JUSCA MILLICENT OJWANG

AND

PUBLIC PROSECUTOR

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 22 of 2014)

Before: Mortimer P, Leonard and Burrell JJ A.
11th of November 2014

Mr Hj Mohamad Daud bin Hj Ismail for the Applicant
DPP Hjh Suriana Hj Radin as for Respondent

Leonard, JA.:

On the 26th August 2014 after a trial the appellant was convicted in the High Court on the following charge.

> *That you, Jusca Millicent Ojwang, on the 7th day of March 2012, at the Brunei International Airport, Bandar Seri Begawan, Negara Brunei Darussalam, not being a person authorised by the Misuse of Drugs Act, Chapter 27, or the regulations made thereunder, did import a Class 'A' controlled drug, to wit, 3,019.56 grams of Methylamphetamine contained in a total of 3,956.59 grams of crystalline substances, into Negara Brunei Darussalam, in contravention of section 5 of the Misuse of drugs Act, Chapter 27 and you have thereby committed an offence punishable under section 29 read with the Second Schedule of the said Act.*

The appellant, a Kenyan national, arrived from Dubai at Brunei airport having earlier travelled by air from Addis Ababa to Dubai. She collected a suitcase from the luggage conveyor belt. The case was wrapped in plastic wrap and padlocked. It bore a tag bearing the appellant's name, an address and a telephone number. The case was scanned once. Then the plastic wrap was removed and the key from the appellant's handbag was used to unlock the padlock. The case was scanned again and suspicious images having been detected, customs officers examined it further and found four aluminium laminated plastic packets containing crystalline substances concealed under the lining of the suitcase. Two were in a hidden compartment at the bottom and the other two on the sides. When asked 'Do you know anything about that? The appellant said

'No. I don't know anything about it because it is not my bag. It belongs to my friend in Ethiopia. I borrowed [it] from her since the traditional dress I bought in Ethiopia [did] not fit with [the] luggage that I brought from Kenya'.

Upon analysis, the crystalline substances were found to contain 3,019.56 grams of methylamphetamine. There was evidence that it had a street value of B$2.8 million. The appellant made four written statements to the NCB. Her explanation for her possession of the suitcase was that she had borrowed it from a friend in Addis Ababa, whom she named as Hirut Bekela. The explanation she gave varied somewhat from the original one in that she was now saying that her carry on bag was too heavy and that she had had difficulty because of the regulations concerning the carriage of liquids in hand luggage. When offered the loan of a suitcase she had had 6 cases to choose from and she chose the smallest. She found it a bit heavy and asked her friend about it. The friend said that this was how bags were in Ethiopia and suggested that she wrap the bag because people could put things in it if it was not wrapped.

There was no forensic scientific evidence such as DNA or fingerprints to connect the appellant to the packets found in the suitcase. Her urine sample tested negative for amphetamines, opiates, benzodiazapines and cannabis. The customs and narcotics officers involved in surveillance of the appellant on the arrival and in the investigations relating to the suitcase described her as normal, calm and co-operative. The investigators failed to ascertain whether the appellant's alleged friend existed. We note that all these matters were considered by the trial judges.

During her trial the appellant maintained that she had not known that the packets were in the suitcase, which did not belong to her.

On the evidence before the court, there was a prima facie case that the appellant was in possession of the suitcase containing the packets of the drugs mentioned in the charge and that she knew the nature of the drugs. The effect of section 16 of the Misuse of Drugs Act is that anyone proved to have in his possession or custody or under his control anything containing a controlled drug or the keys of anything containing a controlled drug shall, until the contrary is proved, be presumed to have had such drug in his possession. The next presumption provided under section 16 is that any person who is proved or presumed to have had a controlled drug in his possession shall, until the contrary is proved, be presumed to have known the nature of such drug. The presumption provided for in the section shall not be rebutted by proof that the accused never had physical possession of the controlled drug.

The trial judges were satisfied by the unchallenged evidence of the handling of the exhibits and the analysis that the crystalline substances in the packets contained the drugs in the quantity described in the charge. Their conclusion is not challenged by the appellant.

