IN THE SUPREME COURT OF SEYCHELLES

THE REPUBLIC
VS.

NITIN REDEKAR (Accused)

Criminal Side No. 21 of 2007

Mr. Esparon for the Republic
Mrs. Antao for the Accused

JUDGMENT

***Gaswaga*, J**

On the 21st day of April, 2007 at about 12:15 pm at the main gate of the fishing port, Victoria, Mahe Mr. Nitin Redekar (hereinafter accused) was arrested with a bag containing what proved on subsequent chemical analysis by Dr. Jakaria (PW1) to be a controlled drug namely, cannabis (See analyst's report PE1). He was consequently arraigned before this court on the following two counts:

Trafficking in a Controlled Drug contrary to section 5 read with sections 14 and 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 1990 as amended by Act 14 of 1994. The particulars alleged that the accused on 21st day of April 2007 at the Fishing Port, Victoria, Mahé was trafficking in a Controlled Drug by virtue of having being found in possession of 840.8 grams of Cannabis on Count 1 and 1209.8 grams of Cannabis on Count 2 which gives rise to the rebuttable presumption of having possessed the said controlled drug for the purpose of trafficking.

The accused denied these charges and the prosecution called and led evidence of four witnesses in a bid to discharge its burden of proving the case beyond a reasonable doubt. The accused is an Indian national who had arrived in Seychelles on the evening of the 20th day of April, 2007 aboard the vessel "Shear

Water" that was at the time anchored in the territorial waters of Seychelles at port Victoria. It was due for departure later in the day between 5:30 and 6:00 pm and the Captain had warned the accused to be back on the ship by 4:00 pm. The accused finished his duty at 12:00 o'clock and left the ship for town allegedly to see the beautiful beaches of Seychelles. He did not make it! The accused was in the company of two workmates, also of Indian nationality. One of them was Nijesh who was later to testify herein for the defence as (DW 2). While exiting one of the security guards at the gate; Evans Dingwall (PW3) called back the accused and requested to search the bag which he was carrying on his back.

As a result of the search two parcels, which the accused said contained food were removed from the bag. They were properly and tightly wrapped in Clingfilm and a foil. That when asked about the type of food he said it was chapatti. Not satisfied with the answers and explanation offered and, being suspicious of the accused's demeanor as well as the parcels retrieved, the accused was allowed time to find and bring with him the stevedore he claimed had given him the parcels to transport. The three workmates however remained under police surveillance all this time. The alleged stevedore was never seen. They were escorted back to the gate and in their presence and full view the parcels were unwrapped and cut open. Both parcels contained some substances like dry grass and herbal material. The Anti Drugs and Maritime Squad Unit (ADAMS) was immediately contacted. At once Sgt Vivers Rose (PW2) was dispatched for the scene. On arrival he arrested the three suspects and took them to the police station. He also forwarded the parcels for analysis. Contents of one of the parcels measured 10x10x2 and weighed 840.8 grams (PE3) while the other measured 11x11x2 and weighed 1209.8 grams (PE4).

With this evidence on record the accused person was put on his defence under section 184 of the Criminal procedure Code, Cap 54 since a *prima facie* case had been established.

In his defence the accused did not contest most of these facts as put across by the prosecution. Indeed during submissions Mrs. Antao did confirm the fact that the accused was arrested at the said place and time with the above exhibits in the bag he was carrying on his back. The nature of the drug after the chemical analysis and its weights too is actually beyond the region of dispute. What is in dispute however is a very technical aspect. It has been vehemently submitted that

although the said exhibits were found on or with the accused he did not know that he was actually carrying controlled drugs. Evidence was adduced to the effect that the accused honestly believed that what was given to him by the stevedore to carry outside the port and deliver to another person was actually food. He never expected any misrepresentation from this man he had encountered at the ship offloading cargo. That he further trusted the man because he was friendly and used to ask him about his wife and whether he liked Seychelles whenever he came into the port. Nijesh (DW2) corroborated the accused when he testified that as they were walking towards the gate it started raining and they sought shelter under a nearby container. That it was during that time that a man who had been working on their ship came with the parcels and asked the accused to convey the same to somebody at a famous place in town called Pirates Arms. The accused just placed the parcels in his bag and proceeded towards the gate. More of this is to come later.

