

IN THE SUPREME COURT OF SEYCHELLES

THE REPUBLIC

VERSUS

TERENCE ALPHONSE

Crimin

al Side No 47 of 2006

Mr. R. Govinden for the Republic
Mr. F. Ally for the Accused

JUDGMENT

B. Renaud J

The accused stands charged with the 2 counts of offence.

The first count is one of trafficking in a controlled drug contrary to Section 5 read with Section 14 and Section 26(1)(a) of the Misuse of Drugs Act 1990 as amended by Act 14 of 1999 and punishable under Section 29 and the Second Schedule referred thereto in the Misuse of Drugs Act 1990 as amended by Act 14 of 1994.

The particulars of the offence is that the accused who is also know as "Ti Kota" on the 7th of September 2006 at Roche Caiman, Mahe, was trafficking in a controlled drug by virtue of him having been found in possession of 4.9 grams of heroin (Diamorphine), which gives rise of the rebuttable presumption of having possessed the said controlled drug for the purpose of trafficking.

The second count is one and possession of a controlled drug contrary to Section 6 read with Section 26(1)(a) of the Misuse of Drugs Act 1990 as amended by Act 14 of 1994 and punishable under Section 29 and the Second Schedule referred thereto in the Misuse of Drugs Act 1994 as amended by Act 14 of 1994.

The particulars of that offence are that the accused on 7th September 2006 at Roche Caiman, Mahe was in possession of a controlled drug by virtue of him having been found in possession of a hand rolled cigarette containing cannabis resin.

The accused was remanded in custody with effect from 11th September, 2006, pending the completion of his trial.

At the trial the accused pleaded not guilty and a trial was held.

PW1 Abdul Kader Jackaria testified that he is a Forensic Chemist. On 8th October, 2006 at 11.10 hours Cpl Veevers Rose brought two exhibits to him in case CB550/06 of the Mont Fleuri Police Station. Together with the exhibits he brought a Request Form signed by ASP Hermitte requesting him to carry out analysis. He carried out laboratory examination and analysis on those exhibits. He found the first exhibit in a plastic sachet wrapping with certain amount of grayish powder and its net weight was 4.9 grams. The second exhibit was one hand-rolled cigarette comprising tobacco mixed with brownish sticky substance. He subjected the first exhibit to a coloured test to determine if the powder was heroin. He carried out a second test on the powder by using an ultra-violet spectrophotometer to confirm or otherwise the presence of heroin. He further carried out a third test on the powder. That test is known as thin layer chromatography which confirm or otherwise the presence of heroin. He concluded and found from the three different tests that the powder he analysed indeed contained heroin.

He also carried out two tests on the second item, that is, the hand-rolled cigarette. Both tests were positive for cannabis. He went on and carried a third test, thin layer chromatography which also gave

positive results for cannabis. Following those examinations and analysis he prepared a Report of his findings. On 11th September 2006 at about 8.30 a.m. Cpl Veevers Rose came to fetch the exhibits and his Report which he gave to him. Cpl. Veevers Rose acknowledged receipt of the Report also the two sets of exhibits. The Report is Exhibit P1. The witness identified the two items that Cpl. V. Rose was invited to present to Court. These are Exhibits P4 and P5. The witness added that in his 33 years experience he had never encountered heroin of 100% purity during the course of his work. He added that it is also very rare even in the world market to encounter 100% heroin. Since working in Seychelles he had never come across heroin of 100% purity.

Police Superintendent Godfroy Hermitte testified that on 8th September, 2006 in the morning Cpl Veevers Rose came to him and brought a small white envelope containing light grayish powder and a hand-rolled cigarette for forensic examination. He examined those items and thereafter prepared a Request Form to Dr. Jackaria of the Forensic Laboratory. He gave a copy of the Form to Cpl. Rose together with those items. The witness identified those items in Court as well as the Request Form. The Request Form is now Exhibit P6.

