

SUPREME COURT OF SEYCHELLES

Reportable
[2019] SCSC 300
CR 46/2018

In the matter between

THE REPUBLIC
(*rep. by Hemanth Kumar*)

and

EMERENTHIA HOLDER
(*rep. by Olivier Chang Leng*)

Neutral Citation: *R v Holder* Cr.46/2018) [2018] SCSC (9 April 2018).

Before: Twomey CJ

Summary: importation of a controlled drug – heroin – knowledge and control of drug in suitcase

Heard: [28th January 2019 – 11th March 2019]

Delivered: [9 April 2019]

ORDER

The accused is convicted of the offence of importation of a controlled drug substance weighing 986.4 grams in total containing 404.4 grams of pre heroin (diamorphine).

JUDGMENT

TWOMEY CJ

Background facts

[1] On 20 August 2018, an Ethiopian Airline flight from Addis Ababa landed in Seychelles. On board was the accused person, one Emerenthia Bianca Holder, a 28-year-old female passenger and the holder of a South African passport, who had travelled from Johannesburg via Ethiopia to Seychelles. She had in her possession two pieces of luggage: a pink suitcase and a black and pink backpack.

- [2] Custom officials decided to search her bags and a black pouch was discovered and scanned. It was found to contain a package. Questioned as to the find in her suitcase, the accused stated that her mother had packed her bags and that she had no idea what the pouch contained. She cooperated fully with the police with a controlled delivery, which was eventually aborted.
- [3] The contents of the package taken from the pouch were analysed and found to contain a beige substance, which tested positive for heroin (diamorphine) with a purity of 41% and weighing 404.4 grams.
- [4] The accused was charged as follows:

Count 1

Statement of Offence

Importation of a controlled Drug namely heroin contrary to section 5 of the Misuse of Drugs Act 2016 and punishable under the said section read with the Second Schedule referred thereto in the said Act.

Particulars of Offence

Ms. Emerentia Bianca Holder a South African national, on 20 August 2018 imported into Seychelles a controlled drug substance weighing 986.4 grams in total, which contained 404.4 grams of pure heroin (diamorphine).

- [5] The accused pleaded not guilty to the charge and indicated at the Pleas and Directions hearing that she would not be disputing the facts as outlined above, but that in her defence she did not know she was carrying the drug and had therefore neither knowledge nor control of it.

The Prosecution's evidence

Testimony of Yves Léon

- [6] Mr. Léon is an agent attached to Anti-Narcotics Bureau (ANB) with duties relating to attending crime scenes and giving evidence in cases of drugs. He also takes photographs and is a fingerprint expert. On 20 August 2018, he was requested by Agent Kathleen Belle to attend a scene. He examined the scene in relation to this case, took photographs,

and had them developed at Photo Eden. He then mounted the 12 photographs into an album. The photographs depict the black pouch found in the accused's luggage, the black plastic bag it contained, the brown tape which wrapped the black bag, and the substance inside the packet. He also took photographs of the dummy used in the controlled delivery.

Testimony of Egbert Payet.

[7] Mr. Payet is also an agent of the ANB and was the exhibit officer in the present case. He received the evidence bag from Agent Kathleen Belle and handed it to the Seychelles Police forensic analyst, Ms. Manju Chettiar, for analysis. She verified that the evidence bag was sealed and intact. After the analysis, he took custody of the exhibits again, which had been resealed in an evidence bag. He also received the certificate of analysis. He placed the exhibit bag for safekeeping in the ANB exhibit store.

[8] He also had in his safe keeping the black pouch that had been seized from the accused's suitcase at the airport. The pouch contained a package made of black tape. This was also taken to the analyst who signed it. After analysis, the pouch was returned to him together with the substance it contained.

[9] He had also received from agent Yvon Legaie two mobile phones which had been taken from the accused, which he kept in his custody together with a decoy black pouch and decoy substance given to him by Agent Legaie.

Testimony of Kathleen Belle

[10] Ms. Belle is also an agent with the ANB and has been working for them for ten years. She was on duty at the Seychelles International Airport on 20 August 2018 and was working with two other agents, Sarah Marie and Jude Roseline. They observed the passengers disembarking from the Ethiopian Airlines flight. The accused was brought to the Custom Desk for a luggage search. The Custom Officer, Jacqueline Landry, found a black pouch inside the accused's pink suitcase. It was empty but seemed heavy. The pouch was handed over to Agent Belle who also thought it was heavy. The pouch was scanned and revealed something concealed inside.

