IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CN 44/2013

Appeal from Magistrates Court decision 750/2011

[2014] SCSC

WILSON YOUPA
Appellant

versus

THE REPUBLIC

Heard: 02 June 2014, 17 July 2014,

Counsel: Mr. Joel Camille Attorney at Law for appellant

Mr. George Robert, State Counsel for the Republic

Delivered: 04th November 2014

JUDGMENT

Burhan J

[1] This is an appeal against conviction and sentence.

[2] The Appellant in this case was charged in the Magistrates' Court as follows;

Count 1

Possession of a controlled drug contrary to section 6 (a) as read with section 26 (1) (a) and punishable under section 29 (1) of the Misuse of Drugs Act Cap 133.

The particulars of offence are that, Wilson Youpa, on the 22nd day of April 2010 at Les Mamelles, Mahe, was in possession of 12 milligrams of heroin (diamorphine) a controlled drug.

Count 2

Possession of a controlled drug contrary to section 6 (a) as read with section 26 (1) (a) and punishable under section 29 (1) of the Misuse of Drugs Act Cap 133.

The particulars of offence are that, Wilson Youpa, on the 22nd day of April 2010 at Les Mamelles, Mahe, was in possession of 0.2 grams of cannabis, a controlled drug."

[3] The learned Senior Magistrate found the Appellant guilty on both charges and proceeded to sentence the Appellant to a term of 5 years imprisonment on Count 1 and to a term of 1 year imprisonment on Count 2. It was further ordered that both terms of imprisonment run consecutively.

[4] Learned counsel for the Appellant has appealed from the said conviction and sentence on the following grounds-

"The learned magistrate erred in law for having failed to consider any or at all,, the statement given by the Appellant from the dock, as part of his defence, at the juncture of reviewing of the evidence in the case.

The learned magistrate erred in law in having failed to consider the defence of the Appellant as raised before the court or at all.

The Appellant submits further that the learned magistrate erred in law for having ordered the sentences on both count 1 and 2 to run consecutive to one another."

[5] The background facts of the case are that on the 22 of April 2010 around 18.30 hrs while agent Kenneth Joseph of the NDEA (National Drug Enforcement Agency) accompanied by agents Melissa Malbrook and Berard Hoareau were on mobile patrol at the bus stop near Court 1 in the Les Mammelles district, they had noticed the Appellant who on seeing the jeep had dropped a white piece of plastic on the ground. The agents had disembarked from the vehicle and agent Joseph had picked up the white plastic and noticed some

powder inside and some herbal materials which they suspected to be controlled drug. The Appellant was arrested and subsequently charged.

[6] Agent Kenneth Joseph gave evidence for the prosecution and agent Melissa Malbrook was called to corroborate the evidence of agent Kenneth Joseph while the Government analyst Mr. Bouzin identified the exhibits as those analysed by him. The powder he stated was Heroin (Diamorphine) while the herbal material was Cannabis.

[7] In defence the Appellant made an unsworn statement from the dock. He admitted he was at the bus stop that day. He admitted he saw a Terios jeep around 18.30 hrs but the jeep had stopped near a boy and officers had got down from the jeep and strangled the boy and drugs had come out from his mouth and fallen into the hands of the officers. The boy had shouted *"larantre sorti bus stop"* and agent Joseph had come towards him and some others who were standing near the Takamaka trees a few feet away, with something in his hand and had handcuffed him and told him to get into the jeep. He had got in and was told that he was being arrested and would stay in the cell for one night. Thereafter he had been accused of being in possession of drugs and the white plastic bag containing the Heroin and Cannabis Herbal material was shown to him.

[8] At page 4 and 5 of her judgment the learned Senior Magistrate has set out in detail the defence as borne out by the unsworn statement of the Appellant. It is apparent if the Appellant's defence is to be summarized his defence is that the drugs were found in the mouth of a boy and therefore not his. He also has mentioned there were others also present close to him. The learned Senior Magistrate having analysed the prosecution evidence in detail and being satisfied that though the witnesses were subject to cross examination there were no material contradictions has come to the conclusion that the evidence of the prosecution witnesses were clear, cogent and reliable.

