

**IN THE SUPREME COURT OF SEYCHELLES****THE REPUBLIC  
VS.****KEVIN BARBE**Criminal Side No. 32 of 2008

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Mr. Labonte for the Republic  
Mr. Gabriel for the Accused

**Judgment****Burhan J**

The accused in this case stands charged with importation of a controlled drug contrary to section 3 read with section 26 (1) (a) of the Misuse of Drugs Act (Cap 133) and punishable under section 29 of the Misuse of Drugs Act and the second schedule referred to therein.

The particulars of the offence are that the accused Kevin Barbe had on the 7<sup>th</sup> of April 2008 imported into Seychelles a controlled drug namely 402.4 grams of Heroin ( Diamorphine).

Initially charges were preferred against two accused namely Kevin Barbe and Jean Paul Bacco. Subsequently charges against the accused Jean Paul Bacco were withdrawn and the case proceeded on the

aforementioned charge against accused Kevin Barbe only.

The accused Kevin Barbe pleaded not guilty and trial against the accused commenced on the 20<sup>th</sup> of February 2009. In order to prove their case beyond reasonable doubt the prosecution called several witnesses namely Dr Abdul Jakaria the Government Analyst, Inspector Winsley Francois, Principal Trade Tax Officer Mr Kelvin Patrick Didon, Trade Tax Officer Aaron Zialor, Mr Maurice Gonthier Manager U.P.S.Courier Service, Immigration Officer Mr Damien Francoise and Police Constable Malvina. At the conclusion of the prosecution case as the prosecution had established a prima facie case a defence was called. The accused chose his right to remain silent. Both counsel made submissions thereafter.

The Government Analyst Dr A Jakaria giving evidence for the prosecution stated that on the 9<sup>th</sup> of April 2008 while he was on duty, he received a request bearing registration No CB 100/08 from Inspector Francoise and two packets and the contents for examination and analysis, together with a carton box containing casseroles and other items. Having conducted his analysis as requested, witness stated he identified Heroin in the samples of powder analysed by him. The two packets containing the powder submitted for analysis were thereafter placed in a white envelope and sealed by him.

Witness identified his report as P2, the envelope with his seals intact as P3 (a) and the two packets and their contents the powder analysed by him as P3 (b) and P3(c).

Under cross examination witness admitted that the samples analysed were not pure and contained impurities and that the amount of heroin in the samples were 53% and 80% respectively.

He further stated that the samples were originally powder but had

lost moisture and had solidified. He stated that if analysed now the percentage of Heroin would be lower due to degradation and deterioration of the mono acid.

Inspector Winsley Francoise testifying for the prosecution stated that on the 9<sup>th</sup> of April he was on duty at the airport, when at 10.45 hrs. Kevin Dodin had handed over a parcel containing three pans of different sizes in addition to several other items. In two of the pans, concealed in a false bottom were two foil packagers each containing a powder which he suspected to be Heroin. Witness stated that these pans were in a carton box containing other items as well and addressed to Morlene Bacco c/o Magdalena Bacco and sent by Kevin Barbe. The

three pans were produced and marked as exhibits P4 (a), P4 (b) and P4 (c). Witness explained further that both the large pan P4 (a) and the medium size pan P4 (b) contained a false bottom with a package inside. He had thereafter taken these packages containing a powder for analysis to Dr Jakaria. Witness identified the packages containing powder and given for analysis by him as those marked as P3 (b) and P3 (c). After receiving the sealed envelope from Dr Jakaria he had placed it in his locker and kept the locker key in his possession. Witness stated further that he had arrested the accused Kevin Barbe on the 10<sup>th</sup> of April 2008 at 11.50 hrs at his residence at Pascal Village, while he was in the company of Morlene Bacco.

Under cross examination witness admitted that he was not a member of the NDEA (National Drug Enforcement Agency) at the time he arrested the accused but was a police officer. At the time the parcel was opened by the Trade Tax Officer several others including him were present. However witness admitted neither the consignee nor the consignor were present at the time the parcel was opened. Witness further stated that the parcel had arrived on Air Seychelles from Bangkok and that both accused chose to remain silent after they were arrested and cautioned by him.

Witness Kevin Didon a Trade Tax officer stated that he was on duty on the 7<sup>th</sup> of April 2008 when one of the officers on duty Aaron Zialor had brought to his notice that three saucepans he had found while doing the UPS mail seemed to contain paint. On further examination he too noted the smell of paint and that the weight of the large and medium saucepans were abnormal. Using his knife he was able to remove the piece of Aluminium which had been fitted to the bottom of the pans and painted over. He noted that underneath the Aluminium was a foil package in each of the two pans. Witness identified P3(b) and P3 (c) as the packages containing powder found inside the saucepans. After further consultation with his Director General and officers of the NDEA a controlled delivery was attempted but this failed. He explained that a controlled delivery was usually done when a parcel contained something suspicious, where the delivery of the parcel is carried out under police observation. He further identified the carton box P12, in which the drugs together with other items were found.