- [11] She asked the accused who the pouch was for, and said the accused replied that she did not know as her mother had packed her bag. At the ANB office at the airport, the pouch was cut open in the presence of other officers. A package wrapped in black tape was discovered inside the pouch. Inside the package was clear plastic containing a substance, which she suspected to be drugs. The accused began to cry and repeated that she did not know about the package as her mum had packed her luggage. She was arrested.
- [12] Agent Belle then asked for permission to perform a controlled delivery of the drug. This was granted by her superiors. Meanwhile, the pouch and its contents were handed over to Agent Egbert Payet.
- [13] Agents Nichol Fanchette and Yvon Legaie then came to the airport to help Agent Belle organise the controlled delivery of the drug. The accused fully cooperated with this operation. She was granted stay in Seychelles by the Immigration Department. She then received a call on her blue Samsung phone from an international caller on telephone number +277 3419085. The phone was put on loud speaker and a male voice speaking in English asked her if her luggage was okay and whether it had been searched, to which she replied in the negative. A female voice then continued the phone conversation but not in the English language. The accused told them that the female voice was that of her mother and the male voice that of her mother's boyfriend.
- [14] Agent Belle then accompanied the accused together with Agents Legaie and Roseline and the accused to Chateau Bleu, Anse aux Pins, which was the booked accommodation for the accused. Whilst there, another call came through on the same Samsung phone from an international caller, namely from phone number + 083 4560693, recorded on the screen as "Tony New". The phone was again put on loud speaker and the male caller asked if the accused was okay, to which she replied in the affirmative. The male caller then told her he would call again in an hour. The accused told the agents that the caller was "Tony the big boss."

Testimony of Yvon Legaie

- [15] Mr. Legaie is the Second Officer in charge of Border Control and had worked in the Narcotics Bureau for 12 years in total. On the day of the incident with the accused, he was working at the Port when he received a call from Agent Belle informing him of what happened at the airport. He immediately went to the airport to assist her. He corroborated what Agent Belle had testified to with regard to the accused stating that she was not aware that the drug was in her luggage and that the luggage had been packed by her mother.
- [16] He spoke to Agent Fanchette who later informed him that permission had been granted by the Commissioner of Police to effect a controlled delivery of the drug. He also corroborated Agent Belle's testimony on the events at Chateau Bleu. In addition, he stated that a further telephone call was made to the accused by "Tony", who told her in the English language that a man would call round at 0800 the next morning to collect the drugs. At around 0600 the following morning, the accused's mother telephoned her to request that she place the drugs in her backpack to hand over to the man who would be calling over.
- [17] Several calls from "Tony" followed and also from the accused's mother. The last call received from Tony was at 9.52 am, and she was instructed by him to take a bus to Victoria bus terminal. On arriving there, the accused telephoned Tony to tell him that she was at the location. Tony then instructed her to go to Independence House. She walked on foot to Independence House, followed by Agents Belle and Padayachy, who then instructed her to call Tony and her mother and tell them where she was.
- [18] After telephoning Tony, the accused told Agent Belle that he had said that a Nigerian man was on his way to collect the drugs. After a long wait with no collection of the drug in sight, the operation was called off.
- [19] Agent Legaie stated that all the calls by the accused were made from and received on the blue Samsung phone which contained the Airtel SIM card.

Testimony of Tracy Lagrenade

[20] Tracy Lagrenade has been working in drug enforcement for eight years. She cautioned the accused on 21 August 2018 at the ANB Investigation Unit at Bois de Rose. The accused stated that she wanted to tell the truth and her rights were then explained to her. She elected to give a statement in which she said that she lived in Johannesburg with her mother, her mother's boyfriend, her son and her two brothers. Her mother had visited Seychelles three or four times previously and always stayed at Chateau Bleu. In August 2018, her mother told her that she had to go to town to get a new pair of shoes and clothes to go to Seychelles. She asked her mother why she was going to Seychelles but her mother gave her no reply. When she got home from shopping, her mother had prepared her luggage, in which she placed a black file. When she asked her mother what it was, she was told to keep quiet. On 20 August 2018, her mother took her to the airport. She was told to await further instructions concerning the black file in her luggage. She did not know it contained drugs.

Evidence of Juliette Naiken.

[21] Agent Naiken has worked in the ANB for four years. She wrote to the Immigration Department for travel lists with regard to both Belinda Holder (the accused's mother) and the accused. The travel history of Belinda Holder showed that she had travelled to Seychelles on eight occasions. The accused had only been to Seychelles once and that was when she was caught on 20 August 2018.

