IN THE SEYCHELLES COURT OF APPEAL

Reportable
[2023] SCA CR 02/2023
(18 December 2023)
(Arising in Criminal Offence No.27 of 2017)

Albert Alexander Geers — **Appellant**
(represented by Mr. Basil Hoareau)

Versus

The Republic — **Respondent**
(represented by Hemanth Kumar)

Neutral Citation: *Geers v R* (SCA CR 02/2023) [2023] (Arising in CO 27/2017) (18 December 2033)

Before: Robinson, Tibatemwa-Ekirikubinza, Balaghee, JJA

Summary:

i. Appeal against conviction and sentence on charge of possession of a controlled drug with intent to traffic contrary to Section 9 (1) and 19 (1) (d) (i) of the Misuse of Drugs Act (MODA) 2016.

ii. Appeal against sentence on conviction of cultivation of a controlled drug contrary to Section 6(2) of MODA, 2016.

iii. Statutory presumption created by Section 19(1) (d) (i) of MODA – *onus lies on an accused person to rebut presumption that they were in possession with intent to traffic.*

iv. Standard required to rebut presumption of intent to traffic is on a balance of probabilities

v. The existence of a statutory presumption does not negate/whittle down the duty of the prosecution to prove its case beyond reasonable doubt.

vi. It is a trite principle of law that in arriving at a decision, a judge must assess the evidence adduced before court in its entirety- what seems in favour of the defence is as important as that which seems to be in favour of the prosecution case.

Heard: 4 December 2023

Delivered: 18 December 2023

ORDER

1. Conviction for possession of a controlled drug with intent to traffic contrary to Section 9 (1) and 19 (1) (d) (i) quashed and substituted with conviction for possession of a controlled drug under Section 8(1) of the Misuse of Drugs Act.
2. Appellant sentenced to a fine Appellant is sentenced to a fine of 30,000 SCR for possession of cannabis, a controlled drug. The fine is to be paid within 30 days of this sentence, in default of the payment of the fine, the Appellant shall serve a sentence of 1 years' imprisonment.
3. The sentence imposed by the Trial Court on conviction of cultivation of a controlled drug is upheld.

JUDGMENT

Dr. Prof. Tibatemwa-Ekirikubinza.

1. The Appellant (Albert Alexander Roderick Geers) was charged with the following 2 Counts: on Count 1, he was charged with unlawful possession of a controlled drug having a net weight of 3.945 kilograms of cannabis with intent of trafficking it contrary to section 9 (1) of the Misuse of Drugs Act, 2016 and punishable under section 7(1) of the Misuse of Drugs Act, 2016. On Count 2, he was charged with cultivation of 49 cannabis plants contrary to Section 6(2) of the Misuse of Drugs Act 2016 and punishable under the second schedule to the Misuse of Drugs Act, 2016.

2. In the Trial Court, five officers from the Anti-Narcotic Bureau (ANB) of the Seychelles Police Force testified to the commission of the crimes stated above.
3. Officer Egbert Payet testified as the Exhibit Officer. According to him, on 31st May 2017 at around 9.50 am, he together with Officers Yves Leon, Aubrey Labiche and Ryan Durup proceeded to the Appellant's premises at Bel Ombre. He stated that Officer Leon took

photographs of the scene while Officer Servina retrieved materials and equipment from the Appellant's store. These materials consisted of 49 plants, a fertilizer sprayer, an indoor sprinkler system, seedling pots, several big black pots, two gunny bags containing herbal material and a packet of open manure. Some of the exhibits which had to be analyzed were put in exhibit bags. Others were kept in the store at the ANB station. Those sent for analysis were the 49 plants; the two gunny bags containing herbal materials and six clear glass jars with lids. He handed over the exhibits to be sent for analysis at the Government laboratory. According to agent Payet, all the exhibits remained in his custody free from interferences from the time that they were recovered until he produced them to court, except when he had to remove them from the exhibit store to hand them over to Officers Servina and Leon. Officer Payet also produced the items in his custody seized by agent Servina but not sent for analysis.

4. Ms. Julia Volcere, the Government Analyst at the Forensic Laboratory, confirmed in her evidence that the exhibits were brought for analysis at her office by both Officers Leon and Servina. Ms. Volcere stated that she received the letters of request and their corresponding exhibit envelopes. Upon her analysis of the exhibits, she made the following findings:

5. For the exhibits brought for analysis by Officer Leon on 1st June 2017, Ms. Volcere found that all the herbal materials in the clear plastic containers were cannabis, 3 of which had only traces. Similarly, the herbal material in a red, blue and white plastic bag was cannabis as well as that found in a clear glass jar. The total combined weight of the cannabis was 952.8 grams. She produced a certificate of analysis to this effect.

