

Gabriel v Republic

(2010) SLR 394

Tony JULIETTE for the appellant

M KUMAR, assistant principal State Counsel for the respondent

Judgment delivered 10 December 2010

Before Hodoul, Domah, Fernando JJ

The appellant had been convicted on two counts of possession of controlled drugs, namely 110 milligrams of heroin and 220 milligrams of cannabis resin.

On 18 January 2004 at about 10.00 pm, PW 2 PC Mousbe, PW 3 PC Sophi and L Cpl Belle had proceeded to the house of one Vincent Samson on information received that a drug transaction was taking place there. Arriving at Vincent's house they had had seen Vincent Samson, Asba, Ventagado and the appellant sitting under the veranda of the house, drinking beer. L Cpl Belle had informed Samson that the police were going to do a search in his presence. They carried out a search inside and outside the house of Samson and found nothing. Thereafter they did a body search of all four persons and in the vehicles of Asba and the appellant. The search of the four persons and the vehicle of Asba did not reveal anything incriminating. Thereafter they searched vehicle S 5768 belonging to the appellant. The windows of the car were open and the doors of it were not locked. In searching vehicle S 5768 in the presence of the appellant, they had seen some substances in the pocket of the door at the driver's side, suspected to be controlled drugs. On questioning the appellant as to what the substances were, he had said that he did not know what they were, that it did not belong to him and someone must have placed it in his car. According to PW 2 the appellant had then told him in the presence of Cpl Belle and PC Sophie that they (meaning the appellant and PW 2) were at NYS together, that he (appellant) has kids and that they should make a deal, to which PW 2 said he does not make deals like that and that he was doing his duty. PW3 said that the appellant had even offered money to PW 2. Thereafter the appellant was brought to the Anse-Aux-Pins Police Station where he was charged.

At the Anse-Aux-Pins Police Station PW 2 had given the exhibit (substances recovered from the appellant's car) to an officer (who was not called as a witness at the trial), for purposes of making the necessary entries and thereafter the exhibit had been kept in the possession of PW 2 till the next day for the purpose of taking it to the Central Police Station to get a 'request letter' to have it examined by Dr Gobine, the Government Analyst and for the purpose of taking it to Dr Gobine to be analysed. The exhibit was placed in the locker of PW 2 at the 'Base' (ADAMS) and the appellant detained at the Central Police Station. PW 2 had stated that only he had access to his locker. PW 2 had in his examination-in-chief stated that the next day (indicating 19 January 2004) he had taken the exhibits to Inspector Hermitte who placed them in an envelope in front of him and issued the letter of request to Dr Gobine. Thereafter the same day he had taken them to Dr Gobine. Later he was compelled to admit that the substances were taken to Dr Gobine on 14 February

2004. After Dr Gobine had analysed the drugs PW 2 had collected a white 'sealed' envelope on which PW 2 had placed his signature. This was on 19 February 2004. After bringing the exhibit from Dr Gobine, he handed over the envelope to the officer in charge at ADAMS, New Port, who had placed it in a safe. In Court PW 2 had identified the envelope as the one he collected from Dr Gobine but stated that he did not know who fixed the piece of paper on the envelope on which was written "CB 13 04 Anse Aux Pins PC Mousbe versus Vincent Gabriel of Anse Royale". PW 1 Dr Gobine had also stated that he did not know where it came from. It is clear from the evidence above that other/s had handled the exhibits, namely the officer who made the entries and the one who fixed the piece of paper on the envelope.

On examination of the substances, Dr Gobine concluded that a sample of the white powder analysed contained 72.3% of heroin and weighed 110 mg. His overall conclusion in respect of the brownish substance was that it was cannabis resin and weighed 220 mg. On 19 February Dr Gobine handed over the exhibits to PW 2 and his report. The results of Dr Gobine's examination as set out in his report (produced as Exhibit P1) had been stated in Court as:

Item No.1: The creamy white powder wrapped in a piece of golden cigarette paper contains 73.2% heroin. Item No 2: The crushed brownish resinous material having a slight green tint wrapped in a piece of silver cigarette paper is cannabis resin. Weight: 220mg.

The main issue in this case is whether the Government Analyst, Dr Gobine, analysed the very substances that were seized from the appellant's car on 18 January 2004?

