GROS COISSY A. M. v THE STATE

2015 SCJ 420

Record No. 234

IN THE SUPREME COURT OF MAURITIUS

(Court of Criminal Appeal)

In the matter of:

Aurore Mélanie Gros Coissy

Appellant

V

The State

Respondent

JUDGMENT

The appellant ("the accused") was prosecuted before the Supreme Court for the offence of importing into Mauritius dangerous drugs "*to writ Buprenorphine contained in 1673 tablets enclosed in 239 packs labelled 'subutex 8 mg' which were concealed in two biscuit boxes and secured from her luggage*" under section 30 (1) (b) (i) of the Dangerous Drugs Act. There was a further averment that having regard to all the circumstances of the case, the accused was a drug trafficker within the meaning of section 41 (3) (4) of the Dangerous Drugs Act. The accused pleaded not guilty to the charge and denied being a drug trafficker. After hearing evidence, the learned Judge found her guilty as charged and found that she was drug trafficker. He consequently sentenced her to undergo twenty years penal servitude, minus the time spent in custody, and to pay a fine of fifty thousand rupees.

The present appeal challenges the conviction and, alternatively, the sentence. There were initially 16 grounds of appeal. However grounds 1, 4, 7, 14 and 16 have been dropped.

Among the remaining grounds, there are two grounds in law, ground 2 which alleges failure by the learned Judge to give himself the "*lucas warning*" and ground 3 which avers that the accused did not benefit from a fair trial as the police enquiry was amiss. The other grounds all challenge the appreciation of the evidence by the learned Judge.

Grounds 2 and 3: the grounds "in law"

Ground 2

This ground is to the effect that the Learned Judge was wrong in not giving himself the *"Lucas"* warning as he has "*clearly inferred"* that the accused was lying.

The "lucas" warning derives its name from the case of **R v Lucas [1981] 1 QB 720, 73 Cr App. R. 159, C.A** and is a warning which has to be given in the context of the reliance on lies by the prosecution in support of evidence of guilt. The following extracts from Archbold Criminal Pleading Evidence and Practice 2015 Ed. at paragraph 4-461 may be appropriately quoted here:

> *"In R V Goodway 98 Cr. App. R. 11. CA**, it was held that whenever lies are relied on by the prosecution, or might be used by the jury, to support evidence of guilt as opposed to merely reflecting on the defendant's credibility, a judge should give a full direction in accordance with R. V. Lucas (R) [1981] Q.B. 720. 73 Cr.App.R. 159. CA, to the effect that a lie told by a defendant can only strengthen or support evidence against that defendant if the jury are satisfied that (a) the lie was deliberate, (b) it relates to a material issue, and (c) there is no innocent explanation for it. The jury should be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame, or out of a wish to conceal disgraceful behaviour. A similar direction as to false alibis should routinely be given*
>
> *[…]*
>
> *In the light of the number of appeals on this point that followed Goodway (for a list, see the 1998 edition to this work), the Court of Appeal gave the following further guidance in R. v. Burge and Pegg [1966] 1 Cr. App. R. 163. A Lucas direction is not required in every case where a defendant gives evidence, even if he gives evidence on a number of matters, and the jury may conclude in relation to some matters at least that he has been telling lies. It is only required if there is a danger that they may regard that conclusion as probative of his guilt of the offence which they are considering. How far a direction is necessary will depend on the circumstances. The direction will usually be required (a) where the defence has raised an alibi; or (b) where the judge considers it desirable or necessary to suggest that the jury should look for support or corroboration of one piece of evidence from other evidence in the case, and amongst that evidence draws attention to lies told, or allegedly told, by the defendant; or (c) where the prosecution seek to show that something said, either in or out of Court, in relation to a separate or distinct issue was a lie, and to rely on that lie as evidence of guilt in relation to the charge which is sought to be proved; or (d) where, although the prosecution have not*

adopted the approach in (c) above, the judge reasonably envisages that there is a real danger that the jury may do so."

