

**IN THE COURT OF APPEAL OF SEYCHELLES**

Garry Stephen

**APPELLANT**

**VS**

The Republic

**RESPONDENT**

CR SCA No: 3/2010

**BEFORE: MacGregor, President; Fernando; Twomey; JJA**

**Counsel: Mrs. A. Amesbury for the Appellant**

**Ms. A. Madeleine, Senior State Counsel, for the Respondent**

**Date of Hearing: 29<sup>th</sup> November 2011**

**Date of Judgment: 9<sup>th</sup> December 2011**

**JUDGMENT**

- 1) This is an appeal against a conviction for trafficking in a controlled drug, namely 19.875 grams of heroin on the basis of the presumption in the Misuse of Drugs Act and the sentence of 12 years imposed on the Appellant. As per the formal charge the Appellant had on the 16<sup>th</sup> of December 2009, at Roche Bois, Mahe was found in possession of 37.5 grams heroin.
  
- 2) At the hearing before us the Appellant's Counsel having dropped the only ground of appeal raised in the Notice of Appeal against conviction confined herself to the alleged inconsistencies between the affidavits sworn by defence witness DW 2 B. Dogley, an investigating officer in the case, and the prosecution case.

- 3) The ground of appeal against sentence argued before us was to the effect that the sentence of 12 years is harsh and excessive in all the circumstances of this case especially since there is no remission for the sentence.
- 4) The prosecution evidence is to the effect that on the 16<sup>th</sup> of December 2009 around 11 am officers of the NDEA, namely PW 1, K. Joseph and PW 2, R. Charles, had been instructed to keep watch on a house belonging to one Georges Hoareau at Roche Bois, on information received that transactions in relation to illicit drugs were taking place therein. According to PW 1 the two of them had positioned themselves behind a boulder facing the back of the house of Georges Hoareau, about 5 meters away from the house. While keeping watch they had noticed people going in and out of Hoareau's house. Around 1.45 pm they had called the NDEA for a backup. Prior to the arrival of reinforcements from the NDEA they had seen the Appellant, who came from the neighbouring house going into Hoareau's house with a machete and a water bottle in his hand. He had been shirtless and was wearing a dirty pair of shorts, in colour similar to the camouflaged clothing of army personnel. About 5 minutes after the reinforcements came they had heard people shouting "police". The police vehicles had stopped in front of the house. Soon thereafter they had seen the Appellant come running out of the house in the direction of where they were hiding. At this stage he did not have his machete but was carrying a jar with a red lid in his right hand and a black bag in his left hand. When he came near them they had asked him to stop and identified themselves as police officers. The Appellant had continued to run and PW 2 had to grab him from his shoulder to bring him under control. At this stage the Appellant had thrown the jar with the red lid that was in his hand. PW 2 had picked up the jar and opened it in the presence of the Appellant. On opening the jar they found that it contained brownish coloured powder wrapped in 4 plastics. The Appellant had said that it does not belong to him and that he has nothing to do with it. The Appellant was thereafter arrested and taken to the Central Police station.
- 5) The evidence of PW 2 had been corroborated by PW 3 in all material particulars.

- 6) The substances seized from the Appellant had been kept in the custody of PW 2 and taken to the Government Analyst, PW 1, the next day itself for purposes of examination. According to the report of PW 1 the total weight of the light brown powder was 37.5 grams and each sample of powder found in the 4 plastic packets was found to be Heroin (Diamorphine) with a purity of 53%. The Learned Trial Judge citing the judgment of this Court in Aaron Simeon V The Republic SCA 23 of 2009 convicted the Appellant of having been in possession of 19.875 grams which was in fact the pure quantity of heroin found in his possession. There was no challenge to the analysis of the substances or the chain of evidence either before the Trial court or before us.
- 7) The defence version corroborates most of what the two prosecution witnesses had said. According to the Appellant's testimony in Court, he had been working with one Ernest William at the premises of Georges Hoareau and had been arrested after his lunch, which he had at Hoareau's house. He had stated that at the time of his arrest there was a black bag which contained Rs 1000 and cigarettes with him. He had also stated that the man who arrested him had told him that he had thrown a pink plastic bag in the bush, which he had denied. He had also categorically stated in his examination-in-chief that at the time of his arrest he was running but claims he did so because he was burning some waste, and had to get there soon. He had also admitted that he had heard a person shouting 'police' while he was still at Hoareau's house. He had also alleged that PW 3 hit him with a stick on his head and he had sustained injuries as a result of it. The Appellant had admitted that he had seen the NDEA officers "picking up the jar in the bush".
- 8) The only ground of appeal raised against the conviction as stated at paragraph 2 above was based on the alleged inconsistencies between the two affidavits sworn by defence witness DW 2, B. Dogley and the prosecution case. DW 2, B. Dogley, had been questioned about his affidavit dated 17<sup>th</sup> December 2009 filed before court when an application was made for further holding of suspect (Appellant), wherein he had stated: "The second suspect namely Ernest William was arrested after the search as there were reliable information that has come to light that he was the one who gave the glass jar which contained the four clear plastic sachet, suspected to contained heroin, a

which contained the four clear plastic sachets, suspected to contain heroin, a controlled drug. The relation between the first and second suspect is that the first suspect, Garry Stephen is working for the second suspect, Ernest William in the agricultural development” This affidavit had been marked by the defence as exhibit D1. The Defence Counsel had posed the question to DW 2 “Did you find out that the drug was not his, like you said, but with that information come to light.....it was Ernest who gave the glass jar to this accused....” DW 2 in response had said that the affidavit of 17<sup>th</sup> December had been filed on the basis of hearsay information. We are compelled to think that this line of questioning amounts to an acceptance that the drugs were with the Appellant at the time of his arrest although the defence position is to the effect that they were given to the Appellant by Ernest William. This does not further the defence case in any way but only corroborates the prosecution version.

9) DW 3’s evidence does not take the defence case anywhere. This is clear from his answer to the question put to him in his examination-in-chief:

“Q. Now we are the 16<sup>th</sup>, so were you there when Garry was arrested, did you see anything, do you know why Garry was arrested, did you see anything at all?

A. No, I did not see anything.”

On the other hand he too corroborates the prosecution version that the Appellant had gone to Georges Hoareau’s house that afternoon. He had also stated that he could not know what was happening at Georges Hoareau’s house that afternoon. DW 3’s evidence also casts doubt on the Appellant’s evidence that he ran from George Hoareau’s house as there was a fire that was lit in the premises and he had to get there soon, because according DW 3 he was “watching the fire at the time Garry went for lunch” and was “waiting for Garry to come back for me to eat.”

10) As regards the appeal against the sentence no arguments were placed before us as to why it was considered harsh and excessive, save for the fact that there is no remission for the sentence. Taking into consideration the quantity of drugs the appellant has been convicted of trafficking and the maximum

sentence that could have been imposed, we are of the view that the sentence imposed is not harsh and excessive and there is no reason to disturb the sentence imposed by the trial Court.

11) In the circumstances we do not hesitate to dismiss the appeal against conviction and sentence.



A.F. T. Fernando  
Justice of Appeal

I agree



F. MacGregor  
President, Court of Appeal

I agree



M. Twomey  
Justice of Appeal

Dated this 2<sup>nd</sup> of December 2011, Victoria, Seychelles