This Court takes note of the fact that the substances were taken to Dr Govine only on 14 February 2004, ie nearly 27 days after its seizure. This came to light only after PW 2's attention was drawn by Court to the date, in the 'Request for Analysis' letter of Inspector Hermitte, which was dated 14 February 2004. In his examination-in-chief, PW 2 said on three specific occasions that he took the exhibits to Dr Gobine the next day, namely on 19 January 2004, after he had seized it from the appellant. In answer to court, at first, he stated that the substances recovered from the appellant on 18 January 2004 were taken to Dr Gobine the next day with the letter from Inspector Hermitte. It was only when the court drew his attention to the fact that Inspector Hermitte's letter is dated 14 February 2004, that PW 2 admitted that he took the exhibits to Dr Gobine after nearly one month.

The prosecution had not questioned PW 2 as to what else was in the locker at the time he placed the substances seized from the appellant in it on the evening of 18 January 2004 and whether or not anything else was put in the locker during the period 18 January to 14 February 2004, for the purpose of excluding a possible mix-up of controlled drugs. This in our view creates a doubt in regard to the chain of evidence.

PW 2 and PW 3 have given different versions as regards to what was seized from the appellant's car and the colour of the substances seized. PW 2 in his examination-in-chief said "There were two packets, one contained some dark powder substance and the other packet contained white powder substance." Under cross-examination PW 2 admitted, as stated in his statement made to the police, that

he recovered three substances from the appellant's car, namely, some white powder in a golden Mahe King cigarette paper, some dark substance wrapped in a piece of silver paper and close to it a piece of small dark substance. In answer to court he said the black piece was with the black powder.

In answer to defence counsel, under cross-examination PW 2 answered in the following manner:

Q. Sir, I put to you that the substances produced in this court are not those which were allegedly taken from you in the accused car, in that it is different and in that, secondly, it is missing.

PW 2's answer was:

Yes, the dark substance itself, and there is another piece of dark substance that is missing, and the powder is not the same colour (verbatim from the record).

When called upon in Court to identify the substances seized from the appellant and taken by him to Dr Gobine, PW 2 stated in respect of the white powder seized from the appellant "I can see the colour of the powder has changed, so, I cannot say that it is the same". PW 2 identified the other substance.

PW 3, PC V Sophie testifying before the Court as regards the search of the appellant's car and the seizure of controlled drugs stated:

It was PC Mousbe who searched the car of Mr. Gabriel; that he searched under the seat and he found a cigarette paper. In the car pocket he removed a piece of silver paper and in this there was some powder and then there was a piece of a black substance which is presumed to be hashish. (verbatim from the record).

Thereafter to the question of the prosecuting counsel which is both leading and misleading (because witness had not made reference to a white substance), "And the white substances where did you find the two substances the powdered substances?" PW 3 said: "It was in the car pocket". Unless there is an error in the recording of the proceedings we would advise prosecuting counsel to desist from misleading witnesses or asking leading questions. When called upon in court to identify the white substance seized from the appellant's car, PW 3 said: "This is the powder it was white and I saw some sort of colours" and again said "There was only one substance white and brownish colour. There was no black colour. No black colour. There was this hashish this small part of hashish but now I don't see". Under cross-examination PW 3 stated that there was no torch and that he did not bother looking too much at the substances recovered from the appellant's car. In answer to court as to how many items were found in the car, PW 3 said "There was this powder, this white powder with brown colour and then a little piece of dark substance which is hashish, supposedly hashish."

PW 1 Dr Philip T Gobine, testifying before the court stated that on 12 February 2004, PW 2 had brought duplicate copies of Letters of Request, signed by Inspector

Hermitte (which were not produced) with an exhibit comprising of two items for examination and analysis. The items consisted of some white powder, wrapped in golden paper, some brownish substance wrapped in silver cigarette paper and a packet of Rizla cigarette paper.

It is clear from the evidence of Dr Gobine that the piece of black or dark substance seized from the appellant's car, as per the testimony of PW 2 and PW 3, was not taken to Dr Gobine for purposes of analysis. The prosecution had failed to produce the Letter of Request for Analysis of the controlled drugs or call Inspector Hermitte as a witness to give an explanation, if one was possible, as to what happened to the piece of black or dark substance recovered from the appellant's car. According to the evidence of PW 2, after seizure of the controlled substances they had gone to the Anse Aux Pins Police Station where he gave the controlled substances to an officer to do the necessary procedures by recording it in the book. There is no evidence on record as to who this officer was, how long the procedure took or where PW 2 was when the procedures were being done. This too creates doubt on the chain of evidence.

PW 1 Dr Gobine had described the substances sent to him for purposes of examination and analysis as a 'creamy white powder' and a 'crushed brownish resinous material having a slight green tint'. Under cross-examination Dr Gobine specifically stated that he was not given a piece of black substance for examination.