The appellant was faced with the presumptions which arose by virtue of her admitted possession of the case and the key, namely that she was in possession of the drugs and knew their nature. In order to rebut the presumptions it was incumbent on her to prove the contrary on the balance of probabilities. She gave evidence, repeating the case set out in her statements. The judges trying the case, after taking into account her explanation for possessing the bag and her calm and co-operative demeanour when the packets were

found, had the advantage of seeing and hearing her testify in court. Taking the evidence as a whole, they found that the appellant's story was incredible. Finding her an alert, intelligent and confident witness, a businesswoman with a tertiary education, they found it inconceivable that she would accept such an implausible explanation for the unusual weight of the bag allegedly given by her friend. They also found it incredible that her friend would lend her a suitcase containing a substantial quantity of drugs with a street value of $2.8 million. She had failed to rebut the presumptions. It was common ground that she had imported the suitcase which was found to contain the drugs and that she was in possession of it at the airport. In those circumstances, the judges were satisfied beyond reasonable doubt that the appellant was guilty as charged.

At the hearing of the appeal, the appellant relied on the following ground set out in the perfected grounds of appeal, the original grounds 1 and 2 having been abandoned.

> *"3(i) That Their Lordships have failed to consider the Defence adequately or sufficiently to the prejudice or disadvantage of the Appellant. If a fair and just assessment of the defence was made by their Lordships, the explanation of the Defence if accepted would have rebutted the statutory presumptions of possession and knowledge in the following aspects:*
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> *a) That the prosecution have not established whether Hirrut Bekela is a fictitious person or not.*
> *b) That the demeanor of the Appellant from the arrival until the completion of the investigation have been consistent with the innocent of the Appellant.*
> *c) The statement both Notice of Warning Statements and Ordinary Statements have shown that the Appellant have given proper and reasonable explanation with regard to the possession of the suitcase containing the drugs ie that the Appellant have borrowed the suitcase from her friend Hirrut Bekela.*
> *d) That the DNA did not implicate the Appellant.*
> *e) That the evidence from handphone and camera did not containing any incriminating materials against the Appellant.*
> *f) That there was no fingerprint of the Appellant found on the drugs.*
> *g) That the urine result of the Appellant was negative."*
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> *(ii) "That this failure to appreciate the defence case is a serious misdirection leading to "failure of justice", "an error of laws" and a "breach of fair trial rights".*

We will take in order the matters relied upon by the appellant.

a) It was not for the prosecution to prove that Hirut Bekela existed or did not exist.. In order to rebut the presumptions the appellant undertook the task of proving on the balance of probabilities that Hirut Bekela did exist, that she lent to the appellant a suitcase containing the drugs and that the appellant did not know that they were there. The judges were not satisfied on the balance of probabilities, having heard the evidence, that the story was true.

b) The judges considered the significance of the appellant's demeanour during the investigation in the light of all the evidence and formed the view, as they were entitled to, that it did not indicate innocence but rather intelligence and strength of character.

c) The judges did not consider that the defendant's story was in the circumstances a proper and reasonable one, having regard to the extra weight that the appellant said that she noticed, her alleged acceptance of the explanation for it and the high value of the drugs.

d),e), f) and g) may be taken together. The absence of DNA, fingerprints and so on does not assist the appellant. The court had to decide the issues upon the evidence before it and on that evidence it found that the presumptions were not rebutted. The presence of DNA or fingerprints would have made the prosecution's case stronger but the absence of it did not weaken the evidence that was there. It was unnecessary to prove that the appellant actually touched the packets of drugs.

There was evidence that the defendant said that it was a mistake for her to borrow the suitcase. Mr Daud describes that statement as an explanation. The comment by the appellant was made in the context of a tale that the judges found had not been established on the balance of probabilities.

Put simply, the appellant's case was that the judges should have accepted her explanation and found that she had rebutted the presumptions. It is clear, however, that they gave full and careful consideration to the evidence as a whole and to the submissions made on the appellant's behalf. Their judgment shows that matters referred to in the perfected grounds of appeal were present to their minds. The evidence failed to satisfy them on the balance of probabilities that she was not in possession of the drugs, knowing their nature.

As for 3(ii) it is clear to us that the judges fully understood the defence case. Unfortunately for her they did not believe it.

Mr Daud has cited a number of cases to illustrate the elementary principle that a court must make a fair and just assessment of a defendant's case. It is unnecessary to refer to those cases here. We are quite satisfied that the judges did make a fair and just assessment of the appellant's case. On the evidence before them they were fully entitled to convict the appellant.

The appeal is dismissed.

Mortimer, P.

Leonard, J.A. **Burrell, J.A.**