

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2022] SCCA 39 (19 August 2022)
SCA CR 20/2021
(Appeal from CO 71/2021)

In the matter between

Michael Andy Fred
(rep. by Mr Basil Hoareau)

Appellant

And

The Republic
(rep. by Ms. Shireen Denys)

Respondent

Neutral Citation: *Fred v R* (SCA CR 20/2021) [2022] (Arising in CO 71/2021) SCCA 39
(19 August 2022)

Before: Fernando President, Twomey-Woods, Robinson JJA
Summary: Appeal against sentence imposed on conviction for possession of a controlled drug with intent to traffic and preventing and obstructing an officer while discharging his duty by offering an undue gift under the Misuse of Drugs Act, 2016.

Heard: 1 August 2022

Delivered: 19 August 2022

ORDER

Appeal dismissed.

JUDGMENT

FERNANDO, PRESIDENT

1. The Appellant has appealed against the sentence of two years and six months' imprisonment and the fine of SCR 20,000 and the six-month term of imprisonment

in default of the payment of fine, imposed on him by the Sentencing Judge on his conviction after being found guilty on his own plea of guilt for the two offences he was charged.

2. The first count on which the Appellant was indicted was for possession of a controlled drug, namely 509 pills methylenedioxymethamphetamine (MDMA) (Ecstasy) [classified as a Class B drug in Part II at 1.9], with a total net weight of 163.30 grams with intent to traffic contrary to section 9(1) of the Misuse of Drugs Act 2016. The second count was for preventing and obstructing an officer while discharging his duty by offering or giving undue gift, namely by offering the 509 MDMA pills as a gift, contrary to section 35(2) of the Misuse of Drugs Act.
3. In respect of count one the Appellant had been sentenced for a term of two years six months' imprisonment and the fine of SCR 20,000 and in default of the payment of fine, a six-month term of imprisonment and in respect of count two for a term of two years' imprisonment. Both terms of imprisonment in count one and two to run concurrently. The six-month term of imprisonment in default of payment of fine is to run consecutive to the term of two years and six months' imprisonment. The Sentencing Court had ordered that the Appellant is to be produced before the Court after serving his 2 ½ years' imprisonment in order to give him time to pay the fine.
4. The maximum sentence for an offence under count one is 50 years' imprisonment and fine of SCR 500,000.00 and the indicative sentence for aggravated offence is 15 years' imprisonment. The maximum sentence for an offence under count two is 5 years' imprisonment and fine of SCR 100,000.00 and the indicative sentence for aggravated offence is 3 years' imprisonment.
5. The Appellant has filed the following grounds of appeal:
 - "1. The learned trial judge erred in law and on the facts in imposing a sentence of two years' six-month imprisonment and a fine of SR20,000 (in default payment to a fine of six-month term of imprisonment) for the offence of possession of 163.30 grams of methylenedioxymethamphetamine (MDMA) (Ecstasy) with intent to traffic in that –
 - (i) The sentence is manifestly excessive as it is outside the sentencing range of similar offences and outside the broad range of penalties appropriate to the case;

- (ii) The learned trial judge failed to take into consideration and attach sufficient weight to the mitigating factors, mentioned in section 49 of the Misuse of Drugs Act, which were present in the case;
 - (iii) The learned trial judge improperly considered that the Appellant was involved in another offence which was related to the commission of the offence of possession of a controlled drug with intent to traffic;
 - (iv) The learned trial judge failed to take into consideration and apply, the general objective of the Misuse of Drugs Act, of proportionality in sentencing; and
 - (v) The learned trial judge wrongly came to the finding that the offence was of an aggravated nature.
2. The learned trial judge erred in law and on the facts in imposing a sentence of two years' imprisonment for the offence of preventing and obstructing an officer while discharging his duties by offering or giving undue gift contrary to the Misuse of Drugs Act, in that the sentence is manifestly excessive as it is outside the sentencing range of similar offences and outside the broad range of penalties appropriate to the case." (verbatim)
6. By way of relief the Appellant has prayed to allow his appeal by reducing and varying his sentence. The Counsel for the Appellant had while making his submissions on mitigation asked the Sentencing Judge to impose a sentence less than 12 months.
7. As regards grounds (ii) & (v) of appeal, contrary to what is stated therein, the learned Sentencing Judge had taken into consideration as mitigating factors that the Appellant's admission of the truth of the charge through a guilty plea at the very outset of the case, thereby expressing remorse and regret as set out in section 49(a) & (b); and that the Appellant is a first offender as set out in section 49(f) of the Misuse of Drugs Act 2016. The other mitigating factors set out in section 49 (c), (d), (e) and (g) has no application to the facts and evidence of this case. In addition, the learned Sentencing Judge had made reference to the age, family, educational background, employment record, the financial burden placed on the Appellant's family since his remand, and the statement in the Probation Report that the commission of the offence is 'out of character' of the Appellant. While the absence of any commercial element in the offence is set out in section 49(d) as a mitigating factor; section 48(1)(a) makes reference to the presence and degree of a commercial element in the offending as an aggravating factor. Counsel for the Appellant pleading in mitigation had admitted that the quantity of controlled drug seized from the Appellant is of a commercial quantity and thereby has