On examination of the items that were produced in court, Dr Gobine said that he was satisfied that they were the same substances which were brought by PW 2 and analysed by him. On examination of item no 1 he said that it "contains heroin. It has gone a little brownish, but, it is storage, because it is damp." Counsel for the appellant argued before us that no evidence was placed before the trial court as to the damp conditions prevailing in the place where the heroin had been stored after its examination by Dr Gobine and prior to it been produced before the court. He said he was not challenging Dr Gobine's evidence pertaining to change of the colour in the heroin but it was incumbent on the prosecution to place some evidence as regards the place where the heroin was stored in view of the apparent change of colour of the heroin and Dr Gobine's explanation.

The trial judge stated in the penultimate paragraph of his judgment:

Therefore he (meaning PW 2, Mousbe), who was the officer who directly handled the substance did not state that there was a solid mass. In these circumstances the fleeting glance of P.C. Sophie is not reliable.

This was evidently an erroneous statement in view of the following answers to Court by PW 2:

Q. You were told in the statement you had mentioned another black piece of something. So, from the car, how many substances that you took? You said white, and the other colour. Did you also get that black piece in the car? In the statement you had mentioned another black piece.

A. Yes, it was in the paper which contains the powder.

Q. So, with the powder there was a black piece, also?

A. Yes, it was, the dark substance was inside the powder.

PW 2 Mousbe had clearly spoken of a solid mass. Had the trial Judge not made this error of judgment he may have come to a different conclusion as regards the chain of evidence.

PW 2 described what happened when he went to Dr Gobine to collect the substances after they had been analyzed by Dr Gobine in the following manner: "The substances were given to me in a sealed envelope". He also stated:

When Doctor Gobine gave me back the envelope I did not open the envelope, because the procedure is that, when we are given back an exhibit from Dr. Gobine, it should be sealed and we should not tamper with it or even open it(verbatim)

PW 1 Dr Gobine's evidence in regard to the handing over of the substances to PW 2 was:

I first showed him the exhibit, comprising of two items, so that he would be satisfied that it is the exhibit that he brought to me in the first place. When he was satisfied, we proceeded to put the exhibit in an envelope and I proceeded to seal the items in his presence.

There is a clear contradiction in the testimony of PW 1 and PW2 in regard to this matter. This Court is of the view that it is difficult to rely on the evidence of PW2 in regard to compliance with procedures pertaining to maintenance of the chain of evidence regarding exhibits in drug cases. There is much credence in the position put by counsel for the defence to PW 2:

I put it to you that the substances produced in this Court are not those which were allegedly taken from you in the accused car, in that it is different and in that, secondly, it is missing.

This Court is in serious doubt as to whether the very substances recovered from the appellant were sent for examination and analysis in view paragraphs 6 to 13 above. We are of the view that this was a fatal irregularity. In the case of *Josianne Vital v Republic* Cr Appeal No 3 of 1997 the police woman who seized the drugs had brought them to the police station put them into an envelope, placed a post-it paper with a number on it as an identifying mark on the envelope, and placed it in a locker. As recorded in the judgment:

However, when the police woman removed the envelope from the locker, she inexplicably peeled off the "post-it" and apparently threw it into a bin. She then took the envelope to the drug analyst who, after examination of the substance contained in the envelope, certified it to

be cannabis, put it into a khaki envelope which was sealed and handed to the police woman.

The judgment goes on to state:

The police woman conceded that during the material time, she brought in similar substances secured elsewhere which she placed inside the same locker, and that she visited the analyst many times.

In that case this Court said:

In these circumstances, it is doubtful that what was analysed by the drug analyst was the same substance that had allegedly been found in the appellant's possession. The whole issue is shrouded in mystery. The onus was upon the respondent to adduce satisfactory evidence to show that the substance that had been brought from the appellant's residence was the same substance that was handed over to the analyst. This they failed to do with the result that there was a break in the chain of evidence to link the drugs analysed by the Drug Analyst to the appellant.

