IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2024] (19 August 2024)

SCA CR 03/2024

(Appeal from CO 46/2022)

In the matter between

Shabani Kizamba Shabani **Appellant**

(rep. by Mr. France Bonte)

and

The Republic **Respondent**

(rep. by Ms. Ketlynn Marie)

Neutral Citation: *Shabani v R* (SCA CR 03/2024) [2024] (Arising in CO 46/2022) (19 August 2024)

Before: Fernando President, Robinson, Andre, JJA

Summary: Appeal against sentence of 12 years imposed on conviction for agreeing with another person or persons to commit the offence of importation of a controlled drug.

Heard: 5 August 2024

Delivered: 19 August 2024

ORDER

The appeal dismissed and the sentence varied by being increased to 18 years imprisonment.

JUDGMENT

FERNANDO, PRESIDENT (Robinson, Andre, JJA concurring)

1. The Appellant has appealed against his sentence of 12 years imprisonment imposed on him on his conviction based on his own plea of guilt, for agreeing with another person or persons to commit the offence of importation of a controlled drug, namely cocaine having a net weight of 1892.60 grams and a total cocaine content of 984.78 grams. Importation of cocaine, which is a class 'A' drug, is an offence under section 5 of the Misuse of Drugs Act 2016 (MODA).

2. The Appellant raised the following grounds of appeal in his Notice of Appeal:
    i. The Sentence is too harsh and
    ii. Against the decision not to grant remission of the sentence

3. The Appellant in his Written Submissions filed, elaborating on ground (i) had stated that the learned sentencing Judge failed to properly consider the mitigation submitted in open Court along with the probation report and that the applicable law on sentencing principles were wrongly applied. The Appellant has not submitted on what he has stated as "failed to 'properly consider' the mitigation". The Appellant has rightly not pursued nor stated anything in his written submissions in respect of ground (ii) of appeal. In **Osama Brandon Casime and Hifa Noura Casime Cr App. SCA 07/08/2019** this Court held that remission as provided for in the Prisons Act shall not apply to a prisoner serving a sentence of imprisonment for an offence of an aggravated nature under MODA. It had been held in **Bradburn V Superintendent of Prisons (2012) SLR 182** that **"**…*no prisoner can claim remission as of right constitutional or otherwise. The grant of remission to a prisoner is nothing but a conditional privilege"*. I therefore dismiss ground (ii) of the appeal.

4. The Sentencing Court had taken note of the maximum sentence prescribed for such an offence, namely life imprisonment and a fine of SCR 1 million. It has also

taken note of the indicative minimum sentence for such offences, which are of an aggravated nature, namely 20 years imprisonment. According to **section 7(4) of MODA**, where a person is convicted of an offence of trafficking in more than 250 grams of cocaine, the Court shall treat the offence as aggravated in nature. In my view importation, which also is a form of trafficking, is more serious an offence than trafficking in MODA. Section 48 of MODA sets out the aggravating factors that support a more serious sentence for offences under MODA. This is because a person importing dangerous drugs is attempting to deceive the border control officers of the country of his departure, arrival and the countries he is transiting in. According to **section 48(1) (a) and (b)**: **"***the presence and degree of a commercial element in the offending, particularly where controlled drugs are imported into Seychelle***s",** and **"***the involvement in the offence of an organised criminal group to which the offender belongs***"** are such aggravating factors, among those stated in 48(1) (a) – (h). Section 48(2) states: **"***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 aggravating in nature*.**"** It is also important to note that section 48(1) is not an exclusive provision, in view of the use of the words **"***aggravating factors for offences under this Act include***"** (emphasis by me), and thus there can be other factors that a Court may consider as aggravating in nature.

5. The facts as narrated by the Prosecutor was admitted by the Appellant at the trial. They are briefly as follows: The Appellant, a Tanzanian national had arrived at the Seychelles International Airport on a Qatar Airways flight on 26 September 2022 and upon being questioned, had shown his accommodation reservations at Villa de Rose and Berjaya Beau Vallon Bay hotel from 26 September 2022 to 6 October 2022. The customs authorities with the assistance of the Police had carried out a search in a suitcase belonging to the Appellant. On removing the clothes inside the suitcase they had noticed that the suitcase when emptied was too heavy, was unbalanced from both sides and smelt of glue and the upper and bottom part of the

suitcase appeared to have been modified. In view of the suspicion, the empty suitcase was scanned in the x-ray machine and this had revealed that it had two hidden compartments. In the presence of the Appellant the false compartment was cut open and two packets, containing the cocaine was found. The Appellant had agreed to cooperate with the Police but the attempt to do a controlled delivery had failed as nobody had turned up to pick up the suitcase.

