

IN THE SEYCHELLES COURT OF APPEAL

Roy Beeharry

APPELLANT

v.

REPUBLIC

RESPONDENT

CR SCA 28/2009

[Before: MacGregor, PCA, Twomey, Karunakaran JJA]

Mr. P. Pardiwalla, Senior Counsel for Appellant

Mr. J. Chinasammy, Principal State Counsel for Respondent

Date of hearing: 3rd April 2012

Date of Judgment: 13th April 2012

Judgment

Twomey JA

1. The Appellant was charged in the Supreme Court with the offence of trafficking in a controlled drug contrary to section 5 as read with sections 14(c) and 26(1)(a) of the Misuse of Drugs Act (Cap133). The particulars of the offence were stated as follows:

“Roy Beeharry on the 25th of March 2008 at La Louise, Mahé was found in possession of a controlled drug namely 201.6 grams of cannabis resin which gives rise to a rebuttable presumption of having possessed the said controlled drug for the purpose of trafficking.”

Background and Facts

2. As some of the facts of this case are in some respects seriously contested we find it important to set out the background and those facts that are uncontested. It is accepted that the Appellant, Roy Beeharry has been the subject of previous police operations which culminated initially in 2002 in criminal charges being brought against

him for the trafficking of controlled drugs. That case was dropped after allegations of “drug planting” by the police force were made by Mr. Beeharry. On 24th March 2008 a search was conducted at the Appellant’s home at La Louise. Nothing illegal was found during that search. However, less than 24 hours later on the 25th March 2008, a second search was carried again out at his home which this time yielded a drug find. As a consequence of this search and seizure the Appellant was charged on 28th March 2008 with trafficking in a controlled drug. On the 5th May 2008 that charge was withdrawn. On the 20th May 2008 an affidavit was sworn by police Officer Samuel Camille supporting the bringing of fresh charges against the accused for the same offence on the basis that “new evidence comes into the possession of the Police after the release of the accused person”(sic, Attachment C1 of Court Record).

3. At trial the following facts were adduced in evidence: On the 25th March 2008 a group of 10 police officers from the ADAMS Unit, SSU and the CID proceeded to the Appellant’s home at La Louise to execute a search. Some of these officers were the same ones who had taken part in the previous day’s search. As the Appellant’s home was a split level building, a group of officers entered the top floor through a door whilst another group entered the ground floor through another door. The Appellant was eating lunch at the time and the search downstairs proceeded in his presence. The search upstairs was conducted with the assistance of his son, who was the only other occupant of the house at the time. The search upstairs began in the son’s bedroom and then proceeded to the bedroom of the Appellant and his wife. A large block of cannabis resin was discovered wrapped in cling film and newspaper in a wardrobe in the room. The Appellant and his son were transported to the police station and charged.
4. The Appellant pleaded not guilty to the charge but was convicted after trial and was sentenced to eight and a half years imprisonment. He appealed against this conviction and sentence and lodged 15 grounds of Appeal.

Grounds of Appeal

5. A formidable list of 15 grounds was put up as follows:

1. The Learned Judge erred in law and fact, when he completely ignored the grave inconsistencies and contradictions of the prosecution witnesses, thereby arriving at a wrong conclusion
2. The Learned Judge erred in law and fact, when he indulged his mind in speculation and conjecture, in respect of several findings and inferences which he arrived at by the process of defective reasoning
3. The fair hearing of the Appellant's case was compromised when the learned judge did not compel the prosecution witnesses to answer questions and produce evidence that had a natural bearing on the case.
4. The Learned Judge erred in law and fact when he failed to evaluate the evidence of the defence properly and fairly, rather than indulging in speculation
5. The Learned Judge's handling of the case is biased and unfair and the whole exercise carried out by him, in the analysis of the evidence, is an exercise of plugging holes in the prosecution case and providing unjustified excuses, rather than giving cogent reasons for rejecting the evidence of the defence when it contradicted that of the prosecution.
6. The Learned Judge's reliance on an alleged "confession" of the appellant to convict him, and blaming defence counsel for not cross-examining on a "material point" is clearly flawed, selective and biased, as the learned judge completely ignores the whole of the cross-examination by the Defence on that point.
7. The Learned Judge's explanation as to why Deeroy's name was on the exhibit rather than the Appellant's name is clearly flawed and biased and is not supported by the other evidence in the case.
8. The Learned Judge erred in law when he drew an adverse inference on the failure of the defence to call a certain witness.
9. The Learned Judge erred in law and fact, in concluding that the Appellant was in possession of the drugs as there was no evidence to show guilt beyond a reasonable doubt linking him to the drugs.
10. The Learned Judge erred in law in amending the charge at the stage of address by the Appellant and arbitrarily concluding that no harm was done to either side.
11. The learned Judge further erred in law is not inviting the Appellant to consider whether he wished to call further witnesses or recall witness in view of his arbitrary amendment.
12. The Learned Judge's finding that "the amendment was

therefore neither fatal to the proceedings nor prejudicial to the Appellant but rather in the interest of justice” is flawed in law and is speculative.

13. There was insufficient evidence to convict the Appellant of the charge and having regard to both the evidence and the reasoning of the trial court; the verdict was one which no reasonable court could have returned.
14. In evaluating the case, the Learned Judge erred in law in that he completely ignored the case for the prosecution as borne out in its cross examination of the Appellant, and had he properly done so, he would have had no option but to acquit the Appellant.
15. The conviction should be set aside as under all the circumstances of the case, it is unsafe and unsatisfactory.

Grounds 10, 11 and 12

6. When the Appeal was heard in November 2010 the Court of Appeal held that the points raised in Grounds 10, 11 and 12 should be resolved “as a threshold exercise” in the Supreme Court before they could proceed to hear the appeal on the other grounds.
7. Those grounds as borne out above related to the fact that the charge under which the Appellant had been convicted was not that under which he had been arraigned and along which the hearing had been conducted up to the stage of final addresses by Counsel. The charge read **section 14 (c)** which refers to heroin and not **section 14 (d)** which refers to cannabis resin. Although this matter was argued before the trial court no ruling had been given by the learned judge yet in his judgment he stated that leave to amend had been granted to the Prosecution. The Court of Appeal rightly found that this was both procedurally incorrect and an error on the face of the record. However, they then remitted the matter back to the Supreme Court for a “ruling on the motion for amendment.”
8. Hence the matter came back before the Supreme Court on 8th July 2011, much to the surprise of the trial judge and indeed to Counsel. In due course despite the fact that all concerned were of the view that the Court was functus officio, in deference to the Court of Appeal ruling, the motion for amendment was argued and the trial judge granted leave to amend.

