IN THE SUPREME COURT OF SEYCHELLES

TERRY MARIE **APPELLANT**

VERSUS

REPUBLIC **RESPONDENT**

Criminal Appeal No 17 of 2004

Mr. W. Lucas for the Appellant

Miss Jumaye for the Respondent

JUDGMENT

Perera J

The Appellant was convicted by the Magistrates' Court for the offence of trafficking in a controlled drug, and was sentenced on 3rd November 2004 to serve a period of 8 years imprisonment, which is the minimum mandatory term prescribed by law. He has appealed against both the conviction and sentence.

The case for the Prosecution was that the Appellant was arrested on 2nd September 2000, around 10 a.m. when he disembarked at the Inter Island Quay from the *"Cat Cocos"* boat which came from Praslin. He was in the company of two other persons. The Appellant was carrying a black coloured bag. At the Inter Island Quay, P.C. Bradford Samedi took possession of the bag from the Appellant and asked the two others whether they had anything inside that bag. They said they had some clothes there. However, only one of them, namely Arthur Hoareau was taken to the Central Police Station with the Appellant. Upon making a body search on the Appellant, the Police found herbal material suspected to be cannabis in a small bag tied to his underwear. Upon searching the bag, three packets of herbal material, also suspect to be cannabis, were found. In one of them there were 92 small plastic bags of that material. P.C. Samedi, on being cross examined stated that the Appellant did not tell him to whom the bag belonged but subsequently told him that it belonged to Arthur Hoareau. During the search, the national identity card, the driving licence and some clothes of Arthur Hoareau were found in that bag. However Arthur Hoareau was released by the Police, as nothing was found on him.

He was not Prosecuted.

The Appellant, in his testimony stated that Arthur Hoareau was his cousin and that the bag he carried belonged to Arthur. The previous night he came to his house to sleep. He asked him to carry two T-shirts, two trousers, an underwear and a pair of socks in that bag. However while on the boat, the Appellant carried the bag. After disembarking he asked Arthur to take the bag, but it was then that the Police arrested him. He admitted that at the Central Police Station, he did not tell P.C. Samedi that the bag did not belong to him. The material found in the black bag was analysed as cannabis, weighing 369gm 300mg, and the material found on the Appellant's person, also as cannabis, weighing 32 gm 400 mg.

The Learned Senior Magistrate *(Mr. V. Ramdonee*) considered the evidence in the case and was satisfied that the Appellant did not seriously challenge the possession of the drugs found in his underwear. He however stated that the thrust of the defence was the ownership of the black bag and the circumstances in which it came to be in his possession with the contents. The Learned Senior Magistrate considering the evidence of the Appellant stated-

> *"After listening to the Accused's story I can but think of it as being fanciful and preposterous. I do not see an iota of truth when he denies knowledge of the contents of the bag. Although Arthur Hoareau should have been called as a witness, but was not called, in order to dispel the slightest doubt as regards the possession of the bag, nevertheless I am entirely satisfied that the said bag and its drug contents belonged to the accused. Assuming the bag belonged to Arthur Hoareau, nevertheless the circumstantial evidence would suggest that the Accused had both control and knowledge of the illicit drugs found in the bag".*

The Appellant relies on three grounds of Appeal, which taken cumulatively, rest on the ownership of the black bag found in the possession of the Appellant. Learned Counsel for the Appellant submitted that the Prosecution failed to establish that the Appellant had knowledge of the drugs in the bag, although he had custody of the bag which belonged to his cousin Arthur Hoareau.

A significant fact was the presence of the identity card, the driving licence and some clothes of Arthur Hoareau in the black bag. The Appellant's evidence was that the bag belonged to Arthur Hoareau and he asked him to put certain items of clothing in that bag as he could not find a plastic bag that night. The fact that there were these personal items of the Appellant in that bag is supported by the evidence of P.C. Samedi who stated that after the drugs in the bags were seized, the personal belongings were returned to the Appellant. There was no evidence how, if the bag belonged to the Appellant, there was the I/D, driving licence and clothes of Arthur Hoareau in that bag. It was more plausible that important documents such as those were in that bag as it belonged to Arthur Hoareau. But that does not necessarily mean that the drugs also belonged to him as admittedly, the Appellant had access to it when Hoareau went to the bar in the boat leaving the bag with him. It was he who disembarked with it.

The Learned Senior Magistrate was not immune to the weakness of the Prosecution case on the issues of ownership and custody of the bag. He ruled that despite the absence of Hoareau as a witness, circumstantial evidence in the case would suggest that the Appellant had both control and knowledge of the drugs.

This Court, exercising Appellate Jurisdiction has the power under Section 316(a) (I) and (ii) to either reverse or alter a finding of fact upon which a conviction has been based. However, as stated by Seaton CJ in the case of ***Monthy v. R (1988) S.L.R. 72 at 27-***

"……. in cases where this Court is asked to disagree with the findings of fact made by the Magistrates' Court it must appear that if the case were being tried by a judge and jury, no jury properly directed could reasonably have come to the same conclusion as did the Learned Magistrate".

In the present case therefore, could the Learned Senior Magistrate have relied on the circumstantial evidence when there was a lingering doubt as to the ownership of the bag. The *"circumstantial evidence"* against the Accused would have been, (1) that he travelled with Arthur Hoareau, (2) the he carried a bag which contained cannabis, (3) that cannabis was found hidden in his underwear.

