

**IN THE SEYCHELLES COURT OF APPEAL**

**[Coram:** A. Fernando (J.A), F. Robinson (J.A), G. Dodin (J.A)]

**Criminal Appeal SCA 56/2016**

**(Appeal from the Review Tribunal SRV No. 82/2016)**

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Geoffrey Antat

Appellant

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The Republic

Respondent

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Heard: 03 May 2018

Counsel: Mr. B. Hoareau for the Appellant

Mr. A. Subramaniam 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 by granting him a remission under section 30(1) of the Prisons Act.
2. The Appellant had been originally charged along with Jeanette Joubert for trafficking in 492.1 grams of heroin with a high purity rate of 52% (255.8 grams of pure heroin), on the basis of the presumption in section 14(c) of the earlier Misuse of Drugs Act 1990 (Cap133). After having entered into an agreement with the Attorney General to cooperate with the prosecution by becoming a State Witness in this case, the Attorney General had filed an alternative charge of possession under section 6(a) of the said Act against the Appellant to which he had pleaded guilty. He had thereafter been sentenced to a period of

six years, under the earlier Misuse of Drugs Act 1990 (Cap 133) on the 26<sup>th</sup> of January 2016.

3. In passing sentence the learned Sentencing Judge had considered the personal circumstances of the Appellant, that he is 42 years of age, has two children, is a first offender and that the Appellant had pleaded guilty at the very outset of the case as pleaded by the Appellant's Counsel in mitigation of sentence. The Sentencing Judge had also taken into consideration the agreement the Appellant had entered into with the Attorney General "to cooperate with the prosecution in this case and in view of the said fact the Honourable Attorney General has decided to file an alternative lesser charge against him."
4. The Review Tribunal had rejected his application on the basis that "the sentence of 6 years imposed is within the range that would likely to be put under the new MODA", namely 2 to 15 years imprisonment. They had gone on to say: "The offence we do know is also aggravated in nature by weight and the convict would not be accordingly be entitled to the benefit of the remission of the sentence. We therefore do not propose to interfere with the sentence in any way." In my view the gravity of the offence committed by the Appellant always remained the same despite a lesser charge been levelled against the Appellant, in view of his willingness to cooperate with the prosecution.
5. The only ground of appeal set out in the Notice of Appeal is to grant the Appellant remission.
6. In the Skeleton Heads of Argument, Counsel representing the Appellant argues that the Court of Appeal ought to consider the issue of remission in the context of the Appellant's right to liberty guaranteed in article 18 of the Constitution and relies on the right to remission basing himself on section 30 (1) of the Prisons Act. Article 18(2)(a), which is a derogation to the right of liberty, states that the detention in execution of a sentence of a court shall not be treated as an infringement of the right to liberty. The Appellant's Counsel's attempt to equate the statutory right to remission under section 30 of the Prisons Act to the fundamental right to liberty guaranteed under article 18 of the Constitution is misconceived.
7. Section 30 of the Prisons Act under the heading 'Remission of sentence', states:

*"(1) Subject to subsections (2) and (3), a person sentenced, whether by one sentence or by consecutive sentences, to imprisonment for a period exceeding 30 days, including a person sentenced to imprisonment in default of payment of a fine or other*

*sum of money, may, on the ground of his industry and good conduct while in prison be granted a remission of one third of the period of his imprisonment.*

*(2) (a) Subsection (1) shall not apply to a prisoner –*

*(a) serving a sentence of imprisonment for life; or*

*(b) serving a sentence of imprisonment for an offence of an aggravated nature under the Misuse of Drugs Act, 1990; or*

*(c) detained in custody during the President's pleasure.”*

*(3) Where a remission granted under subsection (1) to a prisoner results in the reduction of his period of imprisonment to a period less than 30 days, the prisoner shall not be released from prison until he has served a period of 31 days imprisonment.*

*(4) For the purpose of giving effect to subsection (1), each prisoner on the commencement of his sentence shall be credited with the full period of remission which he would be entitled to under that subsection and shall only lose such remission as a punishment for idleness, lack of industry or other offence against prison discipline.*

*(5) The preceding provisions of this section shall be without prejudice to the prerogative of mercy vested in the President under the Constitution.”*

