

IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CO22/2016

[2018] SCSC 670

THE REPUBLIC

versus

FRANCIS ERNESTA
First Accused

BRIAN MOTHE
Second Accused

KEVIN QUATRE
Third Accused

DANNY SULTAN
Fourth Accused

Heard: 9 July 2018

Counsel: Mr. Chinasammy Jayaraj, Assistant Principal State Counsel for the Republic
Mr. Clifford Andre Attorney at Law for all the accused persons

Delivered: 13th July 2018

SENTENCE

Burhan J

- [1] The aforementioned convicts Francis Ernesta, Brian Mothe, Kevin Quatre and Danny Sultan were convicted of the following offences:

Count 1

Trafficking in a controlled drug contrary to Section 5 read with Section 2 and further read with Section 26 (1) (a) of the Misuse of Drugs Act Cap 133 as last amended by Act No 3 of 2014, read with Section 22 (a) of the Penal Code and punishable under Section 29 (1) read with Second Schedule of the same Misuse of Drugs Act.

Count 2

Conspiracy to commit the offence of trafficking in a controlled drug contrary to Section 28 (a) read with 5 and further read with 26 (1) (a) of the Misuse of Drugs Act Cap and punishable under Section 28 read with Section 29 and read with Second Schedule of the Misuse of Drugs Act.

Count 3

Importation of a controlled drug contrary to Section 3 of the Misuse of Drugs Act (Cap 133) and read with Section 26 (1) (a) read with Section 22 (a) of the Penal Code and punishable under Section 29 (1) read with Second Schedule of the Misuse of Drugs Act.

Count 4

Conspiracy to import a controlled drug contrary to Section 28 (1) (a) of the Misuse of Drugs Act (Cap 133) read with Section 3 of the Misuse of Drugs Act (Cap 133) and punishable under Section 29 (1) read with Second Schedule of the Misuse of Drugs Act.

The particulars of offence in the aforementioned charges referred to the controlled drug as heroin (Diamorphine) having a net weight of 746.9 grams containing 477.66 grams of pure heroin.

- [2] On conviction of all four convicts on each of the aforementioned offences, a probation report was called for in respect of the convicts and Learned Counsel for the four accused Mr. Andre made a submission of mitigation on behalf of all four convicts.
- [3] It is to be noted the charges are framed under the Misuse of Drugs Act (MODA), CAP 133. The said Act has been repealed by the new Misuse of Drugs Act 5 of 2016 (hereinafter referred to as the new Act) with saving clauses as contained in section 55 (1) of the new Act.
- [4] In the case of *Cousin v R SCA 21 of 2013* and in the case of *Kelson Alcindor v R [2015] SCCA 7*, it was held that the Appellant should benefit from the change of law in his favour, along the principle of “*la peine la plus douce.*” – See *Aubeeluck Gangasing v The State of Mauritius [2010] UKPC 13*. The Appellants’ sentence in both these cases were reduced to be in conformity with the amended law which was beneficial to the Appellants. Further Section 51 (2) of the new Act states outstanding sentences under the earlier Act must be reviewed in accordance with the new MODA.
- [5] Therefore, based on the aforementioned case law, it is the duty of this Court in passing sentence to ensure the benefits applicable to the convicts brought about by the change of law in the new Act are considered.
- [6] Under the old law, the penalty for such an offence was a mandatory term of life imprisonment. Under the new Act however, there is no mandatory term of life imprisonment for the said offence and the convict is liable to a term of life imprisonment and a fine of SCR 750,000 to SCR 1 million for the said offences.
- [7] I further note that as the quantity of controlled drug is over 250 grams, the offence is aggravated in nature. Therefore the benefit of remission as brought about by the change in law will not benefit the convicts.
- [8] I have considered the facts before Court in respect of each of the convicts. According to the probation report, the 1st convict Mr. Francis Ernesta is 64 years of age, has 8 siblings from 4 different relationships. The probation report refers to the fact that the 1st convict has hypertension and heart problems. In mitigation, Learned Counsel for the convicts

relied on the facts stated in the probation report and further stated that while still denying the charge, he has always been an exemplary citizen and could be considered as a first offender. He further submitted that a non-custodial term be considered and an opportunity be given for him to reform and be an economically viable citizen of the country.