The thrust of the defence case is that the prosecution has failed to establish or prove the "*mens rea possession*" because it was non-existent. The accused had no knowledge of the contents as being controlled drugs. Both counsels drew my attention to the case of **D'Unienville Vs Rep. (1982) SLR 179** wherein it was held that "*possession of a bag without knowledge of its contents was not sufficient to support a conviction on the charge*"

First of all, the concept of 'possession' is far from straightforward. This is because; in criminal law every case of possession seems to involve a mental ingredient of some kind. It is therefore a fundamental principle of criminal law that the *mens rea* as an element of an offence must be proven to secure a conviction. The concept however connotes two elements, the element of custody or mere possession, and the element of knowledge. **See. Archbold, Criminal pleading, Evidence and Practice, 2002, paragraph 26-54**. In the same vein the English case of **DPP Vs Brooks (1974)A.C 862** held *inter alia*: *"The only actus reus required to constitute the offence was that the drug should be physically in custody of the accused and the mens rea by which the actus reus must be accompanied, was the knowledge on the part of the accused that the thing possessed was drug"*

It was explained further by the High Court of Malaysia (Yong, J) in **Saad bin Ibrahim Vs Public Prosecutor (1968) 1 MLJ 158** that

> *“mere possession is one thing and possession with mens rea is another. Possession which incriminates must have certain characteristics. The possessor must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it. Without these characteristics possession raises no presumption of mens rea . without mens rea possession cannot be criminal except in certain cases created by statute,………”*

The consequences of failure to establish the mens rea requirement in criminal law to prove ‘possession’ were clearly demonstrated by the Supreme Court of Canada in the leading case of **Beaver Vs The Queen (1957).** In that case the decision of the lower Court was quashed for non compliance with this requirement when the trial Judge directed the jury that if they find that the two accused brothers (Lewis Beaver and Max Beaver) were in possession of an illegal narcotic their actual knowledge was irrelevant.

One question to entertain now is whether the accused should in the circumstances be held to have possession of the substance, rather than mere control. In answering this question I shall seek guidance from decided cases by different courts on how they dealt with the issue of establishing or proving ‘knowledge’. In yet another Malaysian case of **Chan King Yu Vs Pendakwa Raya No.W-05-17-20**02 (an appeal from the High Court of Kualar Lumpur) the court of Appeal observed that “proof of knowledge in a criminal case is, short of a voluntary confession by an accused, like many other states of a guilty mind in a criminal case, a fact to be gathered inferentially from proved facts and surrounding circumstances.”

The famous case of **Warner Vs Metropolitan Police Commissioner, (1968) 2.AER 356, AT 393** set some guidelines which have since been followed in many jurisdictions including ours. In particular, Lord Wilberforce stated:

> “In order to decide between these two (possession and mere control) the jury should …… be invited to consider all the circumstances – the ‘modes or events’ by which the custody commences and the legal incident in which it is held. By these I mean, relating them to typical situations, that they must

> consider the manner and the circumstances in which the substance, or something which contains it, has been received, what knowledge or means of knowledge or guilty knowledge as to the presence of the substance, or as to the nature of what has been received, the accused had at the time of receipt or thereafter up to the moment when he is found with it; his legal relation to the substance or package (including his right to access of it). On such matters as these (not exhaustively stated) they must make the decision whether, in addition to physical control, he has, or ought to have imputed to him, the intention to possess, or knowledge that he does possess, what is in fact a prohibited substance. If he has this intention or knowledge, it is not additionally necessary that he should know the nature of the substance."

See also Para 26-58 of Archbold, Criminal pleading, Evidence and Practice, 2002,

Applying the principles of **Warner** in the **Chan King Yu** case,*ante*, the court relied on the following factors, among others for satisfaction of proof of knowledge. When arrested a very large amount of methamphetamine was found in the hotel room of which accused was the sole occupant. He was seen bringing into his room the three plastic bags which had the cylinders containing the drug in question. The accused's overt act of disposing of the plastic bags shows that he was exercising dominion over the contents of that bag, all of which came from his room. There was also this plastic bag on the bedside table containing the prescribed drug in question. Then the act of the accused purchasing the large Polo suitcase when he already had one in the room. The unexplained delay by the appellant to open the door to his room taken together with inability of police to get the door open even with the assistance of the hotel staff. He gave no explanation for this. Moreover, unknown to the appellant he had been under police surveillance all this time. Taking these factors together the court was convinced that mens rea possession had been proved. The court of appeal dismissed the appeal and upheld the death sentence.

