IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CN 74/2013

Appeal from Magistrates Court decision 711/2011

[2015] SCSC 77

RON SERVINA
Appellant

versus

THE REPUBLIC

Heard:	17 July 2014 and 28 November 2014
Counsel:	Mrs. A. Amesbury Attorney at law for the Appellant
	Mr Kumar, Assistant Principal State Counsel for the Respondent
Delivered:	20 March 2015

JUDGMENT

Burhan J

[1] The Appellant was charged in the Magistrates' Court as follows;

Count 1

Possession of a Controlled Drugs 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 Ron Servina, residing at Machabee, Mahe on the 9th of January 2011, at North East Point, Mahe, has in possession, 16 Milligrams of heroin (Diamorphine) a controlled drug.

[2] The Appellant was found guilty after trial, convicted and sentenced to a term of 5 years imprisonment by the learned Senior Magistrate Mrs. S. Govinden.

[3] The Appellant seeks to appeal from the said conviction and sentence on the following grounds;

"That the conviction was unsafe and unsatisfactory in that neither the charge nor the evidence led supported a finding that the accused was in possession of heroin (diamorphine) and Cannabis.

That the sentence was harsh, oppressive manifestly excessive.

That the sentence was wrong in principle.

That a matter had been improperly taken into account or the matter that should have been taken into account was not taken into account by the trial court.

The sentence was not justified by law."

[4] The background facts of the case as borne out by the evidence of witnesses Pierre Servina and agent Malvinna are that on the 9th day of January 2011, while they were on mobile patrol at North East Pointe, the Appellant had been observed near a building near Despilly Super market. According to the evidence of both agents, the Appellant on seeing them had dropped something on the ground. The agents had stopped their vehicle and gone towards the Appellant and agent Servina had picked up what the Appellant had dropped and observed it to be a piece of aluminium foil paper. On opening it in the presence of the Appellant, they had come across a piece of brown paper containing some powder which they suspected to be controlled drug Heroin. The Appellant was thereafter arrested and charged in court for being in possession of 16 milligrams of Heroin 'Diamorphine' a controlled drug.

[5] It is clear on a reading of the judgment in her reasoning the learned Senior Magistrate has considered the issue of identity of the Appellant. She has considered the fact that there was sufficient light for the Appellant to be identified as the lights of the vehicle and the lights of the Indian shop close by were on and torches were being used by the officers

during the detection and therefore the agents could clearly see what the Appellant was doing and the exhibit at the time of arrest. I see no reason to disturb her findings on these issues.

[6] The learned Senior Magistrate has carefully analysed the evidence in respect of the chain of custody of the exhibit namely the controlled drug taken into custody. It is apparent that the learned Senior Magistrate, after careful consideration of the evidence before her has satisfied herself that the controlled drug taken into custody from the Appellant was the same that was analysed by the Government Analyst Mr. Purmanan and found to be Heroin 'Diamorphine' and produced in court as an exhibit.

[7] The learned Senior Magistrate has further looked for corroboration and has been satisfied that the evidence of the detecting officer Pierra Servina has been corroborated by the evidence of agent Malvina. Further the evidence of the Government Analyst clearly establishes the fact that the said controlled drug taken into custody from the Appellant was confirmed to be Heroin "Diamorphine' after he analysed same

[8] It is apparent that the learned Senior Magistrate in her judgment at page 7 paragraph 2 has inadvertently referred to the exhibit as *"heroin (diamorphine) and Cannabis"*. It is apparent that everywhere else in the judgment the exhibit has been correctly referred to as Heroin (Diamorphine) and on analysing the evidence the learned Senior Magistrate has stated thus at Pg 6 of her judgment *"....the forensic analyst T. Purmanan confirmed that on the 4th day of May 2011 he analysed exhibit R5 and during analysis and examination he conducted , the brown Powder exhibit R5 was confirmed to be heroin (diamorphine) weighing 16 milligrams and also confirmed by exhibit R2 the analyst report which indicates the description of the exhibits referred*." The analyst report R 2 only refers to a brown powder Heroin (Diamorphine). Therefore it is apparent the learned Senior Magistrate was referring to R5 the exhibit in the case, as a brown powder confirmed to be Heroin (Diamorphine) and the findings in the analyst report R2 which also only refers to Heroin (Diamorphine) and does not mention Cannabis. It is apparent therefore that an oversight has occurred when the learned Senior Magistrate had only in one instance in her judgment referred to the exhibit as *"heroin diamorphine and Cannabis."* When one

considers the facts and reasoning as contained within the entirety of the judgment, this oversight or error is in not fatal to the conviction.

[9] Having thus considered the judgment of the learned Senior Magistrate and for the aforementioned reasons, the submission of learned counsel that the conviction is unsafe and unsatisfactory in that neither the charge nor the evidence led supported a finding that the accused was in possession of Heroin (Diamorphine) and Cannabis bears no merit.

[10] Further this court will not seek to interfere with the findings of the trial court in respect of the truthfulness of the witnesses as it is not apparent that the testimonies of these witnesses in this instant case are so improbable that no reasonable tribunal would believe it ***Eddison Alcindor v The Republic SC. Cr. App, Side No. 20 of 2008.***

[11] I will next proceed to deal with the question of sentence.

[12] The law as it stood at the commission of the offence prescribed a minimum mandatory term of imprisonment of 5 years for the charge for which the Appellant was found guilty and convicted. The learned Senior Magistrate has addressed her mind to the fact that no exceptional circumstances exist for a lesser term to be given.

[13] It is apparent that the learned Senior Magistrate has not felt constrained in that she could not give a lesser sentence as the law prescribed a minimum mandatory term of 5 years imprisonment. She 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" in the country. I see no ground to interfere with her findings in this respect.

[14] 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". In the light of this sentence by the Seychelles Court of Appeal for a similar charge, it cannot be said that the sentence imposed in this case by the learned Senior Magistrate fails the legal tests, judicial tests or the constitutionality of defence

rights as referred to by learned counsel for the Appellant in her submissions, relying on the case of ***Poonoo v The Attorney General 2011 SLR 424***.

[15] For the aforementioned reasons the appeal against conviction and sentence is dismissed. The conviction and sentence imposed by the learned Senior Magistrate is affirmed.

Signed, dated and delivered at Ile du Port on 20 March 2015

M Burhan
Judge of the Supreme Court