

Republic v Bradburn

(2009) SLR 99

Rene DURUP for the Republic
Frank ELIZABETH for the defendant

Judgment delivered on 24 July 2009 by:

KARUNAKARAN J: The defendant Roy Bradburn stands charged - under Count 1 - with the offence of “Trafficking in a controlled drug” contrary to section 5 read with section 14(c) and 26(1)(a) of the Misuse of Drugs Act 1990 as amended by Act 14 of 1994 and punishable under section 29(1) read with the Second Schedule to the Misuse of Drugs Act, hereinafter called the “Act” and - under Count 2 - with the offence of “Possession of a controlled drug” contrary to section 6(a) read with section 26(1)(a) of the said Act as amended by Act 14 of 1994 and punishable under section 29(1) read with the Second Schedule to the same Act.

The particulars of the charge in Count 1 alleged that the defendant on 4 March 2008, at Roche Caiman, Mahe was trafficking in a controlled drug by virtue of having been found in possession of 5 grams of heroin, which gives rise to the rebuttable presumption of having possessed the said controlled drug for the purpose of trafficking; whereas the particulars in Count 2, alleged that the defendant on 4 March 2008, at Roche Caiman, Mahe had in his possession a controlled drug namely, 5 grams of heroin.

The defendant denied the charge. The case proceeded for trial. He was duly defended by a competent defence counsel Mr Frank Elizabeth. The prosecution adduced evidence by calling a number of witnesses to prove the case against the defendant. After the close of the case for the prosecution, on a cursory look at the entire evidence on record, it appeared to the Court at that stage - there was sufficient evidence before the Court to base a conviction against the defendant on both counts first-above mentioned. Accordingly, the Court found that the defendant had a case to answer in defence for the offences charged. He was accordingly, put on his election in terms of section 184 (1) of the Criminal Procedure Code. The defendant elected to give evidence on oath and called two other witnesses in support of his defence.

The facts of the case as they transpire from evidence are these:

The defendant, aged 23 was at all material times and is a resident of Corgate Estate, Mahé. According to the defendant, he had never been a drug dealer or a drug-trafficker. He had been employed as a snack-seller in the tuck-shop at Mt Fleuri Secondary School. However, he stated that in the past, the police officers used to suspect him of being a drug dealer and often conducted searches of his person as well as at his residence for controlled drugs. In spite of many such attempts by the police, the defendant testified that he had never been found in possession of any controlled drug. Be that as it may.

On 4 March 2008, at around 12.30 pm, the defendant was admittedly, travelling in a car - a black Sirion - driven by his friend one Mr Dean Estico (DW3) and going home. The defendant was sitting in the front passenger seat next to the driver. They were travelling from town to Plaisance via Roche Caiman taking the Stad Linite round-about opposite the petrol station and going towards Fresh Cut, the meat shop. A few hundred yards before reaching Fresh Cut, a police jeep, which was behind, overtook and stopped the defendant's car. Four police officers from the Drug Squad, namely, Police Constable Allen Lucas (PW1), Sergeant Rose, Constable Leon and Constable Hubert Oreddy (PW2), who were all on mobile patrol in that area, disembarked from that Jeep and approached the defendant's car in order to conduct a search following certain information they had received earlier. PC Lucas (PW1) and PC Oreddy (PW2) went towards the left, front door of the car, where the defendant was sitting. The other two police officers went towards the driver's side. They identified themselves as police officers to both persons in the car namely, the defendant and the driver Mr Dean Estico (DW3), and asked them to disembark from the car since they wanted to conduct a search of them. The defendant disembarked from the car and submitted himself to the body search. PC Lucas started to conduct a body search on the defendant in the presence of the other police officers. The evidence given by PC Lucas (PW1) on crucial facts in this respect runs thus -