contradicted ground (v) of appeal. According to the facts as narrated to Court by the Prosecutor and admitted by the Appellant, the Appellant had informed the officers who seized the drugs that the parcel had been left with him for safe keeping by somebody, but refused to divulge any information as to who it was. I therefore dismiss grounds (ii) and (v).

8. AS regards ground (iii) of appeal, section 48(1)(c) states “*Aggravating factors (factors that support a more serious sentence) for offences under this Article include the involvement of the offender in other offences...related to commission of the offence.*” According to the facts as narrated to Court by the Prosecutor and admitted by the Appellant, the Appellant had offered the drugs to the officers who found the drugs in the Appellant’s room saying “take this for you and do not inform the team leader”. This was at the time of the detection and before the Appellant was arrested. It is my view that the offer by the Appellant to the officers of the drugs that were detected, in order to obstruct and prevent the officers from discharging their duties was an offence necessarily related to the commission of the offence of possession of a controlled drug with intent to traffic, as correctly held by the Sentencing Judge. It is to be noted that possession, is a continuing offence. Section 35(2) of the Misuse of Drugs Act states: “*A person who...offers... any undue gift...to another person in order to prevent or obstruct an investigation by NDEA or police into any offence under this Act commits an offence...*” and according to 35(3) of the said Act “*Where an offence under section 35(2) is committed by or in relation to an officer, the Court shall treat the offence as aggravated in nature.*” This shows the relation between the two offences the Appellant had been charged with. I agree with the statement of the learned Sentencing Judge: “It therefore cannot be said that the aggravating circumstance arose after the commission of the offence...” I see no merit in ground (iii) and dismiss it.
9. As regards grounds (i) & (iv), I note that the sentence of imprisonment imposed by the learned trial judge on the Appellant is only 5% of the maximum jail term and not more than 17% of the indicative minimum sentence for an aggravated offence and 4% of the maximum fine that could have been imposed. Therefore, on the very face of it the sentence cannot be said to be ‘manifestly’ excessive. None of the cases cited by the Appellant’s Counsel in mitigation of sentence in relation to the offence of possession of a controlled drug with intent to traffic are closely similar to the facts and circumstances of this case. It is to be noted that the facts and circumstances taken into consideration in sentencing differ from case to case and as stated in **Director of Public Prosecutions V De La Rosa, (2010) NSW 194**, “*when considering past sentences, it is only by examination of the whole of*

the circumstances that have given rise to the sentence that ‘unifying principles’ may be discerned.” Consistency in sentencing is achieved not by numerical equivalence but rather in the application of the relevant legal principles as stated in the case of **Hili V The Queen, (2010) HCA 242**. This Court stated in the case of **J. A. Suki V The Republic Cr. App SCA 10/2019** “*...that consistency of sentences does not mean arithmetic exactness. It cannot therefore be argued that a particular sentence is necessarily wrong merely because it is disparate from previous sentences.*” I am of the view that the learned Sentencing Judge in sentencing the Appellant had regard to the general objectives of transparency and proportionality in sentencing. None of the well-known and often cited grounds for interfering and varying a sentence passed by the Trial Court by an appellate court exist in this case. I therefore dismiss grounds 1(i) & (iv) of appeal.