6. According to the Probation Report called for on the application of the Defence shows that the Appellant is presently 54 years old, is married and has two children aged 19 and 14 years presently. The Appellant had claimed that he is a first time offender. He had worked as a fisherman, electrician and wholesale retailer. He is said to have been diagnosed with blood pressure. The Appellant had claimed he was in financial difficulties and had to spend for his sick mother who had been hospitalized. The Probation Report has recorded that: **"**The accused recounted that he was then offered a trip to the Seychelles, where he was offered twenty-six thousand US dollars. He claimed that everything concerning his trip to Seychelles was taken care of, whereby upon his arrival, he will be met by someone at the airport**"**. The Appellant had said that he got involved in this drug transaction to pay for his mother's hospital bills.

7. Except the age of the Appellant, which the Appellant's passport could have revealed there is no proof of any of the other matters in the Probation Report regarding his personal circumstances. Although the Appellant may be a first time offender in the Seychelles, there are no criminal records of the Appellant in Tanzania or elsewhere to verify whether in fact he is a first time offender.

8. The amount paid to the Appellant to act as a mule, the fact that everything concerning his trip to Seychelles was taken care of, and arrangements made for someone to meet the Appellant on his arrival in Seychelles, clearly show that he

was part of an organized group as stated in section 48(1) (b) of MODA. Also in view of the amount of drugs found in the possession of the Appellant and the fact that it was the Appellant who imported the drugs into the country, there is no doubt that there is the presence and degree of a commercial element in the offending and that this comes under 48(1)(a) of MODA. In addition to these aggravating factors, I am of the view that the attempt by the Appellant to deceive the customs authorities by concealing the drugs in the manner that he did is in my view an aggravating factor. I am in agreement with the sentencing Judge that Court should take into consideration "the detrimental effect drugs have on society in Seychelles especially to our youth", also as an aggravating factor. It is common knowledge that a growing number of the Seychelles population are involved in the use of hard drugs and this has a telling effect on our society and economy. This has led to many social problems and an increase in crime. I am also of the view that foreigners should not be made to think that Seychelles is a country that they can bring in drugs freely and get away with light sentences. That will be a wrong message to send to would be drug importers and traffickers who are foreigners.

9. The learned Sentencing Judge has contrary to what is stated, in the written submission of the Appellant, at paragraph 17 of his sentencing order taken into consideration the Appellant's guilty plea at the first reasonable opportunity thereby saving the precious time of Court, that he has shown remorse, that he had somewhat cooperated with the police although a controlled delivery was not successful, that he has 2 children and that he suffers from high blood pressure; as mitigating factors. I am of the view that family circumstances cannot be an excuse for commission of crimes especially of this nature. Those are matters an accused should have thought of, before embarking on criminal activity. In pleading that he has two children and a sick mother, he loses sight of the fact that he is destroying the lives of several children of this country and making many Seychellois parents sick.

10. The effect of pleading guilty and saving the precious time of Court as a sign of remorse is diminished when appellants who have been given light sentences think that they can appeal to have their sentences reduced, since the word remorse means deep regret that torments one for having done something wrong. Although by pleading guilty, it can be said a person admits responsibility for the offence, but by appealing against a light sentence without a legal or factual basis there is no demonstration of visible suffering in demeanour by such person, which is empathic and not self-focussed and indicative of personal transformation. In my view, the sentence given by the sentencing court in this case is inadequate taking into consideration the amount of drugs imported into the country in comparison to the maximum and the indicative sentences that could have been given under MODA. No doubt an accused has a right of appeal to the Court of Appeal under the Constitution, but where this Court is of the view that there is no legal or factual basis whatsoever to challenge the sentence of the sentencing court on the known principles of sentencing and it is simply an attempt by a person to try out his luck, a message should go out that this will not be tolerated by this Court. In this case the Appellant's attention was drawn at the stage of case management to rule 31(6) of The Court of Appeal of Seychelles Rules which states: **"***In the case of an appeal against sentence, the Court may vary the sentence by increasing the same, where it finds that the sentence imposed by the Supreme Court is inadequate given the specific circumstances of the appeal***",**