In the case subject matter of the present appeal, we agree with the submission of Mrs A. Ramano, Assistant Director of Public Prosecutions, who appeared for the respondent, that the prosecution did not, at the trial of the accused, rely on any specific lie on her part to prove its case; and that, furthermore, the learned Judge did not rely on any lie on the part of the accused as evidence of her guilt as opposed to evidence reflecting on her credibility. Indeed, the only lie referred to by the learned Judge in his judgment was a lie to the customs relating to alleged *doliprane* tablets which the accused's friend Tinsley had entrusted to her to be given to his mother in Mauritius. That lie was not relied upon by the learned Judge as probative of guilt but rather as reflecting upon the accused's credibility, so that he did not have to give himself a 'Lucas' warning. Ground 2 accordingly fails.

Ground 3

"That the Appellant did not benefit a fair trial inasmuch as the Police inquiry concerning fundamental aspects of the case was completely left amiss inter alia the non-enquiry about the person(s) involved in the trafficking of Subutex in France whose name was given by Appellant to the Police".

It was submitted, under this ground, by Counsel for the appellant, that the accused did not benefit from a fair trial inasmuch as the conduct and behaviour of Tinsley Cornell, whose name had been given by the accused, was not investigated into. As a matter of fact, the name of Tinsley Cornell, the accused's friend, was given by the accused as the person who by way of deduction, she believed had placed the drugs in her suitcase since he was the only one who had access to it at the material times.

We are unable to agree with the above submission of Counsel for the appellant. On the other hand, we agree with the submission of Counsel for the respondent that the enquiry about the involvement of Tinsley Cornell in the trafficking of Subutex in France was legally irrelevant to the proof of the offence with which the appellant stood charged and that non-enquiry into such involvement could not have any incidence whatsoever on the fairness of the trial.

The remaining grounds: The appreciation of the evidence

The remaining eight grounds of appeal (grounds 5, 6, 8, 9, 10, 11, 12 and 13) challenge the general appreciation of the evidence by the learned Judge. Ground 6 is expressed in general terms, challenging the learned Judge's inference that the appellant had knowledge of the drugs found in her luggage; and the other grounds aver specific ways in

which, in the appellant's contention, the learned Judge went wrong in his appreciation. It is apposite to set out here the eight grounds referred to above following minor corrections to grounds 5, 8 and 9 which Counsel for the appellant was allowed to make with the concurrence of Counsel for the respondent and the Court.

Ground 5

"That the Learned Judge has failed to give consideration to the testimony of the appellant."

Ground 6

"That the learned Judge was wrong to infer that Appellant had knowledge that the drugs were in her luggage when there is no material evidence to support same."

Ground 8

"The learned Judge was wrong to give much weight to the demeanour of the Appellant as perceived by the two witnesses."

Ground 9

"*The learned Judge was wrong in that he imported evidence, among others, '11th September 2001 terrorists attacks' which was not ushered before the trial Court".*

Ground 10

"*That the learned Judge has erred in giving undue weight to the testimony of witnesses namely Customs Officer Dahoo (witness No. 15) and WPC Raghoo (witness No. 1) which are replete with inconsistencies, untruths and which were not found in the statements given in the month the offence allegedly took place."*

Ground 11

"That the learned Judge was wrong to infer that Appellant "surrendered" herself to Mr Tinsley where there is other evidence to point to other possible conclusion."

Ground 12

"*That the learned Judge was wrong to find the traits of Appellant as being an indication of guilt and guilty knowledge when on the same*

circumstances and set of facts other inferences can be inferred from similar circumstances by different persons."

Ground 13

"The learned Judge erred in relying heavily on subjective factors to conclude that Appellant is guilty, the moreso in the absence of objective evidence such as DNA print out and finger prints of Appellant on the drugs parcel to connect Appellant to the drug parcel."

We propose to consider all those grounds together whilst engaging in an analysis of the learned Judge's judgment in the light of the evidence which was before him and of the submissions made by Counsel on both sides.

The learned Judge started considering the case against the accused by reference to an undisputed fact: the accused was arrested at Sir Seewoosagur Ramgoolam International Airport, following the securing of 1673 tablets of "*subutex"* which were concealed in two biscuit boxes, wrapped in a green plastic bag, found in her suitcase. He rightly went on to point out that, as submitted by both prosecution and defence, the only element which the prosecution had to prove was whether the accused had the required knowledge that she was carrying such drugs in her suitcase. The learned Judge also referred to the undisputed evidence from the report of the FSL (Forensic Science Laboratory) that the drugs secured were classified as dangerous drugs under Schedule II of the Dangerous Drugs Act.