Testimony of Dane Legaie

[22] Mr. Leggie is an IT technician in the ANB and is tasked with extracting digital evidence for investigations. On 23 August 2018, he received two mobile phone devices from one Egbert Payet, who asked him to extract the information from the same.

[23] One of the phones was a small blue Samsung mobile phone containing a Seychelles SIM card with the telephone number 2848873. The other was a black Mobicel phone with two dual SIM cards. He extracted the incoming and outgoing details of calls to the Seychelles SIM card in the blue Samsung phone. There were two numbers saved as "Tony New" and "Tony Work".

[24] There were 27 incoming calls to the small blue Samsung GT phone from the 20th to the 21st August 2018 on that phone, with the first call from Tony New. The next number to contact the phone was the number 7977722109. There were several phone calls from Tony New on the number 27834560693. There were nine outgoing calls to Tony New on 20 August 2018.

[25] There were also incoming and outgoing messages from the SIM card in the blue Samsung GT phone. 4 messages were received on the 20th August from telephone number 779772109 saved as “Mom”.

The Accused’s Evidence

[26] The accused testified that she had been living in Durban since she was eleven-years-old. She lived there with her mother, her mother’s boyfriend, her two brothers and her son. She had not been close to her mother since her father passed away eight years ago. She also explained that her relationship with her mother’s boyfriend, one Charles Sea, was complicated. She was HIV positive for the past seven years. She first came to know she was coming to Seychelles two weeks before her departure when her mother informed her that she would have to go to town to buy shoes and clothes. Her mother had been to Seychelles a number of times. She was not told why she was coming to Seychelles. She questioned her mother about it but she did not answer her.

[27] She went to the shop with her brothers and when she arrived home, she found that her mother had packed her bags. She saw the black pouch with her and asked her what it was, but received no answer. She had a couple of fights with her mother about it because she believed her mother was doing something wrong. She, however, had no idea what was in the bag.

[28] When she travelled to Seychelles, she brought two phones with her: the Mobicel was her own phone and the Samsung belonged to her mother. Her mother told her that she was giving her the Samsung so she could receive calls, as her Mobicel phone would not work in Seychelles.

[29] When they searched her bags at the airport and found the black pouch, she was speechless because she did not know what was inside it until it was cut open. She cooperated fully with the police and agreed to help them with a controlled delivery of the drugs. Her first call at the hotel was from a man named Tony, who sounded Nigerian, and for whom her mother was working. She had heard her mother on the phone with him several times and presumed he was the “big boss”. However, she had never met him. He telephoned again on the same day to give her instructions on how carry out the delivery. He only referred to the package and never used the word ‘drug’. Her mother and her mother’s boyfriend also called her to see if she was all right and if the luggage was okay.

[30] Throughout her testimony, she maintained that she did not have any knowledge of what was contained in the black pouch. She was under the impression that her mother was sending her to Seychelles for a holiday. She did have doubts as to what her mother had put in the luggage and believed that her mother “was doing something wrong.” The luggage containing the black pouch had been packed two weeks before she travelled to Seychelles, but she did not try to check what it contained. She stated that although she did not know the black pouch contained drugs, she knew it contained “illegal objects”. She did not know her mother was involved in drug-related activities. She would not have come to Seychelles with the luggage if she knew it contained drugs. If she had refused to come to Seychelles when her mother asked her to, she would not have been asked again. Her mother had never paid for any other holidays for her.

The law

Importation of a controlled Drug

[31] With regard to the importation of a controlled drug, section 5 of the Misuse of Drugs Act 2016 (MODA) provides that

“A person who imports or exports a controlled drug in contravention of this Act commits an offence and is liable on conviction to the penalty specified in the Second Schedule.”

[32] The statutory offence of importation has no express provision for the *mens rea* of the offence. A literal interpretation of the provisions it does contain would lead one to the

conclusion that the offence is one of strict or absolute liability. Yet, the inference of importation, especially where the substance is found on one's body or one's luggage, necessarily involves the physical act of control and custody amounting to possession. The offence of possession also infers a mental element and it is that mental element that has been problematic in law. It is important first though to consider all the ingredients of the offence of importation.

[33] In *R v Micoock & Anor* (CO 07/2017) [2018] SCSC 214, the Supreme Court outlined the necessary components of the offence as follows:

“[F]irst, that there was an importation, secondly that the drugs were controlled by law, thirdly that the person committing the act of importation did so intentionally.”

[34] With regard to the first component, the term “import” is defined in section 22 of The Interpretation and General Provisions Act as follows:

“Import” means to bring, or cause to be brought, into Seychelles.

