

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2020] SCCA ...
SCA CR 21 & 22/2019
(Appeal from CR 61/2018)

Tony Ricky Vidot

Kiera Marshia Maria
(*rep. by Mr. Joel Camille*)

Appellants

and

The Republic
(*rep. by Mr. George Thachett*)

Respondent

Neutral Citation: *Vidot / Maria v R* (SCA CR 21 & 22/2019 [2020] SCCA – 18 December 2020)

Before: Fernando, President, Robinson JA and Dingake JA

Summary: The two Appellants had been convicted of trafficking in drugs. The evidence against the 1st Appellant was that of a witness who had seen him handling the drugs on a date the prosecution had failed to establish, and the finding of the 1st Appellant's thumb impression on a shopping bag in which the drugs were concealed. As regards the 2nd Appellant, who was the girl-friend of the 1st Appellant the only evidence was the finding of her DNA profile in a condom that was found along with the drugs.

Heard: 1 December 2020

Delivered: 18 December 2020

ORDER

The convictions of both Appellants are quashed and they are acquitted forthwith.

JUDGMENT

FERNANDO, PRESIDENT

1. The 1st and 2nd Appellants have appealed against their conviction for trafficking, by virtue of been found in unlawful joint possession of heroin having a net weight of 62.3 grams with an average purity of 35.5 grams on or about the 5th of October 2018 and the sentences of 5 years and 2 years of imprisonment imposed against the 1st and 2nd Appellants respectively.

Grounds of appeal

2. “1. The Learned trial judge erred in law and on the facts to have concluded that the Republic/Respondent had proven beyond reasonable doubt, that both Appellants had possession and control of the drugs found in the tin and this in light of the totality of the evidence in the case.
2. The learned trial Judge erred in law and on the facts, in having failed to sufficiently and adequately address the defence of the 1st Appellant, in regards to the explanation given relating to the presence of his thumb print on the bag obtained from the crime of scene.
3. The learned trial judge erred in law and on the facts, in having failed to sufficiently and adequately assess the 2nd Appellant’s right to remain silence and in concluding that in relation to other evidence relating to the 1st Appellant solely, 2nd Appellant was to be held liable for the offences, charged against her.

4. The sentences meted against the Appellants by the learned trial Judge is manifestly harsh and excessive and goes contrary to sentencing principles relating to the same offences charged.” (verbatim)

Prosecution evidence in brief

3. **PW 10, Dominic Larue** testifying before the Court had stated that he had been working as a plumber at SCAA, 6 months before he testified in Court, namely prior to November 2018. He worked under a manager and two supervisors, one of whom was the 1st Appellant. According to the witness during the period he was working at the SCAA, he had seen the 1st Appellant in the clubhouse on a particular day. He has not given the period he was working at the SCAA. A person by the name of Neil Suzette had also been present at that time, doing some painting. He had heard the 1st Appellant open the door of the store. The 1st Appellant had “removed yellow and red coloured tin of milk marked ‘Pearl’ and then there was a black plastic bag and around that tin of milk there were black pepper. There was the smell of pepper as well as around the tin. The tin had been a bit big, 30 cm in height”. He removed it and “showed me what it contained. He showed me some long and oval shaped drug bullets rounded on both about 2 ½ inches in length, that was inside. And there also two small square shaped plastic containers, and a scale. He told me that it came through the post”. The 1st Appellant had also shown this to Neil. PW 10 had identified the tin and a photograph of the bullets that was shown to him in court as the one he saw that day. Neil Suzette had not testified before the Court.

Under cross-examination PW 10 had said that he cannot recall the date this incident happened. Bearing in mind that the incident happened at a time when he worked for the SCAA, namely 6 months before he testified, the Prosecutor had failed to ascertain how long before he left the services of SCAA had this incident taken place, at least in days, weeks or months or whether it was in the year 2018. He had said the “clubhouse is accessible to a lot of people including SCAA staff”. The witness had said in addition to the Appellant, Moses Dogley, Andrew Figaro and Jim Albert also had the key to the store of the club house that was kept “sometimes at the office and sometimes in my office.” It has

been suggested to the witness under cross-examination that the Appellant “never showed anything at all from the store” to him, and what he had told court was something he had “been told to write in his statement” by the police and that he had not been truthful to court. Larue had denied the suggestions made to him.

The learned Trial Judge at paragraph 58 of the judgment in deciding to act on the evidence of PW 10, had stated that the 1st Appellant had testified that PW 10 Dominic Larue was forced to make a statement but there was no evidence led on this fact and that Dominic Larue was not cross-examined at all on his alleged coercion to testify. In making this statement the learned Trial Judge had erred as it is clearly contrary to the proceedings as recorded and as stated above.

4. **PW 1, C. Herminie, an officer attached to the ANB**, had stated that he had been instructed to collect the 1st Appellant from the Mont Fleuri Police station and take him to the Seychelles International Airport on the 5th of October. Arriving at the airport he had gone to the clubhouse and conducted a search in the store room of the SCAA clubhouse. The key was in the possession of J. Rath, one of the SCAA staff. While searching the storeroom he had found on the left side of the store a blue and green coloured STC shopping bag. In opening it he found a black bin liner and inside the bin liner a big yellow coloured tin of milk, marked ‘Pearl’. From inside the tin of milk he had removed a red plastic bag and a piece of cling film containing 5 cylindrical shape bullets and part of a condom, a small black coloured digital scale.