As the judgment unfolds, we can gather the different aspects of the evidence which appear to have led the learned Judge to conclude that the accused had the requisite guilty knowledge. We shall now refer to those aspects, relating them to the relevant grounds of appeal.

The replies of the accused upon the boxes, then the subutex tablets inside, being found in her suitcase.

The following passage from the learned Judge's judgment shows that his inference of guilty knowledge on the part of the accused was significantly based on the replies of the accused at two crucial stages of the airport episode:

"The prosecution's case is heavily reliant on the testimony of Customs Officer Dahoo (witness No. 15) and WPC Raghoo […]. If their versions are to be believed, and in particular if this Court accepts as true their evidence as to the tenor of the replies of the accused […] upon being confronted with firstly the two suspicious carton boxes and then later in time the actual

> *subutex tablets, this would go a long way in establishing the guilt of accused […] as the alleged spontaneous replies in no uncertain terms admit and confirm her involvement in the offence with all the requisites of guilty knowledge on her part"*.

The learned Judge made the following references to the replies of the accused on the two occasions:

(1) According to Officer Dahoo's testimony, whilst the suitcase of the accused was undergoing scanning he noticed inside the suitcase two carton boxes. Upon being questioned as to these boxes, the accused replied that they were cigarettes.

(2) According to WPC Ragoo's testimony, the accused, upon being asked about the contents of the two boxes seen at scanning, replied "*C'est que de cigarettes que mon ami Tinsley m'avait données pour remettre à sa maman où je vais habiter",* whereas the accused's version is*: "J'ai répondu que dans ma valise il y avait des cigarettes destinées à la maman de Tinsley.* "

(3) In connection with the green plastic bag containing two biscuit boxes found inside the suitcase upon a physical search therein at the ADSU Office, Officer Dahoo testified that when he "*told*" the accused of his findings, that is *"biscuit boxes*" and no *"cigarettes*", the accused was *"not able to answer clearly"*.

(4) Still according to Officer Dahoo's testimony, after he had opened the biscuit boxes and found the subutex tablets concealed under an initial layer of biscuits the accused, after being cautioned by WPC Ragoo, stated: *"C'est Tinsley qui m'a donné le sac en plastic avec les deux boites en France pour les remettre à sa mere à Maurice où je vais habiter".* The learned Judge went on to point out that WPC Ragoo confirmed that reply of the accused upon being so cautioned.

In connection with the two different versions of the reply of the accused at (2) above, the learned Judge's only explanation for believing the version of the two prosecution witnesses is rather puzzling. After referring to the two different versions, he says the following:

> *"whilst it is acceptable that one needs some experience to interpret the digital image on the scanner's monitor, yet when one looks at Exhibits IV and V, it is quite impossible for the accused, who was aware of the loose nature of the cigarette packs in her suitcase, to have mistaken the two biscuits boxes for the cigarettes boxes given by Tinsley in view of the size of the two suspicious boxes and the substantial amount of the space they took in the suitcase".*

What the learned Judge seems to be saying in the above passage is that the accused could not have mistaken the two biscuit boxes appearing on the scanner's monitor for the cigarette boxes given by Tinsley. Counsel for the respondent agreed that this would be the only logical interpretation of the above passage. But the learned Judge's reasoning is clearly flawed, in our view, since he was not in presence of any evidence to the effect that the accused was made to look at the monitor, that her attention was drawn to the two boxes shown thereon, and that she nonetheless maintained they were loose cigarette packs. In fact the accused had deponed in chief to the effect that she had not been shown what appeared on the monitor and that evidence stood uncontradicted.

In relation to (4) above, the accused, in the second part of her statement to the police (Doc L1), admitted that she did say "*C'est Tinsley qui m'a donné le sac en plastique avec les deux boites en France pour les remettre à sa mère où je vais habiter*." She however explained: *"J'ai effectivement répondu cela, étant donné que je n'avais pas placé moi-même ce sac et ces biscuits dans ma valise et que la seule personne ayant eu accès au contenu de ma valise soit Tinsley et que je savais qu'il avait lui même placé les affaires dans ma valise destinées à sa mère et son cousin Denis. Mais je ne l'ai pas vu faire c'est une déduction de ma part et j'en déduis que ca ne peut être nul autre que lui. "*

In other words, what the accused was saying here is that since, by way of deduction, she had realised that Tinsley must have placed the plastic bags containing the biscuit boxes in her suitcase, she – at a time when she had no idea that there were drugs inside the biscuit boxes – loosely explained that the plastic bag and the biscuit boxes therein contained had been (amongst other things) entrusted to her to be remitted to his mother in Mauritius.

