R. Govinden (J.A)

**Criminal Appeal SCA 10/2019**  
**(Appeal from Supreme Court Decision CR 34/2018)**

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Jakari Abdullah Suki

Appellant

Versu  
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The Republic

Respondent

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Heard: 04 August 2020

Counsel: Mr. Clifford Andre for the Appellant

Mr. David Esparon for the Respondent

Delivered: 21 August 2020

**JUDGMENT**

**Prof. Tibatemwa-Ekirikubinza, JA**

1. This is an appeal against the decision of the Supreme Court. The facts as accepted by the lower court are that the appellant was apprehended at the Seychelles International Airport by Anti-Narcotic Bureau (ANB) officers for importation into Seychelles of banned drugs.
2. The ANB officers found that the appellant was carrying in his body 76 cylindrical capsules containing Heroin to the capacity of 523.7 grams and cocaine to the capacity of 151.1 grams. The appellant denied carrying any forbidden substances or drugs until a scan confirmed that he had ingested the capsules containing prohibited drugs. The appellant informed the officers that he was carrying the drugs for someone. He agreed

to assist the officers to conduct a controlled delivery of the drugs to the person who unfortunately did not turn up.

3. Subsequently, the appellant was arraigned before court and pleaded guilty. He however disputed the total weight of the drugs. The net weight of both heroin and cocaine was 244.4grams.
4. The Supreme Court Judge convicted the appellant on his plea of guilty and sentenced him to 15 years imprisonment on Count I (for importation of Heroine) and 8 years on Count II (for importation of Cocaine). The said sentences were to be served concurrently without remission less the period the appellant had spent on remand.
5. Dissatisfied with the court's decision, the appellant appealed to this Court on the following grounds:
  1. **The learned Chief Justice erred in law and fact in sentencing the Appellant to a term 1of 15 years for count 1 and 8 years for count 2, when in other cases the accused were only convicted to 8 years.**
  2. **The learned Chief Justice erred in law and fact in sentencing the Appellant to a term of 15 years for count one and 8 years for count 2 when it was clear that the accused had pleaded guilty for the offences he was charged with, therefore not wasting the court's time.**
  3. **The learned Chief Justice erred in law and fact in sentencing the Appellant to a term of 15 years for count one and 8 years for count 2 in that credit should be given to the corporation made by the accused to the ANB when he agreed to a controlled delivery which in fact happened, but the authority were talking to the said person who then simply went away and the ANB stated that the controlled delivery did not succeed.**

4. **The learned Chief Justice erred in law and fact in sentencing the Appellant to a term of 15 years for count 1 and 8 years for count 2, when the Misuse Of Drugs Act, (MODA) 2016 states that credit should be given when a plea of guilty was taken and that these element should be heavily weighed in favor of the accused/Appellant.**
5. **The learned Chief Justice erred in law and fact in sentencing the Appellant to a term of 15 years for count one and 8 years for count 2, when it was established that the Appellant was a first time offender. The Learned Judge should have compounded the sentence to reflect the 8 years as credit to the Appellant, which she did not do.**
6. **The sentence is manifestly excessive and harsh considering the circumstances of this case.**

### **Prayers**

6. The appellant prayed that:
  - (i) The sentences be set aside for being manifestly harsh and excessive and that the appellant be granted a reduction in sentence.
  - (ii) The sentence of 15 years imprisonment be set aside and subsequently reduced to reflect the circumstances of this case and to apply MODA in full so as to give full benefit to the Appellant.