Under cross-examination PW 1, had corroborated the 1st Appellant’s evidence as to how the bag came to be recovered from the store and the search of his car on the 5th of October. PW 1 had said he had not been given any instructions to search inside the clubhouse building but only the store. He had also stated that that it was at the ANB office that everything was laid out and photographed. PW 1 had admitted that the Appellant had told him: “You have set me up...get the hell out of here.”

5. **PW 2, JP Lucas and PW 3 A. Quatre, both officers attached to the Scientific Support and Criminal Record Bureau** testifying before the court had stated that they had developed impressions from four of the prints taken from the seized items. On subjecting them for examination they had found the left thumb impression of the 1st Appellant on the blue and green coloured, STC shopping bag. They had not specified whether it was outside or inside the shopping bag that the finger print was found. At the stage of examination, they had four suspects in mind. The other three impressions taken were not identifiable.

6. **PW 4, Y. E. Leon, an officer attached to the ANB** had taken buccal swabs from the 1st and 2nd Appellants, W 9 Dominic Larue and Neil Suzette.

7. **PW 8, S Sohun, A Senior Forensic Scientist employed by the Mauritius Forensic Science Laboratory** had stated that he had done DNA testing on the latex condom by checking with the buccal swabs of the 1st and 2nd Appellants, PW 10 Dominic Larue and Neil Suzette, that was brought by the Seychelles Police. The black and white powdery material detected inside the condom on examination had not revealed the presence of any dangerous drugs. There had been “no visible stains of blood which refers at for biological evidence”. In processing the condom for epithelial cells both the interior and exterior surface had generated a female DNA profile which matched at corresponding loci of the DNA profile obtained from the swab of the 2nd Appellant. On being questioned by Court as to from which part of the body epithelial cells may come from PW 8 had said they “can be said to be skin cells, they can be from outside the body which we all shed skin cells. But it could also be from inside for example when we take buccal swabs from an orifice.” To the question by Court as to whether there are epithelial cells in the vagina of a woman, PW 8 had answered in the affirmative. PW 8 had said anybody coming into contact with the condom would naturally leave evidence of epithelial cells. PW 8 has gone on to describe the DNA analysis and the 4 different steps involved in the process. “Firstly the DNA is extracted from the cells any material that is gathered from the exhibit. It is quantified to see how much DNA is present, and then it is amplified to get enough DNA to give a profile. And then it is genetically processed to give a DNA profile”. PW 8, when asked whether he conducted all four tests in relation to this case had said: “I did not conduct all four processes.

I did the first part and the last part. I did the evidence recovery part which is to examine the exhibit, and process for epithelial cells. I did the extraction process which is to recover the DNA from the cells, and I did the genetic analyser process which is the last part. There were two processors in between which are done by other members of the staff". He had said that he did not have records of the test done by other members of staff. The other members involved in the process of analysing had not been called as witnesses. PW 8 had not been able to state from which part of the body the epithelial cells had come from.

8. **PW 5, J Rath, the Administration Manager, SCAA**, had said although the clubhouse store key was in the possession of the 1st Appellant, PW 10 Dominic Larue, Mr. Andrew Figaro, and the rest of the administration staff could also have access to the store.

Defence evidence

9. 1st Appellant had given sworn evidence before the Court, while the 2nd Appellant had opted to remain silent.
10. The 1st Appellant had stated that in October 2018 he had been working at the SCAA as a maintenance supervisor. He had gone to Abu Dhabi on the 27th of September 2018 and returned to the Seychelles on the 2nd of October 2018. On arrival having cleared through immigration and customs he was met by the 2nd Appellant, his girlfriend. He had thereafter gone to Dr. Murthy's clinic as he was having an abscess on his buttock and thereafter gone to the 2nd Appellant's mother's house at Pointe Larue around 10 to 11 am. A little later four NDEA officers had arrived at the house and wanted to do a search of the premises for drugs. On being requested the 2nd Appellant had assisted in the search. She was pregnant at this time. Nothing illegal had been found inside or outside the house. One of the NDEA officers had thereafter told the 1st Appellant that he had received instructions to take him and the 2nd Appellant to the police station. While arriving at the police station he had seen PW 10, Dominic Larue and Neil Suzette. Late in the evening he was asked to give a statement and thereafter arrested. On the 3rd morning he along with the 2nd Appellant, PW 10, Dominic Larue and Neil Suzette had been taken to court. Thereafter they had taken PW 10, Dominic Larue and Neil Suzette and himself to the airport and searched the lockers of each one of

them and the maintenance office. Nothing illegal had been found. On the 3rd the NDEA had not searched the store. All three of them had been brought back to the Mont Fleuri Police station. The 1st Appellant had remained in the cell on the 4th of October; and on the 5th taken back to the airport. Arriving at the airport the NDEA officers had taken him to the clubhouse. Having entered the main living room, the officers had asked him for the key to the store. He had said that he does not have a key. The officers had then opened the store with a key they had with them and had asked the 1st Appellant to assist in the search. The 1st Appellant had not assisted in the search. One of the NDEA officers had then pulled out a bag and placed it on the floor. Thereafter they had searched his car which was parked in the cargo terminal carpark. Nothing illegal was found in the car. The car had been parked since the 27th of September when the 1st Appellant went to Dubai and according to the 1st Appellant “other people had access to the car and the keys were at the plumber’s office”. The evidence of the Appellant set out above, especially the underlined part, had not been challenged by the Prosecution. The NDEA officers had not shown him the contents of the bag they had recovered from the store. The 1st Appellant had categorically denied what PW 9, Dominic Larue had said about him and stated: “What I am aware of, is that Dominic was forced to make his statement.” This is corroborated by PW 1 who had admitted that the Appellant had told him: “You have set me up...” as stated at paragraph 4 above.

