

IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CO 54/2013

[2016] SCSC 94

THE REPUBLIC

versus

RASHID MOHAMED LIWASA

Accused

Heard: 30 May 2014, 8,9 Jan, 6,7 April, 20 August, 22 Sept, 14 Oct, 2015.

Counsel: H. Kumar, State Counsel for the Republic
J. Camille for the accused

Delivered: 28 January 2016

JUDGMENT

Dodin J

[1] The accused Rashid Mohamed Liwasa, a Kenyan National, stands charged with one count of importation of illegal substance into Seychelles. The particulars of the offence are that on the 25th August 2013, at the Seychelles International Airport, the accused imported controlled drugs with a gross weight of 683.7 grams containing a net weight of 287.1 grams pure heroin, (Diamorphine).

- [2] The accused did not deny that he brought the illegal drugs into the Seychelles but maintained that he had no knowledge of the contents of the two cans which he was given to carry to Seychelles by one Mrs Babanguida. The prosecution however maintained that the accused was aware that he was a courier of controlled substances into the Seychelles and that he had made similar trip before, in June 2013, with similar instructions and with similar containers.
- [3] Prosecution witness Jemmy Bouzin, a forensic expert, gave uncontroverted evidence that the contents of the two cans which were brought to him for analysis by agent Adelaide contained a total of 683.7 grams of powder with a purity of 42% hence containing a net weight of 287.1 grams pure heroin, (Diamorphine). One can which had the label Choco Primo on it contained 345.2 grams of powder and the other can labelled Milksi contained 338.5 grams of powder. The powder contained 42% pure heroin.
- [4] Erica Marlene Dufresne, an immigration officer, on the 25th August, 2013, at around 1.40 pm, she observed the accused coming from flight KQ450 from Nairobi, carrying just his passport and landing card. He was directed to Desk N0 9 and he was questioned about the purpose of his trip to Seychelles. The accused answered that he was coming on holiday and he was booked at Berjaya Beau Vallon Bay Hotel from 25th August to 29th August, 2013 and he was to be conveyed there by 7° South Travel Agency. All the information checked out but she also discovered from his passport that he had made a similar trip of 4 days from 30th June to 4th July, 2013.
- [5] She questioned him about his previous visit but his answers were not convincing, so he was told to pick up his luggage and directed to custom's officer Elna August's desk where he was questioned further about the contents of his luggage which he said he packed himself and he had not been given anything by anyone to carry. But when his luggage was searched, they found a white plastic containing two tins, one labelled Choco Primo and the other Milksi which the accused maintained were for his own consumption.
- [6] Although the tins appeared new they decided to open the Milksi tin to check the contents and inside below a layer of milk, they found granular substances wrapped in paper and cling film. She summoned NDEA agents Jimmy Adelaide and Zerene Moise who assisted with the opening of the tins and questioned the accused further about the tins. At

this point the accused stated that he had been given the tins by one Babanguida to take to Seychelles where a Mr Maxwell was to collect them from him. At this point the accused was handed over to the NDEA agents.

- [7] Agent Elna Auguste, a customs officer, testified that she questioned the accused in the presence of immigration officer Dufresne and in addition to what Ms Dufresne has testified to in Court, when the accused was first asked what were these two tins, he stated that he had bought them in a supermarket in Kenya. It was only after the tins had been opened that he admitted in the presence of NDEA agents that a friend by the name of Babanguida gave the tins to him to take to Seychelles and that that same person gave him US \$ 1,000 and paid full board accommodation for his 4 day stay at Berjaya Beau Vallon Beach Hotel.
- [8] NDEA agent Jimmy Adelaide testified that he was stationed at the airport together with agent Moise on the 25th August, 2015, when they were informed by customs officer Auguste that they had intercepted a Kenyan man who appeared to have in his possession two tins containing substances suspected to be controlled drugs. They went to investigate and found the custom's officer with an open tin labelled Milksi with some packets of substance next to it and they witnessed the officer open the other tin labelled Choco Primo with the help of a screwdriver. Inside that tin there were two packets of substance suspected to be drugs. The tins and their contents were handed over to him which he kept in his possession and later took for analysis at the forensic lab.
- [9] He testified that he then called agent Nichol Fanchette and they took the accused to the NDEA headquarters where he was handed over to agents Celestine and Mellie for further formalities. The next day he took the exhibits to Forensic analyst, Jemmy Bouzin and he collected the same on the 29th August together with the report of examination which confirmed the substance to be heroin, (diamorphine). He handed over the exhibits to Evans Seeward for safekeeping until the day of the trial when he retrieved the same and produced them as exhibits.
- [10] Agent Moise testified that she was present at the airport and for a short while assisted agent Adelaide when they were called by custom's officer Auguste but then she left to

attend to another interception. Her evidence which corroborates the evidence of agent Adelaide and custom's officer Auguste was not contradicted by cross-examination.