### **Appellant's submissions**

#### **Ground 1**

7. Counsel submitted that similar cases of importation of banned drugs adjudicated by the trial Judge attracted lesser sentences. That therefore, the sentencing patterns should be consistently followed. Counsel referred to the cases of:

- (a) **Republic vs. Christ Kanjere and Jean - Claude Wellington Adeline**<sup>1</sup> where Jean-Claude Wellington Adeline pleaded guilty to aiding and abetting the importation of 763.6g of Cannabis (herbal materials) and was sentenced to 2 years imprisonment with remission.
- (b) **Republic vs. Marcos Venicius Da Silva Reis**<sup>2</sup> wherein the accused was charged with importation of 1946.6g of controlled substances which contained 545.04g of pure cocaine and was sentenced to six (6) years imprisonment.
- (c) **Republic vs. Francise Ernesta & 3 others**<sup>3</sup> where the accused were charged with conspiracy to commit trafficking in 746.9g heroin and conspiracy to import 746.9g heroin and sentenced to 4 years for 2 of the accused and 9 years for the other 2 accused.
- (d) **Republic vs. Emerentia Holder**<sup>4</sup> Twomey CJ sentenced the accused to a term of 5 years imprisonment for the importation of 986.4 grams of heroin which contained 404 grams of pure heroin.

**Ground 2**

- 8. The Appellant pleaded guilty at the very first opportunity therefore not wasting the court’s time. That in the case of **Republic vs. Emerentia Holder (supra)**, the respondent was charged with importation of a controlled drug, weighing 986.4 grams in total containing 404.4 grams of pure heroin (diamorphine). The respondent was convicted on her own plea of guilty and sentenced to only 5 years.
- 9. Similarly, in the case of **Republic vs. Marcos Venicius Da Silva Reis (supra)**, the respondent was convicted on his own plea of guilty and sentenced to 6 years

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<sup>1</sup> CS CO.35 of 2018. (Supreme Court)

<sup>2</sup> .....

<sup>3</sup> CS CO.22 of 2016. (Supreme Court)

<sup>4</sup> CR 46 of 2018. (Supreme Court)

imprisonment for importation of 1946.6g of controlled substances containing 545.04g of pure cocaine.

### **Ground 3**

10. Under this ground, counsel faulted the ANB officers who failed in successfully carrying out the controlled delivery by the appellant. That therefore the court cannot punish the appellant as he did everything that was asked of him. Counsel argued that in fact this was a strong mitigating factor which the trial Judge failed to take into consideration as prescribed by **Section 49 (c)** of the **MODA 2016**. The Section provides that:

**Mitigating factors (factors that support a reduction in sentence) for offences under this Act include-**

**(c) any substantial assistance given by the offender to law enforcement authorities, as an informer or otherwise, in the prevention, investigation, or prosecution of any other offence under this Act.**

### **Ground 4**

11. The trial Judge failed to take into consideration the plea of guilty made by the Appellant which should have been given considerable credit as prescribed by law, especially **Section 49 of MODA 2016**.

### **Ground 5**

12. The trial Judge should have guided herself with case law which she herself had imposed as in the cases mentioned in Ground 2 above.

### **Ground 6**

13. Under this ground, the appellant's counsel submitted that the sentence was manifestly excessive and harsh considering the circumstances of the case. That the sentence was quite harsh compared to sentences imposed in similar drug importation cases. Counsel relied on the cases cited in ground 1 above.

## **Respondent's reply**

### **Grounds 1 and 6**

14. The respondent on the other hand argued that the sentencing Judge exercised her discretion in imposing the sentences. That the cases cited by counsel for the appellants should be distinguished from the facts of the present case on the basis of presence of a commercial element which made the case to be of an aggravated nature.
  
15. Furthermore, that the mitigation factors considered by the trial Judges in the respective cases cited by the appellant (to support his argument of a lenient sentence) were personal and peculiar to those cases which are not the same in the present case.

### **Grounds 2 and 4**

16. The respondent argued that the fact of the appellant pleading guilty at the first instance was considered as a mitigating factor by the trial court before the sentences were imposed. Counsel referred to paragraph 10 of page 26 of the brief to support his argument. Counsel therefore concluded that the learned Judge did not err in law and facts in sentencing the appellant.

### **Ground 3**

17. Under this ground, counsel submitted that although the appellant attempted to cooperate with the ANB officers to carry out a controlled delivery, it was unsuccessful. That the submission by the appellant that the unsuccessful controlled delivery was due to the ANB officers was evidence from the bar since neither the facts nor the remand proceedings recorded this fact. Counsel concluded this submission by stating that what is important for the purpose of sentencing is that there is an aggravated factor.

