IN THE SUPREME COURT OF SEYCHELLES

THE REPUBLIC

VERSUS

SUCILLA KATHERINE JUMAYE **ACCUSED**

Criminal Side No 23 of 2002

Mr. G. Kulatunga for the Republic
Mr. B. Georges for the Accused

JUDGMENT

Perera J

The Accused stands charged with the offence of unauthorized possession of foreign currency contrary to Section 1 (3 A) of the Exchange Control Act (Cap 76) as amended by Acts numbers 5 of 1999, 4 of 2001 and 5 of 2001, read with paragraph 1(1) of Part II of the second schedule of the said Act, and punishable under paragraph 1(3) read with 1(4) of Part II of the second Schedule of the said Act. In the particulars of the offence, it has been stated that the Accused, "*not being a bona fide tourist", on 16th May 2002 at the Seychelles International Airport, had in her possession foreign currency, namely fifteen thousand nine hundred and fifteen (15915) US dollars in currency notes, three thousand one hundred and fifty (3150) Euro in currency notes, and five hundred and fifteen (515) pounds sterling in currency notes, which had not been obtained from an authorized dealer and without having obtained the permission of the Exchange Controller to process such foreign currency."*

On 16th May 2002, Inspector Agnes Mondon (PW3) was on duty at the Seychelles International Airport in charge of the Squad dealing with foreign currency violations by departing passengers. Although detections are made on a random basis, she received prior information regarding the accused. She asked her whether she had any unauthorized foreign currency in her possession, but she replied in the negative. Then she informed her that she wanted to search her handbag, and she agreed. Upon opening the bag, the Inspector found foreign currency notes as specified in the charge. She had no receipts from any authorized dealer, nor a certificate from the Minister, as required by law. A letter dated 26th April 2005 from the Exchange Controller (P2) confirms that the Accused had no authority to be in possession of foreign currency that day.

The Inspector seized the currency notes and issued the receipt (P3). The currency notes were counted in the presence of the Accused, and she certified that these notes were found on her. She did not board the flight to Dubai that day. However four days later, on 20th May 2002, on receiving information that the Accused was leaving for Dubai by Air Seychelles Flight HM 018 at 20.23 hours, Inspector Mondon arrested her in town and took her to the

Central Police Station around 16.00 hours. There she declined to make a statement on the advice of her lawyer (P6). She was however released to proceed to Dubai on an undertaking that she would return. Statement of her travel history maintained by the Immigration Division, (P1) shows that she returned to Seychelles six times, the last being on 14th May 2005. Philip Bacco (PW1) Immigration Officer confirmed that the Accused, who holds a Seychelles passport, came to Seychelles on each occasion as a resident. Admittedly the Accused is a Seychellois national holding a Seychelles passport.

Prosecution witness James Cedras who was one of the Police Officers who assisted Inspector Mondon during the search was not called, but was tendered for cross examination by the defence. However he corroborated the evidence of Inspector Mondon and stated that the Accused when asked whether she had any foreign currency with her stated that she had nothing to declare. Both Inspector Mondon and Cedras stated that they did mention the reply given by the Accused in their formal statements to the Police as they considered it unimportant.

The defence was that the foreign currency seized, was brought by her from Dubai when she arrived in Seychelles on 3rd May 2002 with her partner, to attend the funeral of her father. Anita Naidoo, Senior Auditor of the Foreign Earnings Regulation Division of the Central bank stated that there was no requirement that an arriving tourist or a resident should declare any foreign currency being brought at the airport.

On 16th of May 2002, soon after she was detected with the foreign currency, the Accused had contacted her employer, "*Damas Jewellery*" in Dubai, and at 21.31 Dubai time, the Sales Manager had faxed a letter confirming that the Accused was employed as a shop Manager since 15th July 1995 to date, and that her monthly gross salary was 2500 dirhams. It was also confirmed that she left Seychelles on emergency leave on *9th May 2002* to attend her father's funeral, and That she was expected back on 20th May 2002. The immigration record (P1) however states that she arrived in Seychelles on *3rd May 2002*. At the trial, she produced salary statements from March 2002 to November 2002 to establish that although her gross monthly salary varied between 2500 DHS, with incentive allowances, she received around 3800 DHS per month. The bank statements were also produced (D2). She testified that her partner was also employed, and as she received free accommodation and meals, their monthly living expenses were about 300 DHS. The Accused. Further stated that they converted their savings to US dollars, sterling pounds and Euros from banks, authorized dealers and even shops. She had no receipts as they were issued only on demand. Apart from the maximum *ignorantia juris non excusat*, the Accused admitted that she was aware of the Exchange Control restrictions and the need to possess receipts, but stated that previously she had brought foreign currency in, and taken them out within any query.

Learned Senior State Counsel produced a bill of entry (P7) showing that the Accused had imported a Nissan

motor car which arrived in Seychelles on 31st October 2002. Admittedly it was cleared around 10th March 2004. By letter dated 10th March 2004, the Accused requested the Controller of Customs to waive storage charges, and 12% G.S.T. on the basis that she had returned to settle down. The approval was granted. However the Immigration record shows that she departed on 20th March 2004 and returned four days later and left again on 29th March 2004. Admittedly she is still employed in Dubai, and has made frequent visits here. The Accused in her testimony stated that the vehicle was purchased by her partner, but was imported under her name. No documents were however produced to substantiate that assertion.