[9] In respect of the 2nd convict Mr. Brian Mothe, the probation report states, he is 47 years of age and has 4 children studying overseas but has no close bond with them. He was a panel beater by profession. It is apparent he has no fixed place to stay but moves around and stays with friends. In mitigation Learned Counsel Mr. Andre stated the 2nd convict Mr. Mothe was only performing his duties as instructed by the person who owned the Canapone Mr. Ernesta the 1st convict. Learned Counsel for the convicts moved that on this ground as he was only assisting the 1st convict and was only performing his duties on the instructions of the 1st convict that he be given a non-custodial term of imprisonment as he is a first offender. It is also apparent from the evidence of the prosecution that this convict had co-operated with officers of the NDEA at the time of his arrest which in the view of this Court is a strong mitigating factor.

[10] In regards to the 3rd convict Kevin Quatre, according to the probation report, he is 31 years of age and the father of a child born while he was in remand. In addition, he has another child aged 7 years old. He too is a first offender. Learned counsel Mr. Andre on his behalf submitted, that he was a young person and he should be given a chance to reform himself and be a good father.

[11] According to the probation report, the 4th convict Mr. Danny Sultan is 45 years of age and at present working as a casual labourer, a painter and maintains his younger children. Learned counsel for the convicts relied on the facts set out in the probation report and moved Court that he be given an opportunity to make a positive contribution towards society.

[12] I am aware of the principle of parity of sentencing of offenders. However in this case as I see from the evidence that certain convicts have played a major role in the committing of said offences and others have played a lesser role. I will therefore proceed to sentence

them accordingly. Having considered the plea in mitigation and the evidence before Court, I am satisfied that the 1st convict Mr. Francis Ernesta and the 4th convict Mr. Danny Sultan played a major role in the importation of the controlled drug and the trafficking of the said controlled drug into the Seychelles and the conspiracy involved therein. Further, the controlled drug is a Class A drug, heroin and the charges they have been found guilty of are serious charges of importation and trafficking, not based on the presumption of possession of a quantity of over 2 grams. Having considered all the aforementioned factors, I proceed to sentence the 1st and 4th convicts as follows:

The 1st convict Francis Ernesta is sentenced to a term of 9 (nine) years imprisonment, on each of the Counts 1 to 4. It is ordered that the terms of 9 years imprisonment on each Count run concurrently.

The 4th convict Danny Sultan is sentenced to a term of 9 (nine) years imprisonment, on each of the Counts 1 to 4. It is ordered that the terms of 9 years imprisonment on each Count run concurrently.

[13] In comparison, it could be said that the 2nd convict Brian Mothe and the 3rd convict Kevin Quatre, played a comparatively lesser role in the importation and trafficking of the said controlled drug. In fact, the 2nd convict co-operated with the officers of the NDEA while the role played by the 3rd convict is much lesser than that of the others. I also consider the fact that the 3rd convict is comparatively young in age and a 1st offender. Having considered all these factors, I proceed to sentence the 2nd and 3rd convicts as follows:

The 2nd convict Brian Mothe is sentenced to a term of 4 (four) years imprisonment on each of the Counts 1 to 4. It is ordered that the terms of 4 years imprisonment on each Count run concurrently.

The 3rd convict Kevin Quarte is sentenced to a term of 4 (four) years imprisonment on each of the Counts 1 to 4. It is ordered that the terms of 4 years imprisonment on each Count run concurrently.

[14] Time spent in remand to Count towards sentence imposed on each convict.

[15] Copy of this sentence to be served on the Superintendent of Prisons.

Signed, dated and delivered at Ile du Port on 13th July 2018.


M Burhan

Judge of the Supreme Court

13-7-2018