### **Ground 5**

18. Counsel submitted that although the issue of the appellant being a first time offender was submitted to his credit in mitigation, the presence of aggravating factors made the case to be of a serious nature.

### **Consideration of Court**

19. The central issue of the appeal before Court is whether or not the sentences imposed on the appellant are manifestly harsh and excessive.

20. It is a trite principle of law that sentencing is a discretion of the trial court. And thus an appellate court will not interfere with a sentence passed by the trial court merely premised on its opinion that it would have come to a different sentence. However, it is also a renowned legal principle that judicial discretion must be exercised judiciously. And it follows that appellate court can interfere with the sentencing discretion of the trial court if it acted contrary to the law or on a wrong principle of law or overlooked a material factor or where the said sentence is manifestly harsh and excessive. (See: **Cedras vs. Republic**<sup>5</sup>).

21. It is also imperative to recall what this Court earlier held in **Randy Florine vs. Republic**<sup>6</sup> that *harsh and excessive is not a ground of appeal but an area of the law in which the trial court reigns supreme. Harsh and excessive cannot be implied without elaborative specificity. It is not reason to disturb the sentence imposed by the trial Court.* This principle was restated in **Cedras vs. Republic (supra)** as follows:

*... to merely aver that a sentence is harsh and excessive does not amount to a ground of appeal in as much just like application of facts in an area where the trial Judge reigns supreme except where his appreciation of facts may prove to be perverse. (My emphasis)*

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<sup>5</sup> Cr. App SCA 38 of 2014.

<sup>6</sup> SCA 7 of 2009.

22. Therefore, the appellant has to specify in what way the sentence imposed is harsh and excessive. In the present case, the appellant specifically argued that the sentences imposed were:

- (i) outside the sentencing range of similar offences as well as the sentencing guidelines prescribed in the **Misuse of Drugs Act (MODA)** 2016 and that
- (ii) the trial court failed to take into consideration the factors the appellant presented in mitigation.

23. In order to resolve each specific argument, it is necessary to look at the record of proceedings which culminated in the sentences appealed against.

I will begin with the argument regarding factors pleaded in mitigation.

In mitigation, the appellant submitted that he was a first time offender, a father of three minor children and a sole bread winner. Furthermore, that he had co-operated with the Narcotic Drugs Enforcement Agents by agreeing to carry out a controlled delivery albeit unsuccessful and that he pleaded guilty to the charge thereby not wasting the court's time.

24. Having heard the appellant's submissions on mitigation of the sentences, the trial court stated that:

*I bear in mind even having taken into consideration the mitigating factors in this case, a deterrent sentence has to be considered in cases of this nature. While heroin is prevalent in Seychelles, the importation of cocaine, a drug also very serious in its effect especially in increasing the levels of violence in users, is creeping in. This has to be stemmed.*

25. In exercising discretion to arrive at a sentence, the Judge should balance the mitigating factors with the aggravating factors and then consider the cumulative effect thereof. It may be that in the opinion of the judge, the aggravating factors



outweigh the mitigating factors even to the extent that the-would be mitigating factors have little or no effect on the sentence. In such circumstances, the factors cited in mitigation will necessarily recede into the background. It is only if the mitigating factors carry sufficient weight to tip the scale in favour of the accused that a lenient sentence would be given.

26. In the persuasive authority of **Sowedhi Serinyina vs Uganda**<sup>7</sup> the Uganda Supreme Court held that although sentencing is a matter of discretion for the sentencing court, the fact that the judge was alive to what the accused submitted in mitigation must be evident on record. It is only then that the accused will be sure that the judge addressed his or her mind to the cited mitigating factors but nonetheless came to the conclusion that the aggravating factors overshadowed the would be mitigating factors.
27. I note that in the present case, it is on record the trial court was alive to the factors pleaded in mitigation but the need to control and protect the Seychellois society from drug abuse outweighed the mitigating factors.
28. It is therefore clear that the trial Judge exercised her discretion judiciously in sentencing the appellant. I see no reason to fault the trial court on this aspect.
29. I now turn to address the appellant's second limb of the argument that the sentences imposed were outside the sentencing range for similar offences.
30. Guarding against unjustifiable sentencing disparity is one of the ways in which Judges avoid the injudicious exercise of their discretion. And I opine that the requirement for consistency in sentencing is one of the underpinning principles of equality before the law enshrined in **Article 27** of the **Constitution**. It is for this reason that I would consider reference to prior decided cases on sentence a useful aid or tool to assist a court in determining an appropriate sentence. In the final