9. The remaining grounds of appeal is now before this Court but as grounds 10, 11 and 12 have been re-canvassed in view of the consequences of the Court's ruling we need to address them afresh. Mr. Pardiwalla contends that the procedure followed by the Supreme Court in respect of the ruling was incorrect. He argues that the ruling of the Court of Appeal directing the Supreme Court trial judge to "hear the parties in law and on the facts and give a ruling on the motion for amendment in the light of the objection raised," was not followed since the trial judge after giving his ruling did not have the amended charge put to the Appellant again as is provided for in **section 187 of the Criminal Procedure Code**. In his submission once the charge had been amended the Appellant should have been asked to plead afresh and the trial started anew. Mr. Chinnasamy, for his part, contended that this would amount to ordering a new trial and was not at all the intention of the ruling.

10. We are conscious of this Court's anxiety to see justice done in this case but are of the view that when this appeal first came before it, it could have been dealt with in its entirety. Remitting the matter to the Supreme Court for the resolution of these grounds "as a threshold exercise" was unfortunate. The Supreme Court was functus officio as it had heard and disposed of the case. It is a well-established general principle that once a court has pronounced final judgment it has itself no authority to correct, alter or supplement either the judgement or indeed the proceedings on either a procedural or a substantive issue or for that matter at all.

11. **Rule 31 (5) of The Court of Appeal Rule 05, (31) (5)** stipulates:

"In its judgment, the Court may confirm, reverse or vary the decision of the trial court with or without an order as to costs, or may order a retrial or may remit the matter with the opinion of the court thereon to the trial court or may make such other order in the matter as to it may seem just, and may by such order exercise any power which the trial court might have exercised... (our emphasis)

In our view since the Supreme Court had no power to alter proceedings or its judgement, similarly the order of the Court of Appeal could not have been made. It could have ordered a retrial of the case based on Grounds 9, 10 and 11 of the appeal but this it did not do.

12. Alternatively the Court of Appeal could have applied the provisions of **section 344 of the Criminal Procedure Code** in relation to irregular proceedings as was the case in the majority decision of this Court in the case of **Jerry Hoareau (CA 2011 unreported)**. In that case Fernando J stated that

“... the Court cannot, on its own motion, after both the case for the prosecution and the defence have closed amend the charge when writing the judgment.”

He proposed instead that since the defence had not been prejudiced in any way and the error in the charge had not in effect occasioned a failure of justice it was curable, vide **section 344 Criminal Procedure Code**:

“...no finding, sentence or order passed by a court of competent jurisdiction, shall be reversed or altered on appeal... on account (a) of any error, omission or irregularity in the ...charge ...before or during the trial.... Unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice”).

13. We are of the view that indeed this should have been the approach taken by the Court of Appeal when it heard the appeal on grounds 10, 11 and 12. The defence is not prejudiced in any way as the whole defence was conducted on the basis that the charge was in fact under section 14(d) and the error in the charge has not occasioned a failure of justice. Hence, although there is merit in those grounds of appeal, the correct approach is to amend the charge pursuant to **section 344 of the Criminal Procedure Code**. As this matter is now revisited before a reconstituted Court of Appeal we proceed to so order. We do have to add that this is the second time in less than six months that such an error in a misuse of drugs charge has been raised on appeal. It behoves the prosecution to exercise extreme care and diligence in drafting charges.

14. The remaining grounds of appeal are so intertwined that with the agreement of Counsel they are consolidated so that the following issues remain to be considered:

1. Whether the inconsistencies in the Prosecution witnesses' evidence amount to a reasonable doubt in the prosecution case.
2. Whether the Appellant was denied a fair hearing.
3. Whether as a whole the evidence led by the prosecution against the Appellant amounted to proof beyond reasonable doubt.

Inconsistencies in evidence and their consequences

15. Counsel for the Appellant contends that there are many inconsistencies in the evidence led by the prosecution. The most important issues under scrutiny relate to the following contradictions:
1. The police officers who were witnesses in the case differed in their evidence as to who amongst them were present when the drugs were found in the wardrobe.
 2. They differed in their version of where the wardrobe was situated in the bedroom and also in relation to their field of vision when the wardrobe door was open with respect to where the drugs were located.
 3. They also differed in their version of when and where the drugs found were shown to the Appellant.
 4. They further differed in their version of where the accused was when the drugs were found.
 5. They differed in their version of what the accused said when the drugs were discovered.

The question arises as to the effect of such inconsistencies in evidence. In all criminal cases discrepancies in the evidence of witnesses are bound to occur. The lapse of memory over time coloured by experiences of witnesses may lead to inconsistencies, contradictions or embellishments. The Court however on many occasions is called upon to assess whether such discrepancies affect the very core of the Prosecution case; whether they create a doubt as to the truthfulness of the witnesses and amount to a failure by the prosecution to discharge its legal burden.

16. This Court is disadvantaged in that that it has to weigh these matters with only the record of proceedings before it and cannot observe the witnesses at first hand to gauge their truthfulness. Can it substitute its finding of fact from the record of proceedings for that of the trial court who had the benefit of seeing and hearing the witnesses at first hand? Or can it only substitute its own inferences from the facts as found by the trial court? In **Akbar v R (SCA 1998)** this court stated

“An appellate court does not rehear the case on record. It accepts findings of facts that are supported by the evidence believed by the trial court unless the trial’s judge’s findings of credibility are perverse.”

This is certainly not the case as we do not for one moment view the learned judge's findings as perverse.

17. But that is not the only duty of the appellate court in relation to findings of fact. It also a well-established principle that the appellate court will and should interfere with the findings of fact of a trial court when satisfied that the trial judge has reached a wrong decision about a witness (vide Lord Reid in **Benmax v Austin Motor Company Ltd 1955 1 A.E.R. 326 vide at 327:**

“Where there is no question of credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge Though it ought, of course, to give weight to his opinion.”

What I understand from Lord Reid's statement and what seems to have been the approach consistently adopted by appellate courts, is that whilst they do not generally interfere in the *perceptive* function of the judge, the appellate court is as well off as the trial judge in the exercise of its *evaluative* function.

18. The **Seychelles Court of Appeal Rule 31(3)** enunciates this common law principle clearly in providing that:

“The court may draw inferences of fact...”

This court is therefore at liberty to evaluate the inferences drawn from the facts by the trial judge. Hence whilst the learned judge finds the inconsistencies in the testimony of the prosecution witnesses as outlined above “minor,” his inference that the inconsistency in the Appellant's testimony when he states first that the drug was shown to him by PC Jean and subsequently by PC Dubel, as “serious contradictions” is arguably not an inference based in fact. There is nothing in fact or in law to persuade us that the inconsistencies in the testimonies of police officers are less serious than those of ordinary witnesses. Police officers are not conferred with some kind of immunity to unreliability or to lying. In our view neither sides' testimonial inconsistencies are serious enough to warrant the inferences drawn by the trial judge.

The constitutional right to a fair hearing.

19. The right to a fair trial is enshrined in our Constitution in **Article 19(1):**

(1) “Every person charged with an offence has the right, unless the charge is withdrawn, to a fair hearing within reasonable time by an independent and impartial court established by law.”