Cpl Veevers Rose testified that on 7th September, 2006 he was at home off-duty when he was called up about 7 p.m. by his superior for some duties. Insp. Agnes Mondon and P.C. Robert Dufrene met him at about 8 p.m. at his home at Petit Paris Police Barrack and they all went to town by a Jeep driven by Insp. Mondon. He performed the assigned duty and he was being taken back home when they reached Mohan Shop at Plaisance and observed a vehicle going towards town which they suspected to be that of the accused. They turned their vehicle and followed the car which went to the Petrol Filling Station at Roche Caiman. That car was parked near the water tap where wheels are

pumped. He alighted from the Jeep which was by then parked behind the parked car. He noticed the passenger in the car at the same time the driver was about to go out. He told the passenger to stay in the car and asked the accused to switch off the engine of the car. The Accused was still sitting in the driver's seat. His colleague Officer Robert Dufrene went and stood by the driver's door of the car and he went to the passenger, Keneth Coeur de Lion, and ordered him out of the car and searched him. Nothing illegal was found on him. He then went towards the Accused's side and he asked the accused to come out of the car to be handcuffed and searched. At that same time he saw the accused using his right hand dropping a white plastic bag down. At that time he was not yet handcuffed. The Accused threw that bag near the right front tyre. The accused then stood up from the car. The witness picked that bag and looked inside it. He saw that there were hard stuffs and he asked the accused for whom were these and the accused told him that he did not know. PC Dufresne searched the accused and saw some money on him but did not know how much there were. He informed the accused of his rights. PC Dufresne handcuffed the accused. They did the necessary procedure and later took the accused to the Police Station. On the scene they also searched the vehicle of the accused immediately after searching on the accused. Nothing illegal was found in the car. The witness kept the objects he picked on the scene, in his locker as soon as he went to his station at ADAMS. He registered them first at Mont Fleuri Police Station. Nobody had access to his locker. He removed them the next day to have them analysed. He brought these with him to ASP Hermitte, obtained the Request Form and took them for analysis to Dr. Jackaria on the same day. The next day he picked them up together with the Report. He placed the items in his locker until he brought them to Court as exhibits. He gave the Report to the Investigation Officer. The Report which is Exhibit P1 and Exhibits P4 and P5 were identified in court by the witness. He did not look under the vehicle

until when further police assistance came. He had by then already searched the accused and under the car. There was nothing under the car.

Under cross-examination the witness stated that there was sufficient light at the scene. There were Petrol Attendants at the Filling Station. PC Dufresne handcuffed the accused when he told him to come out of the car. He was standing near the door of the car when accused came out. When the accused was getting out of the car he first put one foot outside and at the same time he threw out the plastic and at the same time he told the accused to get out and he handcuffed him. The accused was still sitting and was about to get up and he just threw it. The Accused was not yet handcuffed then. He was handcuffed when he was out of the car and the door of the car was opened. The moment accused got out of the car he presented his hands to PC Dufresne and he was handcuffed. It was while the Accused was getting outside of the car for him to stand up that he threw the exhibits. The witness knew that the Police was looking for the accused in connection with a case and if he is seen he should be arrested. The witness stated that he was the one who picked up the exhibits. The vehicle of the witness was parked behind that of the accused in a "T" form thus preventing the accused to drive away.

PC Robert Dufresne testified that on 7th September, 2006 he was off-duty at home when he received a call from Insp. Mondon to do a special duty for the President. He reported for duty. He was together with Insp. Mondon and Cpl now Sgt. Veevers Rose in a Jeep going towards town. While going back home Insp. Mondon noticed the car of the accused going in the opposite direction. Insp. Mondon turned their vehicle and followed the accused. The Accused turned towards the Petrol station and he parked there. They parked their vehicle behind his in such a way to block his way. The witness walked out and the