6. With regard to the exhibits brought by Officer Pierre Servina on the 2nd of June, Ms. Volcere found that the 49 plants were cannabis. The herbal materials in two white gunny bags, were also found to be cannabis. There were also traces of cannabis in the six clear glass jars. The total combined weight of the cannabis was therefore 2976.5 grams. She produced a Certificate of Analysis to this effect.

7. Lastly, Ms. Volcere testified that after her examination, she came to the conclusion that the yellow plastic bag brought to her for analysis on 7 June 2017 contained 15.7 grams of

cannabis. Therefore, the grand total of all of the cannabis that was analyzed by Ms. Volcere was 3.945 kilosgrams.

8. The second Officer – Leon - testified that on 30 May 2017, he together with Officers Louise and Ernesta proceeded to the house of the Appellant's mother at Bel Ombre, arriving at around 20.20hrs. He was instructed by Officer Servina to take photos of the scene. On top of a wardrobe in the Appellant's bedroom, he saw seven plastic containers containing herbal materials. He also took photos of a red and white plastic bag next to the containers and a blue plastic bag at the bottom. He also took photos of a coffee jar containing herbal materials. After that he collected all those exhibits into his possession. He proceeded to the same house the day after in the company of the other officers. In the presence of the Appellant, a store was opened and he took photographs of some further exhibits of suspected cannabis plants and other items. Officer Leon identified all the exhibits that he had taken at the scene and exhibited by Officer Payet before the court, including the Letters of Request and the Certificates of Analysis and he stated that while they were in his possession there had been no interference with them.

9. The third Officer - Servina – testified that he was on duty on 30 May 2017 and at 19.40hrs he received an order to proceed to a house at Bel Ombre regarding a drug transaction. He proceeded in a patrol vehicle, together with Officers Ernesta, Cherry and others. He knocked on the door and shouted that they were NDEA officers. Officer Servina testified that from the outside, he could see both the accused and his mother but the latter refused to open the door and said that she was going to contact her lawyer. He also saw the Appellant's mother moving from the Appellant's bedroom to another part of the house and to the toilet flushing it a number of times. As a result, he had to break down the door. When he entered the house, he saw the Appellant hiding behind a sofa and he proceeded to identify himself and his colleagues to the occupants of the house as well as the purpose of their visit which was to search the house. According to Officer Servina, they seized containers, including plastic containers and plastic bags containing herbal materials from the Appellant's bedroom and toilet. The Appellant admitted to Officer Servina that all the seized items were his.

10. Furthermore, Officer Servina testified that, on the same night, a search was effected outside the Appellant's house and they came to an area which looked like a basement facing the sea. Upon being asked to open the door, the Appellant informed them that the key was at Sunset Hotel. This door was then sealed in the presence of parties and an officer was left at the scene until the key could be obtained for further investigation. The following day – 31 May 2017 - Officer Servina in the company of two other agents returned to the scene and took the Appellant from the Central Station and brought him to the residence at Bel Ombre instead of the hotel where he had initially said the keys were. While at the residence, the Appellant picked a key from the living room and the agents used it to open the basement. The Appellant informed them that inside were cannabis plants that he was using for experiments. Officer Servina also testified that inside the basement, he saw an orange gunny bag and a white gunny bag containing herbal materials. He saw lighting equipment including bulbs; 49 plants in pots and other materials. All were all handed over to exhibit officer Payet for safekeeping.

11. In the Trial Court, officer Servina identified the 49 plants, the two gunny bags containing herbal materials and six clear glass jars with lids; a packet of manure; a fertilizer sprayer; five pieces of black seedling pots and two others; eighty five flower pots, parts of a sprinkler system; two cans labelled "component grow"; five lighting equipment together with their electric cords and bulbs, which he had seized from the Appellant's store on 31st May 2017.

12. Officer Servina confirmed that on 2 June 2017, he retrieved the 49 plants and herbal materials found in the two white gunny and six clear glass jars from officer Payet and brought them for analysis at the Government Analyst after obtaining a Letter of Request. He obtained the exhibits back from the Analyst on 20 June 2017 together with a Certificate of analysis.
13. Officers Wayne Ernesta and Alexander Cherry also testified to the roles they performed in the company of Officer Servina.

