IN THE COURT OF APPEAL OF SEYCHELLES

Jerry Hoareau APPELLANT

VS

The Republic RESPONDENT

CR SCA No: 13/2010

BEFORE: Domah, Fernando, Twomey , JJA

Counsel: Mrs. A. Amesbury for the Appellant
Mr. M.H.Kumar, Asst. Principal State Counsel, for the Respondent

Date of Hearing: 24th August 2011
Date of Judgment: 2nd September

JUDGMENT

A. F. T. FERNANDO JA

1) This is an appeal against a conviction for trafficking in a controlled drug, namely 10.1 grams of diamorphine (heroin) presumably on the basis of the presumption under section 14 of the Misuse of Drugs Act and the minimum mandatory sentence of 10 years imposed by the Trial Court.

2) The indictment as set out in the Court of Appeal brief read as follows:

Statement of Offence

Trafficking in controlled drugs, contrary to section 5 of the Misuse of Drugs Act read with section 14(d) and 26(1) (a) of the same as amended by Act 14 of 1994 and punishable under the Second Schedule of the said Misuse of Drugs Act read with section 29 of the same.

Particulars of Offence

Jerry Hoareau on the 15th of July 2008 was found in possession a controlled drug, namely 10.1 grams of diamorphine (heroin) which gives rise to the rebuttable presumption of having possessed the said controlled drug for the purpose of trafficking.

3) In relation to the charge we wish to state at the very outset that the section 14 (d) presumption applies in respect of cannabis or cannabis resin and not in respect of diamorphine (heroin). We are surprised as to how the trial proceeded on this obviously wrong charge unnoticed by both Learned Counsel for the defence and prosecution. It is not even a ground of appeal before us. The Learned Trial Judge however in his judgment in referring to the charge had said that the Appellant had been charged on the basis of the presumption in section 14 (c), which indeed is the correct provision in law, but we don't see any proceedings on record seeking an amendment to the charge. If that is the position, Court cannot, on its own motion, after both the cases for the prosecution and the defence have closed amend the charge when writing the judgment. We note that in the Particulars of Offence as referred to at paragraph 2 above what is stated is that the Appellant was in possession of "diamorphine (heroin)" and not cannabis or cannabis resin. We are of the view that the defence has not been prejudiced in any way in his defence and had also proceeded on the basis that the charge was in fact under section 14 (c) and therefore the error in the charge had not in fact occasioned a failure of justice and therefore curable under section 344 of the Criminal Procedure Code.

4) It is evident from the evidence of the Government Analyst, PW 1 and PW 2 that the substances seized from the Appellant had been taken to PW 1 for analysis on the very day of its seizure in less than 3 hours. There is nothing to indicate it had been stored elsewhere prior to it been taken to PW 1 or got mixed up with any other parcel seized by the police. There has been no challenge to the chain of evidence pertaining to the analysis of drugs from the time of its seizure up to the time of it been handed over to PW 1 for analysis and thereafter its production in court. Although the total weight of the substance seized and brought to PW 1 weighed 10.1 grams, the actual weight of the heroin content of it was 62.5%, approximately 6.25 grams. Here again we are surprised that no attempt had been made by the prosecution to amend the particulars of offence to fall in line with PW 1's uncontroverted evidence and to find the Learned Trial Judge proceeding to convict the Appellant without adverting to this discrepancy between the charge and the evidence. Since the Appellant had been given the minimum mandatory sentence of 10 years imprisonment we are of the view that the omission to amend the

charge to reflect the correct weight of heroin had not in fact occasioned a failure of justice and therefore curable under section 344 of the Criminal Procedure Code.