10. In relation to ground 2 of appeal, Counsel for the Appellant did not offer any submissions nor produced any authorities to show that the sentence is outside the sentencing range for similar offences. According to section 35(3) of the Misuse of Drugs Act 2006, to offer a gift to a police officer in order to prevent or obstruct the investigation into any offence under the Act has to be treated by the Court as aggravating the nature of the offence of which the appellant stands charged. I am of the view that heavy penalties should be imposed in relation to offences under section 35(2) of the Misuse of Drugs Act 2006.
11. I am of the view that the learned Sentencing Judge had been lenient in the sentences imposed on the Appellant. I therefore have no hesitation in dismissing the appeal.
12. The learned Counsel for the Appellant had come up with two imaginative arguments before the Trial Court which had been dismissed by the learned Trial Judge, and which Appellant’s Counsel said he did not want to pursue before us, when questioned by this Court. I thought it best to comment on them so that the position of this Court is made known in respect of those two arguments.
13. The learned counsel for the Appellant had argued that an offence under section 9(1), namely possession of a controlled drug with intent to traffic, of which the Appellant has been charged is an offence lesser than the offence of trafficking itself under section 7 of the Misuse of Drugs Act 2016. This argument is contrary to the wording of the law at section 9(1) which states that: “*A person who possesses a controlled drug, whether lawfully or not, with intent to traffic in contravention of this Act commits an offence of trafficking and is liable on conviction to the penalty specified for an offence under section 7(1).*” The Second

Schedule of the Misuse of Drugs Act 2016 prescribes the same penalties for offences of possession with intent to traffic [section 9(1)]; for organization, management and financing of drug trafficking, for purposes of importation and exportation, manufacture and cultivation [section (10)]; as that prescribed for the offences of trafficking under section 7 (1) & (2). I do not think that there is any difference between a person caught in the act of trafficking as per its definition in the Misuse of Drugs Act 2016 and one in possession of a controlled drug with intent to traffic. Both have the same mens rea, save the physical act of trafficking as specified in the definition of the Misuse of Drugs Act 2016, has not taken place. In the instant case the Appellant as per the admitted facts was holding the drug that had been given to him, not for his own consumption but for safe keeping, and undoubtedly for delivering it later (an act of trafficking as defined in the law).

14. Counsel for the Appellant had also come up with a novel argument before the Trial Court that ‘ecstasy’ is not a dangerous drug, as cannabis or cannabis resin, on the basis that there is no mention of ‘ecstasy’ methylenedioxymethamphetamine (MDMA) in section 19 of the Misuse of Drugs Act 2016, which creates a rebuttable presumption of trafficking, against a person who is proved or presumed to have had in his possession or custody or under his or her control certain quantities specified therein above a certain amount. It had been his submission that only cannabis or cannabis resin is mentioned out of the Class B drugs therein and thus the presumption of intent to traffic does not apply in the case of methylenedioxymethamphetamine (MDMA). In making this submission he had admitted that his argument is not based on the law as it presently exists and had called for an amendment of the law. Even if there is any merit in the submission of a counsel, a court can only act in accordance with the law as it exists and not venture to make decisions as to what the law ought to be, when there is no ambiguity in the law, save where there is a contravention of the Constitution. Counsel for the Appellant has overlooked the provisions in section 19(2) of the Act which states: “*When the presumption in subsection (1) is not engaged, it shall be a question of fact whether a person possessed any controlled drug with intent to traffic.*” It is clear from the admitted facts that the Appellant had possession of the drugs not for his personal consumption, but with intent to traffic. There are 18 Class B drugs mentioned in the First Schedule, Part II of Controlled Drugs in the Misuse of Drugs Act 2016. Among the 106 Class A drugs mentioned in the First Schedule, Part I of Controlled Drugs in the Misuse of Drugs Act 2016, mention is made only to opium, morphine, heroin and cocaine in section 19. In my view the reference only to cannabis or cannabis resin in section 19 does not make the other controlled drugs referred to in Class B, less dangerous. In my view the reference to opium, morphine, heroin, cocaine and cannabis or cannabis resin in section 19, is

because they are the ones more commonly in use and certainly not because the said drugs are more dangerous than the others referred to in Class B. The fact that all Class B drugs referred to in in the First Schedule, Part II of Controlled Drugs in the Misuse of Drugs Act 2016 are treated the same way is clear from a reading of the provisions of the said Act and from the penalties prescribed for offences in the Second Schedule for class B drugs, which makes no distinction amongst the penalties prescribed for the 18 Class B drugs mentioned in the First Schedule, Part II.

A. Fernando, President

I concur: _____
Dr. M Twomey-Woods JA

I concur: _____
F. Robinson JA

Signed, dated and delivered at Ile du Port on 19 August 2022.