

## IN THE SEYCHELLES COURT OF APPEAL

[**Coram:** A.Fernando (J.A) , B. Renaud (J.A), F. Robinson (J.A)]

### **Criminal Appeal SCA CR 06 & 07/2018** **(Appeal from Supreme Court Decision CR 25/2016)**

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Hattam Monthushimira

1st Appellant

Imam Tarani

2nd Appellant

Versus

The Republic

Respondent

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Heard: 04 December 2018

Counsel: Mr. Clifford Andre for the Appellants

Mr. David Esparon for the Respondent

Delivered: 14 December 2018

## **JUDGMENT**

### **B. Renaud (J.A)**

#### **Background Information**

1. On 6<sup>th</sup> October, 2016 the two Appellants, namely - Imam Baksh Tarani 32 year old Captain of the Vessel Payam Al Mansur (hereinafter “PAM”) of Baluchistan, Charbahar, Konarak, Iran; Hattam Mothashimina 20 year old Sailor of Baluchistan, Charbahar, Konarak, Iran, along with another accused Hoseyn Bazdar 25 year old Mechanic of Baluchistan, Charbahar, Konarak, Iran, were all formally charged in Supreme Court of Seychelles in case CR 25/2016, with four counts of offences, as follows:

2. **Count 1** – importation of a Controlled Drug contrary to Section 3 of the Misuse of Drugs Act read with Section 26(1)(a) of the said Act and read with Section 23 of the Penal Code and punishable under Section 29 read with Second Schedule of the said Act.
3. The **Particulars of Offence** were that Imam Baksh Tarani, Hattam Mothashimina and Hoseyn Bazdar on the 16<sup>th</sup> April, 2016 in the Seychelles Territorial waters imported into Seychelles a Controlled Drug namely Diamorphine (Heroin) having net weight of 97945.1 grams with heroin content of 65211.4 grams of heroin (diamorphine) into Seychelles.
4. **Count 2** – Trafficking in a Controlled Drug contrary to Section 5 read with Section 14(1)(c)(ii) and 26(1)(a) of the Misuse of Drugs Act and further read with Section 15(3) of the Misuse of Drugs Act and punishable under Section 29 of the Misuse of Drugs Act, read with Second Schedule of the same Act.
5. The **Particulars of Offence** were that Imam Baksh Tarani, Hattam Mothashimina and Hoseyn Bazdar on the 16<sup>th</sup> April, 2016 in the Seychelles Territorial waters were trafficking in a Controlled Drug by virtue of having found in possession of substance having net weight of 97945.1 grams of heroin (diamorphine) and having total Heroin content of 65211.4 grams with the knowledge and consent of one another which gives rise to the rebuttable presumption of having possessed the said Controlled Drug for the purpose of trafficking.
6. **Count 3** - Importation of a Controlled Drug contrary to Section 3 of the Misuse of Drugs Act read with Section 26(1)(a) of the said Act and read with Section 23 of the Penal Code and punishable under Section 29 read with Second Schedule of the said Act.
7. The **Particulars of Offence** were that Imam Baksh Tarani, Hattam Mothashimina and Hoseyn Bazdar on the 16<sup>th</sup> April, 2016 in the Seychelles Territorial waters imported into Seychelles a Controlled Drug namely 784.6 grams of opium.
8. **Count 4** – Trafficking in a Controlled Drug contrary to Section 5 of the Misuse of Drugs Act read with Section 14(1)(a)(i) and 26(1)(a) of the Misuse of Drugs Act and further read with Section 15(3) of the Misuse of Drugs Act and punishable under Section 29 of the

Misuse of Drugs Act, read with Second Schedule of the same Act.

9. The **Particulars of Offence** were that Imam Baksh Tarani, Hattam Mothashimina and Hoseyn Bazdar on the 16<sup>th</sup> April, 2016 in the Seychelles Territorial waters were trafficking in a Controlled Drug by virtue of having found in the possession of 784.6 grams of opium with the knowledge and consent of one another which gives rise to the rebuttable presumption of having possessed the said Controlled Drug for the purpose of trafficking.
10. The case against the 3<sup>rd</sup> Accused was thereafter withdrawn by the Prosecution before the start of the trial proper.
11. The other two Appellants pleaded not guilty to all the charges and after trial the Court convicted both of them for the offences set out in Count 1, Count 2, Count 3 and Count 4 and both were given the same sentences, namely, life imprisonment for the offences under Counts 1 and 2, and, 20 years imprisonment for Counts 3 and 4.
12. Both convicts have now appealed against the judgment delivered on 23<sup>rd</sup> January, 2018 and the sentences delivered on 26<sup>th</sup> January, 2018 in Supreme Court case CR 25 of 2016. They are appealing against both the conviction and sentence on the following grounds.