The accused, in **R Vs McNamara and McNamara (1998)Crim. L.R. 440,** admitted to police that the 20kgs of substance found in a cardboard at the back of his motorcycle was cannabis resin but claimed to be the carrier and not the dealer. However at the trial, the accused stated that he did deliveries for a man called John, and he thought there were pornographic or pirated video films in that box, and never thought he was carrying drugs. The trial Judge directed the jury that they

should acquit the accused, notwithstanding they were satisfied that he was in possession of cannabis resin, if they concluded that he probably did not know, nor did he suspect, nor did he have reason to suspect that the box contained a controlled drug. The accused was convicted, and that conviction was upheld by the Court of Appeal.

The facts of **R Vs Abdisalam Ali Mohamed (1982) SLR 55** are similar to those in this case. In that case a Tanzanian National was found in possession of 7kgs of cannabis packed in 24 tins of coffee marked "Africafe" on his arrival at Seychelles international Airport. His defence was that he had been given those tins by a friend to be delivered to a person who would call within a week of his arrival. He therefore pleaded that he was an innocent carrier of material which he thought to be coffee. The issue before the court was whether the accused knew or had reason to believe that the contents of the tins were prohibited drugs.

Although such a story was likely, Seaton CJ found that certain aspects of the accused's story made it doubtful. They included the fact that the accused had no other luggage, no change of clothes or toiletries. He had only 100 US dollars which was insufficient for a two week stay, and he had no reservation in the guest house he named. There were also several inconsistencies in his evidence in court and in his pre-trial statements. It was therefore held that he had both possession and knowledge, and was accordingly convicted.

Perera, J, as he then was, followed the guidelines in **Warner** before reaching a conclusion, in the case of **Terry Marie Vs. Rep. (Supreme Court), Crim. Appeal No.17 of 2004** (appeal from the Magistrate's Court) that the appellant had both possession and knowledge in respect of the drugs found tied on his underwear as well as those in the bag he was carrying when he was arrested coming off the Cat Cocos. The appeal was dismissed and sentence upheld.

It is to be gathered from the foregoing discourse that the acts done by an accused before during and or after the commission of the alleged offence considered together or in light of other or surrounding circumstances provide valuable assistance to a court in determining whether the accused had the requisite knowledge or mens rea. In the present case is there sufficient evidence from which knowledge can be inferred? After analyzing the evidence of the accused's case I would conclude that indeed in our day to day normal life it was quite

possible that one would be asked by a friend to do a favour and quite innocently be given material which, out of delicacy, one might not examine even though he had not been told that he could or should not do so. There was a likelihood of such a story which might actually be accepted. However, in the instant case, I find established a number of inconsistencies and serious aspects, as outlined below, which render the entire story improbable and worthless.

Discerning from the proved facts one will see that when the accused was told to open the bag he did it halfway, pushed the things inside with one hand and hesitated to remove the parcels. He did not want to put the bag on the table to be searched and when this was done he became even more nervous and scared All the witnesses were struck by his demeanor; he panicked and looked confused. He also hesitated to talk but later started answering the questions put to him by the guards. He first informed the guards that the contents were food he had received from the chef. That it was chapatti. And that it was for one of his friends waiting at Pirates Arms. He then changed this version and stated it was food given to him by a certain stevedore. This was the version he was later to maintain all through the trial. Although he denies the earlier version the court sees no possible motive that there could be for the guards to concoct this part of evidence against him. The guards merely recited what they heard from the accused's own mouth, some of it in answer to their questions. As for the truth of what he told them, it could be correct, it could be wrong.