Accused was where the tyre pump was and he informed him that they are the police and they had to search him. At that moment Kenneth Coeur de Lion disembarked from the car but accused did not disembark. The witness and the Sergeant went out and told Accused to disembark from the car for him to be searched, but he refused. The witness knew the accused very well since they played in the same team and he is a friend of his at Les Mamelles. The witness approached him, identified themselves and that they were going to make a search on him. Sgt. Rose went in the direction of Kenneth and told him the same thing. Kenneth was searched by Sgt. Rose. After that Sgt. Rose came towards the witness and at that moment, the witness opened the car door and at the same time he heard Sgt. Rose say "there Terrence had dropped something". The Accused was putting one leg outside the car at that moment before disembarking. The witness had come straight from his vehicle to the right side of the car where accused was sitting inside the car. Sgt Rose went straight to the passenger's side on the opposite side of the car. After searching Kenneth Sgt. Rose came to the driver's side. Sgt. Rose was at the end of the car door and the witness was where the car door would open - standing midway. The accused had not been handcuffed by then. That was when he heard Sgt. Rose shouted that the accused had thrown something. Sgt Rose collected the exhibit, showed it to the witness and the accused was then handcuffed. The accused was informed of his rights. The witness saw Sgt. Rose when he picked up the exhibits near the wheel on the driver's side. It was so fast he did not see. The exhibit when shown to him was brown, - there was a cigarette and then a clear plastic. The witness searched the accused and found 2 notes of SR500; 167 note of SR100.00; 120 notes of SR50.00; 28 notes of SR25.00; 2 notes of SR10.00; a note of \$100; a note of Euro20.00; 18 coins of SR1.00 and a mobile phone. Those moneys were in the pocket of the accused. The money was counted and then returned to the accused. The accused was then handcuffed

and Sgt. Rose continued with the search. After completing the search another Police Officer drove the car of the accused to Mont Fleuri Police Station and the accused went in the vehicle of Insp. Mondon, the witness and Sgt. Rose. They first went to ADAMS Unit and then to Mont Fleuri Police Station. The money that was on the accused was eventually seized at the Police Station and kept in the possession of the witness. The moneys were produced and marked as exhibit P7 and the mobile phone as exhibit P8.

Under cross-examination, the witness admitted that in his written statement he stated - "I told him to disembark at the same time when he was disembarking I saw him drop a clear plastic next to the car". In the plastic bag there was what seemed to be a piece of chalk and a piece of cigarette. The exhibit was picked up at the back of the front right wheel. There was sufficient light there. There was no Petrol Attendant on the scene. There were no other persons on the scene apart from Police Officers.

Cpl. Janet Thelermont testified that about 11.24 hours on 8th September, 2008 the accused was brought at the investigation office at ADAMS where she informed him of his rights, cautioned and interviewed him. The Accused refused to give a written statement and he clearly stated that the Police did not find any drugs on him and he had nothing to say to the Police. After that he was fingerprinted and in the afternoon he was brought before the Magistrate's Court and remanded until Monday 11th September. WPC Noella Savy was the investigating officer in the case and was present when the accused was interviewed.

Under cross-examination the witness stated that the accused was calm and cooperated with the Police but simply denied the possession of drugs.

After the close of the case for the prosecution the accused had a case to answer and he elected to testify on oath.

The Accused testified that he is the owner of car S11666. On Thursday 7th September, 2006 he was at his father's place at les Mamelles. He then used his car to go to the Petrol Station accompanied by one Kenneth Coeur de Lion. At the Petrol Station he parked his car at the Filling Pump and he was served by a Petrol Attendant Mr. Andy Meriton. The Attendant allowed fuel to spill on his car and he asked the accused to bring his car over to the water tap and he would wash the spilt petrol off. The front of his car was facing towards the wall next to the water tap. The petrol Attendant was coming with a bottle of water towards the tap when a Jeep parked near his car. He looked in the rear-view mirror and did not bother. Two persons came and told him they are Police. One Police Officer by the name of Rose went to the side of Kenneth Coeur De Lion and PC Robert Dufresne came to his side. His hands were on the steering-wheel and PC Dufresne handcuffed him while he was still in the car and the door was still closed. At that time the door of the car was still closed and PC Dufresne opened the door for him and told him to get out for his car to be searched. PC Dufresne searched him and found some money in a plastic bag which he took. The money was counted in his presence. Sgt. Rose and PC Dufresne then thoroughly searched in his car and he assisted them. Andy Meriton was there and was approaching the tap with a bottle of water in his hand. The Police told Andy Meriton to move back and he did not move far away. Six police officers then came as back up. Rose got a torch from his colleagues and shone it under the car, then called PC Dufresne and asked the latter to pick up a plastic bag. At that time PC Dufresne was standing next to the driver's side. He also bent and looked to see what it was. PC Dufresne stretched himself under the car and in the middle of the car between the front and back wheel for him to get the plastic bag. PC