5) The Learned Defence Counsel at the trial below had sought to cast doubts on the prosecution case on the basis that what was seized from the Appellant had been described in the 'Request for Analysis Letter' as a powder and what in fact had been examined by PW 1 were 'fragments'. PW 1 in negating this challenge had said "According to my report I refer to powder in fragments". According to the Report of PW 1 marked and produced before the trial court as P2 the substance has been described as "several fragments and powder". Pw 1 had gone on to state "The police very often does not give an accurate description of what they ceased (sic) your Lordship. They refer to it as powder". Although this is very likely a realistic portrayal of the present state of police investigations, it does not augur well for the police and should be corrected immediately. The Learned Trial Judge in dealing with this matter had in his judgment stated: "Learned counsel grossly exaggerated by referring to the fragments and powder as rocks. The fact that particles of the powder detected, had now adhered together to form fragments is apparent due to the fact that both the detecting officer and the Government Analyst had positively identified exhibit P3c in open court as the same powder which was detected, analysed and produced in court." We have no doubt that what was taken to the Analyst within in less than three hours of its seizure, was what was seized.

6) The Appellant has also submitted before us that there is a discrepancy between the CB number as hand written in the evidence envelope (CB No 305/05) in which the exhibits were taken to the Analyst and what is typed in the letter of Request (CB 305/08). We have perused the evidence envelope and find that the numbers handwritten therein, after the digits 305; have not been written clearly as a '05' when compared to the digit '5' which appears elsewhere in that document, although it is also not written clearly as an '08'. The number after the slash mark reflects the year and it is obvious this being a detection in the year 2008 could not have been recorded as one in 2005. Further the rest of the information recorded therein namely, the date and time of seizure, person from whom it was seized, description of article and name of exhibit officer clearly shows that the exhibit that was taken to the Analyst, was the one that was seized from the Appellant. We also find that the description of the exhibit in the evidence envelope is almost identical to the description given to it in the letter of request. We therefore are of the view that this alleged discrepancy in the numbers does not have a bearing on the conviction of the Appellant. The defence also argued before us that in the Letter of Request the request is for: "Could you please **re-analysze** the following"; and "One only

re-analyses something that has been analysed before." In view of the fact that the exhibit was taken in less than three hours after its seizure and our finding that what was taken to the Analyst was what was seized, we are not swayed by this submission.

7) We commend the efforts of Counsel for the Appellant in perusing the evidence with a fine toothcomb but state that the issues raised are not sufficient to disturb the conviction of the Appellant. It is not every short coming in the investigation or presentation of evidence that casts doubt on a conviction. We cannot expect 100% accuracy in the actions of human beings and in their testimony before court. Further in view of the fact that the Appellant's defence is one of fabrication the issues raised as referred to at paragraphs 5 and 6 above fades into insignificance. We also wish to emphasize as we have done on numerous occasions that police need to tidy up their investigations and be more careful in maintaining records and what they record.

8) According to PW 2, on the date of the incident, he along with a police party were on patrol duty, in civil clothes, in relation to a crackdown on drugs and were travelling in a hired jeep when he spotted the Appellant near Supersave around 11.00 hrs travelling in a green coloured bus, heading in the direction of town and onwards to Beau-Vallon. Seeing them, PW 2 claims that the Appellant had tilted the ream of the hat he was wearing. They had decided to follow the bus in order to carry out a search when arriving at a more appropriate area. While nearing the Beau Vallon police station, close to the Sullivan garage, they had overtaken the bus and having identified themselves as police officers, asked the bus driver to stop. According to PW 2 when this statement was being made the Appellant had thrown a plastic that was in his left hand on the grass beside the road. PW 2 had got out of his vehicle and picked up the plastic that was thrown. There was nothing else there apart from the plastic he picked up. Opening it in the presence of the Appellant he saw some powder wrapped inside a cling film which he later took to PW 1 that day itself for analysis. Under cross –examination PW 2 had been asked as to why they did not stop the vehicle in which the Appellant was travelling before nearing the Beau Vallon police station and his answer had been that that there were a lot of vehicles on the road and that hey could not overtake that vehicle. In cross-examining PW 2 the Learned Defence Counsel had challenged his evidence mainly on the basis that the drugs had been planted on the Appellant because he had refused to give him any money.