That explanation by the accused as to what she meant by the impugned reply was not challenged by cross-examination, as was rightly pointed out by Mr G. Glover S.C., Counsel for the then accused, in his submissions at the end of the trial. The learned Judge saw in the impugned reply of the accused an admission that the accused was aware of the presence of the plastic bag and the two boxes therein contained inasmuch as she had conceded that they had been given to her by Tinsley to be remitted to his mother. However, the learned Judge failed to consider the unchallenged explanation of the accused as to what she meant by the impugned reply and to state, giving reasons, why he was not prepared to accept that explanation. In the circumstances the learned Judge's reliance on the impugned reply of the accused as an incriminating admission was not in our view warranted; all the more since the impugned reply,

even taken on its own, did not necessarily indicate that the accused knew what the boxes of biscuits contained.

The demeanour of the accused as perceived by the two witnesses.

Apart from the all englobing ground 6, the learned Judge's consideration of this issue is specifically challenged in ground 8 which is to the effect that the learned Judge gave too much weight to the demeanour of the appellant by the two witnesses. Ground 10, which avers that the learned Judge gave undue weight to the testimony of those witnesses, generally, is also of pertinence here. So too is ground 13, which is to the effect that the learned Judge relied too heavily on subjective factors, in the absence of scientific evidence, to conclude that the appellant was guilty.

The learned Judge referred at various parts of his judgment to the demeanour of the accused as perceived by Officer Dahoo and WPC Raghoo:

(1) the testimony of WPC Ragoo that at the arrival zone, where she was on profiling duties behind the immigration counters, she noticed the accused who appeared "*tense*".

(2) the testimony of Customs Officer Dahoo that at the Green Channel, whilst he was on profiling duty, he spotted the accused in view of her body language and physical appearance, and also noticed that the accused looked "*tense*".

(3) the testimony of WPC Ragoo that when the accused was asked, at the scanning area, about the contents of two boxes seen inside the suitcase of the accused on the monitor, and the accused gave her reply, she appeared "*tense*" during that exchange.

(4) the testimony of Officer Dahoo that when he had seen a green plastic bag containing two biscuit boxes and told the accused of his findings, that is "*biscuits boxes*" and not "*cigarettes*", the accused failed to maintain "*eye contact*" with him, "*evaded his question*", became *"tense*" and was "*not able to answer clearly*".

(5) the testimony of Officer Dahoo that, when he had found the subutex tablets concealed in the biscuit boxes, the accused appeared "*evasive"* and "*shocked*".

(6) WPC Ragoo's testimony that when the biscuit boxes were discovered wrapped in the green plastic bag inside the suitcase, the accused, upon being questioned by officer Dahoo, "*stammered*" by saying something sounding like "*er..er..er*".

However, the learned Judge did not make it clear what inferences he drew from the above demeanour of the accused as perceived by the two witnesses.

And, quite importantly too, the learned Judge did not give proper consideration to the submission of Counsel for the accused that the various aspects of the demeanour of the accused as perceived by those two witnesses, were not, in any event, only compatible with guilty knowledge and could be otherwise explained. The learned Judge did refer to the defence contention that the various reactions of the accused upon being confronted with the findings of the two witnesses – *"tense", shocked" "stammering" "crying" "mute"* - were normal reactions of someone who has been taken by surprise. However, it is clear from the judgment that the learned Judge invoked no argument at all to justify a rejection of that contention. And that contention appears to us to be indeed well-founded. As rightly submitted by Mr R. Valayden, Counsel for the appellant, when the reactions of the accused are viewed in context – e.g stammering upon being told there were drugs, remaining mute after being cautioned, crying at the same time as answering questions – such reactions cannot lead to the irresistible inference of guilty knowledge.