[35] In *Clarisse v Republic* (1982) SLR 75, Sauzier J held that the expression “importation” meant to bring or cause to be brought into Seychelles, and that where a parcel arrives by post from abroad, it constitutes importation.

[36] In relation to the second element of the offence, it suffices to say that drugs are controlled if they are specified as being of Class A, B or C as set out in Schedule 1 of the Act. In the context of the present case, the drug in the present matter, heroin (diamorphine), is a Class A drug and is therefore controlled.

[37] The third component of the offence of importation of drugs, as in all criminal cases, is the “guilty mind” of the accused, which has to be proved by the Prosecution. Hence, in cases of importation of drugs, possession of the drug is not sufficient; knowledge by the accused of the illicit substance is necessary. As was aptly put by Dodin J in *Republic v Liwasa* [2016] SCSC 94:

“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... 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 (at paragraphs 18 and 23)

- [38] While there is a paucity of domestic authority on this issue, the notion and illusiveness of knowledge is well expressed in *Pool v R* (1982) SLR 4. In that case, the Appellant was charged with the offence of receiving stolen property, knowing or having reason to believe the same to be stolen contrary to section 309(1) of the Penal Code. The Court held that:

“In a charge laid under Section 309(1) of the Penal Code, it is necessary for the prosecution to prove that when the accused received the property she actually knew that it had been stolen, in other words, that she was aware of the theft. Such proof may consist of direct or circumstantial evidence...The explanation of an accused as to how he came to be in possession of an article is evidence upon which the trial court may, in proper cases, rely to infer guilty knowledge. However, the trial court must always weigh such explanations subjectively, bearing in mind that it is the guilty knowledge of the particular accused that matters.” (Emphasis added).

- [39] In parallel, the House of Lords on an appeal for the Court of Appeal in the case of *Regina v Lambert* [2001] UKHL 37, Lord Slynn of Hadley referred to the trial judge’s summing-up with respect to the concept of knowledge and the standard of proof as correct:

“A person who is in possession of a controlled drug shall be acquitted if he proves that he neither believed nor suspected nor had reason to suspect that the substance in question was a controlled drug. He doesn't have to know the type of drug but he must prove that he neither believed nor suspected nor had reason to suspect that the substance or product was a controlled drug. Now whenever the criminal law requires a defendant to prove a defence of this type, then he does not have to prove it to the same high standard that the

prosecution have to prove their burden. The prosecution have to make you sure of anything that they have to prove. A defendant has a lower standard of proof. Is it more probable than not, on the balance of probability. So you will have to consider whether the defendant probably didn't know or believe or had reason to suspect that the bag contained controlled drugs of some sort. If you think he probably didn't know, having considered all the evidence, you will find him not guilty and you need not go on to consider any of the other matters I am about to refer to."

Discussion

[40] In the present case, it is uncontroverted that the accused knew of the black pouch concealed inside her luggage. She admits that she saw her mother putting it there. She states that she had a few fights over it with her. She even states that she knew her mother “was doing something wrong”. She knew her mother was doing something with Tony, “the big boss.” Furthermore, she knew her mother had travelled to Seychelles on a number of occasions in a short period of time. Strangely enough, this was the first time her mother had paid for a holiday for her, and a short holiday at that. The telephone calls she received and the instructions as to the delivery of the pouch are all incriminating evidence.

[41] Mr. Chang Leng for the accused submits that these admissions do not amount to knowledge of the drugs. He further submits that, at best, the accused was reliant on her mother and did not know the kind of work her mother did and, at worse, she was naïve to the possible dangers. It is his submission that the evidence does not show the intention by the accused to commit a crime.

[42] Mr. Kumar for the Republic, on the other hand, submits that the knowledge of the suspect pouch in her luggage and of her mother’s clandestine activities with “Tony” confirm that the accused had knowledge that she was carrying an illegal substance.

[43] Both Counsel relied on the case of *Dupres v R* (SCA 04/2011) [2015] SCCA 36 in which the Court of Appeal (Fernando JA) made an important distinction between the concept of knowledge and that of intention in relation to criminal offences. In *Dupres*, the accused had brought into her luggage tins of pork products which in fact contained heroin and

cannabis resin. In considering the mental element involved in the offence of importation of drugs Fernando JA stated:

“‘Knowledge’ as contrasted with ‘intention’ signifies a state of conscious awareness of certain facts or circumstances and although it will usually be relevant to the accused’s reason for acting may be separated analytically from the result which he intends. Crimes such as possession of a controlled drug require no result or conduct and the key element in such crimes is knowledge. On the other hand, intention connotes a conscious state in which mental faculties are roused into activity and summoned into action for the deliberate purpose of being directed towards a particular and specified end, which the human mind conceives and perceives before itself. Another difference between intention and knowledge as a fault requirement is that one can intend a result whether or not it actually occurs, for example to kill someone, but the same cannot be said of knowledge. In other words, one can intend something which does not materialize, but one cannot know something that does not exist in fact or in law. The approach to proof of intention is basically subjective, while proof of knowledge is objective. (Emphasis added).