### **Grounds of Appeal**

13. Learned Counsel for the Appellants raised 6 grounds of appeal.

#### **Ground 1:**

**The Learned Trial Judge erred in coming to a finding that the two Appellants were guilty of the offence of importation into Seychelles territorial waters. This is because there was no production of any documents from the Coast Guard confirming the said position of the boat on arrest.**

#### **Submissions of Appellants**

14. In his written submissions before this Court Learned Counsel for the Appellants *inter alia* stated the following. There was no confirmation by any production of documents from the Coast Guard and specifically Maj. Esticot and the Court was wrong to come to any finding

that the vessel of the Appellants was in the territorial waters of Seychelles as defined in the Maritime Zones Act of Seychelles. The defence witness Capt. Wilton Ernesta testified that to his experience as an International Master Mariner who is far more experienced than Maj. Esticot, that according to the video, it was clear that one could not say which Island it was and there was no distinguishing features that would identify the island which was brought to the attention of the Court. It is therefore not proper for the Court to say that it was indeed the said island that was in the video which was only requested by the defence and was not produced at the hearing of the Prosecution. The elements of the offence was therefore not proved at all as there was doubt as to whether the said vessel was in territorial waters or not. There was no evidence produced before Court to prove that the island being claimed was indeed what was being said it was.

#### **Submissions of Respondent**

15. Learned Counsel for the Respondent submitted the following. Maj. Esticot of the Seychelles Coast Guard (SCG) *inter alia* testified and was cross-examined, that on the material day he was commanding Patrol Boat “Constant” when his boat was about 4 nautical miles North East of Bird Island which lies in our territorial waters, he intercepted the vessel of the Appellants. He called the vessel on radio with no answer. He then hand signaled them to stop but they did not. He crossed in the path of that boat and fired three warning gun shots when the boat stopped and all the crew assembled on its front part. It was 6.30 am when that boat which was not flying any flag, was boarded. The boat was taken back to Mahe under the control of SCG as a vessel suspected of doing illegal transaction. Maj. Esticot testified that he had a GPS, he had a disk which is a plotter and he also had a radar which is also a plotter, on board his vessel. These instruments gave him all the co-ordinates of the movement of his vessel and its position at all given times. Maj. Esticot also testified that from an intelligence source which he received from abroad, which he could not disclosed, about the course the intercepted vessel had taken and was taking and its position. Based on such information he directed his vessel to the position of that vessel which was operating in Seychelles Territorial Waters. There is no evidence to suggest otherwise.

16. Learned Counsel for the Respondent in his submissions concluded that –
- “Therefore, we find that the Prosecution had established beyond reasonable doubt through oral testimonies of the position that the vessel was intercepted within the Seychelles Territorial Waters being only 4 nautical miles off Bird Island. In such circumstances there is no need for the Prosecution to produce any other documentary evidence to establish the position of the vessel at the time of interception.”*

### **The Judgment**

17. As this ground of appeal is based on the findings of fact by the Learned Trial Judge and in view of its importance, we reproduced the gist of these findings hereunder.
18. The Learned Trial Judge in his analysis of the evidence at paragraphs 49 to 51 of his judgment considered the contention of the Learned Counsel for the Appellants (then the Accused) that their vessel referred to as “PAM” was arrested on international waters far away from Seychelles because of the fact that in the statement given by Maj. Esticot he mentioned 400 Nautical miles and 4000 Nautical miles. The Learned Trial Judge also considered the other contention of Counsel for the Appellants that one could not rely on the evidence of Maj. Esticot as it was contradictory in nature and the expert called by the defence Capt. Ernesta had identified the island as a coralline island.
19. The Learned Trial Judge was firstly of the view that the evidence of Maj. Esticot was not contradictory in nature and the evidence of Capt. Ernesta was unsure in that he could not identify the island shown to him on the recording but stated it looked like a coralline island. The Learned Trial Judge stated that in this respect Maj. Esticot would have been in a better position to identify the island as he was physically present at the scene of interception and had his instrument readings before him.
20. The Learned Trial Judge in his judgment also stated *inter alia* the following – that, Maj. Esticot had clearly stated the 400 Nautical miles and 4000 Nautical miles were errors made in the writing of the statement. His evidence and that of Corporal Cesar is that the vessel was arrested close to Bird Island within the territorial waters of Seychelles. The Appellants