I did not find anything on him (defendant). Then I asked him his name. The way he was telling me his name, I noticed that it was not normal. So I asked him to open his mouth. As I asked him to open his mouth he acted as if he wanted to run away. I managed to grab him. But, he managed to take out what was in his mouth. It was something red. He threw it away and it fell near a fence. ... When I got to the fence I saw that it was a red plastic bag. Then we brought him (defendant) to the fence and saw the plastic bag that was on the floor there. And I opened it in his presence and in the presence of PC Oreddy (PW2). ... the red plastic bag contained some white powder, which at that time I suspected to be heroin. He (the defendant) was saying it was not for him.... I pointed out the offence to him telling that he is being arrested for possession of dangerous drugs. The driver (Mr. Dean Estico) was also arrested along with him by Sergeant Rose.... It (the substance seized) was kept in my possession to bring to Mont Fleuri Police Station to show him the cause of his arrest. Both of them were taken to the Mont Fleuri Police Station. ... When all formalities are done, Roy (the defendant) was taken to the central Police Station, where he was detained. I took the drugs (sic), which was in my possession and brought to the ADAMS Unit. There Inspector Marie did a letter of request to take the drugs (sic) to Dr. Jackaria... I brought the drugs (sic) to Dr. Jackaria the same day. From the time that I took possession of that plastic bag at the scene to the time that I handed the plastic bag to Dr. Jackaria I had been in possession of that plastic bag. No one had interfered with the plastic bag between that time.

PC Lucas further testified that Dr Jackaria (PW4), a forensic chemist to whom he had handed over the substance, carried out the analysis and concluded that the substance in question was a controlled drug namely, 5 grams of heroin. The evidence of PC Lucas in this respect reads thus:

On the next day, the 6th of March around 8. 30 am I went to get the result from Dr. Jackaria. He gave me back the exhibit that I had brought to him. He showed me the plastic bag. Then he placed it in an envelope and he wrote the CB number in front of it and details concerning the drugs brought to him. Then he signed at the back and I also signed at the back and he sealed it with cello tape. He also gave me a paper, which I brought directly to the Investigation Unit. The drug itself was given by me to Lance Corporal Confiance (PW3) who at the time was attached to the Drug Squad. He took the drugs and placed it in the exhibit room. Today I went to the Drug Squad, I saw PC Robinson, who is the one in charge of the store presently. He took out the drugs from the exhibit store and gave it to me to produce before this Court.

PC Hubert Oredy (PW2) testified that he was also in the company of PC Lucas (PW1), at the material time when they conducted stop and search of the defendant. According to PC Oredy, he too noticed that the defendant's voice was strange, while he was answering the question of PC Lucas before he carried out the body search. The testimony of PC Oredy in this respect runs thus:

PC Lucas was talking to him we noticed that his voice was strange. He did not want to speak and he was a bit aggressive too. He made a gesture to run away but PC Lucas grabbed and that instance he turned and whilst he was turning I noticed him taking his right hand into his mouth removing something and threw it away. PC Lucas also saw the action that he did and told me to hold the Accused. PC Lucas went in the direction of the wooden fence and picked up the object, which the Accused had thrown. The object was a red plastic bag. Lucas came towards us and opened the object and in it there were powdered substance. Lucas told him that we suspect this to be heroin and he pointed out the offence to him. He told him his constitutional rights and arrested him. At that time Sgt Rose was speaking to the driver. We took the Accused and the driver of the black car to the Mont Fleuri Police Station.

Lance Corporal Confiance (PW3) also testified that in March 2008 he was in charge of the exhibit store at ADAMS unit at the New Port. He confirmed that on 6 March 2008, he received the exhibit in this case with CB No: 265/08 with analyst-report from PC Lucas, after the substance being examined by Dr Jackaria. Corporal Confiance kept the exhibit in the exhibit room in a safe under lock and key until 20 November 2008, when he delivered its safe custody to PC Jules Robinson, who took charge of all the exhibits in the exhibit store replacing the former. PC Jules Robinson (PW 5) also testified that after taking charge of the exhibit store from Corporal Confiance, he had kept the exhibit in question in his safe custody in the exhibit store at ADAMS until he handed over the

same to PC Lucas (PW1) to be produced in Court in this trial.

Indeed, the analyst Dr Jackaria (PW4) testified that on 4 March 2008 at 1.45 pm, whilst he was on duty in his office at Mont Fleuri, PC Lucas (PW1) brought an envelope containing the "substance" folded in a red plastic bag (exhibit P3) and a letter - exhibit P1 - from ADAMS requesting for analysis. As he opened the envelope and the plastic bag, he found some powder in it. He took the net weight of the powder. It weighed 5 grams. After that he proceeded to do a number of tests. He also carried out colour test and chemical analysis of the substance. In fact, he conducted four tests including physical analysis. They all confirmed that the substance in question was "heroin" a controlled drug. Accordingly, he issued the analyst-report - exhibit P2 - confirming his findings. He also while testifying, opened the sealed envelope, which PC Lucas - PW1 - had handed over to Court as an - Item P2. Dr Jackaria took out all the items contained in that envelope, identified and produced them in evidence. The Court marked them all as exhibits including the "red plastic bag with white powder" which was marked as exhibit P3. Thus, Dr. Jackaria concluded that the substance, which PC Lucas (PW1) handed over to him for analysis on the said date and time with CB No: 265/08 was undoubtedly, 5 grams of "heroin" a controlled drug. In view of all the above, the prosecution now contends that the defendant has committed the offences under both counts and it has proved the case beyond reasonable doubt.