Section 1(3A), of the Exchange Control Act, as amended by Act no. 5 of 1999 is as follows-

"(3A) Except with the permission of the Minister, *no person, other than a bona fide tourist, shall have any foreign currency in his possession unless such foreign currency has been obtained in accordance with Sub Section (i)."*

Sub Section (i) of the said Act provides that-

"Except with the permission of the Minister, no persons, other than an authorized dealer, shall in Seychelles, buy or borrow any gold, or foreign currency from, or sell or lend any gold or foreign currency to any person other than an authorized dealer".

Section 5 (as amended) provides that in any Prosecution of a person for an offence against the Act, the burden of proving that he obtained the foreign currency from an authorized dealer or that he obtained the permission of the Minister "*for doing the Act or making the omission which constitutes the offence, shall be on that person*". This reverse burden is however on a balance of probabilities.

In the case of ***David Green v. R S.C.A. No. 9 of 2002,*** the Accused was a citizen of Seychelles by birth at the time he was detected being in possession of foreign currency when departing from Seychelles. He had no receipts, nor the permission of the Minister. He claimed that he brought the money from England and was taking it back. The Court of Appeal was invited to consider whether the Accused who had since 1971 resided in England, derived all his income there and had no income in Seychelles, had no intention to reside in Seychelles, although he came on holiday to visit his mother and family, and also held a British passport would be considered a "*bona fide tourist*". The Court held that "*on a consideration of the totality of the facts and circumstances, the inference is irresistible that the Appellant was in Seychelles not as a "bona fide tourist"* but as a citizen of Seychelles, the land of his birth. Indeed it is difficult to conceive of a situation where a citizen will be in his own country as a bona fide tourist.

In the case of ***Natasha Nundlall v. R (S.C.A. 6 of 2002)*** the crucial issue before the Court of Appeal was whether a foreign national who was a tourist, in the sense that she had visited Seychelles on two prior occasions

before she was detected being in possession of foreign currency was in any event a *bona fide tourist*. On the basis of the facts and circumstances of that case, the Court held that she was not a *bona fide* tourist, but a tourist with an ulterior motive, and that she had not discharged the burden placed on her by Section 5 of the Act.

The Accused has failed to establish any of the statutory defences and hence failed to discharge the burden of proof which fell on her under Section 5 of the Act on a balance of probabilities. Mr Georges, Learned Counsel for the Accused acknowleged the strict liability placed by the statute and the binding effect of the Court of Appeal decisions on the matter on this Court. He however invited the Court to consider at least a minimum chance which the law can offer to a person in these circumstances. He submitted that in the present case the Accused has adduced evidence, for this Court to consider the possibility that the Accused had sufficient income to purchase the foreign currency in Dubai, which she claimed was brought to Seychelles and was being taken back. The objects and reasons for enacting Stringent Exchange Control Laws in this country is to conserve and regulate the foreign currency received, and to channel them to authorized dealers and banking institutions, thus preventing "*black marketing".* In this pursuit, the burden of proving that he is in lawful possession of foreign currency has been placed on the accused person. This is a permitted limitation on the Constitutional right to the presumption of innocence contained in Article 19(2) (a) of the Constitution. Sub Article (10) (b) provides that "anything contained in or done under the authority of any law in a democratic society shall not be inconsistent with or in contravention of –

(b) "Clause (2) (a) to the extent that the law in question imposes upon any person charged with an offence the burden of proving particular facts or declares that the proof of certain facts shall be *prima facie proof of the offence or of any element thereof".*

Strict liability offences are created to control matters which threaten public welfare in general. They include social and economic fields as well. Joel Feinberg in "*The moral limits of the criminal law*" justifies strict liability statutes in respect of Public welfare offences which for example require producers of products such as milk, which are vital to Public health and safety, to keep their products safe, and automatically impose a fine for discovered impurities even without evidence of fault. He states that "*such a penalty lacks the reprobative symbolism of genuine punishment, and the statute that specifies it, therefore, should not be classified as part of the criminal law*." The Exchange Control Laws enacted in countries that do not have convertible currencies fall into the same category. Hence where the burden of proof is not discharged by the Accused person , the Courts are not empowered to formulate categories of persons not envisaged by the legislature.

In the present case, the defence that the foreign currency seized was obtained from earnings in Dubai is not genuine. If indeed it was so, the Accused who went back on 20th May 2002 had ample opportunity to obtain receipts from the sources there, and pursuant to Section 5(b) of the Act *"obtained the permission of the Minister for doing the Act or making the omission which constitutes the offence*", and thereby discharged the burden. The Prosecution has therefore proved beyond a reasonable doubt that the Accused was in possession of the foreign

currency in violation of Section 1(3A) of the said Act. The Accused having failed to establish on a balance of probabilities that she had bought the foreign currency from an authorized dealer or had obtained the permission of the Minister, is found guilty as charged and is consequently convicted of the offence.

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A.R. PERERA

JUDGE

Dated this 30th day of May 2005