9) In view of this line of cross examination, the issues raised by the defence that the substance analysed by PW 1 was not a powder but something in a solidified form and as to why the green coloured bus was not stopped before the Sullivan garage fades into

insignificance. Learned Defense Counsel having put to PW 2 a part of the statement made by the driver of the green colored bus, to the effect "I stopped my vehicle and the police disembark and they searched on me and on 'toto' the accused, and the police went into some grass and when he came he said there is the drug that 'toto' threw"(underlining by us), by way of cross-examination; posed the question to PW 2 to the effect, would the driver be lying. In fact this part of the statement of the driver of the green coloured bus corroborates the evidence of PW 2 and further there is nothing to indicate that the driver had denied that the Appellant had thrown a plastic when the police had asked him to stop.

10) The prosecution had through PW 3 and PW 4 produced, after a voire dire, the confessional statement of the Appellant where he admits to the possession of the substance and the circumstances of his arrest as narrated by the PW 2. The Learned Trial Judge had after hearing the testimony of PW 3 and 4 and the Appellant admitted the confessional statement of the Appellant having been satisfied as to its voluntariness and that it had not been recorded in violation of the fundamental rights of the Appellant or the Judge's Rules. We do not wish to adjudicate on the findings of fact of the Learned Trial Judge in regard to the admission of that statement and more so this case does not rest on that evidence alone. There is strong case against the Appellant even if one were to disregard the confessional statement.

11) The Appellant testifying before the Court from the witness stand had corroborated PW 2 from the time the jeep, in which the police officers were in, started to follow them, namely the Supersave roundabout, and up to the moment of the substance being picked up by PW 2 from the grass. The crucial evidence of the Appellant in his examination-in chief, is to the effect:

"Q. Did you see him actually looking or he just pretended he was looking?
A. They took around ten minutes to search, and he picked up a small plastic bag.
Q. Did you know what he was looking for?
A. No. I do not know. He only said that he saw me throw something away, and I told him that I did not throw anything."

The Appellant however had changed his position soon thereafter by saying that he had not seen anybody picking up something from the ground.

12) The Defence had failed to get Garry Jean-Baptist, the driver of the green coloured bus, in which the Appellant was travelling to testify on behalf of the Appellant despite

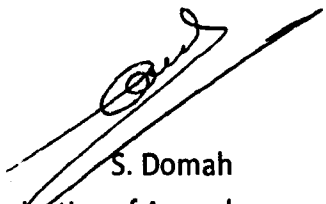
several adjournments obtained to secure his presence in court. The only witness called by the defence to testify on behalf of the Appellant was not in a position to further the case of the defence as he knew nothing about the incident. Even his answer in the negative, to the question posed to him by the Learned Defence Counsel, as to whether he knew "that this young man was dealing in drugs" is of no significance.

13) The Appellant's defence that he was framed by the police has no basis. According to the Appellant he had been beaten by the police in February 2008, and one of his relatives had threatened to sue the police. According to a submission made by the Appellant's Counsel to the trial court an action was not filed in relation to that incident because it was prescribed after 6 months. We find this to be a very irresponsible statement as from February 2008 to the 15th of July 2008 a period of 6 months had not elapsed. The Appellant had also repeatedly stated while testifying before court that police officer Ron Marie had told him that they were only after the driver of the vehicle, namely Garry Jean-Baptist, and not him and all that was expected of the Appellant was to implicate Garry. We therefore see no merit in the defence of fabrication.

14) In view of the facts set out above we do not hesitate to dismiss this appeal.

A.F. T. Fernando
Justice of Appeal

I agree



S. Domah
Justice of Appeal

Dated this 2nd day of September 2011, Victoria, Seychelles

IN THE SEYCHELLES COURT OF APPEAL

JERRY HOAREAU **APPELLANT**

v.

