

IN THE SEYCHELLES COURT OF APPEAL

[Coram: S. Domah (J.A) , A. Fernando (J.A) , J. Msoffe (J.A)]

Criminal Appeal SCA 21/2013

(Appeal from Supreme Court Decision CR 10/2011)

Wilven Cousin

Appellant

Versu
s

The Republic

Respondent

Heard: 11 April 2016

Counsel: Mr. Elvis Chetty for the Appellant

Mr. Hemanth Kumar for the Respondent

Delivered: 22 April 2016

JUDGMENT

J. Msoffe (J.A)

[1] The Appellant was convicted of two counts of the offence of possession of a controlled drug namely heroin contrary to section 6(a) with section 26(1)(a) of the Misuse of Drugs Act Cap 133 and punishable under section 29(1) and the Second Schedule of the said Act. In the first count it was alleged that on 30th January 2011 at Corgate Estate he was found in possession of a controlled drug having a net weight of 2.34 grams containing 0.48 grams of heroin (diamorphine). The allegation in the second count was that on the same date he “was found in possession of a controlled drug in the form of two square tiles of which the brownish stains contained the presence of heroin (diamorphine).”

[2] Briefly, PW2 Terry Florentine and PW4 Nichol Fanchette, both NDEA agents, testified that on the above date at around 3.00 pm they were informed that there was a drug transaction taking place at Corgate Estate opposite the Cemetery. PW2, PW4 and other agents went to the scene. On arrival, they saw a group of men sitting on a tombstone who decided to flee from the scene upon seeing the NDEA agents. The agents pursued the men. In the process, PW2 chased the man running towards a nearby river, the Appellant in this case. As the Appellant continued to run away, PW2 held his right hand. The Appellant stopped running but continued to struggle with PW2. PW4 who was standing three metres away saw the Appellant struggling with PW2. He went straight to PW2 to assist him in restraining or containing the Appellant. On arrival he handcuffed the Appellant. At that point in time both PW2 and PW4 saw the Appellant dropping “a small red thing” on the river bank. PW2 picked up the “small red thing”, opened it and saw “hard stuff in the piece of red plastic”. The agents drove the Appellant and the “stuff” to the NDEA office for purposes of further investigation. At the office, the Appellant told the agents about his vehicle. The vehicle was driven to the office where upon search “two small pieces of glass, two small tiles coloured blue which was under his carpet in a small box” were found. PW2 put the red plastic wrapping the “stuff” and the two square tiles into a brown envelope, sealed it and kept it in his locker until he handed it over to Dr. Purnaman for chemical analysis and report after PW3 Evans Seeward had prepared and signed a letter of request dated 31st January 2011 to that effect. In the meantime, on 17th January 2013 PW3 prepared another letter of request for the purpose of re-analysis of the exhibits and took the exhibit evidence bag to PW1, Jemmy Bouzin for re-analysis. PW3 drew up a report (exhibit P1).

- [3] Yet again, very briefly, the defence case went as follows: The Appellant testified that on 30th January 2011 he was at Corgate Estate. He denied sitting on a tombstone dealing in drugs. He stated that he had gone to Corgate Estate to meet DW2 Mr. James Bacco whom he had wanted to do some work for him. While explaining to DW2 the nature of work involved, he saw NDEA agents and policemen approaching him. As he walked towards his car he saw some people running. In the ensuing chain of events, PW2 jumped on him and wanted to handcuff him. He resisted and kept on asking PW2 what was going on. Subsequently, PW2 overpowered and handcuffed him. He denied possessing drugs at the scene of arrest and in the car in question. He was generally supported by DW2.
- [4] After hearing both aspects of the case the trial Judge opined and held that the prosecution had proved its case against the Appellant beyond reasonable doubt, hence the conviction on both counts. She, thereafter, sentenced the Appellant to concurrent terms of five years imprisonment.
- [5] Aggrieved, the Appellant has preferred this appeal. In his notice of appeal dated 28th March 2016 the Appellant raised six grounds of appeal challenging the conviction and an alternative seventh ground on sentence. Basically, the six grounds of appeal crystallize on one major ground of appeal. That, the evidence on record did not establish the prosecution case against the Appellant beyond reasonable doubt.
- [6] However, in a sudden change of events, when the appeal was called on for hearing the Appellant abandoned the six grounds of appeal and decided to canvass the appeal on the alternative seventh ground of appeal only. This

judgment is therefore about the sentence and not the conviction of the Appellant.

[7] In brief, in arguing the appeal the Appellant's learned Counsel was of the view that the concurrent terms of imprisonment were manifestly harsh and excessive in the circumstances of the case. He urged that the Judge ought to have taken into account the mitigating factors appearing at page 213 of the record. He further contended, *inter alia*, that the Judge should have considered that, as per the analyst report, with respect to the first count the hard brown substance contained heroin with a purity of only 16% and a content of only 0.35 grams and in the second count the two square tiles contained only traces of heroin.