Under cross examination he stated that at the time he opened the parcel Aaron Zialor was present and that he had handed the parcel over to Johnny Malvina for the controlled delivery. The same parcel had been returned to him and thereafter he had kept it with him in his office, to which only he had the key and no one else could have

tampered with it. He thereafter had handed over the packages to Inspector Francois on the 9<sup>th</sup> of April 2008.

The other witness called by the prosecution Aaron Zialor a Trade Tax Officer stated that on the 7<sup>th</sup> April while he was checking for UPS ( United Parcel Services) Courier service parcels with the agent Mr Maurice Gonthier present, he found one carton box which was shipped by Kevin Barbe to Jean Paul Bacco of Pointe Larue. Witness identified P13 as the carton box inspected by him. As he inspected the box in the presence of the agent he noticed three casseroles which had a smell of paint. On further inspection he noticed that there was paint on two of them and the bottom part began to move slightly. Witness identified P4 (a) and P4 (b) as the pans in which the powder was found. He had taken the saucepans to Mr Didon for a second opinion. Mr Didon had opened the false bottoms and found the foils with powder inside. He too identified the foils with powder inside found under the false bottom of the pans as those marked P3(b) and P3 (c).

Under cross examination he stated the box had come from Thailand by Qatar Airways. On the day in question there were eight parcels. He stated that he had opened other parcels too that day and this was the last box. He further stated that what was abnormal in this particular

box was the smell of paint. After he had taken the box to Mr Didon it was Mr Didon who had opened the false bottoms. Thereafter he had given custody of the box and contents to Mr Didon for the controlled delivery.

The next witness called by the prosecution Mr Maurice Gonthier the manager of UPS stated that on the 7<sup>th</sup> of April he was on duty at the airport collecting courier parcels from Dubai. The usual procedure was to check the parcels in the presence of a customs officer to verify whether everything was in order. A parcel addressed to Morlene Bacco c/o Magdalena Bacco was found and officer Aaron Zialor opened the parcel to verify what was inside. His evidence corroborates the evidence of Aaron Zialor in respect of the detection of the Heroin in the false bottoms of the two casseroles. After contacting the police it was decided to carry out a controlled delivery by assigning him with a police officer to effect the delivery.

He together with the police officer had got into his pick up vehicle with the parcel and while the police officer drove the vehicle he had phoned Mr Morlene Bacco and asked for directions to his house and had been given the necessary directions. He had got the phone number from the writings appearing on the parcel. On arriving at the house he had phoned again but there had been no answer. After waiting for about 15 minutes they had

driven back to the airport. The parcel which was in the police officers possession was then handed back to Mr Didon. He identified the parcel P12 in open court and stated that P13 invoice contained the name and address of the person to whom the parcel was assigned namely Morlene Bacco c/o Magdalena Bacco Pointe Larue Mahe Seychelles.

Under cross examination he stated that the parcel had come from Thailand through Dubai and had come on Qatar Airways. On the day in question there had been 8 parcels for UPS and this was the one before the last. He had seen the invoice only after the customs officer had examined the parcel. He further stated under cross examination that Morlene Bacco had answered the phone and given him directions to the house but had not answered thereafter.

The next witness called by the prosecution Mr Damien Francoise an Immigration officer testified to the fact that according to the records maintained at the Department of Immigration the accused Kevin

Barbe had a passport bearing No N0002135. Continuing his evidence he stated that the accused had left Seychelles on the 17<sup>th</sup> of March 2008 to go to Singapore and according to his records had returned from Bangkok

on the 2<sup>nd</sup> of April 2008. He produced the embarkation form of the accused as P15 and the disembarkation card as P16.

The final witness called by the prosecution was Police Constable ((PC) Johnny Malvina attached to the NDEA who participated in the controlled delivery. On being informed an illicit substance had been found at the airport he had gone to the airport and met Mr Kevin Didon. Thereafter he had participated in the controlled delivery. He corroborated the evidence given by witness Maurice Gonthier in respect of the controlled delivery and he too stated it was unsuccessful. He further stated under cross examination that he assisted in the search of Magdalena Bacco's residence where some drugs were found. Thereafter the prosecution closed its case. When the accused defence was called he chose to remain silent.