The 1st Appellant had said that the blue bag in which his finger print had been found and produced in court as an exhibit is similar to the bag he left in his car to place his tools. The 1st Appellant had categorically denied that the drugs and the condom that was found along with the drugs were in the possession of the 2nd Appellant, his girlfriend and himself. He had said that he and his girlfriend, had been set up possibly because of a previous case. He had also said that the drugs were found at a place that everybody had access to.

Summary of the case for the Prosecution and the Probability of the Prosecution version:

11. The 1st Appellant was working as a maintenance supervisor at the Seychelles Civil Aviation Authority (SCAA) on the 5th of October 2018, as of the date he is charged for trafficking in heroin. The 2nd Appellant is his girlfriend.

The main witness for the prosecution was PW 10, Dominic Larue. He had been working at the SCAA as a plumber at the SCAA prior to November 2018 under the supervision of the Appellant. PW 10 was also treated as a suspect in this case according to the prosecution evidence in this case. His finger prints and DNA were checked and analysed during the course of the investigations with the objects that were seized. According to the evidence of PW 10, the alleged incident where the 1st Appellant had made a display of the drugs and the other objects to him and Neil Suzette (Suzette, was also treated as a suspect at the initial stages of the investigation of this case according to the prosecution evidence) had taken place, on an unknown date, before November 2018. PW 10 had not been able to recall the date, week, month, year or even the period this incident happened. The Prosecutor had failed to ascertain how long before he left the services of SCAA (namely November 2018) had this incident taken place, at least in days, weeks or months or whether it was in the year 2018. There is no conceivable reason that could be attributed as to why the 1st Appellant, should just walk into the Store room and take the blue and green coloured STC shopping bag and pull out its contents in the presence of PW 10 and N. Suzette making a public display of them and simply leave the drugs there without removing them. Truth it is said is sometimes stranger than fiction, but a Court has to necessarily take into consideration the probabilities and improbabilities of evidence before placing reliance on them. The improbability of the prosecution version makes giving weight to the other two items of evidence difficult, namely, the finding of the finger print of the 1st Appellant on the blue and green coloured STC shopping bag and the DNA profile of the 2nd Appellant in the condom that was found along with the drugs, taken in conjunction with the evidence that the shopping bag containing the drugs had been found at a place that others had access to, that three of the prints found on the seized items were not identifiable, and the Appellant's testimony that he had been framed. The failure of the Trial Judge to comment on the version of PW 10, shows that she had accepted the evidence of PW 10, as the gospel truth, without any form of scrutiny.

12. I take note of the definition of 'possession' in the Penal Code, which can be applicable in interpreting the word possession under the Misuse of Drugs Act, and which reads as follows: *"possession", be in possession of" or "have in possession" (a) includes not only having in one's own personal possession, but also knowingly having anything in the actual*

*possession or custody of any other person, or having anything **in any place** (whether belonging to, or occupied by oneself or not) for the use or benefit of oneself or of any other person;* (b) *if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody or possession of each and all of them*". Possession, includes two elements: being in physical control of the thing (includes joint control with another / others); and. knowledge (or intention) of having it in any place. For a person to be said to 'knowingly' have something in possession in "any place" it necessarily entails reference to a specific place and a specific time or a time period. The simple question is when did the person have it or how can it be said that a person had something in his or her possession without any evidence as to when he/she had possession of it. In this case PW 10 has not given any identifiable date, week, month, or year; when he alleged that he saw the 1st Appellant removed the capsules from the milk tin. There is also no other evidence as to when the 1st and 2nd Appellants are said to have possession of the drugs. Merely because the drugs were found inside a bag which had the thumb impression of the 1st Appellant on a search of the Clubhouse store room, on the 5th of October 2018, a place where others had access to, it cannot be said that the drugs were in the joint possession of the 1st and 2nd Appellant on the 5th of October 2018. This is more so as the 1st Appellant was not in the country from the 27th September to 2nd October and had no access to the store room since his arrest on the 2nd and up to the 5th of October, when the drugs were seized. Even if it could be said that the 1st Appellant knowingly had the capsules on that unspecified date that PW10, is alleged to have seen him with the capsules, there is no evidence to establish that the 1st Appellant knowingly had the 'same' capsules at the storeroom on or about the 5th of October. Further there is no evidence that the capsules that PW 10 claims to have seen with the 1st Appellant on that unspecified date, contained heroin.

13. The uncontradicted evidence of the Appellant that the ANB officers conducted a search of the lockers of himself, PW 10 and Neil Suzette and the maintenance office on the 3rd of October 2018 and found nothing and that on the 5th of October 2018 the ANB officers, went straight to the Store room in the clubhouse gives credence to the Appellant's testimony that he and the 2nd Appellant had been framed.