8. It is the argument of the Appellant’s Counsel that in the earlier Misuse of Drugs Act 1990 under which the Appellant was convicted and sentenced, there was “no reference to an offence of an aggravating nature nor to aggravating factors”; that “it is only in the Misuse of Drugs Act, 2016 that offence of aggravated nature and aggravated factors are mentioned and referred to” and therefore “the term ‘aggravated nature’ as used in section 30(2)(b) of the Prisons Act must be read in pari materia with the Misuse of Drugs Act 5 of 2016 more specifically with sections 7(4), 47 and 48 of the said Act”. According to the Appellant’s Counsel it is only when a person is convicted of trafficking in more than 250 grammes of heroin, the Court is mandated to treat the offence as one of an aggravated nature under section 7(4) of the 2016 Act and the Court is mandated to have due regard to the indicative minimum sentence for an aggravated offence of that kind only in such a circumstance in view of the provisions of section 47(5) of the Act. It is therefore his argument that since the Appellant has been convicted only of possession of heroin, section 30(2)(b) of the Prisons Act has no application to him.
9. It was also his argument that “an offence of an aggravated nature can only be applicable in respect of a prisoner convicted and sentenced under the Misuse of Drugs Act 5 of 2016 and not to one convicted and sentenced under the Misuse of Drugs Act 1990”. The learned Counsel’s argument is misconceived, for if he is right the word “aggravated nature” is a new found word in the fight against controlled drugs. The Sentencing Court and the Review Tribunal in my view was perfectly entitled to treat the offence of possession committed by the Appellant under the earlier Misuse of Drugs Act 1990 as one of an aggravated in nature in view of its weight, namely 255.8 grammes of heroin. I was dismayed to note the Appellant’s Counsel’s submission in response to a question by the Court that “the offence of possession of 255.8 grammes of heroin as in the instant

case, or even 10 kilos of heroin; under the 1990 Act was not one of an aggravated nature”.

10. Whether an offence under the 1990 Act was of an aggravated nature or not, is a determination the Court or the Review Tribunal could make, taking into consideration the type of the substance involved, its weight and any other factors which have now come to be codified under section 48 of the Misuse of Drugs Act 5 of 2016. It is a misnomer to argue that merely because there was no specific reference to aggravating factors in the 1990 Act, that aggravating factors did not exist and a court when sentencing an offender could not have considered them. If that be the case there was no reference also to mitigating factors in the 1990 Act, as one finds in section 49 of the Misuse of Drugs Act 5 of 2016. In this case the Sentencing Judge had said: “this court ... considers that the drug concerned in this case is a Class A drug namely Heroin with a net weight of 492.1 grams with a high purity rate of 52 per cent. The deleterious and dangerous nature of this drug on society especially the younger generation is also considered.” The Sentencing Court has thus made a determination that the offence committed by the Appellant was of an aggravated nature. As I have stated at paragraph 4 above the gravity of the offence committed by the Appellant always remained the same despite a lesser charge been levelled against the Appellant in view of his willingness to cooperate with the prosecution.
11. According to section 47 of the Misuse of Drugs Act 5 of 2016 in sentencing a person convicted of an offence...the Court shall have regard to the objectives of the Act which undoubtedly is control of mainly class A drugs.
12. As per the Second Schedule to the Misuse of Drugs Act 5 of 2016 the indicative minimum sentence for an aggravated offence of possession of a Class A drug is 10 years and the maximum sentence is 30 years imprisonment and a fine of SCR 500,000. Under the earlier Misuse of Drugs Act 1990 the maximum sentence for unauthorized possession of a controlled drug like in this case, taking into consideration its classification and weight was 15 years imprisonment and a fine of R 300,000, and a minimum of 5 years for the first offence and 10 years for the second and subsequent offence. Thus the sentence prescribed under the Misuse of Drugs Act 1990 for an offence of this nature shows that the Legislature had treated such offences as serious.
13. The Counsel of the Appellant also made an attempt to argue at the hearing before us, that in view of the repeal of the Misuse of Drugs Act 1990 by section 55 of the Misuse of Drugs Act 5 of 2016 section 30(2)(b) of the Prisons Act has no application and therefore the Appellant was entitled to remission under section 30(1) of the said Act. This was not a matter raised in the Appellant’s Skeleton Heads of Argument. We warn Counsel that introduction of new arguments without notice to the other party will not be tolerated in

the future. However section 55 (2) of the said Act has clearly specified that the repeal of the 1990 Act shall not affect the previous operation of the repealed Act or anything duly done or suffered under it; affect any liability incurred under the repealed Act or affect any punishment incurred in respect of any offence under the repealed Act and for the said purposes the 1990 Act is treated as not having been repealed.

14. I am therefore of the view that the Appellant is not entitled to remission under section 30(1) of the Prisons Act and therefore dismiss his appeal.

A.Fernando (J.A)

**I concur:.**

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G. Dodin (J.A)

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