14. The Appellant admitted to having in his possession cannabis but denied having it for the intention of trafficking. According to him, the drugs that he had in his possession were for his personal treatment of dyslexia.

15. In finding the Appellant guilty on Count 1, the trial Judge held that for an accused to be found guilty of possession of a controlled drug with intent of trafficking contrary to Section 9 (1) of the Act, the Prosecution must prove beyond reasonable doubt, the following essential elements of the offence:

    a. The accused was in possession of a controlled substance under the Act; the *actus rea* for possession.

    b. The accused knew that he was in possession of a controlled substance. This knowledge can be actual or constructive or constructive possession under Section 20 of the Act, the *mens rea* for possession.

    c. The accused had possession of that controlled drug with the intention of trafficking the in the said drug, the specific mens rea for trafficking with intent.

16. The Trial Judge held that where the above elements are proved, a presumption of intention to traffic will be triggered and the burden will then shift to the accused to disprove on balance of probabilities that he had no such intent. Alternatively, the burden will also shift if (a) and (b) are proven by the prosecution coupled with the fact that the controlled drug is above the prescribed weight indicated in Section19.

17. After evaluation of the evidence, the Trial Judge found that the Appellant failed to disprove on a balance of probabilities that the amount of cannabis found in his possession was for the purpose of trafficking. The Judge convicted him on Count 1 and sentenced him to 6 years' imprisonment and a fine of SR 100,000 to be paid within 30 days after the delivery of the sentencing order. In default of the payment of the fine, the convict was to serve a further 2 years' imprisonment to run consecutively to the 6 years' imprisonment.

18. In respect of Count 2, the Trial Judge held that he was satisfied by the evidence adduced that the Appellant was cultivating a controlled drug. The Judge convicted the Appellant and sentenced him to 5 years' imprisonment together with a fine of SR 100,000 to be paid within

30 days of the sentencing order. In default of the payment of the fine, the convict was to serve an additional 2 years' imprisonment to run consecutively to the 5-year imprisonment term.

19. Dissatisfied with the Trial Judge's decision, the Appellant appealed to this Court against the conviction on Count 1. He also appealed against the sentences on each count. The grounds were as follows:

    1. **The decision of the learned Trial Judge convicting the Appellant of the offence of possession of a controlled drug with intent to traffic is unreasonable and cannot be supported by evidence.**

    2. **The learned trial Judge erred in law and on the facts in failing to hold that the Appellant had rebutted the presumption of possessing a controlled drug with intent to traffic, on the basis of the evidence before the trial Judge including the testimony of the Appellant.**

    3. **The learned trial Judge erred in law and on the facts in imposing the sentences, in respect of both offences, in that-**

        (i) The sentences are manifestly excessive as they are outside the sentencing range of similar offences and outside the broad range of penalties appropriate to the case;

        (ii) The learned trial Judge failed to take into consideration and apply, the general objective of the Misuse of Drugs Act, of proportionality and transparency in sentencing; and

        (iii) The sentences were harsh, oppressive and manifestly excessive.

Prayers

20. The Appellant prays that this Court:

    i. allows the appeal

    ii. quashes the conviction for the offence of possessing a controlled drug with intent to traffic; and or

    iii. reduces and varies the sentences.

Ground 1

Appellant's submissions

21. Counsel submitted that it is trite law that when a statute creates a statutory presumption which operates to place on the defence a legal burden requiring the accused to disprove or negate a presumed fact, the accused has the burden to rebut the presumption on a balance of probabilities.

22. Counsel submitted that on the basis of the evidence adduced and accepted by the court, the Appellant rebutted the presumption of intention to traffic on a balance of probabilities.

23. That it was the uncontroverted evidence of the Appellant that he was an ardent and dedicated advocate of the use of medicinal cannabis. The Appellant testified that he was experimenting on the medicinal value of cannabis. In his testimony the Appellant explained that he used cannabis to alleviate and treat his dyslexia and that he also produced oil from the cannabis, which he used personally for anti-inflammatory purpose.

24. Another piece of evidence referred to by Counsel was the Appellant's testimony that in his quest to advocate the medicinal use of cannabis he lobbied the Government and a number of other authorities. In that respect the Appellant wrote letters to the President, the Principal Secretary of Health, Ministers and medical practitioners, amongst others. The letters were produced and exhibited as D4 to D14. Furthermore, the Appellant also published advertisements in the "Today" newspapers and gave an interview to the said newspaper regarding the benefits of cannabis and its medicinal use.