THE REPUBLIC **RESPONDENT**

SCA 13/2011

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BEFORE: Domah, Fernando , Twomey JJA

Counsel: Mrs. A. Amesbury for Appellant

Mr. M. Kumar for Respondent

Date of hearing: 24th August 2011

Date of Judgment: 2nd September 2011

JUDGMENT

Twomey JA

[1] I have read the written submissions of Counsel for the Appellant and Respondent and meticulously perused all the court proceedings including those relating to the remand of the accused prior to his trial. I have also listened to arguments of Counsel. I have read the judgment of Fernando JA. I am unable to come to the same conclusions as my learned brethren.

[2] A number of doubts linger in my mind as regards the charge as framed as well as the procedure undertaken in the analysis of the drugs in this case. It is regrettable that in serious offences of this kind the officers in question cannot ensure the degree of credibility required for the integrity of the chain of evidence and in the framing of the charges.

[3] The Appellant was convicted of the offence of trafficking in a controlled drug contrary to section 5 of the Misuse of Drugs Act as read with section **14 (c)** of the same Act. That conviction relates to 10.1g of diamorphine (heroin). However, an

examination of the formal charge before the Supreme Court reads differently. He is therein charged with trafficking in a controlled drug contrary to section 5 of the Misuse of Drugs Act as read with section **14(d).** The latter charge relates to cannabis or cannabis resin. This irregularity contravenes section 114 (a) (ii) of the Criminal Procedure Code:

> "the statement of offence shall describe the offence shortly in ordinary language...and if the offence charged is one created by enactment, shall contain a reference to the section of the enactment creating the offence;"

[4] The particulars of offence states the Appellant was in possession of 10.1g of heroin giving rise to the rebuttable presumption of having possessed the same for the purpose of trafficking. The trial proceeded based on these particulars as no one seems to have noticed this aberration. Up until the close of the prosecution case and even at judgment stage this mistake was not corrected. The judgment, however states categorically that the accused is charged with a section 14(c) offence. The warrant of commitment after sentence has 14(d) crossed out and (c) inserted above. Nobody initialised this correction and one is left with the impression that this court document was amended as if it was a rough draft and a typographical error corrected administratively rather than following due process. Tampering with official documents is serious and inexcusable.

[5] The second error in the charge relates to the quantity of drugs with which the Appellant was charged. He was charged with 10.1g of heroin, although an analysis of the drug sample revealed that it only contained 6.25 g of the drug. I do take on board the argument of learned Counsel for the Republic that this case took place between the *Terrence Alphonse* case *(SCA 4th December 2008)* and the *Aaron Siméon* case *(SCA 13th August 2010).* In the former this court had decided that in drug cases it sufficed to charge the accused with the weight of the whole mixture but in the latter the court departed from its own decision, rightly I might add, to state that it is the actual weight of the specified drugs referred to that brings the possession of them under the presumption of trafficking and not the total weight of the mixture in which the controlled drug is found.

[6] In this case, since the possession of 2g of heroin is enough to attract the presumption of trafficking it is immaterial whether the Appellant was charged with 10.1g or 6.25g apart from the fact that the law requires for reasons of certainty that the exact weight is specified.

[7] Both the above raise doubts in my mind as regards the credibility I should attach to court proceedings despite the fact that the defects are curable by virtue of the application of section 187 of the Criminal Procedure Code and the powers invested by

Article 120(3) of the Constitution). It is true that the decision of *Jules SCA 2006* and the leading authority on this matter, *R v Ayres [1984] AC 447* confirm the view as that expressed in the latter case that:

> "...if the statement and particulars of offence can be seen fairly to relate to and to be intended to charge a known and subsisting criminal offence but plead it in terms which are inaccurate, incomplete or otherwise imperfect, then that question whether a conviction on that indictment properly be affirmed under the proviso must depend on whether in all the circumstances, it can be said with confidence that the particular error in the pleading cannot in any way have prejudiced or embarrassed the defendant."

Similarly, in *Nelson (1977) 65 Cr. App R 119,* the charge failed to specify the statute breached but was cured. It is not however unlikely that there might be circumstances where this may not be possible. The Prosecution should ensure integrity in procedure as merits and doubts raised on such integrity of process cannot be resolved against an accused but against the prosecution.