Having thus carefully analysed the evidence it is clear that the prosecution has based its case on circumstantial evidence. The evidence that a carton box arrived from Thailand to Seychelles

given by witness Kevin Didon is corroborated by the evidence of three prosecution witnesses namely Inspector Francoise, Aaron Zialor and Maurice Gonthier. The evidence of witness Kevin Dodin that the carton box in addition to other items contained 2 casseroles with false bottoms in each of which a foil

package containing a powdery substance identified as P3(b) and P3(c) was found is further corroborated by the evidence of Aaron Zialor, Maurice Gonthier and Inspector Francoise as such this court is satisfied that these pieces of evidence could be safely accepted by court.

The evidence and report marked P2 of Dr A Jakaria confirms the fact that the powdery substance P3(b) and (c) was identified as Heroin a controlled Drug weighing 402.4 grams. He identified exhibits P3(b) and P3(c) in open court as the parcels containing the powder analysed by him and given to him for analysis by Inspector Francoise. Witness Inspector Francoise identified in open court P3(b) and P3(c) as the parcels containing powder which was detected by Kevin Didon and taken over by him and given for analysis to Dr Jakaria. Kevin Didon and Aaron Zialor identified in open court P3(b) and P3(c) as the parcels containing powder detected by them in the false bottoms of the casseroles which was in the carton box sent by Kevin Barbe from Thailand to Morlene Bacco c/o of Magdalena Bacco in Seychelles. Both Inspector Francoise and Kevin Didon stated the exhibits were kept locked whilst in their possession. The seals placed by the Government Analyst were perused in open court and found not to have been tampered with. Although the evidence of these witnesses were subject to cross examination by the accused counsel no inconsistencies were forthcoming in respect of these vital pieces of evidence. This court is satisfied beyond reasonable doubt that the prosecution has established the chain of evidence from the time the heroin was detected, analysed and subsequently produced and identified in open court.

Further more the fact that Kevin Barbe was the consignor of the parcels containing the powdery substance identified as heroin imported into Seychelles has been established by the evidence of witness Kevin Didon which was corroborated by witnesses Aaron Zialor and Maurice Gonthier. This evidence is further corroborated by the

invoice marked P13. It is to be noted that this invoice was permitted to be marked by the defence without any objection being taken. Furthermore the facts contained in the invoice was not contested by the defence. Therefore court can safely assume by its deafening silence on this matter the defence sought not to contest the contents of the invoice and that the contents of the invoice speak for itself.

Furthermore the evidence of the prosecution was that the accused Kevin Barbe had arrived in Seychelles on the 2<sup>nd</sup> of April from Thailand the country from where the parcel was sent.

This piece of evidence too has also gone in uncontested by cross examination. It is to be noted the date in the uncontested invoice P13 is 31<sup>st</sup> March 2008 the defence has not sought to deny the fact that the accused was in Bangkok at that time but appears to have conceded the fact in their submissions and by suggesting in cross examination, that there is nothing unusual about going to Bangkok ( vide page 19 of proceedings of 13th March 2009 1.45 PM).

Another piece of circumstantial evidence relied on by the prosecution was that at the time of arrest the accused Kevin Barbe the consignor of the carton box was in the company of Jean Paul Bacco the consignee. This evidence too has gone uncontested. It is an uncontested fact that Morlene Bacco and Jean Paul Bacco refer to the same individual. This clearly establishes a connecting link between the

consignor and consignee of the parcel containing Heroin imported into the country.

Furthemore there is evidence that while attempting the controlled delivery Mr Gonthier states he phoned the consignee Bacco and obtained instructions of how to find the house to effect delivery. He was able to speak to the consignee Bacco who gave instructions how to arrive at the house but thereafter switched of his phone. Infact the defence in this instance does not seek to deny this fact but suggests he had phoned more than twice. Thereafter according to the evidence of Inspector Francoise and PC Malvina a search was conducted in the house of Magdalena Bacco and under cross examination witness stated, in answer to counsel's question that a quantity of controlled drug was found in the house of Magdalena Bacco another fact not contested by the defence in cross examination. The defence has admitted that the accused was a regular traveller abroad as he was an employee of Air Seychelles. The prosecution has satisfied court that he was employed as a stevedore and nothing more as per the document marked P13.

In the light of all this circumstantial evidence led by the prosecution the accused when his defence was called chose to remain silent. The right of the accused to remain silent is embodied in Article 18 (3) the Constitution of the

Republic of Seychelles. Court warns itself that no adverse inference should be drawn by the accused choosing his right to remain silent as stated in Article 19 (2) (h) of the Constitution.