25. Also, on 6th June 2014, the Appellant organized a virtual meeting between Doctor David Berman - who is based in the United States - and the Drug and Alcohol Council, where the said doctor explained to members of the council the various medical usages and advantages of cannabis.

26. Further still, the Appellant took part in a live televised debate on the national television regarding the legalization of cannabis.

27. Counsel submitted that in light of the foregoing evidence, the trial judge should have come to the conclusion that the Appellant had rebutted the presumption of intention to traffic.

Ground 2

28. For this ground counsel adopted the submissions made under ground 1 which are already reproduced above.

Respondent's reply to grounds 1 and 2

29. In reply, counsel for the Respondent submitted that the evidence of the Prosecution witnesses, coupled with the admission of the Appellant that he had in his possession the controlled drugs, proved the essential elements of the charge.

30. Counsel argued that once possession of a large quantity of the prohibited drug was established, it was sufficient for the court to make an inference of intent to traffic. That in this case, the learned trial Judge was right to reject the defence raised by the Appellant that he was using the drugs to campaign for the legalization of cannabis in Seychelles as an effective medicine for various ailments.

Ground 2

31. The Respondent's counsel submitted that the Appellant's defence of using cannabis for personal medical treatment could not stand in light of the large amount of drugs seized from his possession as well as the cannabis plantation which was cordoned off. Counsel argued that this was a well arranged method to engage in trafficking of a prohibited drug.

Court's Consideration of grounds 1 and 2

32. Section 19 (1) (d) (i) of the MODA creates a statutory presumption in the following words:

> **A person who is proved or presumed to have had in his or her possession or custody or under his or her control-**

(d)25 grammes or more of-

(i) cannabis; or

(ii) cannabis resin,

shall be presumed, until the person proves the contrary, to have had the controlled drug in his or her possession with intent to traffic in contravention of Section 9 of this Act.

33. A statutory presumption is an assumption established by a Statute or Law. It is also known as a legal presumption. In essence, a statutory presumption means that, according to the law, certain facts are considered true unless proved otherwise.

34. Once the Prosecution proves possession of an illicit drug (cannabis), a presumption arises against the accused that they intended to engage in trafficking the prohibited drug. The accused person then bears the burden to disprove or challenge the presumption. This can be by providing explanations or adducing evidence that undermines the basis for the presumption.
If successful, the presumption created by the statute will have been rebutted.

35. The Appellant admitted having been in possession of a prohibited drug (cannabis) but denied having an intent to traffic. He therefore bore the burden to adduce evidence, *on a balance of probabilities*, showing that the controlled drug in his possession was not for purposes of trafficking. This is the evidential burden.

36. Counsel for the Appellant faulted the learned Trial Judge's finding and conclusion that the Appellant failed to rebut the statutory presumption of intent to traffic. The Appellant contended that he adduced evidence to rebut the statutory presumption of intention to traffic cannabis but that evidence was not properly analyzed by the Judge. He argued that the Judge's decision was solely based on the large amount of cannabis found in his possession. That the Judge drew the wrong inference from the evidence adduced by the Appellant and

wrongly concluded that the cannabis was for trafficking yet he was using it for medical treatment.

37. The Appellant's Counsel drew the attention of the Court to Section 19 (3) of the Act which provides *inter alia* that *in determining whether a controlled drug was possessed with intent to traffic, the court shall have regard to all relevant circumstances*. It was his submission that the trial judge had not had regard to all the circumstances of the case.

38. The evidence adduced by the Appellant to show that the cannabis found in his possession was not for an illegal purpose was as follows:

    i. the undisputed fact that he was an ardent and dedicated advocate of the use of cannabis for medical treatment. In his testimony, the Appellant testified that he used cannabis to alleviate and treat his dyslexia and that he was extracting oil from the plant which he used personally for anti-inflammatory purposes;

    ii. the fact that he lobbied the Government through letters written to the President, Principal Secretary of Health, medical practitioners. These letters were exhibited in the Trial Court and were marked exhibits D4-D14;

    iii. The fact that he was engaged on a live national television to debate the legalization of cannabis;

    iv. Absence of any drug paraphernalia such as (weighing) scales and money;

    v. The uncontroverted evidence explaining why he possessed 3.945 kilos of cannabis. That from 500 grams of cannabis, he would obtain only 50ml of cannabis oil. Thus, 3.945 kilos would produce only 400 ml of oil.