The learned Judge's analysis of the accused's defence

Under this heading, the points raised under grounds 5, 9, 11 and 12 are dealt with.

The crux of the accused's defence was properly stated by the learned Judge as being *"that she was completely unaware of the two biscuit boxes and their contents in her luggage and only became aware of them when they were discovered by the authorities"* at the Airport. The learned Judge also referred, in that connection, to the accused's explanation that she had complete trust in her friend Tinsley, until, by way of deduction, she had concluded that he had surreptitiously placed the biscuit boxes containing the drugs in her luggage on 18 August 2011, at his place, while she was temporarily absent to buy a swimming suit.

The learned Judge then referred to a *"a number of issues"* which raised "*some concerns*" in connection with her defence. Although that part of his judgment is at times hardly intelligible, those "*issues*" would seem to be the following:

(1) the blind *"trust*" of the accused in her friend Tinsley, the basis of which appeared unclear to the learned Judge inasmuch as the relationship which the accused and Tinsley had in 2005, during a five months period, "*was over, and meanwhile Tinsley got married and had a child, was divorced at the material time and was living at his mother's place"*;

(2) the apparent lack of interest from the accused, after the initial excitement in relation to her trip to Mauritius, which appeared quite "*baffling*" to the learned Judge;

(3) the fact that although the accused had the "*means*" she *"without any qualm"* accepted 50 Euros from Tinsley to pay for the taxi in Mauritius, and at first refunded only 1000 euros out of the 1250 euros paid by Tinsley for her air ticket to Mauritius

(4) the fact that, as the learned Judge saw it, the accused "*adamantly refused to accept in cross-examination*" that her decision to come to Mauritius was determined by the financial savings that she would benefit from by being *"logée, nourrie et blanchie"* by the "*Tinsley family"*.

(5) the fact that she decided to make the trip because Tinsley was to visit his family in Mauritius, yet Tinsley decided not to make the trip at the last minute for reasons which have remained unclear and she came on her own;

(6) the secrecy surrounding the trip to Mauritius, as indicated by the fact that she was taken to task by Tinsley for having talked to his cousin, a Mauritian resident, about the trip;

(7) the fact that Tinsley's request to tag the gifts he was sending through her with the names of the recipients did not seem to raise any concern to her, *"given the amount of 'gifts and recipients' involved as well as the fact that Tinsley not only had already informed her of who to give what and it would seem she had already packed them in her suitcase";*

(8) the unlikelihood, in the learned Judge's assessment, that Tinsley would have placed the boxes in the accused's suitcase, at the risk of the accused noticing the subterfuge;

(9) the accused 's decision not to open her suitcase to put in her just bought swimming suit;

(10) the fact that the boxes in the plastic bag took nearly one third of the space in the suitcase leading to the conclusion that any extra luggage could have been easily detected by weight;

(11) her manifest boldness in *"travelling on her own for the first time to a foreign country thousands of miles away from her home town and little known to her, to stay with a person little known to her, at a place of which she had no knowledge and following a last minute change of plan."*

(12) the fact that, having often travelled outside France as part of a school programme or on holidays with her parents, she could not be said to be *"totally ignorant of airport procedures, in particular the enhanced security measures after the 9th September 2001* (meaning 11th September 2001) *terrorist attacks in the United States;"*

(13) the accused's excellent memory as shown by the amount of details in her statements;

(14) the learned Judge's opinion that the accused was *"not someone who is destablished quickly";*

(15) the fact that the accused had struck the learned Judge as someone very "*calculating*" in view of *'her readiness to provide an explanation to each and every situation put to her in cross-examination by State Counsel and even correcting State Counsel when her version as appeared in her statement, was somehow "mis-quoted" or "mis-read";*

(16) the computer literacy of the accused, her familiarity and easy access to the internet, her education and her experience of small jobs which showed she was "*a person with character, education and sufficient experience in life, and certainly not naïve or "someone that will blindly follow another person, be it an ex-boyfriend".*

We are unable to agree with the learned Judge's appreciation of the above considerations.

With reference to some of the above considerations viewed as *"traits"* (of character, presumably) by the learned Judge, we agree with the submission of Mr R. Valayden, Counsel

for the appellant, in his skeleton arguments relating to ground 12, that the *"traits"* of the appellant referred to by the learned Judge could not be any indication of guilty knowledge.