However court in coming to its final conclusion in such instances must determine how far the prosecution case has been weakened by cross examination. It appears in this case as mentioned above that several vital pieces of circumstantial evidence led by the prosecution have gone uncontested and it appears that the defence set up impliedly by cross examination is a mere suggestion by the defence counsel that the parcel was never sent to Bacco by Kevin Barbe (vide page 12 of the proceedings of 13<sup>th</sup> March 2009 1.45 PM). Considering the circumstantial evidence led by the prosecution in the context of self preservation, specially when he chose to remain silent, the evidence led by the prosecution should have been challenged in an attempt to weaken the case for the prosecution rather than to allow these pieces of evidence to slip in uncontested.

The mere fact that there was a discrepancy in the name of the airline which brought the carton box from Thailand to Seychelles by the witnesses is not fatal contradiction as all witnesses state that the parcel originated from Thailand and its end destination was Seychelles a fact

corroborated by invoice P13 marked by the prosecution and which establishes the act of importation. The mere fact that one witness states the box checked that day was the last box and another witness states it was the penultimate box is not a serious contradiction which is fatal to the case of the prosecution. As to the contention that there was a contradiction in the evidence of the prosecution in respect of who called the police to report the detection is not a material or serious enough contradiction to discredit the case of the prosecution..

Furthermore learned counsel has sought to mention in his submissions that the prosecution witness Dr Jakaria failed to identify the substance analysed by him in open court and counsel mentions in his submissions "We never saw anything nor did we have the benefit of viewing photographs of the said materials....." However page 5 of the proceedings of 20<sup>th</sup> February 2009 9.00AM clearly show that the packages 1 and 2 with contents were produced in open court through witness Dr Jakaria as that analysed by him. In fact learned counsel has at page 8 cross examined as follows;

*Q You said the packages were powder?*

*A Yes*

*Q But it is hard solid now?*

This clearly shows that counsel has had sight of the said exhibits and to say now he did not at the stage of submissions, is to say least a sad lapse of memory. Further when the exhibits have been physically produced in court there is no necessity to produce photographs of exhibits as well. Although the prosecution has sought to mark certain productions as exhibits and not items through Dr Jakaria, no immediate objection from the defence was forthcoming though a somewhat belated complaint was made in the submissions. However this has in no way caused any prejudice to the accused as these productions have subsequently been identified by the detecting officers themselves.

Another ground urged by learned counsel was that Inspector Francoise was not an officer of the NDEA ( National Drug Enforcement Agency) and hence his arrest of the accused was unlawful and learned counsel has requested a ruling from court on that issue. However the officer has categorically stated he did so as a police officer and even though he may have not been attached to the NDEA he has every right to affect an arrest as a police officer when the need arises.

In his submissions learned counsel has stated in order to prove importation the prosecution has to under section 26 (b) of the Misuse of Drugs Act Cap133 establish that the accused did an act preparatory to the importation. There is no section 26 (b) and Section 26 (1) (b) does not speak of any preparatory act. The accused has not been charged under section 27 (c) of the Act which is an distinctive offence and refers to

an act preparatory to or in furtherance of the commission of an offence under this Act nor is there reference in the charge sheet to section 10 (b) which also refers to an act preparatory to or in furtherance of an act outside Seychelles which if committed in Seychelles would constitute an offence under this Act. He has been charged for importation of a controlled drug under Section 3 read with Section 26 (1) (a). It is to be noted that neither section 10(b) or 27(c) have been included in the charge or included even in a separate charge. As such it is not necessary for the prosecution to prove a preparatory act in respect of the offence this accused is charged with. For the aforementioned reasons I proceed to reject the contentions of learned counsel for the defence in his submissions and the defence set up impliedly by defence counsel in his cross examination.

Furthermore the word “ import” is defined in the Interpretation Ordinance Cap 103.

*“Import” means to bring, or cause to be brought, into Seychelles.*

The prosecution sought to establish beyond reasonable doubt in this case that the accused cause to be brought into Seychelles by air the controlled drug namely 402.4 grams of Heroin as mentioned in the particulars of

offence.

Having considered the entirety of the circumstantial evidence led by the prosecution this court is satisfied that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt of the accused.

This court is also satisfied as in the case of ***Teper v R (1952) SLR 264*** that there are no other co-existing circumstances which weaken or destroy the inference of guilt. This court is satisfied that for the reasons adduced that the prosecution has proved the charge beyond reasonable doubt.

The accused Kevin Barbe is therefore found guilty as charged and convicted of same.

**M.N. BURHAN**

**JUDGE**

Dated this 15<sup>th</sup> day of May, 2009.