11. The learned sentencing Judge, in my view had correctly taken into consideration and applied the sentencing principles and guidelines stated in the cases of **Ponoo V Attorney General (2011) SLR, Savy V R (1976) SLR 54, R V Aden (2011), Njue V R (2016) SCCA 12** and **Suki V R SCA 10 of 2019**. The Appellant has not stated how the principles set out in these cases have been wrongly applied as alleged in his written submissions. This Court said in the case of **Suki V R SCA**

10 of 2019 "*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.***"** I agree with the statement of the Sentencing Judge that the **"**aggravating factors outweighs the mitigating factors in this case to such an extent that the would be mitigating factors have little or no effect on the sentence.**"**

12. Most of the cases cited by the Appellant in his written submissions to show sentencing pattern either do not have the citations or have been decided over 10-20 years ago when the drug problem in the Seychelles was not as acute as it is now, or have no relevance as they were not cases on importation. It was held in **Suki V R (SCA 10 of 2019)** by this Court, that although that the requirement for consistency in sentencing is one of the underpinning principles of equality before the law and a useful aid to assist a court in determining an appropriate sentence; in the final analysis however, each case must be decided on its own merits, since no two cases are the same. Citing the High Court of Australia case of **Hili V The Queen (2010) HCA 242** this Court said, consistency is not demonstrated by and does not require numerical equivalence rather consistency is obtained in the application of the relevant legal principles. In **Osama Casime & Hifa Casime V R (SCA 07 & 08/2019)** this Court held that: **"***Sentences in and of themselves do not delimit the exercise of discretion and are not binding precedents. The sentencing exercise 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 the case.**" In Marengo V R (Criminal Appeal SCA 29/2018)** this Court stated that **"***sentencing is a discretionary power exercisable by the Court. It involves human deliberation of the appropriate sentence to be imposed for a particular offence in the circumstances of the case; it is not the mere administration of a common formula, standard or remedy*.**"**

13. In the case of **R V Mohamedi Khalidi Mikidadi (CO6/2022) SCSC (10 May 2022)** referred to by the Appellant, the accused on pleading guilty for importation of 285.03 grams of pure cocaine, which was 663.76 less than the amount imported by the Appellant; had been sentenced to 9 years' imprisonment. In **Suki V R SCA 10 of 2019**, a sentence of 15 years' imprisonment was upheld by this Court whereby the appellant had been convicted of importation of heroin with a purity of 523.7 grams. It is to be noted that the purity of the heroin in that case was less than 461 grams, as in this case. In **Patrick Uwaoma SCA CR 05/2023**, a sentence of 30 years' imprisonment was upheld by this Court in December 2023, whereby the appellant had been convicted of importation of cocaine with a net weight of 4896.10 grams.

14. I am of the view that the well-known principles where an appellate court would interfere with the sentence imposed by a trial court for reducing the term of imprisonment are non-existent in the circumstances of this case, although there are sufficient grounds for enhancing the sentence. Certainly, it cannot be said that taking into consideration the amount of cocaine that was imported, that the sentence is harsh, oppressive or manifestly excessive.

15. I am of the view that the time has come for us to impose the indicative minimum or heavy sentences closer to the indicative minimum sentence in relation to cases of importation of class 'A' drugs especially by foreigners. It is only in exceptional cases that we should deviate and impose sentences much lower than the indicative

minimum sentence. Taking into consideration the aggravating factors of this case referred to at paragraph 8 above and the sentences imposed in **R V Mohamedi Khalidi Mikidadi**, **Suki V R SCA 10 of 2019** and **Patrick Uwaoma SCA CR 05/2023**, I am of the view that a sentence of 18 years imprisonment, should be the appropriate sentence that should be imposed on the Appellant.

16. I therefore in exercise of the powers vested in this Court under rule 31(6) of The Court of Appeal of Seychelles Rules 2023, vary the sentence imposed by the sentencing court by increasing it to 18 years imprisonment, as I find the sentence imposed by the sentencing court is inadequate taking into consideration the circumstances of this case and the alarming trend of importation of drugs into Seychelles by foreigners, which have a drastic effect especially on the youth of this country.

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Fernando President

I concur:

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F. Robinson JA

I concur:

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S. Andre JA

Signed, dated and delivered at Ile du Port on 19 August 2024.