

IN THE SEYCHELLES COURT OF APPEAL

Weston Noel

v.

The Republic

Criminal Appeal No. 11 of 1984

Mr. Esparon for the appellant
Mrs. Moulinie-Georges for the Republic

JUDGMENT OF THE COURT

This is an appeal by Weston Noel against his conviction on an information which charged him with possession on 24th November, 1983 at Rock Lane, Mahe of dangerous drugs, namely, 1 gm. 880 mg. of cannabis without lawful authority contrary to ss. 4, 5, 25(1) and (1) of the Dangerous Drugs Act Cap. 186.

The evidence in support of the case for the prosecution, which the learned trial Judge believed, was to this effect. Around 10.30 a.m. on 24th November, 1983, Sgt. Forte and Police Constables Esparon, Belle and Elizabeth, dressed as civilians, began to keep watch on a house occupied by the appellant and his family at Rock Lane. For this purpose they concealed themselves under an old house about 15' from Revolution Avenue. Between that time and 2.30 p.m. they saw about 10 persons going into and coming out from the house at short intervals.

At about 2.30 p.m., a man known to the police as Roland Orphee, went into the appellant's house and came out five minutes later followed by the appellant. They observed that the appellant was then wearing a pair of jeans and had his right hand inside the pocket of his trousers. The appellant saw Orphee off on the track leading from his house and then turned around to return to it. As he proceeded to do so Sgt. Forte and his men came out of hiding from under the house and went towards the appellant's house.

The appellant saw them as they got to about 5' from him and immediately he removed his right hand from his pocket and placed something in his mouth. P.C. Belle thereupon moved in on the appellant and held him. With his right hand P.C. Belle clamped the appellant's jaw and chin, while P.C. Esparon held on to one of his arms and P.C. Elizabeth, the other.

A struggle ensued in the course of which a small ball of material was expelled from the appellant's mouth. Sgt. Forte picked it up, and took it to the Government Analyst George Lai Lam on 20th November, 1983 for examination.

The Analyst examined it and returned it to Sgt. Forte on the same day with his certificate verifying that the material handed to him by Sgt. Forte weighed 1g. 880 mg. and that it was cannabis resin.

There was a fundamental flaw in the prosecution case however and it arose in this way. In proof of the prosecution claim at the trial that the material expelled from the appellant's mouth was cannabis resin, the Analyst's certificate and an envelope with its contents were tendered and admitted in evidence.

An application was thereupon made and granted for the attendance of the Analyst for cross-examination. The certificate at that stage had an endorsement on it signed by the Analyst certifying that the material was returned to Sgt. Forte on 28 November 1983, but below that endorsement under the signature of Sgt. Forte there appeared another endorsement acknowledging that he received the material on "30/11/83".

The Analyst had returned the material in a sealed envelope to Sgt. Forte. When however it was admitted in evidence in Court and opened, there was material in it, but there was no writing or endorsement on the envelope to identify it with the envelope which the Analyst handed to Sgt. Forte on 28 November aforesaid.

On being cross-examined the Analyst swore that he returned the exhibit to Sgt. Forte on 28 November and that the written endorsement thereon stating that it was received by Sgt. Forte on "30/11/83" was a mistake. When he was shown the envelope and further questioned he had this to say:

"I gave back the exhibit 1 on the 20th. Usually on the envelope I have my initial on the back, but on this one I do not see any initial on it, and (sic.) nor the date. I always put my initial and the date at the back of the envelope and then seal it. (emphasis added).

The record of his re-examination is to the following effect:

- "Q. You said that the certificate is dated 30th but the exh. (sic.) was returned on the 28th.
- A. Yes.
- Q. Could it happen that you thought you have initialled the envelope but you overlooked? (sic.)
- A. If it does, it is the first time I overlook such situation because I do make sure that I sign it and date it and seal it in front of the Sgt. (sic.)