39. In reply to the submissions for the Appellant in support of Grounds 1and 2 of the appeal, Counsel for the Respondent merely reproduced the holding of the trial judge, first that the court had not been convinced on a balance of probabilities either that the accused needed so much of cannabis to treat his dyslexia and secondly that the court had rejected the defence of the appellant as the relevance of campaigns for the legalization of cannabis usage.

40. Counsel for the Respondent also argued that if the amounts possessed were in the category of commercial quantity, the fact clearly infers the intent of the possessor to traffic. He did

not make any submissions, as to why the Appellant's argument that quantity alone - in the circumstances of this case - should not be the sole basis of a finding of intent to traffic, should not be accepted by this Court as a reason for overturning the decision of the learned trial judge. Counsel for the Respondent then made mention of the obvious – the legal position of the Seychelles regarding possession and usage cannabis.

41. In other words, Counsel hardly offered any guidance to this Court as to why the decision of the trial judge should be upheld.

41. I will deal first, with the relevance of the Appellant's explanation that a large amount of cannabis produces relatively small quantities of the oil he needed for medicinal purposes. The Trial Judge held that:

> *The prosecution having proven such a large amount of cannabis in possession of the accused, the latter attempted to discharge the onus of proof by stating that it was for his own personal use as he was self-medicating his medical condition. However, this does not explain the large amount of cannabis in his possession, in order to treat his alleged ailment. He did not need the total number of kilograms seized from his possession for this purpose. He has not convinced this court on a balance of probabilities that he would need so much of cannabis in order to treat his dyslexia. As I have further found below, the amount of cannabis in his possession only renders it more probable that he had the intent to traffic. It is more probable that he had such amounts for the purpose of supplying or selling.*

42. It was the argument of the Appellant that the judge never addressed his mind to the explanation given by the Appellant as to why he had in his possession a large amount of the drug. In other words, the amount of cannabis had to be looked at in the context of the case at hand before inference of intent could be drawn.

41. I note that the prosecution did not adduce evidence to dispute the Appellant's testimony regarding the medicinal properties of cannabis neither did they cross examine the Appellant on his analysis that the 3.945 kgs of cannabis found in his possession could only produce 400ml of the oil he needed. In a similar vein, the Judge did not offer any explanation as to why he did not find the explanation offered by the Appellant plausible. There was no explanation as to why the court was "*not convinced … on a balance of probabilities that he would need so much of cannabis in order to treat his dyslexia*."

42. I must also point to another flaw in the handling of this case by the prosecution. The evidence on record shows that the Appellant stated that he was *"experimenting on the medical value of cannabis … that the oil is made only from the cannabis flower itself. He does not use the stem, the roots or anything else."* And yet the prosecution did not adduce evidence to establish whether all the 3.945 kilograms of cannabis found with the Appellant was in form of flowers. This is important in light of the definition of cannabis stipulated by the MODA 2016. Section 2 defines cannabis as "*any part, excluding seeds, of a plant of the genus cannabis from which the resin has not been extracted, by whatever name it may be designated*."

44. I now move on to the court's handling of the evidence that no drug paraphernalia such as (weighing) scales and money were found at the scene. Counsel for the Appellant used it to buttress his argument in regard to the need to consider <u>all</u> the circumstances of the case before determining intent to traffic. Counsel referred to paragraphs 31 and 32 whereat the Learned Chief Justice gave examples of circumstantial evidence which might assist the court in coming to a finding that the possession of drugs was with intent to traffic. The Learned Chief Justice stated:

> *The Republic can also rely on circumstantial evidence such as the value or quantity of the drugs they found, or the presence of paraphernalia like (weighing) scales, baggies (and money). All will have to depend on the*

facts and circumstances of each case and all these pieces of evidence must pass the test of relevance and admissibility.