The accused panicked and pleaded with the guards. He even offered them the three bottles of lemonade which he had and said "*take it for you, take it for you.*" By the way, carrying the three bottles of lemonade together with the parcels properly wrapped in foil like food could easily give an impression that the drinks were meant to be taken while eating that "food". The drinks belonged to the accused while the "food" belonged to the unknown stevedore- what a coincidence! Surprisingly the accused did not know the names nor the contacts of the stevedore who allegedly gave him the parcels. How could they fail to trace or obtain at least particulars of this stevedore registered and assigned to offer services on that vessel and was to be paid later. Unauthorized people cannot gain entry into the port let alone board and work on foreign ships. Further, one wonders how the accused could all over a sudden trust such a man he had just allegedly met and seen a few times on the ship. What even makes the whole story and transaction more suspect is that the accused did not know the intended recipient of the parcels nor his contacts (names, telephone number, address etc). That he was to meet him at a

place (Pirates Arms) he did not know and therefore had never visited before. But he alleges (as in the **Abdisalam** case above) that the said intended recipient was to identify him upon arrival since the stevedore had already described the accused to him.

The accused also struck me as a very intelligent and astute young man. No doubt, he is a seasoned seaman who has visited several countries while performing duties in that capacity. As such he knew very well the dangers and risks associated with carrying parcels for other people- a mistake which a prudent person, such as him, could not easily make. In fact as a seaman he should be the one to announce advice and warn voyagers of such pitfalls. The following extract from the record is relevant:

Q ***Something has happened to you but your version is a story. Now when someone gives you a packet, let's say you are at the airport and someone asks you to check in some luggage for him because they say that they are overweight would you blindly check in the luggage of a person which you do not know? Would you risk that?***

A ***At an airport I would never take a person's luggage.***

Q ***From your testimony I discovered that you have been a seaman for quite some time and you have gone to many countries. Do you know the dangers associated with carrying other people's packets, parcels or luggage when you were not there when they were packing the same and you do not know the content because the package was completely sealed like this one was?***

A ***No, I do not have any idea.***

The accused was evasive when asked whether he felt the parcels before putting them in the bag. Of course the feel would have been different if the parcels contained food or chapatti, which is soft, and not the dry-grass-like cannabis or dried herbal material. To this effect the record reads:

Q ***Did you feel the parcel before you put it in the bag?***

A ***I just took it in my hand and put it in the bag.***

Q You did not feel it?

A As I told you I just took the packet and put it in my bag because the person told me it was food.

Both the accused and Nijesh (DW2) were not truthful when they stated that they only got to see and therefore know the contents of the parcels when they were in court. Even if I were to agree with them, which I do not, that their plea to the guard to be shown the contents fell on the deaf ears, this assertion does not erase the fact that after Emmanuella Laurence (PW4) opening the parcels, in their full view, some of the drugs got poured on the floor. They saw it before the same was collected and re-packed.

Each one of these circumstances when taken alone may be insufficient to prove mens rea possession. But that is not the test to be applied to circumstantial evidence. The true test is as follows:

> "…where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand (or cord) but also the combined strength of these strands when twisted together to form a rope. The real question is: Is the rope strong enough to hang the prisoner?"

<u>See Teper v R. 1952 (the Appeal cases page 490) and Chan Chwen Kong v Public Prosecutor 1962 MLJ 307.</u>

A consideration of the combined strength of the above factors (evidence) leads me into making one logical inference: that without any doubt whatsoever, the accused had full knowledge of his possession of the drug and that he knew the nature of the drug he physically and exclusively possessed. I am also fully satisfied that he had power of disposal or control over it. There is no evidence suggesting that he had been told that he could or should not examine it otherwise that evidence would have been adduced. He protected the drugs by first placing it in his bag (PE2) and then misrepresenting to the police that it was food thereby exercising further dominion over it. He also opened the bag and surrendered it to the guards for the search to be conducted.

The quantity of drugs involved (i.e 840.8gms and 1, 209.8gms) attracts the

presumption of trafficking as per the provisions of our law. This presumption has not been rebutted. All the prosecution witnesses were credible and coherent. The accused's defence that he was an innocent carrier without knowledge is unbelievable, doubtful and cannot be maintained as it is tainted with falsehoods. I am fully satisfied that the prosecution has proved all the ingredients of the offences herein beyond a reasonable doubt.

The accused is accordingly found guilty and convicted on both counts, as charged, of trafficking in a controlled drug.

D. GASWAGA
JUDGE

Dated this on 16th day of June, 2008.