too admitted that they had strayed from course as their GPS was malfunctioning and their radar was not working, they could not tell where they were at the time the Coast Guard vessel intercepted them. The 1<sup>st</sup> Appellant admitted they had seen a small island with trees. He had thought they were in international waters but the Coast Guard Vessel had approached, stopped them and boarded them. Unlike them, the Coast Guard was relying on their instruments and radar according to the evidence of Maj. Esticot were plotting their course in their logbook as well. Corporal Cesar of the Coast Guard gives the exact co-ordinates where the vessel was intercepted and in cross examination it was observed he had mentioned same in his contemporaneous statement given by him. Further the time taken for both vessels Constance and PAM to reach Mahe just after midnight, after leaving the point of interception after 5.30 p.m., does not indicate the PAM was intercepted 400 or 4000 nautical miles away from Seychelles.

21. The Learned Trial Judge concluded that he had no reason to disbelieve the evidence of the Prosecution in this regard and he was satisfied the vessel was arrested within the territorial waters of Seychelles.
22. The Learned Trial Judge also considered the other contention of the Appellants to the effect that the vessel PAM was exercising its right of innocent passage and therefore the case could not proceed against the Appellants. The Learned Trial Judge stated in his judgment that the right of innocent passage was never denied by the Officers of the Coast Guard but the Coast Guard does have the right to board and search suspected vessels within the territorial waters of Seychelles and if illegal and controlled drugs are found aboard the vessel, they have a right to apprehend the vessel and crew. In that regard, the Learned trial Judge drew attention to Article 27 (d) of UNCLOS (United Nations Convention on the Law of the Sea) which grants a coastal State permission to exercise its criminal jurisdiction, if such measures are necessary for the suspension of illicit traffic in narcotic drugs or psychotropic substances on vessels passing their territorial sea.
23. At paragraph 53 of his judgment the Learned Trial Judge accepted the evidence of the Prosecution against the 1<sup>st</sup> and 2<sup>nd</sup> Appellants and rejected their defence. That conclusion

amounted to the finding that the offence was actually committed in the territorial waters of Seychelles.

**Was the vessel PAM in the territorial waters of Seychelles when it was intercepted?**

24. This question can only be answered after analyzing the facts as established by evidence before the trial court.

**Analysis of the Evidence**

25. It is trite that in many jurisdictions Courts of Appeal are slow to interfere with findings of fact by courts below, unless they are perverse, manifestly unreasonable, or if there were mis-directions or non-directions on the evidence, etc. In saying so, we are aware that under Rules 31(1) of the Court of Appeal Rules, 2005, appeals to this Court are by way of a re-hearing but there must be strong and compelling reason(s) to interfere with findings of fact by a trial judge.
26. The correct approach in deciding whether or not to interfere with findings of fact by a trial judge was followed by this Court (J. Msoffe with Domah J.A. and Fernaddo J.A. concurring) as stated in the case of *David Rose & ors v Republic Criminal Appeal SCA 06, 15 & 16/2014*.
27. We have analysed and considered the evidence of the witnesses for the Prosecution, namely, Major Esticot and Cpl. Cesar as well as the evidence of the Appellants and their witness Capt. Ernesta with regard to the essential element of the offence as to whether the interception and arrest of the Appellants' vessel was made in the Territorial Waters of Seychelles or not, as raised by the Appellants in their first ground of appeal.
28. According to our analysis of the evidence of **Maj. Esticot** who was commanding the Coast Guard Vessel "Constant", it is established that he left Port Victoria Coast Guard Base at around 3.30 p.m. on 15<sup>th</sup> April 2016. Maj. Esticot testified that he took the north direction at a speed of about 14 to 15 nautical miles per hour. He first sighted the Vessel "PAM" on his radar at about 7.00 p.m. that evening. He continued his course towards it until around

10 to 11 pm p.m. when he came to about 14 nautical miles from it. He continued to travel further towards PAM until he reached a distance of about 7 nautical miles from it. At that time PAM was maintaining a speed of about 6 to 8 nautical miles per hour and Maj. Esticot also maintained that same speed and kept PAM in sight until around 6.30 a.m. the next morning when he intercepted it.