The concept of "*possession"* connotes two elements, the element of custody or mere possession, and the element of knowledge. As was held in ***D,P,P V. Brooks (1974) A.C. 862,-***

"The only *actus reus required to constitute the offence was that the drugs should be physically in custody of the accused and the mens rea by which the actus reus must be accompanied, was the knowledge on the part of the accused that the* thing possessed was drugs"

In the case of **Warner v. Metropolitan Police Commissioner**, (***1968) 2. A.ER 356, at* 393, Lord Wilberforce** stated thus-

"The question to which an answer is required and in the end a jury must answer, is whether in the circumstances, the accused should be held to have possession of the substance, rather that mere control. In order to decide between these two, the jury should, in my opinion, be invited to consider all the circumstances …….. the "modes or events" by which the custody commences and the legal incident in which it is held. By these I mean, relating the to typical situations, that they must consider the manner and circumstances in which the substance, or something which contains it, has been received, what knowledge or means of knowledge or guilty knowledge as to the presence of the substance, or as to the nature of what *has been received, the accused had, at the time*

of receipt or thereafter up to the moment when he is found with it, his legal relation to the substance or package (including his right of access to it). On such matters as these, they must make the decision whether, in addition to physical control, he has, or ought to have imputed to him, the intention to possess, or knowledge that he does possess what is in fact a prohibited substance. If he has this intention or knowledge, it is not additionally necessary that he should know the nature of the substance.

In **Warner**, the burden was shifted to the accused to show or suggest that he had no right or opportunity to open the box or reason to doubt the legitimacy of the contents and that he believed the contents where different in kind and not merely in quality from what they actually were. The rigidity of the principle contained in *Warner,* was sought to be mitigated by enacting Section 28 of the Misuse of Drugs Act 1971. Section 28(3) (b) (i) in particular provided that once the Prosecution had proved that the accused had control of the box, knew that he had control, and knew that the box contained something which was in fact the drug alleged, the burden was cast on the accused to bring himself within that Sub Section which stated that he shall be acquitted-

"(I) If he proves that he neither believed nor suspected nor had reason to suspect that the substance or product in question was a controlled drug……." the reverse burden on the accused was however on a balance of probabilities.

In **R v. Mc Namara (1988) Crim. L.R. 440** the Police found 20 kg of cannabis resin in a cardboard box at the back of the motorcycle of the accused. According to Police evidence, the accused admitted that it was cannabis resin, but claimed to be the carrier and not the dealer. However at the trial, the accused stated that he did deliveries for a man called John, and he thought there were pornographic or pirated video films in that box, and never thought he was carrying drugs. The Judge directed the jury on the provisions of Section 28(3) of the Misuse

of Drugs Act, and stated that they should acquit the accused, notwithstanding they were satisfied that he was in possession of cannabis resin, if they concluded that he probably did not know, nor did he suspect, nor did he have reason to suspect that the box contained a controlled drug. The accused was convicted, and that conviction was upheld by the Court of Appeal.

In a similar local case, ***R v. Abdisalam Ali Mohamed (1982) S.L.R. 55,*** a Tanzanian National was found in possession of 7 kilograms of cannabis packed in 24 tins of coffee marked "Africafe" on his arrival at the Seychelles International Airport. His defence was that he had been given those tins by a friend to be delivered to a person who would call within a week of his arrival. He therefore pleaded that he was an innocent carrier of material which he thought to be coffee. The issue before the Court was whether the accused knew or had reason to believe that the contents of the tins were prohibited drugs.

Seaton CJ applied the principles of Warner (supra) and conceded that it was quite possible that one would be asked by a friend to do a favour when travelling and quite innocently be given material which, out of delicacy, one might not examine even though he had not been told that he could or should not do so. The Learned Judge further stated that although such a story was likely, and might therefore be accepted, yet certain aspects made the truth of that story doubtful. Some of them were that the accused had no other luggage, no change of clothes or toiletries. He had only 100 US dollars which was insufficient for a two week stay, and he had no reservation in the guest house he named. There were also several inconsistencies in his evidence in Court and in his pre-trial statements. It was therefore held that he had both possession and knowledge, and was accordingly convicted.

In the present case, the Appellant did not dispute that he had cannabis hidden in his underwear. Hence he had both possession and knowledge in respect of 32 grams 400 milligrams of cannabis, which, due to its quantity attracted the presumption of trafficking. If the black bag belonged to Arthur Hoareau, it would have been a strange co-incidence that both of them were carrying drugs without the knowledge of each other. As was held in **R v. Royce Dias & Or (1985) S.L.R. 66,** *"there could be joint possession and there could be possession by one on behalf of another".* Hence in the circumstances disclosed by the Appellant in his evidence, his defence that he was an innocent carrier could not be accepted as being truthful. Hence the finding of the Learned Senior Magistrate that the Appellant had knowledge that the bag contained 369 grams 300 mg of cannabis cannot be faulted. Even if

Arthur Hoareau had been jointly charged, the Appellant was liable to be convicted for possession on behalf of Another. Accordingly the Appeal against conviction is dismissed.

As regards the Appeal against sentence, this court is satisfied that there were no exceptional reasons why the Learned Senior Magistrate should not have imposed the minimum mandatory sentence of 8 years prescribed in Misuse of Drugs Act.

Accordingly, the Appeal against sentence is also dismissed.

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A.R. PERERA

JUDGE

Dated this 6th day of October 2006