Dufresne picked it up and lifted it and showed to Insp. Agnes Mondon and everybody who were there. The Accused was then brought to the Mont Fleuri Police Station and thereafter to the New Port Police Station and then to the Central Police Station. The next day he was taken to Court where he was remanded. Under cross-examination the accused admitted that Andy Meriton was not standing close to his car but aside a few metres looking on. The package that was found was so small that one could easily hold it in one's palm of the hand. There was light at the Petrol Station.

Andy Meriton testified that he was working at the Petrol Station on 7th September, 2006 as fuel attendant and he knew the accused. On that day the accused told him to put fuel in his car, fuel overflowed and spilt on his car. He told the accused to drive his car forward in order to remove the fuel. He had a plastic bottle which he filled with water and started to clean the car. When he was going to fill the bottle for a second time he saw a blue vehicle parked behind the accused car and saw police officers coming out. Sgt.

Rose, PC Dufresne and Insp. Agnes Mondon. Sgt. Rose disembarked followed by PC Dufresne and the last one to disembark was Insp. Agnes Mondon. Sgt. Rose went towards the direction of the passenger's side and PC Dufresne went to the driver's side. Sgt. Rose told him not to move so he stopped back and watched him handcuffed "Amar" (the passenger) and PC Dufresne was at "Ti Kota's" side (Accused) and he placed handcuffs on "Tikota" through the window. They (Police) disembark the accused from his car with his hands handcuffed and he was searched. He saw when money was removed and placed in a plastic bag and then they followed on the searching of the car. They searched inside the car first and they made the Accused to open the bonnet and booth. He was standing close by and looking at what the Police was doing. He was there for about 45 minutes. Then further

police assistance came and assisted with the search. Rose asked for a torch light, he shown it everywhere and he (witnessed) saw him when he showed the light under the car. Sgt. Rose was standing at the passenger's side and PC Dufresne was standing at the driver's side. PC Dufresne told him to show the light clearly on the ground and PC Dufresne picked up something and lift it up.

Under-cross examination the witness admitted that he was a detainee at Montagne Posee Prison for some months. He is a good friend of the accused and meets him there now and then and they talked, but did not talk about this case. He was standing behind the car, at the corner of the rear left side, when the object was found. The fuel tank of the car is at the rear left hand side. He could see the accused sitting in the car and he could see him inside the car. He could hear the noise of the handcuffs when it was snapped on the accused. He was the only member of the public who was looking on. He agreed that may be there were things that could have happened between PC Dufresne and the accused that he might have not been able to see. He was being remanded at Montagne Posee Prison on an allegation that he conspired with other persons to rob his employer.

After analyzing the powdery substance that was brought by PC Dufresne, the Analyst Dr. Jackaria made a finding that the powder contain 25% pure heroin and the other 75% part are materials other than pure heroin. The issue is whether the Accused ought to have been charged with 25% of the total weight of the powder found i.e. 2.225 grams or indeed the 100% weight i.e. 4.9 grams as he has been charged. This is of significance and relevance as there is a threshold of 2 grams above which an accused person is presumed to be "trafficking" and below 2 grams one is presumed to be only "possessing". The sentence applicable in the case of trafficking is considerably different to that of possessing.

