

**IN THE SUPREME COURT OF SEYCHELLES**

**THE REPUBLIC**

**VS.**

**BARNSLEY LEBON (A1)**

**PAUL JAPHET (A2)**

Criminal Side No. 22 of 2008

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Mr. Labonte for the Republic

Mr. Georges and Mr. Gabriel for the 1<sup>st</sup> Accused

Mrs. Amesbury for the 2<sup>nd</sup> Accused

**JUDGMENT**

**Gaswaga, J**

Mr. Bansley Lebon of Les Mamelles and Paul Japhet of Plaisance stand charged with the following offences:

**“Count 1**

***Statement of offence***

Trafficking in a controlled drug contrary to Section 5 of the Misuse of Drugs Act read with Section 14(d) and 26(1) of this same amended Act 14 of 1994 and punishable under the second schedule of the said Misuse of Drugs Act read with Section 29 of the same.

### ***Particulars of offence***

Barnsley Lebon a stevedore of Les Mamelles on the 10<sup>th</sup> March, 2008, being a front seat passenger in vehicle S2279 at Petit Paris was found in possession of a controlled drug namely 78 grams of cannabis (herbal material) which gives rise to the rebuttable presumption of having possessed the same for the purpose of trafficking.

### **Count 2**

#### ***Statement of offence***

Possession of a controlled drug contrary to Section 6(a) of the Misuse of Drugs Act read with Section 26(1)(a) of the same as amended by Act 14 of 1994 and punishable under second schedule of the said Misuse of Drugs Act read with Section 29 of the same.

### ***Particulars of offence***

Paul Japhet, a casual labourer of Plaisance on the 10<sup>th</sup> March, 2008 being a rear seat passenger in vehicle S2279 at Petit Paris was found in possession of a controlled drug namely 21.7grams of cannabis (herbal material)

Both accused pleaded not guilty and evidence was led by the prosecution from seven witnesses in support of the charges. Briefly, the prosecution case as put across by the prosecution was as follows:

On the 10<sup>th</sup> of March, 2008 at 2.00 pm Police Constable Paul Meriton together with Police Constables Leon and Dufrene as well as WPC Legaie went in a jeep to Providence near the round about with instructions to stop and search a motor vehicle bearing registration number S 2279 that was coming from the southern part of Mahe. Not long after their arrival the car in question passed by heading

towards Victoria. They followed it for a short while. With the help of another police officer PC Oredy who was off duty at the time the said car was stopped. PC Oredy had driven past motor vehicle S2279 and then blocked its way with his jeep.

Once stopped the police officers who were moving right behind it quickly disembarked from the jeep and surrounded the car. Each of the occupants had specific police officers observing and monitoring their actions. Donatien Tirant (PW6) was the driver. Paul Japhet (A2) was a passenger in the left rear seat right behind Bansley Lebon (A1) who occupied the front passenger seat. Kevin Jean (PW5) who was standing by the left front door right behind PC Leon (PW3) had his eyes fixed on Lebon as did PC Leon. PC Leon ordered the occupants to disembark. That when the left front door opened and Lebon was in the process of coming out Kevin Jean saw a red plastic bag lying in between his legs down on the carpet (floor). PC Leon then picked the red plastic bag from the floor where Lebon was sitted and immediately opened it before him. However, a body search conducted on Lebon yielded nothing. That because the red plastic bag contained some herbal material which was suspected to be cannabis, Lebon was handcuffed and taken to Port Larue police station. The suspected herbal material weighing 78 grammes was analyzed (see analysis report PE2) by Dr Jakharia (PW2) as cannabis and admitted in court as PE7.

Nothing illegal was found on Paul Japhet and Donatien Tirant when searched. That while at the Port Larue police station the car was photographed (PE1) by PC Ralph Agathine (PW1). It was also searched the second time by PC Meriton and PC Dufrene and herbal material wrapped in magazine papers and placed in a red plastic bag were recovered from underneath the rear seat where Paul Japhet had

been sitting. The herbal material was taken inside and opened in front of Paul Japhet. He was arrested and together with Lebon charged accordingly. Meanwhile, Donatien Tirant was released and later testified for the prosecution (PW6). That herbal material weighed 21.7 grammes and was analysed (see analysis report PE3) by Dr Jakharia (PW2) as cannabis and exhibited as PE5.

Pursuant to Section 184 of the Criminal Procedure Code, Cap 54 both accused persons were invited to make a defence given that a *prima facie* case had been established with the evidence on record.