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<sup>7</sup> Criminal Appeal NO.1 of 2017.

analysis however each case must be decided on its own merits since no two cases are the same.

31. The question however is: by what means is this consistency achieved? In the persuasive authority of **Hili vs. The Queen**,<sup>8</sup> the High Court of Australia stated that consistency is not demonstrated by and does not require numerical equivalence rather consistency is obtained in the application of the relevant legal principles. (Emphasis mine)
  
32. In stating the above, the majority of the Justices agreed with Simpson J's observations made on sentencing patterns in **Director of Public Prosecutions vs. De La Rosa**<sup>9</sup>. He observed as follows:

*Sentencing patterns are, of course, of considerable significance in that they result from the application of the accumulated experience and wisdom of first instance judges and of appellate courts But the range of sentences that have been imposed in the past does not fix the boundaries within which future judges must, or even ought, to sentence ... They are no more than historical statements of what has happened in the past. They can, and should, provide guidance to sentencing judges and to appellate courts and stand as a yardstick against which to examine a proposed sentence. When considering past sentences, it is only by examination of the whole of the circumstances that have given rise to the sentence that 'unifying principles' may be discerned.*

33. From the foregoing it is clear that consistency of sentences does not mean arithmetic exactness. It cannot therefore be argued that a particular sentence is necessarily wrong merely because it is disparate from previous sentences.
  
34. Since consistency is derived from legal principles as well as statutory provisions, reference will be made to the MODA, 2016 as well as the Sentencing Guidelines.

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<sup>8</sup> (2010) HCA 242.

<sup>9</sup> [2010] NSW 194 at pages 303-305.

35. Under the MODA 2016, the offence of importation of class ‘A’ drugs such as heroin and cocaine carry a maximum sentence of life imprisonment and a fine of SCR 1,000,000. The minimum sentence being 20 years imprisonment.

36. The MODA 2016 also gives guidelines that courts should follow in sentencing a person convicted of an offence of importation of class ‘A’ drugs. **Section 47 of MODA 2016** particularly provides as follows:

**(1) In sentencing a person convicted of an offence under Part II of this Act, whether upon a guilty plea or following trial, the court shall have regard to-**

**(a)-----**

**(b) the degree of control to which the relevant controlled drug is subject and**

**(c) the general objectives of transparency and proportionality in sentencing.**

**(2)-----**

**(3)-----**

**(4)-----**

**(5) 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 offences of that kind. (My emphasis)**

37. **Section 48 (1) of the MODA, 2016** provides for aggravating factors as follows:

**Aggravating factors (factor that supports a more serious sentence) for offences under the Act include-**

(a) the presence and degree of commercial element in the offending particularly where controlled drugs have been imported into Seychelles;

(b) .....

(c) .....

(d) .....

38. Furthermore, **Section 48 (2)** of the **MODA** provides that:

**Where one or more of the aggravating factors identified in subsection 1 is present to a significant extent, the court shall treat the offence as aggravated in nature.**

39. The 2<sup>nd</sup> schedule of MODA provides for punishment of importation of controlled substances into Seychelles as follows:

For importation of class ‘A’ drugs (such as heroin and cocaine), the maximum sentence is life imprisonment or a fine of SCR 1,000,000. The minimum sentence for the aggravated offence of importation of class ‘A’ drugs is 20 years imprisonment.

The appellant in the present case imported into Seychelles controlled drugs with hope of benefitting commercially from the transaction. This according to **Section 48 (1) and (2)** (supra) made the offence of an aggravated nature.

