SUPREME COURT OF SEYCHELLES

Reportable
[2021] SCSC
CO71/2021

In the matter between:

THE REPUBLIC **Republic**
(rep. by Aaishah Molle)

and

MICHAEL ANDY FRED **Accused**
(rep. by Basil Hoareau)

Neutral Citation: *Rep v Fred* (CO71/2021) [2021] SCSC (11th October 2021)
Before: Burhan J
Heard: 27th September 2021
Delivered: 11th October 2021

ORDER

Count 1- A term of two years six months imprisonment and a fine of SCR 20,000/ (twenty thousand). In default of payment of fine a six month term of imprisonment to be imposed.

Count 2 – A term of two years imprisonment.

Both terms of imprisonments in Count 1 and 2 to run concurrently. The default of payment of fine six month term of imprisonment to run consecutively.

Time spent in remand to Count towards sentence. As aggravating circumstances exist the accused is not entitled to remission.

SENTENCE

BURHAN J

[1] The accused Michael Andy Fred was charged on the 17th of August 2021 as follows:

Count 1

Possession of a controlled drug with intent to traffic contrary to section 9(1) of the Misuse of Drugs Act, 2016 and punishable under Section 7 (1) as read with the Second Schedule of the Misuse of Drugs Act, 2016.

Particulars of offence are that, Michael Andy Fred, of Pointe Larue Ex Albert Estate, Mahe, on the 21st June 2021, at his residence, was found in possession of five hundred and nine (509) pills with a total net weight of 163.30 grams with each pill containing a controlled drug namely illicit 3, 4 – methylenedioxymethamphetamine (MDMA) (Ecstasy) with intent to traffic.

Count 2

Preventing and obstructing an officer while discharging his duty by offering or giving undue gift contrary to Section 35(2) of the Misuse of Drugs Act 2016 and punishable under the Second Schedule of the said Act.

Particulars of offence are that, Michael Andy Fred, of Pointe Larue Ex Albert Estate, Mahe, on the 21st June 2021, at his residence, offered the controlled drug namely five hundred and nine (509) pills of illict 3, 4 – methylenedioxymethamphetamine (MDMA) (Ecstasy) that was found in his possession to the Police Officers whilst discharging their function at his residence in order to prevent and obstruct the investigation by the said Police Officers.

[2] On the 30th of August 2021, the accused pleaded guilty to both the aforementioned charges and was convicted on both Counts.

[3] Learned Counsel Mr. Basil Hoareau moved for a probation report to be called prior to his plea in mitigation and accordingly a report was called. According to the report, the accused is 43 years old and has a partner and two children aged 17 and 4 years old. The accused had completed his Primary and Secondary education and one year education at the NYS (National Youth Services). The employment record of the accused indicates he was first employed as a life guard at the Roche Caimon swimming pool and then at Barbaron Hotel. He also worked as a store keeper at the Paradise Sun Hotel. Thereafter he had worked as a driving instructor and as a driver for the past few months prior to his arrest. The report further refers to the fact that the accused has informed the probation office he was not a user of controlled drugs and the parcel had been left with him until another person would come to collect it. The report also refers to the financial burden being placed on the partner and family of the accused since his remand. The probation report further refers to the fact that if the controlled drug had reached the market, it would have had an impact especially on the younger generation and therefore there is a need to deter such situations.

[4] Learned Counsel for the accused in his plea in mitigation referred to the fact that Section 7 (3) of the Misuse of Drugs Act (MODA), clearly indicates that if a person is charged with trafficking in a controlled drug and Court is satisfied that a person is not guilty of the offence of trafficking then a person could be convicted of an offence under Section 8 which is possession of a controlled drug or under Section 9 which is a possession with intent to traffic. Therefore learned counsel submits, the offence of possession with intent to traffic by implication is a lesser charge. He further referred to Section 47 (1) (c) of MODA which refers to the principle of proportionality and transparency at the time of sentencing. On aggravating factors learned Counsel referred to Section 48 of MODA and admitted that the quantity of controlled drug taken into custody is of a commercial quantity.

[5] Learned Counsel also referred to the mitigation circumstances set out in Section 49 stating that the accused has accepted the responsibility of having committed the offence and been truthful. It is clear learned Counsel for the accused is referring to the fact that by pleading guilty, the accused has accepted responsibility of the offence thereby

expressing remorse and regret at what he has done. He further submits that no other person has been harmed by this offence and he is a first offender. Learned Counsel refers to the clean record of the accused as borne out by the probation report and states that it clear from the report that the commission of this offence is " out of character " as the report indicates he is an individual with a family and takes his family responsibilities seriously. Learned Counsel also referred to several cases where suspended sentences have been given namely **R v Mickey Zelia [2019] 1043** where a suspended term was given for a quantity of 161 grams of Cannabis. He also referred to the case of **R v Freminot [2021] SCSC 67** where a term of four years was given for the offence of importation of the controlled drug Ecstasy and 2 years for trafficking, the quantity of controlled drug being larger than in this case. He also referred to the fact that the other accused received a more lenient sentence of 18 months for importation and 12 months for trafficking. He also referred to the case of **R v Daniel Georges Fred [2020] SCSC 720** where for a quantity of 412 .19 grams Cannabis Resin a fine of SCR 30,000 was imposed.

