

IN THE SEYCHELLES COURT OF APPEAL

[Coram: A.Fernando (J.A), B. Renaud (J.A), G. Dodin (J.A)]

CriminalAppeal SCA23/2016
(Appeal from the Review Tribunal SRV No 108./2016)

Dominic Dugasse

Appellant

Versus

The Republic

Respondent

Heard: 30 April 2018

Counsel: Mr. C. Andre for the Appellant
Mr. C. Jayaraj for the Respondent

Delivered: 11 May 2018

JUDGMENT

A.Fernando (J.A)

1. The Appellant has appealed against the decision of the Review Tribunal set up under section 51(1) of the Misuse of Drugs Act 5 of 2016 for rejecting his application under section 51(2) of the said Act, for review of the outstanding portion of his sentence.

2. The Appellant along with Nelson W. Payet and Christopher D'Unienville had been convicted by the Supreme Court of aiding and abetting in the trafficking of 536.1 grams of monoacetylmorphine (a substance of morphine) and conspiracy to traffic and all three of them had been sentenced to 12 years imprisonment in respect of each count, under the earlier Misuse of Drugs Act, 1990 (Cap 133). The Sentencing Judge had ordered both sentences to run concurrently. Their appeals to the Court of Appeal on conviction had been dismissed. They had not appealed against the sentences imposed.

3. The Appellant's application to the Review Tribunal had been rejected on the basis that the sentence imposed by the Supreme Court "is within the range that would likely be imposed under the new Misuse of Drugs Act 2016. In fact it is less than would be recommended under the new Misuse of Drugs Act. The offence in this case is also aggravated in nature..." The sentence prescribed in the Misuse of Drugs Act 2016 for trafficking for Morphine is life imprisonment and a fine of SCR 750,000.00 and an indicative minimum sentence for aggravated offence is 20 years. According to **section 48 (1)(a) of the Misuse of Drugs Act 5 of 2016** "the presence and degree of a commercial element in the offending, particularly where controlled drugs have been imported into Seychelles" is an aggravating factor to which weight shall be given in considering the appropriate sentence. The Appellant in the 'Collection of Information' document had admitted "that the said drug was not for personal use but only assist in leading some money" (second part of sentence not clear). According to **section 51(8)(a) of the said Act** in considering the application the tribunal shall take account "*whether the offence in question would be treated as an offence of an aggravated nature under this Act, in which case there shall be a presumption against review*".

4. The Appellant has appealed to this Court against the Tribunal decision on the grounds that purity was not taken into account and that remission was not granted. The Appellant did not pursue his second ground of appeal at the hearing. The issue of purity of the drugs has been raised for the first time. The Tribunal Order in respect of the Appellant does not bear out that the issue of the purity of the drugs had been considered by the Review Tribunal. However in the Affidavit of the Appellant filed before the Tribunal it is averred that the

“case involved 536.1 grams of monoacetylmorphine which is a preparation of the product morphine”. Since this case is one of trafficking that was not based on the presumption and conspiracy to traffic, the purity of the drugs has no bearing. **Section 7(2) of the Misuse of Drugs Act 5 of 2016** states: *“A person who traffics in a substance, preparation or product which purports to be a controlled drug but is not, or which purports to be a controlled drug but is so low in purity as not to be usable as such, whether on his or her own behalf or on behalf of another person, whether the other person is in Seychelles or not, also commits an offence of trafficking and is liable on conviction to the penalty specified for an offence of trafficking under subsection (1)”*. (emphasis added)

5. In the Skeleton Arguments filed on behalf of the Appellant, there is an allegation that the Review Tribunal was chaired by the Chief Justice who heard the Appellant’s appeal when it came up before the Court of Appeal. Although it may have been preferable for the learned Chief Justice to have recused herself in hearing the application before the Tribunal, we are of the view that since there was a panel of three Justices of Appeal who heard the earlier appeal and also a panel of three judicial officers who heard the Appellant’s application before the Review Tribunal, no prejudice would have been caused to the Appellant. It is also to be noted that there was no appeal against sentence when this Court considered the appeal of the Appellant as stated earlier. The Appellant’s other issue raised in the Skeleton Arguments is to the effect that the other two accused who were charged and convicted along with the Appellant and given the same sentences as the Appellant by the Supreme Court, had their sentences reduced by four years by a differently constituted Review Tribunal.
6. It was only at the hearing of this appeal that the Review Tribunal Orders in respect of the other two accused were produced before the Court. We warn Counsel that this is not a practice that will be tolerated in the future. We have examined the Tribunal orders and find that the main reason for reduction of the sentences of the other two accused had been as stated in the order: “We note that whilst the quantity of drug involved in this case was 536.1 grams of morphine, the evidence at trial was that the purity was so low that it could not be measured.” The learned Counsel for the Republic did not dispute this.

7. In the Tribunal Order against the Appellant there is nothing to indicate that the learned judicial officers who heard the review application had considered the issue of the purity of the drugs that had been referred to in the Appellant's application to the Review Tribunal. Since it was referred to in the application it should have been, in our view, dealt with in the order, although it would not have made a difference in view of what has been stated at paragraph 4 above. Nevertheless, the Tribunal Orders in respect of the two other accused whose sentences had been reduced do not show that the learned judicial officers who heard the review applications had considered sections 48(1)(a) and 51(8)(a) of the Misuse of Drugs Act 5 of 2016, as referred to at paragraph 3 above and section 7(2) of the said Act, referred to at paragraph 4 above. We also find that in the Tribunal Order the sentence meted out to the Appellant by the Trial Court had been incorrectly stated as 10 years whereas it is 12 years and that the Tribunal had not considered the issue of the "*conduct of the offender while in prison...*" as required by **section 51(8) of the said Act** and despite reference having been made to it in the review application form. We do not know how the Tribunal would have decided had they not been mistaken on the period of sentence meted out to the Appellant by the Sentencing Court and had they given consideration to the Appellant's conduct while in prison.
8. We do find that mistakes had been made by the respective Tribunals who heard the review applications of the Appellant and the other two accused as stated earlier, and this had resulted in the disparity in the sentences after review by the Tribunal. We therefore have decided in the particular circumstances of this case to treat the Appellant in the same manner, his other two co-accused had been dealt with by the Review Tribunal and reduce the sentence of imprisonment imposed on him by the Trial Court by 4 years. It would be unfair in our view to treat the Appellant differently from his co-accused who were charged along with him in respect of the same offences, committed on the same day and place under the same indictment.
9. We therefore allow the appeal and reduce the sentence of imprisonment imposed on the Appellant by the Trial Court by 4 years. We however wish to emphasize that this should

not be held as a precedent as the rule pertaining to consistency in sentencing does not apply when a court or tribunal has erred when sentencing an offender.

A.Fernando (J.A)

I concur:.

B. Renaud (J.A)

I concur:.

G. Dodin (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 11 May 2018