On the other side, the defence did not dispute any of the material facts pertaining to the stop and search operation conducted by police and the resultant arrest and detention of the defendant for the alleged drug offences. In defence, the defendant gave evidence under oath and also called two more witnesses to testify for the defence. The defendant testified in essence that on the day in question, the police did stop the car he travelled and conducted a body search. According to him, during the said search the police hit him and he fell down. The testimony of the defendant in this material aspect of his defence runs thus:

then he (PC Lucas) told me to spit what was in my mouth..... So, I spat and there was only saliva. Then PC Oreddy (PW2) left us and walked towards a wooden fence.... He stood on top of the wooden fence and shook an avocado tree. PC Lucas left me with Sergeant Rose. He went and jumped over the wooden fence and started to search.

Further the defendant testified that he never took out anything from his mouth at the material time nor did he throw anything towards the wooden fence. The police did not pick up any substance from the ground near the fence nor did they show him at the material time any red plastic bag with white powder. At the Mont Fleuri Police Station he saw PC Lucas (PW2) was putting a plastic bag in an envelope. And he was telling other police that he caught the defendant with drugs. According to the defendant, the police have falsely fabricated this case, when he had neither been in possession of nor been involved in trafficking of any controlled drug.

In cross-examination the defendant stated that when the police asked his name he coughed as his throat was dry that time. According to the defendant, the police have

maliciously foisted this case since PC Lucas had a personal grudge against him due to an incident happened in the past. According to the defendant, he once accused PC Lucas of being a thief as he stole the money from one of his friends. Besides, PC Oreddy - PW2 - was telling lies against him in Court, though he had no reason for doing so.

Ms Christian Letourdie - DW2 - testified that she is a resident of Roche Caiman and on the alleged date and time noticed two men searching the yard of a lady opposite to where she lives. Then one of them stood on a laundry basin. They were trying to shake an avocado tree and one was searching the ground. The one who was on the laundry basin told the other one to look on the corrugated iron sheet of the adjacent veranda. The one who was on the ground climbed on top of the roof of that veranda and stated to the other one "yes" there it is and he picked up something on the roof and jumped down and they both left.

Mr Dean Estico - DW3 - the driver of the car, in which the defendant was travelling at the material time, testified that although the police stopped and conducted a body search of the defendant, the police did not pick up anything from the ground near the fence nor did the defendant throw out anything taken out of his mouth. However, in cross-examination, he admitted that he was kept on the other side of the car he could not see the defendant, when he was on the ground after the police physically restricted his movement. Moreover, he did not know what the officers were doing on the fence side. In the circumstances it is the case of the defence that the police had planted the controlled drug on the defendant and had manufactured the evidence to incriminate him with drug offences.

Mr Elizabeth, defence counsel in his final submission contended that the prosecution had failed to prove the guilt of the defendant beyond reasonable doubt, in that the evidence given by the police officers leaves a doubt as to whether the defendant was in possession of the substance. According to Mr Elizabeth, police officers PW1 and PW2 are not credible witnesses. Mr Elizabeth submitted that there are a number of discrepancies in the evidence given by the police officers, which create a doubt on the credibility of the witnesses. Counsel also submitted that Dr Jackaria has described the colour of the substance, which he examined was light-brown vide analyst-report - exhibit P2 - whereas PW1 and PW2 testified it was white powder. Because of this variation in the description of colour, Mr Elizabeth contended that the substance, which the police allegedly found on 4 March 2008, is not the same substance that was taken to Dr Jackaria for analysis. According to counsel, in any event, the case was not proved to the standard required in criminal cases, in view of the doubtful evidence on record.

Thus, Mr Elizabeth argued that prosecution had failed to establish their case against the defendant beyond reasonable doubt and hence this Court cannot convict the defendant in this matter for the offences charged. For these reasons, defence counsel urged the Court to dismiss the charge and acquit the defendant.