[8] In determining this appeal, this court is guided by the principle that sentencing is a matter pre-eminently falling squarely within the purview of the trial court's discretion, which should not lightly be interfered with. In the case of **Godfrey Mathiot v The Republic**, Cr. Appeal No 9/1993, Adam JA, delivering a unanimous judgment held that –

...the proper approach for an appellate court in sentence appeals is only to intervene where (a) the sentence was wrong in principle; (b) the sentence was either harsh, oppressive or manifestly excessive; (c) the sentence was so far outside the normal discretionary limits; (d) some matter has been improperly taken into consideration or failed to take into consideration something which should have been; (e) the sentence was not justified in law.

[9] The mere fact that any or all the judges sitting on an appeal would have

imposed another sentence, be it heavier or more lenient, if he presided in first instance, is not enough reason for a court of appeal to interfere with the sentence imposed.

[10] In determining whether the sentence qualifies for review by this Court, we looked at the quantity of heroin that the appellant was accused of possessing. It was 0.48 grammes of heroin. The tiles found on the car used by the Appellant had brownish stains, which when subjected to further tests, were found to contain presence of heroin.

[11] We further considered that when the Appellant was arrested in 2011, the law required that he would be sentenced to a minimum term of 5 years if convicted of possession. However, that provision was repealed in the year 2012 and no minimum sentence was retained for a first offender in regard to possession. The Appellant was sentenced on the 7th August, 2013. As was held in the case of **Kelson Alcindor v R [2015] SCCA 7**, the Appellant should benefit from the change of law in his favour, along the principle of “la peine la plus douce.” – See **Aubeeluck Gangasing v The State of Mauritius [2010] UKPC 13**. The Appellant was sentenced for the possession of the apparatus; the minimum sentence prescribed by the Act is three years.

[12] In **Poonoo v Attorney-General (2010) SLR 361**, this Court held that -
“Sentencing involves a judicial duty to individualize the sentence tuned to the circumstances of the offender as a just sentence...”

[13] In **S v Van der Westhuizen 1974 (4) SA 621 C**, Baker J, reaffirmed that

consideration should be given to the crime, the criminal, society and the element of mercy. But it must also be borne in mind that the consideration of mercy must not be allowed to lead to the condonation or minimization of serious crimes. The sentence handed should be just and appropriate. It should not be to either be too harsh or too lenient as to meet the purposes of the punishment.

[14] In the case of **Jean Fredrick Ponoo** supra, this Court held in dealing with the issue of mandatory sentences that: “While the legislature is concerned in a general way with the penalty that should attach to an offence, the Court is concerned in a case to case basis the actual sentence that should be meted out to the particular offender. There is a difference between the preoccupations of the legislature in legislating a penalty provision and the pre-occupations of the court in sentencing a particular offender.” In **Ponoo** the mandatory jail term of 5 years given to the accused for breaking and entering into a building and stealing a pair of shoes therein, was reduced to 3 years.

[15] On the mitigating factors, the learned trial Judge was right to consider the Appellant’s age but in error when she did not take this into account. When she quotes this Court, in the case of **Ignace v Republic** [2006] SCCA 5, that, special reasons (in mitigation) should relate to the facts of the offence, and not the offender, she overlooked the fact that a lot of water has flown down the bridge of time ever since 2006. Evolved principles of sentencing have emerged.

[16] The facts of the offence in this case being that the quantity of the drugs on

which the Appellant was found with was 0.48grams and traces found on the surface of tiles in his car. The Privy Council in the Mauritian case of *Aubeeluck Gangasing v The State of Mauritius [2010] supra* held that “*The minimum penalty would be considered disproportionate in cases wherein the imposition of a mandatory minimum sentence would be startlingly or disturbingly inappropriate with respect to hypothetical cases which could be foreseen as likely to arise...*” See also *Bhinkah v The State, 2009 SCJ 102*). Similarly, in the case *Pandoo v The State 2006 MR 323*, the court held that the constitutional right against torture, inhuman and degrading punishment, incorporates the principle that sentence must be proportionate to the seriousness of the offence. We would consider such quantity to be such minute that it would induce the trial court to consider a lenient punishment on the Appellant.

[17] Accordingly, we reduce the sentence on count one from 5 years to 3 years. The sentence on count 2 is reduced from 5 years to 1 year. Both sentences shall run concurrently as had been previously ordered. And, the period spent in remand custody shall be taken into account as had also been previously ordered.

J. Msoffe (J.A)

I concur:.

S. Domah (J.A)

I concur:.

A.Fernando (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 22 April 2016