29. Maj. Esticot having left the Coast Guard Base in Port Victoria at 3.00 p.m. and travelled at between 14 and 15 nautical miles per hour. Seven hours later, between 10 and 11 p.m., he could have only covered a distance of about 100 nautical miles when he spotted PAM on his vessel's radar. At that time PAM was about 15 nautical miles away.
30. In our considered judgment, we find and conclude that it is definitely an error, if in his statement given to the NDEA on 11<sup>th</sup> May, 2016, it is recorded that Maj. Esticot stated that Patrol Boat Constant was 4000 or even 400 nautical miles away. This in our view is practically impossible as there is no evidence or even a suggestion that vessel Constant can possibly ever travelled either of such distances in 7 hours.
31. We therefore agree with the finding of the Learned Trial Judge that 4000 or 400 nautical miles referred to in the statement of Maj. Esticot to the NDEA, must be a mistake and cannot be correct in the circumstances.
32. The particulars of the offence in the Formal Charge Sheet stated that the offence took place in the Territorial Waters of Seychelles. The onus is therefore on the Prosecution to prove that fact beyond a reasonable doubt.
33. At the outset we take judicial notice that it is a geographical fact that Bird Island also known as Ile aux Vaches is the most northerly island of Seychelles. It lies about 57 Nautical Miles from Port Victoria. Our territorial waters on the northern boundary extends 12 nautical miles from Bird Island or around 70 nautical miles from Port Victoria.



34. As stated earlier above, Maj. Esticot left his Base in Port Victoria at 3.00 p.m. travelling at a speed of between 14 and 15 nautical miles per hour. After travelling for 7 hours later, at around 10 to 11 p.m. he first spotted PAM on his vessel's radar. At that time PAM was about 15 nautical miles away from his vessel Constant. Effectively, that put PAM at about 115 nautical miles from Mahe. Maj. Esticot continued until he reached about 7 nautical miles from where PAM was and maintained that same course and at that same speed that PAM was travelling, that is, at a speed of between 6 and 8 nautical miles, until 6.30 a.m. the next morning. Therefore, both vessels must have travelled a distance of around 45 nautical miles during that period. There is, however, no evidence of what direction both vessels had been travelling from 11 pm to 6 am.

35. Under cross-examination Maj. Esticot was asked:

*Q. So now when you were 7 nautical miles with the vessel what was your position?*

*A. I am not able to state exactly the position of the boat whilst being at 7 nautical miles from the suspected vessel as the vessel was moving.*

*Q. So now Major what was your position when you spotted the vessel, the suspected vessel then?*

*A: 40 nautical miles North East of Ile au Vaches.*

*Q. So you confirm you were 40 nautical miles with Ile Aux Vaches when you spotted the vessel?*

*A: Approximately.*

36. Under further cross-examination Maj. Esticot answered questions put to him, as follows:

*Q. So now you said it was 4 nautical miles, so is it 4 nautical miles North East or 40 nautical miles North East?*

*A: The point where the boat was intercepted was 4 nautical miles North East direction of Ile au Vaches. The point where the boat was spotted from the*

*radar it was 40 nautical miles. It was seen at 40 nautical miles on the radar and it was stopped at 4 nautical miles North East of Ile au Vaches.*

*Q. I am putting it to you Major that you are not telling the truth because when I asked you the question what was your position when you spotted the vessel you said 40 nautical miles.*

*A. When the boat was seen and the point where it was intercepted is 2 things.*

37. Major Esticot clarified that when the boat was spotted it was 40 nautical miles from Ile aux Vaches, when the boat was intercepted it was 4 nautical miles from Ile aux Vaches. After that he maintained a distance of 7 nautical miles between Constant and PAM. What Maj. Esticot did not testify was in what direction the vessels were travelling.

The Court intervened and asked Maj. Esticot:

*Q. And you say the suspected vessel would have been how far from Ile au Vaches?*

*A. It could be 48 to 49 nautical miles.*

38. Maj. Esticot was recalled to testify about the recording equipment on his vessel Constant. He testified that there were filming of the events that were happening using an AV system from which footage cannot be removed. He explained that that AV technology does not record date and time of the event being filmed. He also made reference to a Log Book where information about date and time are recorded, but that Log Book was not produced in evidence. He answered two further questions:

*Q. The first time you spot the vessel it was in the territorial waters Mr. Esticot?*

*A: It was not less than 12 nautical miles but it was in our EEZ (Exclusive Economic Zone).*

*Q. What was the distance that you spotted the vessel on the recordings that has no date?*

A. *The distance at which it was spotted it could have been around 12 to 14 nautical miles. I cannot state exactly how many miles.*