[6] Learned Counsel further submitted that when one considers Section 19 of the MODA, it could be argued that as the presumption of trafficking is made in respect of over 25 grams of Cannabis and as MDMA has not been mentioned, it could be argued Cannabis has been treated more seriously by MODA than MDMA/ Ecstasy.

[7] Learned Counsel mitigating in respect of Count 2 stated that the accused in the heat of the moment of being detected panicked and offered the police a part of the controlled drug. He further referred to Section 48 (c) which refers to the involvement of the offender in other offences facilitated by or related to the commission of the offence. It is his contention that the 'other offences' should be related to the commission of the offence and do not include acts that have been committed after the commission of the offence for which he was arrested.

[8] Having thus considered in detail the plea in mitigation and the contents of the probation report, I am satisfied that the accused is a first offender who has pleaded guilty at the very outset of the case, thereby expressing remorse and regret and expecting the leniency of Court. I also take into consideration the fact that the controlled drug is a Class B drug.

In regard to learned Counsel Mr. Basil Hoareau's plea in mitigation that a charge under Section 9 of MODA is a lesser charge than that under Section 7 of MODA when one peruses the Second Schedule of the Act, the punishment for persons charged for trafficking in controlled drugs under Sections 7 (1), 7 (2), 9 and 10 are the same which is 50 years imprisonment and a fine of SCR 500,000.00. Therefore I am inclined to disagree with learned Counsel that Section 9 is a lesser charge than a charge brought under Section 7 (1) and (2) of MODA.

[9] Learned Counsel further submitted that as per Section 19 of MODA, it could be argued that as the presumption of trafficking is made in respect of over 25 grams of Cannabis and not MDMA, Cannabis is a more serious drug than MDMA. In this regard I observe that there is no such differentiation is observed in respect of Class B controlled drugs as per Schedule One of the Act. As the Schedule does not separately categorise Class B controlled drugs Cannabis and MDMA, I am of the view they should be treated alike as Class B controlled drugs in sentencing an accused.

[10] In regard to aggravating circumstances, firstly in this case learned Counsel Mr. Hoareau submitted the quantity of 509 pills indicates a commercial element which is an aggravating factor. In regards to the quantity, this Court is of the view that as the accused admits he is not a user of the said drug, the controlled drug was for the purpose of trafficking and not personal use. However it is the view of this Court that at the time of detection, the commission of the offence was ongoing as he was in possession of the controlled drug with intent to traffic it. At the time of detection, the accused had attempted to offer a share of the controlled drug whilst the offence was ongoing and even before his arrest. Subsequently, the detecting Officer had brought the controlled drugs and the accused to the team leader and brought to the notice of the team leader the nature of the bribe offered by the accused. Thereafter the accused had been arrested. It is clear to this Court therefore that the accused had offered to share the control drug in order to obstruct and prevent the officers from performing their duties at the time of detection whilst the offence was still on going. It therefore cannot be said that the aggravating circumstance arose after the commission of the offence. I am therefore satisfied that an aggravating circumstance exist under Section 48 of the Misuse of Drugs Act.

[11] In respect of the case law referred to by learned Counsel, the *Mickey Zelia* case and the *Daniel Fred* case (supra), do not contain aggravating circumstances which are peculiar to this case such as commercial element and obstruction of police officers performing their duty by offering an undue gift. In the *Freminot* case (supra), leniency was exercised as the particular accused had assisted the authorities in apprehending the main culprit in the case which Court considered as a strong mitigating factor which does not exist in this instant case

[12] Having considered all the facts in mitigation, including the aggravating circumstances, I proceed to sentence the accused as follows:

Count 1- A term of two years six months imprisonment and a fine of SCR 20,000/ (twenty thousand). In default of payment of fine a six month term of imprisonment to be imposed.

Count 2 – A term of two years imprisonment.

Both terms of imprisonments in Count 1 and 2 to run concurrently. The default of payment of fine six month term of imprisonment to run consecutively.

[13] Time spent in remand to Count towards sentence. As aggravating circumstances exist the accused is not entitled to remission.

[14] Considering the maximum sentence for such an offence under Count 1 is 50 years imprisonment and the indicative sentence is 15 years, this Court is of the view that the sentence imposed is proportional to the gravity and seriousness of the offences with which the accused has been charged.

[15] The accused is to be produced to Court after serving his two year six month term of imprisonment in order to give him time to pay the fine. A copy of this sentence order to be attached to the committal.

Signed, dated and delivered at Ile du Port on 11th October 2021.

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M Burhan J