- [11] Agent Terrence Dixie testified that on the 27th August, 2013, agent Sigguy Marie brought the accused and informed him that he had been arrested at the airport on the 25th for importation of controlled drugs. He proceeded to arrest the accused stating to him the offence for which he was being arrested and read him his constitutional rights. The following day he learned that the accused had been involved in a failed controlled delivery using a decoy.
- [12] Agent Tania Lozaique testified that on the 29th August, 2013, she was instructed to take a formal statement from the accused and the statement was witnessed by agent Lisa Larue. Agent Lozaique maintained that she was not aware that the accused had been involved in a controlled delivery and what if any conditions were agreed upon between the accused and the NDEA. Consequently, after a voire dire, the Court ruled the statement of the accused inadmissible.
- [13] At the close of the case for the prosecution, the accused made a dock statement in which he admitted that he brought the two tins and their contents into Seychelles from Nairobi Kenya, after he was handed over the same by one Babanguida, and he agreed that the two tins were opened after he was intercepted at the Seychelles airport and that is when he realised that what were in the tins were not what were labelled on them. He maintained that he had no knowledge of the contents of the tins. Subsequently he voluntarily agreed to assist the NDEA, as he had been asked to co-operate so that they can find out who was to pick up the exhibits but the delivery attempts were not successful. Only then he was formally arrested and charged.
- [14] Learned counsel for the prosecution submitted that the prosecution has established its case against the accused beyond reasonable doubt in that all the elements of the offence of importation has been proved by the prosecution witnesses. Learned counsel submitted that the accused admitted that he made the trip on instructions of one Babanguida, and the passport of the accused showed that he had made a similar trip in June, 2013.

- [15] Learned counsel submitted that the evidence of the prosecution witnesses have not been contradicted and the demeanour of the accused at the airport showed that he had knowledge that he was carrying illegal drugs into Seychelles. He therefore moved the Court to find the accused guilty as charged and to convict him accordingly.
- [16] Learned counsel for the accused submitted that the most crucial issue in this case is whether the accused had knowledge that what he was carrying in the tins was illegal substance, namely controlled drug heroin. He submitted that according to the evidence, the accused had a valid passport, fully booked and paid for hotel reservation, which showed that he had come for a vacation. It was only after the tins were opened that the accused became aware that the contents of the tins were not what the labels stated. Consequently, the accused agreed to assist the NDEA to make the controlled delivery. All these show that he had no knowledge that he was carrying something illegal into Seychelles.
- [17] Learned counsel submitted that the prosecution has failed to establish that the accused had exclusive knowledge of the content of the tins and hence failed to establish the element of knowledge as the offence required. Learned counsel hence moved the Court to find that charge against the accused has not been proved beyond reasonable doubt and to acquit him accordingly.
- [18] A general rule concerning all criminal cases is that a person has to have a "guilty mind" if he is to be convicted. If someone is carrying controlled drugs without knowing it, he should, if believed, be found not guilty of possession. Knowledge includes deliberately or recklessly disregarding the obvious fact that the item in one's possession is illicit substance and there is no requirement to know exactly what type of illegal drug is involved.
- [19] Having an illegal drug in one's pocket or one's suitcase may not establish actual possession if a doubt can be raised on the issue of knowledge that the item existed. For example, one may wear an item of clothing such as a jacket or pair of jeans belonging to friend or relative without knowledge that drugs were left in the pockets of the clothing. This person cannot be said to have knowledge of the illegal drug. Without knowledge

that the drug was there in the first place, one cannot properly be found guilty of the offence of possession.

[20] Another scenario may exist where the person was aware of the item in his possession but he did not know the item was an illegal drug. For example, someone in possession of a bag of marijuana, mistakenly thinking it was a bag of tea or a type of herb used for cooking cannot be said to have the requisite knowledge to establish possession of the illicit narcotic.

[21] However, mistaking one type of illegal drug for another type of illegal drug is not a proper defence to possession of drug. A person will not be acquitted of possession where he asserts that he believed they were in possession of cocaine when they were actually in possession of heroin.

[22] In the actual case the case for the defence is that the accused knew he was carrying two tins labelled Milksi and Choco Primo. The defence contention is that the accused believed that the contents of the tins were as labelled and therefore did not have knowledge that drugs were actually concealed inside.

[23] In order to determine whether the accused had knowledge or not of the contents of the tins, the Court must look at the circumstances surrounding the action of the accused and his demeanour and conduct as observed and testified to in Court. From the evidence adduced, the prosecution has established that the accused did not tell the truth when asked whether he had been given anything to carry by anyone. He also maintained that he had bought the tins in a supermarket for his own use. It was only after the tins were opened and the drugs removed that he told the truth. This is strong evidence that the accused had knowledge of the contents of the tins he was carrying and he was doing all that he could to avoid detection of the illicit drugs.

[24] I am therefore satisfied that the prosecution has established all the elements of the offence as charged beyond reasonable doubt. I reject the contention of the accused that he did not have knowledge of the contents of the tins in his possession. Consequently, I find the accused guilty of the offence of importation of 683.7 grams of powder containing a net

weight of 287.1 grams pure heroin, (Diamorphine) into Seychelles on the 25th August 2013, and I convict the accused accordingly as charged.

Signed, dated and delivered at Ile du Port on 28 January 2016

G Dodin
Judge of the Supreme Court