(2) “Every person who is charged with an offence-

(a) is innocent until the person is proved or has pleaded guilty.”

20. Counsel for the Appellant contends that this right has been breached in two aspects, firstly with respect to the fact that the court was not impartial and secondly in relation with the court’s assessment of the burden of proof in this case.

19. In interpreting **Article 19(1) of the Constitution**, the Court of Appeal in **Bacco v R (SCA 5/2005)** stated that the Court had a duty to protect the rule of law and constitutional freedoms and that such a duty falls more heavily on this Court than any other Court. It went on to quote Lord Birmingham in **Ashley King, CA [2002] 2 Cr. App. R. 391 at 406**: [that this Court]

“is concerned not with innocence but with the safety of the conviction.”

We share that view and we reiterate that whether a constitutional case alleging breaches of these rights is brought or not, it is incumbent on the Court to safeguard at all times the constitutional rights of accused persons charged with criminal offences.

20. In the present case the Appellant contends that the Court was not impartial. In support of this contention he relies on certain passages from the judgment where the judge substitutes his beliefs for evidence adduced namely:

“Why would the accused deny being taken to his bedroom? Was he already aware of what was being kept in the wardrobe? The short answer is yes...”

“What I believe happened is that the accused was caught off-guard not expecting the police officers to return to his residence so soon...”

“The set up version of the story, though adopted a bit early in the transaction was riddled with inconsistencies and falsehoods as pointed out earlier on and it is entirely rejected as fabrication.”

21. While these are certainly speculative statements by the learned judge we do not find that they amount to bias on his part. In our view these speculations are rather suggestive of what *he* appreciated to be

reasonable inferences to be drawn from the evidence that had been adduced. However, whether they can objectively be taken as reasonable, inferences is a different matter. We do not find that they were the only irresistible and logical inferences that could be drawn from the facts for the following reasons:

1. The police witnesses accepted that they had been inside the Appellant's home on more than two previous occasions and that in fact some of the same officers took part in searches conducted at the Appellant's home on two consecutive days.
2. The police witnesses accepted that on two previous occasions the Appellant had been charged with trafficking and both times the charges were withdrawn, on one occasion demonstrably because of allegations of "planting."

In our view it was even more incumbent on the trial judge, on this third attempt to try the accused to take every precaution to see that his fair trial rights were protected. We do not think that such protection was adequately afforded to the Appellant.

22. The Appellant also contends that the reliance on an alleged admission by the Appellant is also in breach of his fair trial rights, is flawed and selective. This admission concerns an alleged statement by the accused to the effect that everything in the room belonged to him. The learned judge finds that since PC Dubel was not cross-examined on this matter this implies an admission of fact. He relies on **Cross on Evidence** and quotes the **7th Edition at p.303**

"Any matter upon which it is proposed to contradict the evidence-in-chief given by the witness must normally be put to him so that he may have an opportunity of explaining the contradiction, and failure to do this may be held to imply acceptance of the evidence-in chief."

This passage continues as follows in the **11th Edition at p.337**:

"...but it is not an inflexible rule..."

A similar passage from **Adrian Keane, "The Modern law of Evidence 7th Edition at P.206** is even more instructive

"In other cases as acknowledged in *Browne v Dunn*, the story by a witness may be so incredible that the matter upon which he is

to be impeached is manifest, and in such circumstances it is unnecessary to waste time in putting questions to him upon it...”

23. In our opinion it is crucial to analyse the provenance of this alleged statement by the accused. In scrutinising all the court records we note the following:

1. The affidavit of PC Samuel Camille sworn on 26th March states among other things that “...Sergeant Octobre showed both Roy and Deeroy Beeharry the dark substance he had found in the wardrobe. They were both cautioned, informed of their constitutional rights and informed of the offence committed. Roy Beeharry elected to remain silent whereas Deeroy Beeharry pointed out the bedroom did not belong to him but belonged to his father, Roy Beeharry...”
2. An undated statement given by Sergeant Octobre states “...I found a folded Nation paper and I opened it and found a piece of black substance wrapped in cling film, which I suspected to be controlled drugs, namely hashish. I asked Deeroy “Whose is it” and he stated “Sa ki zot in war mon pa konen pou ki, akoz sa i lasanm mon manman ek mon papa (what you have seen I don’t know to whom it belongs as this is my mother’s and father’s room). At a certain moment Roy came to the said bed room and I informed him that something suspected to be drugs was seized in that room. I showed it to him and he stated “Sa i mon lasanm. Deeroy napa nanyen pou dir avek gard, mon a dir tou keksoz mon avoka.”(This is my room. Deeroy has nothing to say to the police, I will tell my lawyer everything).
3. The case against the accused was withdrawn on 12th May 2008.
4. On the 20th May 2008 Police Officer Samuel Camille swore another affidavit in which he stated that “...This fresh charge is brought by the Republic upon new evidence comes into the possession of the Police after the release of the accused person” (sic).
5. This new evidence was never adduced although Counsel for the Appellant stated that it consisted of an undated statement by PC Dubel.
6. At the trial however during the examination-in-chief of Sgt Octobre the following exchange takes place:

Q. So who is this Roy?

A. Roy Beeharry.

Q. The accused?

A. Yes. I then showed him what I had found in his house...

Q. Continue officer.

A. I showed him what I had found in his house. He said to Deeroy you have nothing to say to the police whatever we have to say I will say to my lawyer...

Q. What else happened?

A. I informed him that we were going to arrest him and I informed him of his constitutional rights and he told me that this was a set-up.

Q. At that time was he speaking?

A. It was when I was talking to him that he said that this was a set-up.

Q. No what I am saying is, was this the only thing he said?

Mr. Pardiwalla: The officer has said it already is he pushing the officer to say something more.

Mr. Govinden: No my Lord.

Mr. Pardiwalla: Well it looks like it.

Mr. Govinden continues.

Q. Who were the other police officers present?

A. Lance Corporal Dubel and Constable Jean.

Q. And did he speak to you or was he speaking in general.

A. When he spoke all the police officers heard him. I also heard him say "everything that you see in this house belongs to me."

Mr. Pardiwalla: I want the Court to take special note that what this officer said just now is after prompting from the prosecution as to did he say anything else. I just want the court to highlight that, bear it in mind for the future.

Mr. Govinden: My Lord I would not call this as prompting I would call this as another question during the course of examination in chief."

7. In cross examination by Mr. Pardiwalla the following exchange takes place:

Q. ...When did you actually give this statement?

A. Just after the incident.

Q. Only a few days after I think.

A. But I do not recall when it was but just after.

Q. And of course at that time when you gave the statement

things were very fresh in your memory, is that not so.

A. Yes.

...

Q. Tell me show me where in this statement that you say Roy said all that is in this house is mine, show where it is.

A. I did not write it in my statement but I recall the words which Roy said on that day.

...