Finger print evidence

14. A person may be convicted merely on the basis of finger print evidence, especially if the person has failed to offer an explanation as to how his/her finger print came to be found in a crime scene, in certain circumstances, such as at a place that the person normally does not visit and does not have access to. The difficulty in this case is even if it has been established that the fingerprint on the shopping bag is that of the 1st Appellant there is no evidence to conclude that the fingerprint on the shopping bag came to be placed at the time the drugs were put inside the milk tin; or to exclude the possibility that the drugs found inside the milk tin that was inside the bin liner that was inside the shopping bag, were placed therein by someone else; in view of the absence of any evidence as to when they were placed therein and the fact that others had access to the store. Further the fact that three of the prints found on the seized items were not identifiable casts a serious doubt on the prosecution case. It is to be noted that the drugs were found wrapped in a cling film inside a red plastic bag that was inside the tin. In view of the manner the drugs had been concealed, namely inside a cling film, red plastic, milk tin, and bin liner the finding of the finger-print of the 1st Appellant loses its significance. It is also noted that the Appellant was out of the country from the 27th of September to the 2nd of October and there had been in his car that was parked at the SCAA car park, a bag similar to the blue bag that was seized from the Store in which his finger print had been found. The car had remained parked at the car park at the time of the arrest of the Appellant and he did not have access to his car or to the store room after his arrival in the country and prior to his arrest.

15. In the case of **Forte & Ano v R (SCA 34 & 35/2018) [2020] SCCA 12 (21 August 2020)** where the facts were somewhat identical to that of this case, this Court said:

“The NDEA had found and seized the bag containing the drugs on the 7th of November 2014 near a rock at Roche Bois, 28 days after it had been allegedly imported into the country...There is absolutely no evidence to show that whatever drugs that were found inside the tin on the 7th of November 2014, were the same drugs that 1A and 2A had placed therein, even if the prosecution version is to be accepted...Save for the finding of a fingerprint of 2A underneath the ‘Anlene’ tin lid, there is no evidence to prove that the Lulu

bag belonged to the Appellants...It is also strange that there were no fingerprints detected on the other exhibits, namely the plastic bags or the coffee sachets. The question then arises as to whether it was the same Lulu bag that Beverly is alleged to have imported into the country on the 11th of October 2014 that was recovered from Roche Bois on the 7th of November 2014 as stated by the Prosecution. Even if we are to accept the entirety of the Prosecution evidence, one cannot conclude with certainty that the drugs found in the tin were those that the Appellants had placed therein, in view of the break in the chain of evidence and the absence of the finger prints of the Appellants on the other exhibits, namely the plastic bags or the coffee sachets.”

16. In the instant case, the facts are even less incriminating as regards the Appellants. PW 10 has not been able give a date as to when he saw the 1st Appellant with the capsules. There is absolutely no evidence to show that the capsules that were found inside the ‘Pearl’ milk tin on the 5th of October 2018, were the same capsules that PW 10 saw with the 1st Appellant on that unknown date, even if the prosecution version is to be accepted. Save for the finding of a fingerprint of 1A on the shopping bag, there is no evidence to prove that what was inside the shopping bag belonged to the Appellants. It is also strange that there were no fingerprints of anyone of the Appellants detected on the pearl milk tin and the other items found inside the shopping bag. In the said circumstances the fact that three of the prints found on the seized items were not identifiable casts a serious doubt on the prosecution case.

17. In the cases of **Josianne Vital V The Republic CR Appeal No. 3 of 1997** and **Vincent Allainson Gabriel V The Republic CR SAC 22/09**, the appeals were allowed simply because there was a break in the chain of evidence to link the drugs analysed by the Government Analyst to the appellant. Both were cases where the chain of evidence was broken after its seizure from the appellant and while the drugs were in police custody, i.e. the failure of the prosecution to prove that it was the same drugs that were seized by the police from the appellant that were taken to the Government Analyst for purposes of analysis. The facts in this case are much more complicated because here, the drugs that were found in the ‘Pearl’ milk tin, later analysed, and found to be heroin had been allegedly seen

with the 1st Appellant on a date unknown to the Prosecution. This Court in the case of Vincent Allainson Gabriel said that the failure to prove the chain of custody “*was a fatal irregularity*” and went on to state: “*Maintaining the chain of evidence...is absolutely vital in dealing with a drug case. Investigators and Prosecutors should consider the severe nature of punishments provided by the Act and thus leave no room for doubt in the mind of the court that there could have been any possibility whatsoever that the substance seized could have been tampered with before it reached the Government Analyst...There must always be a balancing of the two interests, namely the public interest of combating drug related crime and the right of an accused person to a fair trial enshrined and entrenched in the Constitution.*” In the case of **Valsala V State of Kerala, AIR 1994 SC 117** it was held that when the link evidence relating to the safe custody is missing, the missing link is fatal for the prosecution. Similar views have been expressed in the cases of **Prafulla Kumar Prharaj V State of Orissa 78 91994) CLT 366**, **Balaji Sahu V State, 84 (1997) CLT 357** and **Ram Phal V State of Haryana, 1997 (1) SFR 151**.