In relation to considerations (1) and (16) above, there was nothing in the trust placed by the accused in her ex-boyfriend Tinsley, married and then divorced at the material time, and with whom she had renewed a relationship through chatting on facebook, which could affect the plausibility of her version to the effect that she had placed sufficient trust in him to allow him access to her luggage for the purpose of placing tags on gifts and in leaving her luggage at his place upon going to buy a swimming suit which she thereafter placed in her hand luggage.

In relation to consideration (3) above, the acceptance of 50 euros for the taxi fare could not be attributed any significance with regard to the issue of guilty knowledge as (i) Tinsley was initially to take care of the transport from the airport and upon her leaving alone, offered the taxi fare, which she accepted; and (ii) the payment of the taxi fare was insignificant, the important payment being that of the airfare, a fare which was to be refunded, and was indeed refunded, as opposed to the fares of couriers of drugs which are normally paid by the sender of the drug. Consideration (3) was therefore not indicative, in any way, of guilty knowledge.

In relation to the other considerations, it is clear to us that the learned Judge indulged in an exercise which was mostly based on conjectures, and drew adverse inferences against the accused from facts which were either irrelevant or of little significance.

Counsel for the appellant has rightly pointed out how accused's "excellent memory" (consideration 13 above) and her good performance under cross-examination (consideration 15) have been erroneously relied upon in reaching an eventual conclusion as to the accused's guilty knowledge. Similarly, consideration (8) above appears to us to be an instance of incorrect reasoning, being based on a surmise as to how Tinsley would have been expected to behave. For instance, there would have been nothing implausible, in our view, in Tinsley taking the risk of placing the packet inside the suitcase and hoping to get away with it, upon detection by lying as to its contents, in the confidence that the accused would not check those contents.

Again, with respect to consideration (9) above, there was nothing implausible in the accused's explanation, in evidence, that after she had purchased her swimming suit and placed it in her handbag, she did not find it necessary to open her suitcase to place the swimming suit therein.

With respect to consideration (10) above, the learned Judge's reasoning appears to us to be clearly faulty. No evidence has been adduced in relation to the weight of the two boxes inside the plastic bag and their contents - subutex tablets with biscuits at the top – are unlikely to have been heavy. The mere fact that nearly one third of the space in the suitcase was occupied by the boxes could hardly lead to a reasonable inference that the extra luggage could have been easily detected by weight. Furthermore, as pointed out by Counsel for the appellant, there was no evidence that she herself carried her luggage or that she ever lifted it, having regard to its having wheels.

On the other hand, we cannot fail to note that, whilst engaging in an exercise of fault-finding in relation to the version of the accused, the learned Judge said nothing in rebuttal of the submission made by Mr G. Glover S.C, the then Counsel for the accused, to the effect that the latter had not in any way, in her testimony, departed from her version in her statements to the police, and had well withstood the test of cross-examination.

Conclusion

Although, as a Court of appeal, we are loth to intervene with the appreciation of facts by the learned Judge, we conclude in the light of all our above observations, that the assessment of the evidence by the learned Judge in the present case is so flawed that his conclusion that the accused knew about the presence of the drugs in her suitcase cannot be allowed to stand. We are equally of the view that the evidence on record could not even reasonably lead to the conclusion that the accused should have known of such presence. As was rightly submitted by Mr Glover S.C., then Counsel for the accused, before the learned Judge, there was nothing which had been brought by way of evidence during the prosecution case which would show that the accused ought to have known that something had been placed in her suitcase over and above what she thought was in the suitcase. Whilst the evidence could have raised suspicion as against the accused, it fell short of proving the guilt of the accused beyond reasonable doubt. The conviction was therefore, in our view, unsafe. We accordingly quash the conviction and sentence.

E. Balancy
Senior Puisne Judge

A. F. Chui Yew Cheong
Judge

G. Jugessur-Manna
Judge

25th November 2015

Judgment delivered by Hon. E. Balancy, Senior Puisne Judge

For Appellant :	**Mr Attorney K. Bokhoree** **Mr R. Valayden, of Counsel**
For Respondent :	**State Attorney** **Mrs Ramano-Egan, Assistant DPP**