Q. Why did you not put it in there?

A. I forgot, but I recall what he said.”

8. In the examination-in-chief of Police Officer Dubel a similar exchange takes place between Mr. Govinden and the witness:

Q. What happened after that?

A. Sergeant Octobre asked Deroy about the contents of the newspaper. Deroy told them that he did not know because this is his parent's room. At the same time I heard people coming up the stairs. While Sergeant Octobre was talking to Deroy, Mr. Roy Beeharry arrived along with some other officers who had been downstairs. When he came in he saw Deroy and Sergeant Octobre and he said to “Deroy that he has nothing to say and that whatever he has to say he say it (sic) in the presence of his lawyer. Sergeant Octobre then showed M. Beeharry the substance that was found and told him that the substance was found in his wardrobe and it was then that that the arrestation began. It was then that that Sergeant took both Roy and Deroy down.

Q. Now tell us again Officer Dubel what the accused told Deroy.

Mr. Pardiwalla: Objection, the officer has already said what was told I can see where my friend is leading and this is the most important point in this case, my learned friend with respect, is trying to coax the witness into saying something which fact is a contention of the defence was never said..

Mr. Govinden continues.

Q. Yes Mr. Dubel

A. When he came in he told Deroy that he has nothing to say.

What is in this room falls under my responsibility, whatever you have to say you will say it in the presence of my lawyer."

23. It is patently obvious that the Appellant impugns not only the credibility of both PC Dubel and PC Octobre in their assertions that the admission was made by him but also raises the possibility that this statement was fabricated in order to recharge the accused. We cannot close our eyes to the previous inconsistent statement by Police Officer Octobre nor to the possibility that this account of what the accused said could have been fabricated after the charge against him was withdrawn. We cannot therefore come to the same conclusion as the learned judge to find that this is an acceptance by the Appellant of the fact that he made the admission to the police. Further, the trial judge does not direct his attention to the fact that the alleged admission was by both accounts of the police officers made without the Appellant being cautioned. As this was the case he should have warned himself of the risk of relying on such evidence. This he did not do.

The presumption of innocence

24. The second limb of **article 19 of the Constitution** is in respect of the presumption of innocence:

“Every person who is charged with an offence is innocent until the person is proved or has pleaded guilty.”

The Appellant argues that the prosecution did not discharge this burden of proof and that it was shifted onto him.

25. It is not disputed that the prosecution had the legal burden of proving all the elements of the offence in relation to the offence of drug trafficking. What however is at issue is the evidential burden placed on the accused when he raises a defence, in this case, that he had no knowledge of the drugs as these were planted and the legal burden if any that ensues for the prosecution. Mr. Pardiwalla contends that once he has raised the defence he does not have to do anything else.
26. Mr. Chinnasamy while agreeing that at all times the prosecution has the legal burden to prove all the ingredients of the offence

argues that it is up to the defence who alleges the planting to prove it. He also contends that the Misuse of Drugs Act imposes a reverse burden on the accused. In respect of this case it is our view that the reversal of the burden of proof is limited to the presumption of trafficking arising from the fact that the drugs found in the accused house exceeded 25g of cannabis resin. In any case if such a legal burden had been imposed on the accused by statute it would be a breach of his constitutional rights. The recent cases of **Lambert [2002] 2 A.C. 545**, **Johnstone [2003] 1 W.L.R. 1736** and **Sheldrake [2005] 1 A.C. 264** decided in relation to English legislation incompatible with Article 6 of the Human Rights Convention (which contains a near identical provision to our article 19) point to the now accepted view that although legislation may impose a burden of proof on the accused where there is incompatibility with article 6 of the Convention, (in our case, article 19 of the Constitution) the proper balance would be achieved by reading down the provisions as imposing an evidential burden only. Hence, to succeed in a defence of “planting” the accused must adduce some evidence that the drugs were planted but he does not have the duty of proving it. We find that he did. The prosecution must prove that the accused’s assertion of the “planting” is ill-founded, and prove it beyond reasonable doubt. A court cannot magnify the weakness of an accused defence and overlook the failure of the prosecution to discharge its onus of proof. We are not of the view that the prosecution discharged its legal and persuasive burden in this case.

27. We are well aware of the catastrophic and calamitous situation in relation to drugs and drug trafficking in Seychelles. Contrary to an often held view we also live in the real world. In this tiny community we are all related or connected to victims and perpetrators of this crime in some way. We know too well the pressures on the police, the prosecution and the courts to secure convictions and put away drug traffickers. It is certainly tempting to bow to public opinion but we must do our work according to our judicial and constitutional oaths and only consider the evidence before us. As Lord Sankey said nearly one hundred years ago:

“It is not admissible to do a great right by doing a little wrong. The inequalities of life are so dangerous in a state whose subjects know that in a court of law at any rate they are sure to

get justice by obtaining a proper result by irregular or improper means.” **(Hobbs v Tinling and Co.[1929] 2 KB 1 at 53).**

28. For these reasons we resist the temptation and allow this appeal.

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M. Twomey
Justice, Court of Appeal

I concur:

.....

F. MacGregor
President, Court of Appeal

Delivered, at Victoria, Mahé Seychelles, this thirteen day of April 2012.

IN THE COURT OF APPEAL OF SEYCHELLES

Roy Beeharry

Appellant

Versus

The Republic

Respondent

CR SCA No: 28 of 2009

Before: F. MacGregor (presiding), M. Twomey, D. Karunakaran, JJA

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Counsel: Mr. P. Pardiwalla for the Appellant

Mr. J. Chinnasamy for the Respondent

Date of Hearing: 3rd April 2012

Date of Judgment: 13th April 2012

D. Karunakaran, JA

JUDGMENT

I will humbly begin by saying, that being apex in the judicial hierarchy, we, the Court of Appeal, are final. We are final, not because we are infallible. We are infallible, because we are final. The privilege of

finality accorded to our decisions, is a barometer of the trust and confidence, which the people of Seychelles have placed on us as Justices of Appeal hoping that we would meet their expectations in the administration of justice. Needless to say, they have conferred that privilege on us with an implied condition that we would secure the freedoms, rights and liberties of all the people of Seychelles; not only of those who appear before us as appellants or respondents seeking remedies for their individual grievances. Justice is an indivisible word and rooted in public confidence. If we want to enjoy it and fight for it, we must be prepared to extend it equally to everyone, whether he or she be a prisoner or a law abiding citizen going about his daily business. In deciding cases, obviously, judges should look at the bigger picture and face reality. We cannot isolate ourselves from the fabric of contemporary society and live in a legal utopia, cut off from the rest of the world. We cannot and should not lock ourselves in our ivory tower and turn a blind eye to emergence of certain crimes that threaten social morality and the very existence of our society. After all, a judge is but an agent of society who enforces the social will that manifests itself in the law. Yet, he remains very much a part of the society he serves as he sits on the judgment-seat and passes judgment on his fellow citizens. However, the sensitivities of the community are largely invisible, voiceless and unrepresented in our Court rooms, while vociferous lawyers argue their cases to protect the interests of their clients only. In striking a fine balance between the interests of the individual on the one hand, and the larger interest of the community on the other, one should never miss the forest for the trees. The interest of the majority, the law abiding citizens in this country, is in no way inferior to that of an individual. The rights and freedoms found on the glossy pages of the Constitution and the statute books, are guaranteed not only to the small minority, who have the opportunity to appear before us as litigants, but is guaranteed to every citizen, whether he be seen outside or inside the clutches of the law.

