

Stephen Joseph Francis

Appellant

v.

The Queen

Respondent

FROM

THE SUPREME COURT OF MAURITIUS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
18TH FEBRUARY 1992

Present at the hearing:-

LORD KEITH OF KINKEL
LORD BRANDON OF OAKBROOK
LORD OLIVER OF AYLMEYTON
LORD JAUNCEY OF TULLICHETTLE
LORD LOWRY

[Delivered by Lord Keith of Kinkel]

This appeal raises the same constitutional question regarding the validity of section 38(4) of the Dangerous Drugs Act 1986 as the Board has had occasion to consider in *Mukhtar Ali v. The Queen* and in *Gulam Rasool v. The Queen*. In those appeals their Lordships concluded that section 38(4) was invalid, that the sentences of death pronounced upon the appellants must be set aside, and that the cases should be remitted to the Supreme Court to substitute such sentences within the limits of section 38(3) as it considered appropriate.

Counsel for the appellant, in addition to presenting an argument on the constitutional point, submitted that his conviction under section 38(1)(c) of the Act with a finding of trafficking should be quashed on the ground that the evidence before the trial judge did not demonstrate beyond reasonable doubt that the 2.050 kilograms of substance imported by the appellant contained heroin to a greater extent than *de minimis*. The facilities available in Mauritius are not such as to allow of the quantity of heroin contained in a substance being ascertained with any degree of accuracy. An expert witness for the prosecution, Mr. Jarkaria, deponed that the substance in question contained roughly 50% of heroin. An expert for the defence, Mr. Ah Yu, deponed that the substance included a number of ingredients, including heroin, of

which the heroin was the most minor quantitatively. He said that it did not contain a substantial amount of heroin. The trial judge expressed himself as preferring the evidence of Mr. Ah Yu to that of Mr. Jarkaria, and concluded that the substance contained some amount of heroin, however minor in comparison with the other ingredients in it. Plainly the judge did not consider that the amount of heroin in the substance was *de minimis*, nor indeed was Mr. Ah Yu's evidence, on a fair reading, to that effect. Heroin remains heroin notwithstanding that it is mixed with other substances, and their Lordships accordingly conclude that the appellant was rightly convicted of importing it.

Their Lordships will humbly advise Her Majesty that this appeal should be dealt with in the same manner as those of Mukhtar Ali and Gulam Rasool. The respondent must pay the appellant's costs of the hearing before the Board.