Perusing paragraph 15-31 (vii) at page 479 of Criminal Practice - Misuse of Drugs and Drug Trafficking Offences by Rudi Fortson 3rd Edition - I quote -

“Cutting agents. *These are used to dilute certain drugs, especially heroin. The existence of a large quantity of drug coupled with a separate finding of a familiar cutting agent may be indicative of supply. Such a view may be reinforced if the drug is also found to be mixed with that agent. There are three reasons why the drugs may be cut. Firstly, to maximize profits if cut for the purpose of supply. Secondly, to reduce the purity, from the addict’s point of view, if a lesser dose is required, or in order to enforce an “economy” by padding out the quantity, and thirdly, with a view to adding another active substance to achieve a desired effect. In recent years the practice of cutting the drug with “rubbish”, i.e. a harmful additive such as cleaning powder, seems to be on the decline. This is probably not because suppliers have become more scrupulous, but simply because it makes good commercial sense given that there is now much more heroin on the black market, sold by many more dealers. Since competition is tougher, there is a disincentive to supply “bad” heroin”.*

A person when trafficking in illegal drug such as heroin does not differentiate whether the substance is 100% pure or it contains “cutting agents”. When he dispenses 1 gram of the powder he collects his money for that 1 gram. He does not collect a percentage of the money relative to the percentage of purity of the powder. He trafficked in the whole content. In my view, when the law refers to heroin it should be interpreted in the context of that illegal trade. The fact that it is known to the law that heroin which is being illegally

traded are not necessarily 100% pure then it cannot be interpreted otherwise than the whole weight of the powder is to be considered as heroin for trafficking although it may not be 100% pure. To interpret it otherwise would mean that when the crime which is being addressed by the law would be deemed to be on one scale when the trafficking is going on by the trafficker but when the trafficker is apprehended the scale is different when facing the consequence. I find that the Accused was trafficking in the whole content of the powder that was found and he had taken all that powder to be heroin for the purpose of his trafficking. Hence the Accused had been properly charged with the whole content of the package as being heroin.

The testimonies of the prosecution witnesses were cogent and consistent. The witnesses withstood the rigours of vigorous cross-examination and maintained their respective version. Their evidences corroborated each other on the material particulars. Having observed their demeanour whilst they were testifying, I did not get the slightest impression that they had concocted or fabricated their testimonies.

Whilst testifying the prosecution witnesses used the words "*thrown*" or "*dropped*" -which in creole is translated as "*zete*" or "*large*", when describing the action of the accused in relation to the package that was found. I have given careful thought as to what difference it would make if the package was thrown or dropped. I found that the accused could have done either of those actions in order to transmit the package from his hand to the place where it was found. I believe that is a matter of semantic and is of no material relevance.

There is no dispute that PC Dufresne approached the side of the car where the accused was and at that time the accused was still sitting in the driver's seat of his car with his hands on the driving wheel. The issue as to whether the accused was handcuffed whilst still in the car or when he was out of the car would, in my view, be material if the dropping or throwing of the package would have been hampered by

the handcuffs. I find that it is both practicable and possible for one to either throw or drop the package when alighting from the car even whilst in handcuffs. The handcuffs are placed on the wrists leaving the forehands to move freely. The act of dropping or throwing takes a matter seconds. PC Dufresne demonstrated to Court how it took place and I believed him.

In my judgment it is immaterial whether the package was found before or after additional Police Officers came on the scene when a torch was made available. That only goes to clear any doubt that Sgt Rose and PC Dufresne could have placed the package there in the first instance to frame the accused. Had they done this they would have known where it was and collected it there and then and showed it to the Accused. If it was found after additional Police Officers came and a torchlight was made available for the purpose of shining it under the car and the package was found, that also is reasonable. Having seen the accused thrown or dropped something under the car it is normal that when the torch was shone the “thing that was dropped” was found.