Q. *You do not have any visual evidence of what you are telling us?*

A. *I have a disk onboard my boat which plots the position I am at. I am a navigator.*

39. **Corporal J.J. Cesar** of the Coast Guard Unit who was on Constant on that mission, testified that PAM was spotted on the radar at 10 p.m. and Constant maintained a distance of 7 nautical miles away. He also did not state in what direction the two vessels were travelling. At 6.30 a.m. the next day PAM was intercepted and at that time their position was 0.3 degrees 38 minutes South, 0.55 degrees 15 minutes West and in the vicinity of Ile aux Vaches. Another crucial piece of evidence that would have made sense and assists this Court to determine the exact location of the two vessels when the interception place, is a Chart showing the coordinates as well as the location of Ile aux Vaches. These are unfortunately lacking.
40. Cpl. Cesar also testified that the Constant left Port Victoria at 3.30 pm. and was travelling at around 13 and 15 nautical miles per hour going towards the North point of Mahe to go towards Ile aux Vaches. There again, like Maj. Esticot, he did not testify as to whether their vessel changed course at any given time and if so in what direction they continued to travel.
41. The **1<sup>st</sup> Appellant** gave a statement to the NDEA which after a “Voir Dire” the Court ruled that it was voluntarily given by him. He testified that he was navigating by GPS as its vessel’s radar was not functioning. The memory card in his GPS was spoiled and was not showing him his exact location. He had no intention to come to Seychelles but was travelling to Tanzania. During his voyage he saw a small island with some trees. He thought that he was in international waters. He was not sure that he had encroached other territory. Under cross-examination he stated that in the morning he noticed a small island near them.

42. The 2<sup>nd</sup> **Appellant** testified but in his testimony there is no indication that he had any knowledge of his vessel's location when it was intercepted.
43. **Capt. Wilton Ernesta** is an experienced Master Mariner having qualified and working as such since 1993, and who is presently the Director of Seychelles Maritime Academy. At a point in time he was the Director General of the Seychelles Maritime Safety Administration. He testified as an expert witness. He viewed a recorded video footage in Court. He observed that there is no date and time recorded on the videos and the position where the footage was filmed is also not recorded. At a point in time Capt. Ernesta stated that Constant changed course towards the right as shown by the video. He also observed that the vessel in the footage was flying a flag located at the back on the upper portion of the vessel. Capt. Ernesta answered questions put to him in relation to the footage that he was viewing:

*Q. Is it possible for you to tell us in which waters it is?*

*A. Since there's no position mention you cannot say whether it's in territorial waters, or international waters, or in the EEZ area so you cannot have the information. Because of position not available.*

*Q. Now if you look on the horizon can you tell us what it is?*

*A. There's an island.*

*Q. Can you tell us the island?*

*A. Now[t] possible simply [from] my experience all the Coralline Islands, looks very similar when you sight the island and coming a bit close. It's very difficult for you to identify the Island.*

*Q. In your experience if you can if you cannot you'll tell us you can't. What would be the distance from the Island to the boat?*

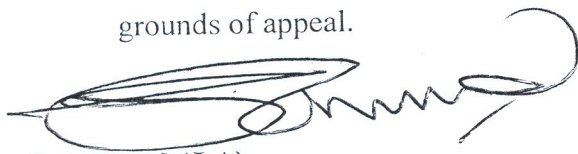
*A. Approximately 15 NM.*

### Conclusion

44. It is our considered judgment that in the light of our analysis of the evidence we are unable to uphold the decision of the Learned Trial Judge that the vessel (PAM) was arrested within the territorial waters of Seychelles. We find that there was no cogent evidence adduced by the Prosecution through its witnesses to prove beyond a reasonable doubt the position of the vessel when it was intercepted by the Seychelles Coast Guard and arrested.
45. It is our judgment that it is incumbent on the Prosecution to establish and prove by cogent evidence that the offences were committed by the Appellants when they were within the jurisdiction of the Seychelles' Court, which they have failed to do.
46. It is our finding that it is not proven beyond a reasonable doubt that the offences with which the two Appellants were charged with and convicted, were actually committed in the territorial waters of Seychelles.

### Decision

47. In view of the foregoing conclusion we hereby dismissed the charges against both Appellants and we accordingly acquit both of the Appellants. The Appellants are to be discharged and released from Prison unless they are serving other prison sentence.
48. Having reached that conclusion we find that there is no necessity to consider the other grounds of appeal.

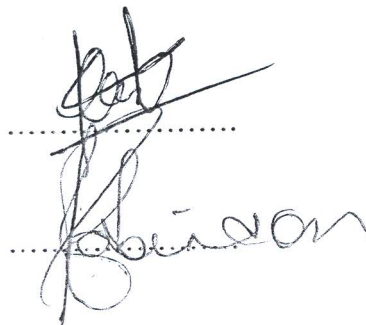
  
B. Renaud (J.A)

I concur:..

  
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A.Fernando (J.A)

I concur:..

  
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F. Robinson (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 14 December 2018