There was thus a break in the chain of evidence linking the exhibit produced in court with the substance expelled from the appellant's mouth. And as the case for the prosecution could not have been established without the production of the original material or without proof of its existence by secondary evidence if the absence of the original was satisfactorily accounted for, the case ought to have been dismissed.

Although this flaw remained uncorrected, the prosecution closed its case. The appellant was thereupon called to answer the charge after being advised of his options. He gave evidence on oath vigorously denying he had anything in his mouth, or that anything was expelled from it, or that the substance produced in court was in his possession as claimed by the prosecution. He alleged in addition that he was severely beaten up by the police without cause or justification. He called three witnesses to support his story but the learned trial judge rejected his evidence and that of his witnesses as untrue.

In the reasons given by the learned judge for convicting the appellant he referred specifically to the evidence of the Analyst and stated, inter alia, as follows:

"However before the envelope was shown to Mr. Lai Lam (P.W.5) it had already been produced by Sgt. Forte and it was torn open in court for the substance inside, which was wrapped in a white paper, to be produced as an exhibit. The envelope was then re-sealed and it is possible that the part containing Mr. Lai Lam's initials was torn and lost, or it is possible that Mr. Lai Lam exceptionally did not put his initials on this envelope." (emphasis added)

The explanations suggested by the learned trial judge were, with great respect, not only speculative but it was impermissible for him to suggest any. The first possibility was not supported by the evidence or by the condition of the envelope which we ourselves had an opportunity to examine and indeed the Analyst himself who examined the envelope in court never suggested such a possibility. And as to the second possibility suggested by the learned trial judge the Analyst expressly discounted it as one which was "very slim".

The only point argued by Mr. Esparon for the appellant was that the prosecution failed to establish that the substance contained in the envelope (Exhibit 1) was the substance found on the appellant and was in fact cannabis resin. The point, in our view, was well taken. Mrs. Moulinie-Georges sought to save the day for the prosecution by

contending that the identity of the material expelled from the appellant's mouth, with the contents contained in the envelope, was established by Sgt. Forte's evidence, in which he claimed that the envelope he produced in court contained the contents which the Analyst had examined and returned to him. But as previously noted, it was a claim which the Analyst on examining the envelope in Court found himself unable to support.

For these reasons we hold that there was a fatal flaw in the case for the prosecution and that in consequence thereof it was not established beyond reasonable doubt that the appellant was in possession of the cannabis resin attributed to him. We accordingly allow the appeal and set aside the conviction and sentence imposed on him.

Before parting with this appeal, we find it necessary to express our profound concern over the improper tampering with the original certificate of the Analyst. This must have occurred between the conviction of the appellant and the hearing of this appeal. At the trial, it was clear from the answers given by the Analyst in cross-examination, that the date of receipt endorsed on the certificate under the signature of Sgt. Forte was "30/11/83", but on the copies of the records supplied to members of this court, the date of receipt appeared to be "28/11/83". On our inspection of the original certificate we observed that "28/11/83" was traced over "30/11/83" in ink that was different from the original and that the same ink was used to trace over the signature of Sgt. Forte.

This was an unwarranted interference with an original exhibit in the custody of the court and we trust that what occurred in this case will never be repeated.

Dated this 3rd day of October 1984.

A. Mustafa
..... President
(A. Mustafa)

Eric Law
..... Justice of Appeal
(Sir Eric Law)

Isaac Hyatali
..... Justice of Appeal
(Sir Isaac Hyatali)

It has since come to our knowledge that the alteration of the date in the analyst's report Exh.2 was made by Police Sgt. Henry Forte during the course of the trial.

It would seem that he corrected what he thought was a genuine mistake in the belief that he was entitled to do so. He acted in good faith, though clearly in error, which he now recognises.

This unfortunate incident reflects no discredit of any kind on the Court Registry.

A. Mustafa

(A. Mustafa)

President of the Court of Appeal

Dated this 5th day of October, 1984