A court of law, be it appellate or trial, should steer the law towards the administration of justice, rather than the administration of the letter of the law. In that process, its primary function amongst others, is to adjudicate and give finality to the litigation. However, in my view, such finality cannot and should not be given mechanically by the Court for the sake of a technical conclusion to the case, disregarding the sensitivities of the community, to which we, as judges are accountable. In each adjudication, the Court ought to ensure that all disputes including the latent ones pertaining to the cause or matter under adjudication, are as far as possible completely and effectively brought to a logical conclusion once and for all. The good sense of the Court, I believe, should always foresee the long term ramifications of its determination, and adjudicate the cause so as to prevent or control the contingent delays that could possibly proliferate in future, due to the multiplicity of litigations on the same cause or matter. It is trite to say, prevention of potential delays, through judicial foreseeability, is always better than the cure. Therefore, our Courts in Seychelles – as would any other Court of such foreseeability and sense - should adjudicate the disputes accordingly and prevent the chronic delays that have cancerously afflicted our justice delivery system. After all, the law is simply a means to an end; that is, justice. If the means in a particular case fails to yield the desired result due to procrastination – as it has happened in the instant case because of repeated appeals, remittals and retrials over a period of four years – we have to rethink, reinvent, reinterpret and sharpen those means of procedural and substantive laws, the tools of our trade, in order to eradicate judicial delay, or as Lord Lane once called it, the Enemy of Justice. Hence, the Courts should never hesitate, where circumstances so dictate, to adopt measures that are just and expedient to prevent the procrastination and the resultant frustration in the due administration of justice. Now then, I would simply ask: Which is to be preferred? The **“means”** or the **“end”**? Please, forgive my *obiter* herein. When a Court, short-sighted by the letter of the law, at times, prefers the **“means”** over the **“ends”**, I too, at times, deem it necessary to ventilate what I feel. Having said that, I will now turn to the facts of the case on hand.

The appellant, Roy Beeharry, has appealed to this Court against the decision of the learned Judge D Gaswaga dated 3rd of November 2009 whereby the appellant was convicted on one count of trafficking in a controlled drug, contrary to Section 5 as read with Section 14(c) and 26(1) (a) of the Misuse of Drugs Act (Cap 133) and punishable under Section 29 of the Second Schedule of the said Act, and sentenced to imprisonment for 8½ years. The appellant urges this Court to allow the appeal, quash the conviction and set aside the said sentence on the following grounds of appeal:

- (1) The learned judge erred in law and fact, when he completely ignored the grave inconsistencies and contradictions of the prosecution witnesses, thereby arriving at a wrong conclusion.**
- (2) The learned judge erred in law and fact, when he indulged his mind in speculation and conjecture, in respect of several findings and inferences which he arrived at by a process of defective reasoning.**
- (3) The fair hearing of the Appellant's case was compromised when the learned judge did not compel prosecution witnesses to answer questions and produce evidence that had a natural bearing in the case.**
- (4) The learned judge erred in law and in fact when he failed to evaluate the evidence of the defense properly and fairly, rather than indulging in speculation.**
- (5) The learned judge's handling of the case is biased and unfair and the whole exercise carried out by him, in the analysis of the evidence, is an exercise of plugging holes in the prosecution case and providing unjustified excuses, rather**

than giving cogent reasons for rejecting the evidence of the defense where it contradicted that of the prosecution.

- (6) The learned judge's reliance on an alleged "confession" of the Appellant to convict him, and blaming defense counsel for not cross-examining on a "material point" is clearly flawed, selective and biased, as the learned judge completely ignores the whole of the cross-examination by the Defense on that point.
- (7) The learned judge's explanation as to why Deeroy's name was on the Exhibit rather than the Appellant's name is clearly flawed and biased and is not supported by the other evidence in the case.
- (8) The learned judge erred in law when he drew an adverse inference on the failure of the defense to call a certain witness.
- (9) The learned judge erred in law and fact, in concluding that the Appellant was in possession of the "drugs", as there was no evidence to show guilt beyond a reasonable doubt linking him to the "drugs".
- (10) The learned judge erred in law in amending the charge at the stage of address by the Appellant and arbitrarily concluding that no harm was done to either side.
- (11) The learned judge further erred in law in not inviting the Appellant to consider whether he wished to call further witnesses or recall witnesses in view of his arbitrary amendment.
- (12) The learned judge's finding that "the amendment was therefore neither fatal to the proceedings nor prejudicial to the accused but rather in the interest of justice" is flawed in law and speculative.
- (13) There was insufficient evidence to convict the Appellant of the charge and having regard to both the evidence and the

reasoning of the trial court, the verdict was one which no reasonable court could have returned.

(14) In evaluating the case, the learned judge errs in law in that he completely ignores the case for the prosecution as borne out in its cross-examination of the Appellant, and had he properly done so, he would have had no option but to acquit the Appellant.

(15) The conviction should be set aside as under all the circumstances of the case, it is unsafe and unsatisfactory.

Be that as it may. I have had the advantage of perusing the majority-judgment (in draft) of the Honourable Justice MacGregor (Presiding) and Honourable Justice Twomey delivered in this appeal. For the sake of brevity, I adopt herein the background facts of the case, the written submissions and the authorities cited by counsel as found in their judgment and the relevant excerpts as found on record, which may be read *mutatis mutandis*, as part of this judgment hereof.

To my mind, although the appellant has torrentially rained 15 grounds of appeal challenging the decision of the trial Court, many of them are in pith and substance, repetitive, overlapping and abundantly redundant. Some share a common ground and give rise to almost the same, or to say the least, identical issues. In passing, with due respect to counsel, the grounds of appeal could have been fewer, and better phrased with more clarity and identity. Having carefully analysed the nature and substance of all the 15 grounds individually and in combination, in my considered view, they all can broadly be categorised into 6 grounds. They are:

- (i) The Learned Judge wrongly evaluated and analysed the prosecution evidence. He relied and acted upon evidence, which was inconsistent, contradictory, weak and unreliable, to convict the appellant, on which no other reasonable tribunal would rely and act. Vide grounds 1, 4, 6, 7, 9, 13 and 14.**
- (ii) The Learned Judge drew adverse inferences on the failure of the defence, to cross-examine the prosecution witnesses, and to call certain witnesses for the defence. Vide grounds 2 and 8.**
- (iii) The Learned Judge acted on speculations, conjectures and surmises to convict the appellant, and not on evidence. Vide grounds 2, 4, 8 and 12.**
- (iv) The Learned Judge erred in the procedural law, in that he failed to invite the defence to adduce further evidence after granting an amendment to the charge. Vide grounds 11 and 12.**
- (v) The Learned Judge was biased and prejudiced against the appellant and favoured the prosecution throughout the trial by plugging the holes in the prosecution case. No fair trial was granted to the appellant. Vide grounds 3, 5, 6, 7 and 14.**
- (vi) The Prosecution failed to discharge its evidential burden to prove the case beyond a reasonable doubt, as the charge against the appellant for the same offence was withdrawn in a previous case on 5th May, 2008 for lack of evidence but was subsequently re-charged based on fresh evidence vide the statement of PC Dubel. This creates a doubt that the drugs could have been planted to foist the charge against the appellant in the present case.**

Ground (i) Inconsistencies, Contradictions, etc in the prosecution evidence

This ground relates to the quality of evidence adduced by the prosecution. I carefully perused the evidence of the prosecution-witnesses. To my mind, there are no grave or material inconsistencies or contradictions

in the testimony of the prosecution witnesses, as alleged by the appellant. It is truism that there are inconsistencies on trivial details in the testimony of the witnesses for the prosecution. But, they are immaterial, irrelevant and not fatal to the case of the prosecution. In fact, they do not relate to the material facts that were necessary to constitute the offence or relevant to any of the elements of the charge. I would like to repeat what the Supreme Court had to state in this respect, in the case of **Republic vs. Marie-Celine Quatre [2006]** which runs thus:

“.... [I]t is pertinent to note that human memory is not infallible. All tend to forget things sometimes; some, all the time; others, from time to time. It is normal. Witnesses are not exceptions or superhuman. The ability of individuals differs in the degree of observation, retention and recollection of events. Who is the more credible - the witness who recalls in tremendous detail every bit of what went on when he was involved in or observed some incident, or the one who says honestly that he cannot exactly remember every minute detail? I am not here referring to dishonest witnesses who so often seem to suffer from selective amnesia for reasons best known to them. Of course, a liar ought to have a good memory to keep his lie alive! Obviously, it is a task set before the Court to try and distinguish a genuinely forgetful witness from the one who chooses not to remember.”

Hence, forgetful witnesses though at times give seemingly different or discrepant or inconsistent or even contradictory descriptions on minute details based on their observations of the same incident, they need not necessarily be dishonest all the time, in all cases. Having said that, in the case on hand, I do not find any grave discrepancy or contradiction or inconsistency in the evidence of PC Jean, PC Octobre, PC Dubel and S. Camille on any material fact or particular that *constitutes* the offence alleged against the appellant. The discrepancies on trivial details are not uncommon; they are bound to occur as the ability of individuals differ in the degree of observation, retention and recollection of events.

In these circumstances and in my view, the learned judge did not err in law or fact, when evaluating, analysing, relying and acting upon the evidence on record. I therefore, reject this ground of appeal.

Ground (ii) Adverse Inferences from non-cross-examination, etc.

Upon a careful perusal of the record it is evident that PC Raymond Dubel testified in the examination-in-chief, that when the appellant arrived in the bedroom and was asked about the drug recovered, he stated that he was responsible for all that was in his bedroom and told his son not to say anything unless in the presence of a lawyer. It is true that PC Dubel was not cross-examined by the defence on this very crucial matter. The Learned Judge has rightly identified and referred to the defence's failure in this respect as any reasonable tribunal would, in the given circumstances of the case. In his judgment, at page 471 of the record, he has quoted the relevant excerpts from "Cross on Evidence", 7th Edition, page 303, which reads thus:

" ... any matter upon which it is proposed to contradict the evidence-in-chief given by the witness must normally be put to him so that he may have an opportunity of explaining the contradiction, and failure to do this may be held to imply acceptance of the evidence-in-chief."

It is therefore wrong to conclude from the above that the learned judge drew adverse inferences against the appellant in this respect. It is true that the appellant has a constitutional right to remain silent. The Court shall not draw any adverse inference from the exercise of his right to silence, either during the course of the investigation or at the trial. Vide Article 19(2)(h) of the Constitution. At the same time, it is pertinent to note that the appellant has also a constitutional right to examine in person, or by a legal practitioner, the witness called by the prosecution. Vide Article 19(2)(e). The appellant, who failed to exercise his right at the appropriate time to cross-examine properly and effectively, a witness, cannot subsequently avoid the consequences that follow such failure.

Indeed, cross-examination of prosecution witnesses in criminal matters, apart from being a search-engine for the truth, serves three purposes: (i) to challenge the evidence in chief insofar as it conflicts with the intended line of defence; (ii) to elicit facts favourable to the defence case which have not emerged, or which were insufficiently emphasised in chief and (iii) to bring into question the credibility of the witness.

The main evidential reason for cross-examining any witness is that a failure to cross-examine may be taken by the court - as the learned judge did in this particular case - as an acceptance of any part of the examination-in-chief which is not challenged: ***R v Bircham [1972 Crim. LR 430]***. This means that the cross-examiner should cross-examine the witness about any matters on which his instructions differ from the evidence-in-chief, and about any parts of his case with which the witness can reasonably be expected to answer. Although facts about that which the witness has not given evidence-in-chief are excluded from this rule, the court may draw an adverse inference from failure to cross-examine about a relevant matter with which the witness could have dealt. This is the common law principle. In passing, it is pertinent to mention that what the appellant stated in excitement, at the time the police entered his bedroom is not at all a confession in the eye of law. In fact, he never confessed his guilt. He was not charged with any offence at the stage of the raid. What he uttered as he was moving away from his bedroom is simply ***res gestae***, as such although it is admissible in evidence, this can in no way be treated or termed as a confession of his guilt. In the circumstances, Judges Rules and Caution are not relevant and shall not apply to the case, as the police were not recording any statement from the accused since the appellant was not even informed of any charge. Obviously, there is a world of difference between ***res gestae utterances*** and ***confessional statements***. Both are governed by different sets of rules for their admissibility in evidence.

It is unfair to deny the witness (PC Dubel) the opportunity to answer challenges to his evidence, where the defence intends to invite the court to disbelieve or disregard the evidence of the witness. Therefore, it is the duty

of a cross-examiner to 'put his case' to the witness, or in other words, to question the witness directly on the points on which his evidence diverges from the cross-examiner's instructions. This means that one must fairly put the substance of his case, not that one must harp on every minute detail. As an attorney, one is trusted to distinguish the essential from the inconsequential.

All advocates are human, and from time to time, you will forget to put something which should be put in cross-examination. When this happens, ask the court to have the witness recalled, if necessary, at the first possible opportunity. Although this can cause delay and inconvenience, it is better than omitting an important aspect of your case. Recall of a witness is within the court's discretion, and although the court may express some disapproval, it will realise that occasional inadvertence is a fact of life and normally allow recall of the witness. Vide ***Kate vs. R 1973 SLR***. Having failed to exercise these options, the appellant cannot now find fault with the judge for having drawn inferences on the failure of the defence to cross-examine the prosecution witnesses and in not calling certain witnesses for the defence. Hence, Ground (ii) also fails.