It is the evidence of Lebon that on the 10<sup>th</sup> of March, 2008 he met with Paul Japhet and Donatien Tirant at the land marine office where he had gone to receive his money. Lebon was a team leader at the port while Paul Japhet worked as a stevedore. Tirant too worked at the port. They all knew each other. That Paul Japhet asked Lebon whether he was going back to Les Mamelles so they could both use a '*pirat*' taxi. The two then asked for a lift in Mr. Tirant's car to take them to Les Mamelles and were prepared to pay him. That shortly after they had driven off Tirant received a phone call then hung up. He stated that he was needed by a certain lady at Anse- Royale. That Lebon and Paul Japhet asked him to first take them to Les Mamelles before proceeding to Anse-Royale. It is Lebon's evidence that Tirant refused and instead said he would go to Anse-Royale straight with both accused persons then take them to Les Mamelles. On the way to Anse-Royale they branched off to Pointe Larue petrol station where Japhet paid SR 50/- for the petrol. Again at Anse Aux Pins Tirant stopped and each of the three occupants of the vehicle bought a box of take-away (food). That Lebon and Paul Japhet ate their food in the car as Tirant drove. At Anse-Royale they went

past the Polytechnic before stopping at the Indian's shop at Mont Plaisir where Lebon and Paul Japhet were asked to disembark since Tirant was going to see the lady who had called him. That Tirant returned after twenty minutes, picked Lebon and Japhet and set off for Les Mamelles.

Essentially Paul Japhet's defence was almost the same as that of Lebon only that he added a few things. For instance that after they had eaten their food the empty boxes were put in a bin at the Indian's shop and entered the car with nothing. Further, it was categorically denied that the two accused persons never went to the alleged woman's house at 'Cap Bonm Zan' nor get into Tirant's car with any herbal material.

From this evidence on record it is clear that most of the facts as put by the prosecution are not in dispute. It is also beyond the region of dispute that both accused persons and Tirant were friends at the material time and they all travelled in the car S2279 from which the illicit drugs were recovered at Providence near the civil construction company limited (CCCL) premises. However, what seems to be in dispute and therefore the main contention in this case is the knowledge on the part of the two accused persons of the existence of the herbal material in the car S2279 at the relevant time. It has been submitted that neither of the two accused persons was in possession of the alleged herbal material. Of importance to note here is that the court is not only satisfied that the herbal material herein (PE5 and PE7) is cannabis as analyzed by Dr. Jakharia but also that the same has been handled well right from the time it was impounded at the scene of crime, all through the analysis process and subsequent storage in the police exhibit room to the time it was exhibited in court.

For a conviction to be secured the prosecution must prove its case against each accused person beyond a reasonable doubt. See **Raymond Mellie vs. Republic SCA 1 of 2005**. Now, has the prosecution discharged that burden in this case? Evidence has been led to the effect that when the car in which the accused were travelling was stopped PC Kevin Jean and PC Leon who never lost sight of what Lebon was doing in the car saw the red plastic bag (PE7) on the floor in between the legs of that accused person. PC Leon picked it immediately and showed its contents to him. The explanation that the red plastic bag slid from underneath Lebon's seat is implausible and far-fetched for the following reasons; at the time their car was stopped around CCCL it was not moving at a high speed as there was a traffic jam in the area and further they were at a junction, just joining a major road hence even if the brakes were to be applied suddenly it is highly improbable that a light package of herbal material would slide out of its position underneath the seat onto the carpet; and Tirant strengthened the above evidence when he said that he saw Lebon put the red plastic bag whose contents he did not know in between his legs before they drove away from the lady's house at Anse Royale back to Les Mammelles. In his own words Tirant stated "*...contents were wrapped in newspaper as if someone had come from a herbalist*". It is not even convincing how two responsible adults, one with children to collect from school around that same time could allow to be taken in a car they had hired to Anse-Royale instead of Les Mammelles without a good reason.

I find the prosecution witnesses to be cogent, logical and coherent on the above matters. In case one was to call Tirant an accomplice (*participes criminis*), like it emerged during cross examination, his testimony is reliable and has been corroborated by other independent pieces of evidence in some material particular from PC Leon and PC Kevin Jean who saw the red plastic bag in between Lebon's

legs. But even if it were not, the authority of The King Vs Baskerville K.B (1916) P658 held “...the uncorroborated evidence of an accomplice to be admissible in law as long as the court warns itself”. Obviously here the defence would be fearing the danger arising from the motive of avoiding or minimizing such witness’ own involvement in the offence charged, and of emphasizing, or it may be, fabricating, that of the accused. But in this case such fears would not arise as Tirant has not been and will not be charged. Instead he was called to testify as a prosecution witness.