[9] It is apparent that she was also satisfied that the evidence of agent Kenneth Joseph was corroborated by that of Melissa Malbrook. At page 5 of the judgment she has clearly stated *"it is clearly established that on the day in issue there was no other person with the accused and or near the accused on the bus stop and or elsewhere around the bus stop and hence no obstruction to the said NDEA agents observing and identifying the action of the accused as they described……".*

[10] Therefore it is apparent from the above that the learned Senior Magistrate has decided to accept the uncontradicted and corroborated evidence of the prosecution witnesses as against what the Appellant has stated in his unsworn statement from the dock. It is apparent that she has accepted the evidence of the prosecution in this regard and in doing so rejected the defence of the Appellant as borne out in his unsworn statement that there were several others present and the controlled drug was not found on him.

[11] In the case of ***R. v. Campbell 69 Cr. App. R. 221*** which held:

"A statement from the dock is not, of course, evidence. It is, as many think – the fact that a defendant is still at liberty to make a statement of fact from the dock, invite a jury to consider his version of the facts without taking the oath and without subjecting himself to cross examination – an anomalous historical survival from the days before the Criminal Evidence Act 1898 when a person could not give evidence on his own behalf. There it is anomaly or not; the courts have to grapple with it and a statement from the dock unsworn now seems to have taken on in current practice a somewhat shadowy character half-way in value and weight between unsworn evidence and mere hearsay. A jury cannot be told to disregard it altogether. They must be told to give it such weight as they think fit, but it can be properly pointed out to them that it cannot have the same value as sworn evidence which has been tested by cross-examination."

[12] In this instant case I am satisfied the corroborated and uncontradicted evidence of the prosecution far outweighs the unsworn evidence of the Appellant and the learned Senior Magistrate cannot be faulted for accepting same. Therefore the contention of learned counsel for the Appellant that the defence was not considered bears no merit.

[13] Further the learned Senior Magistrate has carefully analysed the evidence in respect of the chain of custody of the exhibits namely the controlled drugs taken into custody. It is apparent that after careful consideration of the evidence before her she has satisfied herself that the controlled drugs taken into custody from the Appellant were the same that were analysed by the Government Analyst Mr. Bouzin and found to be Heroin 'Diamorphine' and Cannabis herbal material and produced in court as an exhibit. Further the evidence of the Government Analyst clearly establishes the fact that the said powder

taken into custody from the Appellant was confirmed to be Heroin "Diamorphine' and the herbal material Cannabis.

[14] In regard to the findings made by the learned Magistrate, in the case of ***Akbar vs R (SCA 5/1998)*** the Seychelles Court of Appeal held that an appellate court will accept findings of fact that are supported by the evidence believed by the trial court unless the trial judge's findings of credibility are perverse. In this instant case I am satisfied that the learned Senior Magistrate findings are supported by evidence which she believed and found credible because the evidence was corroborated and uncontradicted. Having considered the evidence led at the trial, the learned Senior Magistrate's findings of credibility cannot be said to be perverse. I see no reason to disturb her findings.

[15] In regard to sentence, it is apparent that the learned Senior Magistrate has correctly addressed her mind to the fact that the offence for which the Appellant was convicted was a serious offence which in the view of this court is correct as the controlled drug set out in the charge is a Class A drug Heroin 'Diamorphine'. She has also addressed her mind to the need for a deterrent punishment as the offence is "rampant" and to the dangers of controlled drugs on society especially the young and future generation of this country. The learned Senior Magistrate has come to a correct finding that there were no exceptional circumstances that warranted a term of imprisonment less than the minimum mandatory. In the case of ***Aaron Simeon v The Republic SCA 23 /09*** a sentence of 7 years imprisonment was imposed by the Seychelles Court of Appeal having found the Appellant guilty of the lesser charge of Possession of 0.0976 grammes of Heroin 'Diamorphine'. Therefore the sentence of 5 years imposed in respect of Count 1 being the minimum mandatory term prescribed by law at the time the offence was committed, cannot be said to be harsh and excessive.

[16] In regard to count 2, the learned Senior Magistrate has imposed a term of 1 year imprisonment to run consecutive to the sentence imposed in respect of Count 1. However considering the fact the controlled drug in Count 2 is a Class B drug Cannabis and the quantity of herbal material is only 0.2 grams and the fact the Appellant is a first offender and both offences were committed in the same transaction, I make order that the term of

1 year imprisonment imposed in Count 2 run concurrently with the 5 year term imposed in Count 1.

[17] Subject to this variation in sentence the conviction is upheld and appeal dismissed.

Signed, dated and delivered at Ile du Port on 4 November 2014

M Burhan
Judge of the Supreme Court