DNA Evidence

18. There is also nothing to link the condom, that was found inside the milk tin that was inside the bin liner that was inside the shopping bag, to the drugs and thus to the 2nd Appellant, since there is no evidence of any traces of drugs being found in the condom. It is only by guesswork, speculation, or conjecture that it can be said that the 2nd Appellant is liable. That is not proof beyond reasonable doubt as required in a criminal case. The example used by the learned Trial Judge at paragraph 69 of her judgment, of “a hammer with an accused’s DNA being found next to a dead body as strong circumstantial evidence that the accused killed the person” and thus necessitating an explanation from him as to how his DNA got there is not an appropriate example. This is because in that situation, there is a clear link between the hammer and the death. In the case of **The People V Pedro Arevalo, the Court of Appeal, Fourth District, Division 3, California, G047523, decided on March 10, 2014** it was held that there must be a connection between an object found at the scene of the crime and the crime itself, rather than just a connection between the object and the defendant. The need for a connection between the object and the crime rather than just a connection between the object and

the defendant was confirmed in **Birt v. Superior Court (1973) 34 Cal.App.3d 934, 936–937**. For a conviction to be based on DNA evidence there must be other corroborating evidence.

19. Further, merely on the basis of the DNA profile of the 2nd Appellant having been found on the condoms, it cannot be said that it was with the knowledge and consent of the 2nd Appellant that the 1st Appellant, had the drugs in his custody or possession on or about the 5th of October 2018, so as to make the 2nd Appellant jointly liable, even if the case against 1st Appellant could have been established. The mere fact that the 2nd Appellant had failed to offer an explanation as to how her DNA profile came to be found on the condom inside the milk tin, where the drugs were found, in the circumstances of this case cannot amount to proof beyond reasonable doubt of her guilt. As stated earlier there were no traces of drugs on the condoms. The 2nd Appellant cannot be penalized for the inability to offer an explanation to the finding of her DNA on the condoms, when the Prosecution itself has not suggested a plausible reason for that. The position may have been different if traces of drugs had been found in the condoms.
20. In the US case of **The People V Pedro Arevalo**, and the Malaysian case of **Hanafi bin Mat Hassan v Public Prosecutor**. [2006] 4 MLJ 134 at p 175, it had been held the mere existence of DNA evidence alone cannot link the accused to the crime. It was not sufficient to prove beyond a reasonable doubt that the accused had committed the offence.
21. In the South African case of **NKwanyana V S (AR108/16) [2016] ZAKZPHC 82 (27 September 2016)**, citing the analysis given by **Nicci Whitear-Nel from the School of Law Pietermaritzburg** analysed the South African Supreme Court of Appeal case of **Bokolo V S (483/12) [2013] ZASCA 115 (18 September 2013)**, regarding the DNA evidence in general:

“The probative value of DNA profiling in any particular case will depend on a number of different factors which must be assessed in the context of the facts of that case. Firstly, an important factor will be whether the samples were properly taken so that they were not contaminated or otherwise compromised. Also, the samples must be shown not to have been tampered with before they were tested in the laboratory. This is known as the chain of custody. Secondly, the equipment used to produce the DNA profile through the processes

explained above must be shown to have been working properly. Thirdly, the electropherogram must have been properly analysed and interpreted based on logical and cogent reasoning. Fourthly, the probability of the profile match occurring in the particular relevant population must be considered. This is because STR profiling does not conclusively identify an individual because only 9 loci plus gender are analysed. If the profile which has been revealed on the electropherogram potentially matches many people within the population to which the tested individual belongs, the probative value of the evidence is low.” I am of the view that the learned Trial Judge had not assessed any of the above mentioned factors in convicting the 2nd Appellant which was based only on DNA evidence.

22. The evidence in this case shows that the 1st and 2nd Appellants were at the Police station when the seized drugs were shown to the 1st Appellant. There was no evidence led by the prosecution to show that proper procedures had been adopted to avoid contamination at this stage. In the case of **Public Prosecutor v Richard Chia Kok Hiong, a case decided by High Court of Brunei Darussalam. [2007] 3 MLJ 129 at p 166 Steven Chong J** disregarded DNA evidence after he lamented on how the police officers involved in the investigation of the case had little appreciation of the risks of contamination and had disregarded the procedure in the collection, handling and storage of exhibits from the crime scene.
23. It must be noted that DNA analysis involves complicated scientific analysis and experiments and like any other laboratory experiments, the analysis is always open to mistakes or human errors due to many circumstances. Therefore, DNA evidence must be approached with great caution and subjected to much scrutiny before it can be made admissible in court. In **Hanafi bin Mat Hassan v Public Prosecutor. [2006] 4 MLJ 134** the Court ruled that when testifying, the DNA expert must explain in detail on how he obtained the matching DNA characteristic. In other words, he has to explain all the details as to how the results tabulated in the report were obtained. Apart from that, the DNA expert is also required to explain on how he managed to get the random match probability including the method of calculation used by him. Failure to satisfy on the above requirements would cause the DNA evidence to have no evidential value. An examination of the evidence of

PW 8, S Sohun, the Senior Forensic Scientist employed by the Mauritius Forensic Science Laboratory referred to at paragraph 5 above, shows that there is no detailed explanation of how he obtained the matching DNA characteristics. In fact, his evidence had been to the effect that he had not done two of the processes in the DNA analysis and that they were done by other members of the staff.

24. In view of what has been stated above I have no hesitation in allowing the appeals of both Appellants, upholding the 1st, 2nd and 3rd grounds of appeal.