Ground (iii) Acting on speculations, conjectures and surmises etc

I revisited the record, especially pages 472-473 of the judgment. These pages, according to Mr. Pardiwalla, contain certain expressions of the Judge, which are based on speculations and inferences. To my mind, all those alleged expressions are simply "vituperative epithets" and they are not speculations, conjectures and surmises as portrayed by Mr. Pardiwalla. For instance, the phrase used by the learned judge namely: "Deliberate move by the accused", is being criticized and categorized as a "Speculation" of the Judge. In fact, the learned judge by using this expression conveys to the reader that the appellant had the knowledge as to why he distanced himself from the bedroom at the material time. The learned Judge cannot be faulted

for using that expression, which is his style in order to reveal the defendant's knowledge of the drug's existence and his ulterior intention of propounding his set-up theory. Reasonable and logical inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as it had been actually observed. In other cases, the inference does not go beyond reasonable probability. In the case on hand, all the expressions Mr. Pardiwalla identified as conjecture or speculation, are in my view, again, simply "vituperative epithets" used by the learned judge, or to say the least, they are plain logical inferences that any reasonable tribunal would draw from the evidence on record. The submission made by Mr. Pardiwalla to the contrary, does not appeal to me in the least. Hence, ground (iii) too, is devoid of merit and thus fails.

Ground (iv) – Alleged failure to invite further evidence following amendment to the charge, etc.

Indeed, by its Judgment dated 10th December 2010, the Court of Appeal remitted the matter to the Learned Judge with a specific direction; that he *should "hear the parties in law and on facts and give his ruling on the motion for amendment in the light of the objection raised"* vide page 5 of the said judgment. In fact, the Court of Appeal decided to remit the case to the learned judge only for that limited purpose as it took the view that the points raised under grounds 10, 11 and 12 should be resolved as a threshold exercise before they could proceed, if at all, to determine the rest of the grounds, should that become necessary in light of the determination under grounds 10, 11 and 12 *vide page 1 of the same judgment.*

In pursuance of the said direction, the Learned Judge heard the parties in law and on facts, and accordingly gave his ruling on the motion for amendment on 6th October 2011, whereby the learned Judge allowed the amendment to the charge-sheet to reflect the correct section of the law to read as Section 14(d) instead of 14 (c) of the Misuse of Drugs Act.

In fact, this amendment for an alphabetic correction did not bring in any new charge against the accused. The particulars of the offence in the charge-sheet remained the same. From day one the accused had known what the charge was and what material facts that allegedly constituted the charge levelled against him. In an identical situation involving a similar amendment, the Court of Appeal (A. F. T. Fernando JA), in the case of *Jerry Hoareau Vs The Republic Cr. SCA 13 of 2010*, held thus:

“We are of the view that defence has not been prejudiced in any way in his defence and had also proceeded on the basis that the charge was in fact under Section 14(c) and therefore, error in the charge had not in fact, occasioned a failure of justice and therefore curable under Section 344 of the Criminal Procedure Code”

According to Mr. Pardiwalla, after having allowed the amendment to the charge, the learned judge should have invited the defence to adduce further evidence if any, in view of the said amendment. However, he failed to do that in the instant case; therefore, the conviction is unsafe and defective due to this procedural irregularity.

First of all, I note, the case was remitted by the Court of Appeal to the learned Judge with a specific direction to hear the parties and rule only on a particular issue pertaining to the amendment to the charge. It was not remitted for any fresh trial or for taking fresh evidence. Had the learned judge invited any party to adduce evidence after giving his ruling on the amendment, as canvassed by Mr. Pardiwalla, then obviously, the learned judge would be faulted for acting beyond the mandate given to him by the Court of Appeal on remittal and reopening a case for fresh hearing, in which he had already convicted and sentenced the accused person. Evidently, the Judge is *functus officio* in this respect, *a fortiori* he had no jurisdiction to take further evidence in the case that was pending before the Court of Appeal for the final determination. In any event, the accused was, on the date of ruling, an *autrefois convict* and it would be unconstitutional for the learned judge in terms of Article 19(5) to invite any party to adduce further evidence and entertain a trial again for the same offence against the appellant. *Nemo debet bis puniri pro uni delicto*. No one should be twice put in jeopardy of being convicted and punished for the same offence.

In the circumstances, the approach taken by the learned judge cannot be faulted for any reason whatsoever. Mr. Pardiwalla's submission criticizing the judge for not inviting the defence to adduce further evidence after amendment to the charge in this respect, does not appeal to me in the least. Hence, ground (iv) is also devoid of merit and so rejected.

Ground (v) - Judicial Bias and lack of Fair Trial.

According to the appellant, the learned Judge was biased and prejudiced against the appellant and favoured the prosecution

throughout the trial by plugging the holes in the prosecution case. It is argued that the conviction is unsafe because of the way in which the learned judge had conducted proceedings and that no fair trial was granted to the appellant.

No doubt that justice always requires that the judge should have no bias for or against any party to the litigation whether individuals or groups of any racial, political, religious or cultural or gender based denominations. His judicial mind should be perfectly free to act as the law requires. Bias could also arise from personal interest (pecuniary or otherwise) the Judge may have in the subject matter or acquire from the outcome of his decision.

It is truism that the safety of a conviction does not merely depend upon the strength of the evidence alone which the learned Judge heard. It also depends on the observance of due process by the Judge who presides over and conducts the trial. Although the judge in a criminal trial has the power to control, regulate and conduct the proceedings, it is a power which ought to be exercised impartially with integrity, without fear or favour, affection or ill will, for or against any party; needless to say, in accordance with law, equity and good conscience. This is and should be the judicial norm of the *due process*. A Judge, who exercises that power otherwise, would be faulted for judicial bias. This can be shown by the remarks or comments he makes at or before the trial. It may also manifest in the decisions he makes contrary to fact, reason or law. This can also be shown by some other unfair conduct of the learned Judge in the proceedings. A judge who thus, demonstrates bias for or against a party to the litigation, in a hearing over which he presides, not only deprives the party of the right to a fair hearing but also fails in his duty to sit as an umpire and supervise fairly the course of the trial.

If the appellant could establish an obvious judicial bias on the part of the judge in this matter, elucidating from the entire circumstances of the case, that would definitely constitute a valid ground for reversal of the conviction on appeal as argued by Mr. Pardiwalla. However, Judges are usually careful to display apparent fairness in their comments, during trial. A Judge may have a predisposition or a preconceived idea or opinion that could prevent him from impartially evaluating facts that have been presented for determination. However, human ideas or opinions are abstract and nonfigurative entities, trickily elusive, deeply subtle and hard to pin down. Hence, it is not easy to define, identify and prove a judicial bias. Having said that, in the light of all the above, I considered the submission by counsel on both sides on this issue. Now, the question arises. What is the test the court should apply to find out a judicial bias if any, in the instant case?