45. Counsel argued that whereas the presence of paraphernalia as referred to by the Chief Justice can be interpreted as evidence of intention, in the same way, the absence of such paraphernalia should be interpreted as evidence that there was no intent to traffic. In the case before court, the whole house was searched and no such articles and/equipment needed for the activity was found. The Appellant drew the attention of court to the fact that all the officers who visited the scene confirmed absence of paraphernalia such as cash, weighing scales, plastic sachets etc. And that what is even more pertinent is that all the officers agreed in cross examination that in normal drug trafficking cases, paraphernalia will usually be found at the scene and this would confirm the trafficking aspect of the crime. Money would confirm that the accused is trading, sachets would confirm that he is putting the drugs in small packets for sale, scales would prove that he is weighing for purposes of trade. It was argued that absence paraphernalia usually associated with trafficking in illegal drugs creates doubt in the prosecution case and the doubt must be resolved in favour of the accused by way of acquittal. Indeed, it was the submission of Counsel for the Appellant in the court below that the prosecution's own evidence as explained herein cast doubt as to whether the accused had intent to traffic.

46. It was the submission of Counsel that since the trial judge opined that the presence of paraphernalia can be interpreted as evidence that there was intent to traffic, at the very least, the Judge should have explained why the absence of such paraphernalia in the case before court would not be regarded as evidence that there was no intent to traffic.

47. Indeed, as submitted by Counsel, it is pertinent to note that the trial judge did not speak to the importance or relevance of this point in the context of this case. The Trial judge did not state why in his view the absence of paraphernalia did not create doubt in the prosecution case as regards the mental element of the offence.

48. Counsel also argued that the Judge did not take into consideration the fact that a number of empty jars with residual cannabis in them were found in the premises of the Appellant as

indicated in the certificate of analysis from the forensic analyst. Appellant's Counsel submitted that the fact that only traces of cannabis were found in the jars was evidence that the Appellant was using the cannabis. Had he been selling or supplying to other people, the jars would not have been found in his possession. That the fact that the jars had residue, was evidence that at one point they held cannabis in them but the appellant used/was using it.

49. All in all, the essence of the Appellant's arguments was that inference of intention to traffic cannot, and should not be drawn *exclusively* from the fact of possession of a large amount of cannabis.

50. It is a trite principle of law that in arriving at a decision, a judge must assess the evidence adduced before court in its entirety- what seems in favour of the defence is as important as that which seems to be in favour of the prosecution case. A determination that an accused person had intent to traffic must be based on a holistic assessment of all the evidence before court. In the case before us, the judge was duty bound to evaluate the evidence in its entirety and based on his appreciation of *all* the evidence determine whether the Appellant possessed the cannabis with intention to traffic. Evidence that the trial judge had done so had to be on record. It is expected that a judgment evidences on the face of it, the "thought process" of the author. It must be on record that whatever evidence the judge adopted was after critical analysis. A judgment is not written for the benefit of the judge; the most important audience are the litigants. They are entitled to have a candid explanation of the reasons for the decision.

51. I must emphasize first, that the standard of proof expected of the accused in rebutting the legal presumption is on a balance of probability. Secondly, as already noted in this judgment, the existence of a statutory/legal presumption does not negate/whittle down the duty of the prosecution to prove its case beyond reasonable doubt. Having carefully read the judgment of the trial judge, I come to the conclusion that that the trial judge did not give due weight to the Appellant's evidence.

52. And yet it must be remembered that existence of a statutory/legal presumption does not negate/whittle down the duty of the prosecution to prove its case beyond reasonable doubt. Because **Article 19 (2) of the Constitution** is to the effect that a person is presumed innocent until proven guilty, even with the existence of a legal presumption, the trite principle of law that in criminal cases the legal burden of proof rests on the prosecution throughout the trial remains.

53. I therefore quash the conviction for possession of a controlled drug with intent to traffic and substitute it with a conviction of possession of a controlled drug under Section 8(1) of the Act. This is in line with **Section 9 (2**) which provides that:

> *Where a person is charged with an offence under this Section and Court is of the opinion that the person is not guilty of that offence but is guilty of an offence under Section 8, the court may convict the person of the offence under Section 8 even though the person was not charged with that offence.*

54. And Section 8 provides as follows:

> "*A person who possesses, purchases, or uses a controlled drug in contravention of this Act commits an offence and is liable to the Penalty specified in the Second Schedule*."

Sentence

55. In arriving at an appropriate sentence for the offence of possession of a controlled drug, I have been guided by the provisions relevant to sentencing under the MDA to wit Sections 47, 48 and 49; as well as with settled sentencing principles enunciated by case law. Under Section 47 (1), when sentencing a person convicted of dealing with Class B Drugs (Cannabis is a Class B Drug), a court must have regard to the objectives of the Act; the degree of control to which the relevant controlled drug is subject and the general objectives of transparency and proportionality in sentencing. Case law considers factors such as the circumstances surrounding the offense such as the quantity possessed, and the individual's criminal history.