Although there were two other occupants of the car which was under the charge of Tirant – its driver, I am fully convinced that Lebon, and not any other person, had the actual, physical and or exclusive possession of the herbal material in the red plastic bag (PE7). The bag was within his vicinity as compared to the others. He also had the control thereof. He very well knew the nature of the contents of the bag that is why when surprised and stopped by the police he stepped out of the car alone leaving it behind on the floor. In addition to this pertinent knowledge he displayed and exercised control over the bag (PE7) by bringing and placing it into the car at Anse Royale and later abandoning or getting rid of it when abruptly intercepted by the police at CCCL. He had earlier on gone out of the car with a red plastic bag containing his take-away box and returned from the lady’s house with a red plastic bag but without the take-away box. Tirant fully observed this incident. See D’Unienville and Another vs. Rep. (1982) SLR 179.

This being so, I am unable to agree with the defence submission that the two accused persons were left at the Indian’s shop by Tirant and later picked from the same shop. Instead I find substantial and logical evidence to prove that all the accused together with Tirant went to the lady’s house at Mont Plaisir. Both

accused spoke to that lady before returning to the car. And further, that Lebon returned with a red plastic bag (PE7). There is no credible evidence to suggest that Japhet, Tirant and Lebon parted company at any one moment when they reached Anse Royale.

As for Paul Japhet (A2), nothing incriminating was found on his body but allegedly where he had been sitting in the car. Mr. Japhet denied having asked Tirant while at the Port Larue police station whether the police officers had checked the rear seat when they searched the car. According to the evidence, after the initial search near the CCCL premises the car remained in the hands and control of the police. The accused were taken to the police station in a jeep. Japhet deponed that after being handcuffed and staying inside the police station for some time PC Meriton and PC Dufrene came in with a magazine paper wrapping placed in a red plastic bag (PE5) containing herbal materials. They claimed to have retrieved it in the presence of Tirant from under the rear seat of the car where Japhet had been sitting.

I am not satisfied with the manner in which the second search was done and it leaves a lot to be desired. By the way these are well qualified and experienced police officers who have conducted searches on numerous occasions. Even if I were to believe the two police officers and Tirant on this matter that they all heard Japhet asking Tirant whether the rear seat had been searched, one wonders why on receiving and deciding to act on this message they did not search the car in the presence of Japhet. He was only ambushed with the contents of the bag (PE5) which could have come from any source. Moreover, Tirant had earlier correctly stated that Japhet entered the car at Anse Royale with nothing. Of the three people who were in the car, and given the circumstances and the time the



car was in the hands and control of the police, it is not easy to conclusively tell which one of them had exclusive possession and or control of that bag (PE5). In such unclear circumstances the presumption would be that the driver of the car containing the illegal substance was the one in possession of that illicit drug. Section 18 of **The Misuse of Drugs Act, Cap 133** is instructive and reads:

**18** *“where a controlled drug is found in a vehicle, vessel or aircraft, other than a vessel or aircraft referred to in Section 17, it shall be presumed, until the contrary is proved, that the drug is in the possession of the owner of the vehicle, vessel or aircraft and of the person in charge of the vehicle, vessel or aircraft for the time being.”*

Further, whereas PC Meriton stated that Tirant asked him whether he had looked under the rear seat Tirant himself testified that while he was sitting at the wall outside the police station after giving his statement, Japhet came and asked him whether the rear seat had been searched. That he was not sure whether it was the police officer who was near the window or in the toilet that overheard these words and called him for a second car search. These sorts of affairs create doubt in the prosecution case which should always be resolved in the favor of the accused. Consequently the prosecution fails to discharge its burden of proof in count 2 as the available incriminating evidence is insufficient and falls far below the required standard of proof.

In conclusion, I find proved in this case the requisite incriminating *mens rea* and *actus reus* in respect of the first count. The prosecution has therefore proved all the ingredients of the offence of trafficking in a controlled drug, as laid out in the charge, beyond a reasonable doubt. The court having warned itself of basing a

conviction on uncorroborated accomplice evidence, and considering the amount of controlled drug involved herein together with the fact that there was no evidence led to rebut “the presumption of trafficking”, Mr. Lebon is hereby found guilty and accordingly convicted on count 1 as charged.

However, the prosecution having failed to establish its case against Paul Japhet, the court hereby acquits him.

**D. GASWAGA**

**JUDGE**

Dated this 9<sup>th</sup> day of March, 2009.