The test is simple and straightforward. After meticulously examining the entire record of proceedings in the case on hand, one should ask whether a fair minded and informed neutral observer would conclude in all the circumstances of the case that there was a real possibility that the judge had been biased against the defendant see, *R v Malcolm* [2011] All ER (D) 4 (Sept) - *R v Grafton* [1992] 4 All ER 609 considered; *R v Cordingley* [2007] All ER (D) 131 (Sep) considered; *R v Cole* [2008] All ER (D) 181 (Dec) considered; *Michel v R* [2009] All ER (D) 142 (Nov) considered.

I gave careful thought to all the circumstances surrounding the nature including the background facts of the case, as demonstrated by Mr. Pardiwalla soliciting this Court to infer and impute judicial bias

against the learned judge. To establish a Judicial bias in the instant case, the appellant should substantiate the allegations of partiality or its strong likelihood on the part of the learned judge by taking into account the entire circumstances of the case. In fact, all judicial acts are presumed to have been done rightly and regularly as the Latin maxim goes: *Omnia praesumuntur solemniter esse acta*. This presumption cannot be rebutted by mere conjecture and surmises or on guesswork as propounded by the appellant in this matter. When I look at the entire proceedings through the eye of a fair-minded and informed neutral observer, I conclude in all the circumstances of the case that there has been no possibility that the judge had been biased against the defendant. I do not find any scintilla of judicial bias or prejudice on the part of the learned Judge against the appellant before, at or after the trial. There is no justification for the appellant to make such serious accusations against the judge, such as he favoured the prosecution throughout the trial by plugging the holes in the prosecution case. No such serious accusations can be made against judges simply on suspicion without substance. It is not only undesirable but also condemnable. And one should be cautious with such accusations that could be said to challenge the very integrity of the institution.

I am satisfied that the learned judge heard and weighed the material evidence without any bias or prejudice or even likelihood of bias or prejudice, against the appellant, and granted him a fair trial in this matter. Hence, I do not find any merit in ground (v) as well.

Ground (vi) – Evidential burden and Standard of proof

It is the contention of the appellant that the prosecution failed to discharge its evidential burden to prove the case beyond a reasonable

doubt. The charge against the appellant for the same offence was admittedly, withdrawn in a previous case on 5th May 2008 for lack of evidence but was subsequently re-charged based on fresh evidence vide the statement of PC Dubel. This according to the appellant creates a strong doubt that the drugs could have been planted to foist the charge on the appellant in the present case.

Burden of proof

In criminal cases, it is a fundamental rule of common law that the prosecution bear the burden of proving the guilt of the defendant. In almost all cases, this means proving all essential elements of the offence charged. As Viscount Sankey LC beautifully stated in *Woolmington Vs DPP 1935 AC 462*:

“Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt. ... If, at the end of and on the whole of the case, there is a reasonable doubt ... as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained”

It is important to appreciate that the proper time for the bench to assess whether the prosecution have discharged their burden of proof is at the conclusion of the entire case, which I find the trial Court has properly done. In fact, establishing a prima facie case may not be enough to secure a conviction, because the defence are entitled to argue that the overall burden of proof has not been discharged. The fact that the court may be entitled to find the case proved does not mean that it must do so. Nonetheless, once the prosecution have established a *prima facie* case, as has been done in the present case, the defence run a serious tactical risk in not calling evidence

to rebut it, not because the defendant is called upon to prove his innocence (which would be contrary to the rule in Woolmington's case cited supra) but because the court may exercise its entitlement to accept the uncontroverted prosecution evidence. This is what the learned Judge has done in this matter and rightly so.

Despite the rule set forth above, and although the prosecution must in all cases prove the guilt of the defendant, there is no rule that the defence cannot be required to bear the burden of proof on individual issues such as whether the drugs could have been planted by the police to foist a false case against the defendant, i.e. the appellant in this matter.

This does not require the appellant who stood charged with trafficking in drugs to prove his innocence, but only to show reasons as to how and why it was possible, but not in the least probable that the drugs were planted. And, of course, the appellant need not prove even this unless and until the prosecution establish a prima facie case that the defendant in fact had such drugs with him in his bedroom.

Having considered the whole of the evidence on record, I am of the view that the prosecution has satisfactorily discharged its legal and evidential burden by adducing strong, cogent, corroborative, sufficient and admissible evidence to prove the charge against the appellant, which evidence has not been contradicted by the defence. Nothing more and nothing less is required to be proved by the prosecution to tip the scale in their favour and so I conclude.

Standard of proof

I gave serious thought to the defence contention on this issue of standard of proof. In fact, the standard of proof defines the degree of persuasiveness, which a case must attain before a court may convict a defendant. It is true that in all criminal cases, the law imposes a higher

standard on the prosecution with respect to the issue of guilt. Here the invariable rule is that the prosecution must prove the guilt of the defendant beyond reasonable doubt or to put the same concept in another way, the Court is sure of guilt. These formulations are merely expressions of a high standard required, which has been succinctly defined by **Lord Denning (then J.) in Miller Vs. Minister of Pensions [1947] 2 All. E. R p372&973** thus:

“It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt ... If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence “of course, it is possible but not in the least probable” the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

Having said that, on a careful analysis of the evidence on record first, I find that the prosecution evidence is so strong and no part of it has been discredited or weakened or contradicted by any other evidence on record. I am sure on evidence, that the police officers did not plant the controlled drugs in question on the defendant at any stage before, during or after investigation. Besides, The Honourable Attorney General has unfettered discretion in law to withdraw the charge in a criminal case at any stage of the proceeding but before the closing of the case for prosecution. One cannot find fault with the prosecution for re-charging the same person subsequent to withdrawal of a charge, for the same offence with which he previously stood charged. This is permitted in law, provided he had neither been convicted (autrofois convict) nor acquitted (autrofois acquit) for that offence before. In the circumstances, I find, there is nothing wrong, it is lawful in re-charging the appellant for second time for the same offence. No adverse inference can be drawn from a lawful act of withdrawal of the first charge as that is an extraneous matter and has nothing to do with the present trial or charge. Each case should be determined only on its own evidence and not on matters extraneous to evidence a fortiori on guesswork.

Mere withdrawal of a charge cannot lead to the only inference of set-up theory that it was done to frame the appellant by planting drugs on him. Secondly, I am satisfied that looking at the evidence as a whole, the prosecution has proved the case beyond reasonable doubt covering the essential elements of the offence the defendant stood charged with.

An Appellate Court should not interfere with the judgement of trial court except in the presence of either mis-appreciation of evidence or wrong application of law. Aply as the matter has been argued, I see no reason to question the decision of the learned Judge on conviction and sentence in this matter and I would accordingly, dismiss the appeal in its entirety.

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D. Karunakaran

Justice of Appeal

Dated this 13th Day of April 2012