56. Section 47 (2) obliges a sentencing court to **expressly** identify and to give weight to aggravating factors (factors that support a more serious sentence) or mitigating factors (factors that support a reduction in sentence) specified in Sections 48 and 49.

57. Section 47 (5) MDA provides that 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. It is to be noted that in the case before this Court, none of the factors which would be considered aggravating on a charge of possession of a class B controlled drug is present. It follows that I am not bound by the indicative minimum sentence of 5 years set out in the Second Schedule to the Act.

58. As already noted, I am also obliged to identify and give weight to mitigating factors enumerated in Section 49 of the Act. One such factor mentioned in Section 49 is the absence of any commercial element in the offence. In the present case, what led this Court to reduce the conviction of the appellant from one of possession with intent to traffic, to the lesser and cognate offence of (mere) possession is because the prosecution failed to prove that the element of trafficking, the element which would bring a commercial element into the circumstances of the case. Another factor considered as mitigating - by case law - is where the convict is a first-time offender. According to the report from the Probation Services placed before the trial court, the Appellant was a first-time offender.

59. The maximum sentence on conviction for possession of a class B controlled drug, is 10 years' imprisonment and/or a fine of SCR 200,000.

60. But I must also be guided by Section 47 (4) which provides that *in sentencing a person convicted of an offence under Section 8, the Court shall not impose a sentence of imprisonment unless satisfied that a non-custodial sentence is inappropriate in all the circumstances.* In light of the absence of aggravating factors on the one hand and the existence of some mitigating factors mentioned above on the other, I sentence the convict to a fine of 30,000 SCR. The fine is to be paid within 30 days of this sentence, in default of the payment of the fine, the Appellant shall serve a sentence of 1 years' imprisonment.

61. The prison sentence in default would run consecutively with the term of imprisonment upheld for cultivation of a controlled drug.

Ground 3

62. In specific reference to the sentence imposed on the Appellant for cultivation of a controlled drug, Counsel submitted that considering that 49 plants is a small number of plants, 5 years' imprisonment together with a fine of SR 100,000 was harsh, oppressive and manifestly excessive.

63. This Court has in a plethora of cases stated that sentencing is a discretion of the trial court.[1] 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. It is also imperative to recall what this Court has held in several cases - 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.* The Court has again and again held that *to merely aver that a sentence is harsh and excessive does not amount to a ground of appeal.* Therefore, the appellant has to specify in what way the sentence imposed is harsh and excessive. The closest that the Appellant can be said to have buttressed his argument was by his submission that the sentence was outside the range of similar offences and outside the broad range of penalties appropriate to the case. However, the decision in R vs Ritty Rene[2] which Counsel provided us with is of little help because the accused in that case was guilty of cultivating a much smaller number of plants – 18 plants of cannabis.

64. 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

[1] There is consistent case law in this jurisdiction concerning the discretional power of a trial court in sentencing and I need not reiterate it all save to state that Suki vs R (SCA 10 of 2019) [2020] SCCA 13 is authority for the proposition that 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.
[2] [2019] SCSC

of the trial court if it acted contrary to the law or on a wrong principle of law or overlooked a material factor.

65. A reading of the ruling of the learned Chief justice reveals that in arriving at the sentence, he appraised himself with the provisions of the law relevant to sentencing under the Act to wit Sections 47, 48 of the Act as well as with settled sentencing principles enunciated by case law. The Court also considered the pleas in mitigation by Learned Counsel for the convict as well as the recommendations of the Pre-Sentencing Report from the Probation Services.

66. As already stated, 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.

67. I find no reason to interfere with the sentence imposed by the Learned Chief Justice. The Judge exercised his discretion judiciously.

Conclusion and Orders

68. 1. Conviction for possession of a controlled drug with intent to traffic contrary to Section 9 (1) quashed and substituted with conviction for possession of a controlled drug under Section 8(1) of the Misuse of Drugs Act.

2. Appellant is sentenced to a fine of 30,000 SCR for possession of cannabis, a controlled drug. The fine is to be paid within 30 days of this sentence, in default of the payment of the fine, the Appellant shall serve a sentence of 1 years' imprisonment.

3. The sentence imposed by the Trial Court on conviction of cultivating controlled drug is upheld.

Dr. Lillian Tibatemwa-Ekirikubinza, JA.