25. In view of my findings above I quash the conviction of both Appellants and acquit them forthwith.

Signed, dated and delivered at Ile du Port on 18 December 2020

Fernando, President

I concur

Robinson, Justice of Appeal

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable/ Not Reportable / Redact

[2020] SCCA 18 December 2020

SCA CR 21 & 22/2019)

(Appeal from CR 61/2018)

TONY VIDOT

KEIRA MARSHIA MARIA

(rep. by Mr. Joel Camille)

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THE REPUBLIC

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Respondent

Neutral Citation: *Vidot & Maria v R* (SCA CR 21 & 22/2019) [2020] SCCA (18 December 2020).

Before: Fernando, President, Robinson JA, Dingake JA

Summary: Criminal law – possession of drugs for the purposes of trafficking – evidence – accused finger prints used as evidence by the prosecution – prosecution witness testifying that the first appellant paraded the drugs to him – second appellant electing to remain silent.

Heard: 1 December 2020

Delivered: 18 December 2020

ORDER

The appeal is dismissed. The appellants' conviction and sentence are confirmed.

JUDGMENT

DINGAKE JA (DISSENTING)

1. This is an appeal by the appellants to this court against their conviction and sentence by the trial court, for trafficking, by virtue of being found in unlawful joint possession of drugs, namely, heroin.
2. The majority takes the view that they are innocent of the charges preferred against them. I have had the benefit of reading the judgment of the majority, authored by my brother Fernando PCA, in this matter, and I cannot agree with the final conclusion reached because on a proper consideration of the totality of the evidence adduced by the prosecution the appellants are guilty as charged.
3. In this dissent I shall set out in crisp and brief terms my reasons for coming to the contrary conclusion.
4. Before setting out the dispositive facts of this matter, I take the liberty to state the basic principles that have shaped and given direction to the conclusion I have reached.
5. It is a well-known principle of our law that every person charged with an offence is entitled to the benefit of two sacred principles of our criminal justice system: the presumption of innocence that endures until it is dislodged by proof that the person charged with the offence is guilty beyond reasonable doubt, and the right of the accused to remain silent.
6. The rationale for the presumption of innocence is traceable to the remarks of Blackstone, writing in the 18th century, when he asserted that: “it is better that ten guilty persons escape than that one innocent suffer”(W. Blackstone, *Commentaries on the Laws of England* (1897), *Book iv*, c.27, at p.358).
7. The converse of the above is that those who have been proven to be guilty beyond reasonable doubt by cogent and admissible evidence should not be allowed to escape based on hypothetical and fanciful possibilities.
8. The principle that the standard of proof in a criminal trial is proof beyond reasonable doubt is so trite that no authority need be cited. But it is a preposition that is continuously haunted by the need for continuous refinement. It clearly does not require the prosecution to prove

its case beyond any shadow of doubt, nor is the prosecution required to close every avenue of escape available to the accused even if it be fanciful.

9. Philosophically, and even practically, proof beyond reasonable doubt may lend itself to prolonged anxiety, as it occurred to me in this case. The concept on occasions appears baffling, nebulous and elusive. This is so because the expression, “beyond reasonable doubt” is not capable of exact, convincing and informative exposition. Intuitively, an ordinary person familiar with the facts of a case, and who is objective, may be expected to appreciate when reasonable doubt exists. Some jurists claim that the truth is sometimes felt even when it cannot directly be proved by evidence. However, for a trier of fact reasonable doubt must as far as humanly practicable be explained by reference to evidence, not fanciful submission about hypothetical possibilities. (G.H.L. Fridman, “ Standards of Proof” The Canadian Bar Review [Vol. XXXIII])
10. I make it plain, from the onset, that in my mind, in this case, the fingerprint evidence relied by the prosecution on its own would not be sufficient to found a conviction, but considered together with the evidence of Dominic Laure, with respect to the first appellant and other circumstances, with respect to the second appellant, it would.
11. The facts of this case bears stating briefly. The appellants, a man and his girlfriend, were charged and convicted of trafficking in a controlled drug, namely heroin, the respondent alleging they were found in unlawful possession of a controlled drug with intent to traffic, contrary to Section 9 (1) read with Section 2 (c) of the Misuse of Drugs Act, 2016. The complete charges and particulars of the offence are set out extensively in the judgment of the learned Chief Justice (as she then was) and are incorporated herein as if specifically traversed.
12. On diverse dates in 2018, between the 3rd and 5th of October, a search was conducted at several places connected to the appellants and eventually the drugs, the subject matter of the charges preferred against the appellants, were found in a blue and green coloured STC

shopping bag belonging to the first appellant at a store at Seychelles Civil Aviation Authority at Pointe Larue, Mahe, where the 1st appellant worked.

13. The bag containing the drugs was found in the store which he and other persons had access to. The only identifiable finger prints on the bag were those of the first appellant.

14. The evidence tendered by the prosecution shows that inside the bag was a tin that also had a piece of a condom. The finger prints of the second appellant, the first appellant's girlfriend, were found on the condom.

15. It is not in dispute that the blue bag referred to earlier, containing the drugs, belonged to the first appellant.

16. The evidence of the respondent in the court below was anchored mainly on the finger prints evidence found on the bag and DNA profile of the second appellant on the condom that was found along with the drugs, in the context of the totality of the prosecution case, to connect the appellants to the offence charged and the evidence of Dominic Laure who testified that he saw the first appellant at the Club House, open the store and remove a tin of milk marked "Pearl"; removed a black plastic bag and showed him the "bullets" (in reference to the drugs) inside. He told him they came through the post.