In 78 (1994) CLT 366 it was held that there was unreasonable and unexplained delay in sending the seized articles to the Chemical Examiner and further there was no convincing evidence as to whose custody the seized articles were kept during the intervention period. The vital link evidence being missing the conviction and sentence cannot be sustained. In *Balaji Sahu v State* 84 (1997) CLT 357 it was held that where the prosecution evidence is silent that any effective step was taken for proper custody of the seized article and same was sent after 43 days, the benefit of doubt must be extended to the accused. In *Ram Phal v State of Haryana* (1997) 1 SFR 151 it was held that the variation in the weight of the sample spoke volumes against the prosecution and that the only inference could be that either the sample was tampered with somewhere or the sample sent to FSL was not the same which was alleged to have been recovered from the appellant. In *Valsala v State of Kerala* (1994) AIR SC 117 it was held that when the link evidence relating to the safe custody is missing, the missing link is fatal for the prosecution. In *Ajajya Kumar Naik v State of Orissa* (1995) Cr LJ 82 and *Jayakrushna Parida v State of Orissa* (1997) Cr LJ 2179 it was held that the incriminating materials recovered from the accused and duly identified during the proceedings go a long way in connecting the accused in the case. In a case where the subject matter of the offence committed is an article for which an expert opinion is necessary to prove the nature of the contraband article, it is all the more necessary and imperative on the part of the investigating agency to seal it in such a manner and keep it in such custody so as to wipe out the slightest doubt in the mind of the Court that there could have been any possibility whatsoever that the article so seized could be tampered with before it could reach the public analyst.

There is nothing in the judgment to indicate that the trial Judge had examined the issue of possession by the appellant before convicting him. All that he said in regard to possession is to be found in the concluding paragraph of his judgment:

On the totality of evidence, the Court is satisfied that, unlike in the cases of Josianne Vital (*supra*) and Robert Rioux (*supra*), there are no doubtful factors to assume the possibility of tampering or there being a mix up of substances taken for analysis to warrant a finding that the element of possession had not been proved. Hence the prosecution has proved the elements of possession and knowledge, required to establish both charges under count 1 and count 2 beyond a reasonable doubt.

The establishment of the chain of evidence pertaining to the analysis of the controlled drugs has nothing to do with proof of possession. The trial Judge does not appear to have considered the evidence of PW 2 that the windows of the car of the appellant in which the controlled substances were found were open and the doors of it were not locked. There was no evidence before the Court as to when the appellant came to Vincent Samson's house, from where he came, with whom he came, who had been travelling in his taxi prior to him coming to Vincent Samson's house and how long he had been at Vincent Samson's premises. The trial Judge has failed to comment in his judgment as to the weight he attaches to the appellant's statement to the police when the controlled substances were found, namely that he (appellant) did not know about the presence of controlled drugs, that it did not belong to him, that it must have been placed in his car by somebody and that he was a taxi driver. In the absence of any evidence to the contrary this evidence emanating from the prosecution itself has a bearing on the innocence of the appellant. The principles of fair hearing demand that a trial court must necessarily pronounce on matters like this before coming to a finding against an accused person. Further it was incumbent on the trial Judge to make a pronouncement on these items of evidence as such evidence may be sufficient to rebut the presumption under section 18 of the Misuse of Drugs Act (Cap 133).

The conversation that is alleged to have taken place between the appellant and PW 2, as referred to at paragraph 2 of this judgment, is not sufficient alone to make a finding of guilt against the appellant when there is a serious doubt as to the chain of evidence pertaining to the exhibits. Many a person tries to wriggle out from a situation by having recourse to 'deals'; which unfortunately have become the norm when dealing with certain officials. This does not mean that this Court condones such actions or is casting aspersions on any particular witness in this case but this court cannot ignore the realities of society. Unfortunately even the innocent find this an easy way to get out of an inconvenient situation which may look incriminatory against them but for which they may not be responsible for. Even if the 'deal story' is to be acted upon, a person cannot be convicted on a sole reliance of such evidence if there is a serious doubt as to the chain of evidence in a drug case.

This case is yet another illustration of a pathetic investigation, a poor prosecution and a desire by the trial court to rope in the accused ignoring the obvious lapses on the part of the prosecution. Maintaining the chain of evidence from the time of seizure of the drugs up to the time it is analysed by the Government Analyst is absolutely vital in dealing with a drug case. Investigators and prosecutors should consider the severe nature of punishment provided by the Act and thus leave no room for doubt in the mind of the court that there could have been any possibility whatsoever that the substance seized could have been tampered with before it

reached the Government Analyst. To ensure this, drugs seized should be placed in an envelope or receptacle as soon as possible and sealed. The CB number assigned to the case should be written on the envelope or container. It should then be placed in safe custody and taken to the Government Analyst for examination and report at the earliest possible opportunity. There must always be a balancing of the two interests, namely the public interest of combating drug related crime and the right of an accused person to a fair trial enshrined and entrenched in the Constitution.

In view of the circumstances set out above we are of the view that it is unsafe to maintain the conviction. We therefore allow the appeal and acquit the appellant.

Record: Court of Appeal (Criminal No 22 of 2009)