[8] Unfortunately the catalogue of errors in relation to this case does not seem to end there. Two other defects are noticeable in the documentary evidence produced by the prosecution in support of its case and both relate to the analysis of the drug. The first of these concern the serial number entered on the evidence envelope. The Respondent contends that this reads *305/05* whereas the forensic laboratory report lists the serial number as *305/08.* I have examined the original document contained in the court file and although the handwritten serial number on the evidence envelope does indeed look like a 5 it is not convincingly so, resembling more an S. However, the certainty that the drug inside the envelope is that recovered in 2008 from the Appellant is further put in doubt in view of the fact of a second defect contained in a letter addressed to the analyst, Mr. Jackaria states:

> "Could you please **re-analyze** the following:..." (emphasis mine)

The use of the term **re-analyse** is disturbing when added to the doubt already raised by the disparity in the serial numbers discussed and in my view raises a further doubt in the integrity of the chain of evidence linking the exhibit produced to the package recovered from the scene of the incident at Beau-Vallon.

[9] Further, although the Appellant gave a confessional statement this was retracted by him in court. In such cases I am of the view that corroboration is required [vide *Guy Pool v R SCAR (1974) 100*).

[10] However in a sworn affidavit of the 16th July, the day after the accused was arrested a fellow police officer, Terence Dixie avers:

> "On the 15th July 2008 at around **11.30** hrs some police officers from ADAMS namely LCPL Samson, LCPL Dookley, PC Freminot and PC Camille, were mobile patrolling in a police vehicle namely a jeep, in the vicinity of **Beau-Vallon**, whilst patrolling they came across one green vehicle driven by Garry Jean Baptist namely S 14629. The driver was alarmed (sic) by the police officers to stop their vehicle by stopping in front of the green vehicle, the driver managed to stop his vehicle, but whilst ordering the driver to stop his vehicle police officers was able to see as the passenger threw a wrapped piece of red plastic bag from the front passenger window...both suspect was arrested...Both suspect was arrested at **12.20** hrs." (sic) (my emphasis).

[11] There is to my mind a grave doubt as to what took place on that date especially so in terms of the material inconsistencies emanating from the evidence. I cannot be sure that the evidence adduced by the prosecution was sufficient for the trial judge to come to the conclusion he did in view of the fact that one version before this Court describes the patrol as being in Beau-Vallon and another as coming from Mont Fleuri. I am also not convinced that the patrol car could have been at Mont Fleuri, Victoria and Beau-Vallon in the space of 30 minutes whilst there was heavy traffic at Victoria as alleged by the police officer. There is a further inconsistency in the fact that according to the averments of Dixie the arrest took place at 12.20pm when the evidence shows that the patrol was Beau Vallon at 11 am and another version that it was at 11.30am in Victoria. Added to this is the fact that Lance Corporal Dixie inexplicably states:

> "It is only now that we are realizing that he was already guilty before he was charged."

[12] It is my view that the inconsistencies in this case are basic, material and significant and in this respect quite distinguishable from cases (viz *Suleman v R, CA 1995, Quatre v R CA, 2006, R v Spiro SC 2008*) where the ability of individuals differ in the degree of observation, retention and recollection of events. Added to this fact is a statement by one of the main prosecution witnesses that goes completely contrary to a basic tenet of our criminal law, that one is presumed innocent until proven guilty by a court of law.

[13] I am acutely conscious of the scale of the drug problem in Seychelles and its scourge on society. I do not come to my decision in this case lightly. In this

particular case, there are a number of factors which combine to impair the integrity of due process – from the charge sheet, the procedure, the evidence in such material particulars as to the weight of the drugs, its analysis and the particular circumstances of the alleged offence. In the circumstances I would allow the appeal and set aside the conviction and sentence passed on the Appellant.

Mathilda Twomey

Justice of Appeal

Delivered at Victoria, Mahe, Seychelles 2nd September 2011.