17. Under cross – examination Mr. Laure testified that he also saw small plastic containers and a scale in the tin. It is instructive that the said items were not put to him in examination in chief. Mr Laure did not recall the date this incident happened.

18. At the trial the first appellant denied the charge and gave evidence in his defence. The second appellant denied the charge but did not lead evidence as she elected to remain silent.

19. The issue that falls for determination in this appeal is this: Did the trial court err in concluding that the appellants were guilty as charged having regard to the evidence presented at the trial?

Analysis

20. In this case it is not only the evidence of the fingerprints that connects the appellants to the offence charged. Dominic Laure's evidence that he saw the first appellant parade the drugs constitute direct evidence that the first appellant had knowledge and control of the drugs. The evidence was Mr Laure was so detailed in terms of the contents of the bag and or tin, going so far as to state the items that were found in the tin that were not even put to him under cross-examination. It is inconceivable that he could have imagined all that which he said about the contents of the tin that turned out to be true. The fact that he didn't remember the date of the incident, viewed in the context of the totality of the evidence, does not in any way devalue his evidence.
21. It is plain from a reading of the judgment of the learned Chief Justice (as she then was) that her conclusion was based not just on the finger prints, but a totality of the evidence led by the prosecution and more significantly that of Dominic Laure, with respect to the conviction of the first appellant.
22. In my respectful view the evidence of finger prints of the appellants on the blue bag and a piece of condom respectively, was a critical piece of circumstantial evidence that on its own justified an inference of possession in law. It is trite learning that a person may be convicted merely on the basis of finger print evidence in appropriate circumstances.(Jean Francois Adrienne and Another v R (Criminal Appeal SCA25 & 26/2015 [2017] SCCA 25 (11 August 2017); R v Albert and Another (CO 27/2015) [2018] SCSC 131 914 February

2018). In this case evidence of the prosecution viewed holistically, and particularly that of Mr. Laure as recited above, with respect to the first appellant, reinforced the evidence of finger prints and pressed hard on the appellants and made their conviction irresistible and unassailable.

23. Circumstantial evidence can only result in conviction when the only rational inference that can be drawn is that the accused is guilty. (R v Griffin 2009 SCC 28)

24. In my considered opinion inference must be distinguished from conjecture or speculation. It is trite learning that there can be no inference unless there are objective facts from which to infer other facts which it is sought to establish. (Caswell v Powell Duffryn Associated Collieries Ltd 1939, (1940) AC 152 (UKHL)). In this case the fact that the first appellant was in physical possession of the drugs has been proved, and in my mind combined with the finger prints, it is enough for a criminal conviction to be sustained. The fact that many other persons had access to the store room may suggest that a court properly directing itself may be inclined to give him the benefit of doubt, but this inclination is displaced by clear evidence of physical possession. In my considered opinion where an offence may be committed by any of several people, the benefit of doubt would ordinarily favour one, only if no other incriminating evidence is available. It follows that where there is evidence incriminating the accused, showing he was in possession, as in this case, any other protestation, by him, would be fanciful.

25. A careful survey of the case law in this country and other jurisdictions makes it clear that whether an accused's finger prints on an article may support an inference that he was in possession of the article will depend on the circumstances of each case and all the evidence adduced.

26. In my respectful and considered opinion the fact that finger prints were found on a bag is one of the factors to be taken into account in deciding whether or not to draw the inference of possession based on the totality of the evidence adduced. On its own it is not conclusive. I am clear in my mind that the fact that the appellants' finger prints were found as recited earlier is clearly highly probative of possession of drugs.

27. Direct evidence where it may be insufficient may be strengthened by circumstantial evidence. In the case of R v Exall (1866) 4 F & F 922 at p 929, Pollock CB described circumstantial evidence as follows:

“It has been said that circumstantial evidence is to be considered as a chain and each piece of evidence as link in the chain, but that if not so, for then, if any one link break, the chain would fall. It is more like the case of a rope comprised of several chords. One strand of the chord might be insufficient to stand the weight, but three strands together might be quite of sufficient strength. This it may be in circumstantial evidence- there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion; but the three taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit of.”

28. With respect to the first appellant the two strands that I found quite weighty are the fact of possession evinced by finger prints and the evidence of Dominic Laure.

29. In the case of R v De Villiers 1994 AD 493 at p 508-509, Davies AJA, described circumstantial evidence in the following terms:

“The court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together and it is only after it has done so, that

the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn...

The elements or links which compose a chain of presumptive proof are certain moral and physical coincidences which intermediary indicates the principle fact and the probative force of the whole depends on the number, weight, independence and consistency of those elementary circumstances.

.....Not to speak of greater numbers, even two articles of circumstantial evidence although each taken by itself weigh but as a feather, join them together you will find them pressing on the delinquent with a weight of a milestone.”

30. In the case of *Gofhamodimo v the State [1984] BLR 119 (CA)* at page 134, Maiseis JP (as he then was) relying on the locus classicus case of *R v Blom 1939 AD 288* stated that any inference that is sought to be drawn from circumstantial evidence must be consistent with all the proven facts and further that the proven facts should be such that they exclude every reasonable inference from them save the one sought to be drawn.
31. In other words what the learned Judge President was saying was that for the court to convict based on circumstantial evidence, the inference that the accused is guilty as charged must be irresistible. It must exclude the possibility that some other people other than the accused may have committed the offence of which the accused is charged with. If the inference pointing to the accused as guilty is not irresistible, to the extent of excluding other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.
32. I am not oblivious of the argument that on the evidence there were other people who had access to the store where the blue bag containing the drugs was found. In my mind alternative possible explanations that may exist in any given case should not be fanciful or just hypothetical.