- [44] Mr. Chang Leng’s submission is that, in contrast to *Dupres*, the accused in the present case was ignorant as to what was inside the pouch as she showed no nervousness until the pouch was opened. He submits that her reaction when the pouch was opened shows the absence of knowledge that it contained drugs. He further submits that although it can be inferred that the accused had doubts about what her mother was involved in, such doubts do not raise a presumption of tacit intention or knowledge.
- [45] As pointed out by Fernando JA in *Dupres*, intention is not an issue in this offence – the *mens rea* in importation or possession of drugs is knowledge by the accused that the substance was drugs and the proof of that knowledge in such cases is objective. When in *Micock* the Supreme Court holds that the offence of importation infers that the accused committed the act of importation intentionally, it is knowledge intent and not purpose intent that is being referred to. In any case, what is clear is that possession implies some mental element apart from physical control or custody of the thing.
- [46] Difficulties with knowledge occurs in two circumstances where an accused person is found to be in possession of drugs: first, where the defence of the accused is that he did

not know that the drugs were in his possession, and secondly, when he knew that there were illegal substances on his person but not the particular drug in question. As stated already, in general, possession crimes, despite the requisite ‘uncertain mental element’, seem to veer towards strict liability (despite the Charter of Human Rights) especially because the test applied for knowledge is objective.

[47] In *Warner v Metropolitan Police* (1968) 2 All E R 256, the defence of the accused was that he thought the parcels he had collected contained perfume and not drugs. The law lords were at pains to make the distinction between “mere physical custody of an object and its possession, and possession connot[ing] a mental element of some sort”. The Court of Appeal in *R v McNamara* 87 Cr. App. R. 246 extracted the ratio from the different speeches in *Warner* as follows:

- (1) *A man does not have possession of something which has been put in his pocket or house without his knowledge*
- (2) *A mere mistake as to the quality of a thing under the defendant’s control is not enough to prevent him being in possession...*
- (3) *If the defendant believed that the thing was of a wholly different nature to that which in fact it was, then ...“the result would be otherwise”*
- (4) *In the case of a package or a box, the defendant’s possession of it led to the strong inference that he was in possession of the contents. However, if the contents were quite different in kind from what he believed, he was not in possession of them.”*

[48] *Warner* and *Dupres* both indicate there is a presumption that some element of *mens rea* is still required when a statutory provision is silent as to the requirement. Once the prosecution had proven that the accused had brought the drug into the country, an evidentiary burden is placed on the accused to show that she did not know that the contents of the pouch were indeed controlled drugs. As Lord Slynn of Hadley stated in *Lambert* (where the accused claimed he did not know what was contained in a duffle bag he was carrying):

“The mental element involves proof of knowledge that the thing exists and that it is in his possession. Proof of knowledge that the thing is an article of a particular kind, quality or description is not required. It is not necessary for the prosecution to prove that the defendant knew that the thing was a controlled drug which the law makes it an offence to possess” (at 61).

[49] In the present circumstances, the uncontroverted evidence is that the accused suspected that the contents of the black pouch were something illicit or that her mother was up to no good when she put the pouch in her luggage. In my view, this was a case of wilful blindness by the accused (see in this regard the Australian case of *He Kaw Teh v R* [1985] 157 CLR 523; 60 ALR 449). She deliberately shut her eyes to the obvious and consciously avoided the truth, which would have been evident to any reasonable person. This gives rise to an inference of knowledge of the crime in this case. It was incumbent on the accused to rebut this inference to show that she had no knowledge or had made a genuine mistake as to the contents of the pouch, or had no opportunity to acquaint herself with the contents.

[50] She failed entirely in this duty. Further, it is public knowledge that there are warnings at all airports written and made orally by ground crew seeking reassurances from travellers that they have packed their own luggage and that they are acquainted with its contents.

My finding

[51] Ultimately, I find that in all the circumstances of the case and on consideration of the evidence of the Prosecution, that all the elements as contained in the charge against the accused have been proved beyond reasonable doubt by the Prosecution.

[52] I therefore find the accused person guilty of the charge and convict her as charged.

Signed, dated and delivered at Ile du Port on 9 April 2019

M. Twomey
Chief Justice