40. In a recent decision, **Rashid Liwasa vs. Republic**<sup>10</sup>, this Court reviewed a number of cases in which sentences of convicts found guilty of trafficking and importing controlled drugs were appealed. I need not repeat those cases here in this judgment. However, it is necessary to restate the principles developed in that case in resolving the issue at hand. The brief background of the case is that, Rashid Liwasa (appellant), a Kenyan national was convicted of the offence of importation of 683.7

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<sup>10</sup> Cr. App SCA No. 2 of 2016.

grams which contained 287.1 grams of pure heroin. He was found guilty, convicted and sentenced to life imprisonment. Liwasa appealed against the conviction as well as the sentence. The ground of appeal against sentence was to the effect that the sentence of Life imprisonment offended the principle of proportionality of sentencing, and that it was harsh and excessive.

41. Having reviewed a number of cases in which sentences following a conviction of importation of drugs were imposed, the Court of Appeal held as follows:

*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.*

42. Following the above reasoning, the Court of Appeal reduced Liwasa's life imprisonment sentence to 14 years imprisonment.

43. Counsel for the appellant also referred Court to past decisions in which the offenders were given lenient sentences for importation into the Republic prohibited drugs. I have already highlighted these cases in the earlier part of the judgment. However, for clarity I will reproduce them below:

- (a) **Republic vs. Christ Kanjere and Jean - Claude Wellington Adeline (supra)** where Jean-Claude Wellington Adeline pleaded guilty to aiding and abetting the importation of 763.6g of Cannabis (herbal materials) and was sentenced to 2 years imprisonment with remission.
- (b) **Republic vs. Marcos Venicius Da Silva Reis (supra):** wherein the

accused was charged with importation of 1946.6g of controlled substances which contained 545.04g of pure cocaine and was sentenced to six (6) years imprisonment.

(c) **Republic vs. Francise Ernesta & 3 others (supra)** where the accused were charged with conspiracy to commit trafficking in 746.9g heroin and conspiracy to import 746.9g heroin and sentenced to 4 years for 2 of the accused and 9 years for the other 2 accused.

(d) **Republic vs. Emerenthia Holder (supra)** Twomey CJ sentenced the accused to a term of 5 years imprisonment for the importation of 986.4 grams of heroin which contained 404 grams of pure heroin.

44. I note that the weight and class of drugs involved in the above mentioned cases differ from those in the present case. Whereas in **Republic vs. Emerenthia** the weight of the drug imported was 404 grams of pure heroin, in the present case, the appellant was convicted of importing 523.7 grams of pure heroin. I also note that in the case of **Republic vs. Christ Kanjere (supra)** the drug in question is categorised as a ‘class B’ drug while in the present case a ‘class A’ drug is involved. Relatedly, the offence with which the accused was convicted of in the aforementioned case was a less serious offence compared to the offence in the present case.

45. Since the cases the appellant’s counsel referred to are distinguishable, it cannot be said that the range of sentences depicted in those decisions ought to be exactly applied to the present matter. Sentences in and of themselves do not delimit the exercise of discretion and are not binding precedents. The sentencing exercise itself is not merely the imposition of a number in a previous decision presenting similar circumstances. Rather, it is an exercise of discretion in which the sentencing judge must tailor a sentence according to the particular circumstances of case.

46. Therefore since the trial court took into consideration the mitigating factors presented to the credit of the appellant and weighed them against aggravating

factors as well as the sentencing range of sentences spelt out by MODA, 2016 and case law, I find that the sentences of 15 years imprisonment and 8 years imprisonment imposed are not outside the prescribed sentencing range and do not infringe the appellant’s constitutional right of equality before the law. The sentences are proportional to the offence with which the appellant was convicted.

**Conclusion and orders**

- 47. In conclusion, the appeal against sentence is hereby dismissed.
  
- 48. I accordingly uphold the sentences imposed by the trial court.

**Prof. Lillian Tibatemwa-Ekirikubinza, JA**

<b>I concur:.</b>	.....	A.Fernando (President)
<b>I concur:.</b>	.....	R. Govinden (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 21 August 2020