33. The view I hold is that in the face of overwhelming evidence by the prosecution it is not enough for the defence to merely postulate, hypothetically, that there are other possible explanations that suggest that it may not be the accused who is guilty as charged. Put differently, in the face of overwhelming evidence that point to the accused as guilty, it is not open to the defence to suggest possible alternative explanations without actual evidence to back up those claims.
34. I am also alive to the version of the first appellant that he was set up. He offered no evidence to back that claim. The majority seem to have sympathy for this view. I don't. In my considered view the appellant was merely dead catting when he made such claim.
35. Much of what I have said above relates to the first appellant. With respect to the second appellant, the prosecution led evidence that connected her to the offence. Her DNA was found on piece(s) of condom in a tin of milk which also contained the drugs. The tin was in the blue bag on which the first appellant's figure prints were found. In the face of all this incriminating evidence she opted not to offer any explanation and chose to remain silent as she was constitutionally entitled to do.
36. The learned Chief Justice approached her evidence with great circumspection. She was cautious not to convict solely on the DNA evidence adduced with respect to fingerprints on the bag and piece of condom. She indicated that in the face of compelling evidence that pointed to the guilt of the second appellant, her silence was one of the factors to take into account in making the irresistible inference that the second appellant had knowledge and consent of the control of the drugs by the first appellant.
37. In my view the learned Chief Justice was entitled to draw the inference in the manner she did.

38. The following passage from *R v Johnson (1993)*, 12 O.R. (3d) 340 (CA), at pp. 347 -48 is on point and captures my preferred approach in dealing with an accused who chooses to remain silent:

“No adverse inference can be drawn if there is no case to answer. A weak prosecution’s case cannot be strengthened by the failure of the accused to testify. But there seems to come a time, where, in the words Irving J.A. in R v V. Jenkins (1908), 14 C.C.C. 221 at p. 230, 14 B.C.R 61 (C.A.), “ Circumstantial evidence having enveloped a man in a strong and cogent network of inculpatory facts, that man is bound to make some explanation or stand condemned”. That point, it seems to me, can only be the point where the prosecution’s evidence, standing alone, is such that it would support a conclusion of guilt beyond a reasonable doubt. Viewed that way it would be better said that the absence of defense evidence, including the failure of the accused to testify, justifies the conclusion that no foundation for a reasonable doubt could be found on the evidence. It is not so much that the failure to testify justifies an inference of guilt; it is rather that it fails to provide any basis to conclude otherwise. When linked in that fashion to the strength of the Crown’s case, the failure to testify is no different than the failure to call other defense evidence... If the Crown’s case cries out for an explanation, an accused must be prepared to accept the adverse consequences of his decision to remain silent; R. v. Boss (1988), 46 C.C.C (3d) 523, 68 C.R (3d) 123 (C.A.), at p. 542 C.C.C, p. 42 [sic] C.R. But the failure to testify cannot be used as simply one of the circumstances from which the guilt of the accused can be inferred: R. v Armstrong (1989), 52 C.C.C (2d) 190... As Doherty J. pointed out in R. v. Manchev, an unreported judgment of the Ontario High Court, August 23, 1990, the accused’s failure to testify is not an independent piece of evidence, to be placed on the evidentiary scale. It is rather a feature of the trial which may assist in deciding what inferences should be drawn from the evidence adduced”. [Emphasis added.]

39. Having regard to all the evidence, I do not think that the evidence of the prosecution considered as a whole allowed for any other conclusion other than that the appellants are guilty as charged.

40. In any criminal trial we must always bear in mind that this court is not required or expected to treat real life situations or cases as a completely intellectual exercise, where no conviction can be made if there is the slightest competing possibility (in this case arising out of the fact that other people other than the first appellant had access to the store). Our criminal law requires a high standard of proof, being proof beyond reasonable doubt, but it does not demand certainty.

41. The point I am trying to make in saying that our criminal law does not demand certainty, is stated by Lord Denning with breathtaking simplicity and clarity in the case *Miller v. Minister of Pensions (1947) 2 ALL ER 272*, when he said:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it permitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with a sentence “ of course, it is possible but not in the least probable,” the case is proved beyond reasonable doubt...”

42. In a country where illicit drugs are of some notoriety with real and or potential adverse consequences on the community this court ought not to take the above words of wisdom lightly.

43. In this case, having regard to the totality of the evidence and the closely reasoned judgment of the learned Chief Justice (as she then was) it seems to me that the trial court was correct in finding that the prosecution had proved its case beyond reasonable doubt, and that the absence of the explanation from the second appellant, merely failed to provide any basis to conclude otherwise.

44. Reading the learned Chief Justice judgment (as she then was), as a whole, I am not persuaded that she improperly used the second appellant's silence to shore up the case of the prosecution. Her assessment of the evidence was balanced and clinical and cannot be faulted in anyway.

45. In the result, I would dismiss the appeal and affirm both the conviction and sentence of the court below.

Signed, dated and delivered at Palais de Justice, Ile du Port on 18 December 2020

Dingake JA