Could the package have been on the ground before Accused came to park where he did, bearing in mind that that is a public area? The likelihood of that happening is extremely remote and it would have been too much of a farfetched coincidence that the Police Officer Rose saw the accused dropped or thrown something and then that something was found in the same direction or vicinity. I reject any insinuation that a member of the public could have earlier advertently left it there. I do not believe that to be so in the light of cogent evidence of those Police Officers.

I believe that it is possible that the witness of the Accused, namely Andy Meriton could have been present on the scene on that day but I

do not believe that he saw the material action of the Accused when disposing of the package as testified by PC Dufresne. The witness Andy Meriton was standing a distance of a few metres from the car on the rear left hand side. The Accused was sitting in the driver's seat. From where the witness was standing he could not have seen anything that was going on on the opposite side of the car, particularly when the accused was putting his right foot outside the car and dropping or throwing the package. The view of the witness would have been hampered by the driver's seat and the rear left panel of the car. I therefore do not believe that that witness could have seen anything in relation to throwing/dropping or not of the package.

I believe that the witness Andy Meriton who admitted having met the accused whilst in detention at the Prison discussed this case together. Not to do that would have been unreasonable on the part of the accused who had summoned Meriton as a witness in his defence. Who would have not done it anyway? From my observation of the demeanour

of the witness Meriton when he testified I could easily discern that he had his version well cut out and was doing his best to help out the accused when he was testifying as to the material particular before the Court.

In this case what is required of the Prosecution is to prove beyond reasonable doubt, with regard to Count 1 of offence, firstly, that the package that was found under the car of the accused; secondly that that package belonged to the accused and, thirdly that the weight of the heroin was more than 2 gm which raised the rebuttable presumption that the accused was trafficking in the said drug and finally that the accused has no legal authority to possess the said drug. As regards the second count of offence the Prosecution has to similarly prove the same elements except that the package included cannabis resin.

Upon my careful and meticulous analysis of the evidence I find that on 7th September, 2006 past 7 p.m. the accused had parked his car near the tyre pump of the Victoria Petrol Filling Station. At that time the Accused had in his company one Mr. Kenneth Coeur de Lion who was sitting in the front passenger's seat and the Accused was sitting in the driver's seat. Sgt. Veevers Rose and PC Dufresne accosted the vehicle of the Accused. Sgt Rose went towards the person in the passenger's seat whilst PC Dufresne went towards the side of the Accused. Sgt Rose ordered the passenger to come out of the car and he searched him and nothing illegal was found. In the meantime PC Dufresne had restrained the Accused in his car by standing near the right front door of the car of the Accused. The Accused was then sitting in his car with his hands resting on the driving wheel. After completing the search of the passenger, Sgt. Rose then came towards the side where PC Dufresne was and upon reaching near the right side of the car he saw the Accused throw or drop something underneath his car. At that time PC Dufresne had opened the driver's door and had ordered the Accused to come out for him to be handcuffed and searched. When coming out of his car, the Accused put his right foot out of the car and immediately threw or dropped a small package under the car and that action was seen by Sgt. Rose. Sgt Rose called out, "*there he had dropped something*" or words to that effect. Additional Police Officers had come by then and Sgt. Rose obtained a torchlight from them and he shone it under the car and upon finding the small package he called on PC Dufresne to pick it up. That package was kept by PC Dufresne until it was analysed by the Forensic Laboratory Analyst, Dr. A. K. Jackaria.

On 8th September 2006 Dr. Jackaria took possession of (a) one plastic sachet wrapping a certain amount of greyish powder, weighing 4.9 grams. That powder contained Diamorphine (Heroin) of 25% purity. Dr. Jackaria also received one hand-rolled cigarette comprising tobacco

admixed with a brownish sticky substance. The brownish sticky substance is cannabis resin.

On the basis of my findings, I am satisfied that the Prosecution has proven to the satisfaction of this Court beyond reasonable doubts all the elements that constitute the offences with which the Accused stands charged. I find the accused guilty as charged on both count of offences and convict him accordingly.

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B. RENAUD

JUDGE

Dated this 23rd day of June 2008