On the other side, State counsel Mr Durup in reply, submitted that the evidence

adduced by the prosecution including the testimony of the two police officers (PW1 and PW2) the key witnesses for the prosecution were very reliable, strong, consistent, cogent and corroborative. The discrepancies alleged by the defence counsel were immaterial to the charge levelled against the defendant. According to the State Counsel, there were no weaknesses or inconsistencies in the evidence adduced by the prosecution. He argued that the difference between white and light brown is a matter of nuances in the perception of individuals. Dr Jackaria being an expert was more precise in the colour description of the substance, than the two police officers, who merely gave a general colour description of the substance. Therefore, Mr Durup contended that prosecution has established the case against the defendant beyond reasonable doubt. Hence, he submitted that the Court should rely and act upon the evidence on record and convict the defendant for the offences he now stands charged with.

I meticulously perused the entire evidence on record. I diligently analysed the submission made by both counsel touching on a number of issues, mostly, based on facts. First of all, on the issue as to credibility of the witnesses, I observed the demeanour and deportment of both police officers PW1 and PW2, when they testified in Court. From my observations, I conclude that both of them are credible and spoke the truth to Court. Their evidence is strong, reliable and corroborative in all material particulars, which was not shattered or discredited by cross-examination. However, the defendant's evidence did not appeal to me in the least nor appeared to be credible. On the other hand, the evidence given by PC Lucas (PW1) was aptly corroborated by the cogent evidence given by PC Oreddy (PW2), in all material particulars necessary to constitute the offence levelled against the defendant. Especially, the fact that the defendant had the substance in his mouth at the material time of body search and the fact that he took out that substance and throw it towards the fence on the road side at Roche Caiman. The police officers did witness his act of taking out the substance from his mouth and throwing it towards the fence. They did pick up that substance, from the ground near the wooden fence. On a careful examination of the evidence on record, I find the following facts have been proved to my satisfaction and to the required degree in criminal law –

- (i) The defendant was in possession of the substance namely, a “red plastic bag with white powder” - exhibit P3 by keeping it in his mouth on 4 March 2008, whilst he was stopped and searched by the police at Roche Caiman. He did take out and throw that substance towards the fence on the roadside presumably to avoid its seizure by the police.
- (ii) PW1 did pick up and seized the substance - exhibit P3 – as and when the defendant threw, from the ground near a wooden fence on the roadside at Roche Caiman. This PW1 did in the presence of the defendant and PW2 PC Oreddy.
- (iii) From the time the substance was seized until it was handed over to the analyst, it had all along been kept in safe custody and possession of PW1 and then by the officers in charge of the exhibit store at ADAMS.

No other person at any time had circumstances and opportunity to tamper with it. There had been no break in the chain of possession of the substance either by PW1 or officer in charge of the exhibit store at ADAMS during the intervening period between the seizure and its production in Court.

- (iv) There was no possibility at all for the analyst to muddle up the “substance” in question with some other items in his laboratory nor was there any possibility for any other person to tamper with it during the time it had been kept in the safe at the office of the analyst.
- (v) Neither PC Lucas (PW1) nor PC Oreddy (PW2) nor any other police officer from the drug-squad for that matter, planted or could have planted the “substance” on the defendant nor did the police officers in the squad conspire to frame the defendant in this case.
- (vi) Undoubtedly, the substance that was found in defendant’s possession and seized by PW1 from the ground as and when it had been thrown by the defendant was a controlled drugs namely, 5 grams of heroin.
- (vii) Since the quantity of the said controlled drug exceeded 2 grams, the defendant is presumed in law of having possessed that controlled drug for the purpose of trafficking by virtue and operation of Section 14(c) of the Misuse of Drugs Act.
- (viii) Obviously, the defendant did not adduce any evidence to rebut the said presumption activated against him by operation of law or to rebut the quantity of drug as proved by the prosecution.

At this juncture, it is pertinent to quote what the Chief Justice Seaton stated in *Phillip Cedras v Republic* (Criminal Appeal No 7 of 1988) on the issue of possession that amounts to trafficking in law -

If the prosecution has no evidence, which it can present to the Court to show either an act of trafficking or an offer to traffic in the drug or preparatory to an act, then it might show that the accused person has had possession of the drug and that the quantity amounted to 15 grams or more [as it was 15 grams then under the previous Dangerous Drugs Act, whereas now 2 grams under the Misuse of Drugs] in which case there would arise a presumption of trafficking, which could lead to a conviction unless the accused person rebutted the presumption.

Indeed, the defendant in this matter did not adduce any evidence in rebuttal nor did he testify under oath about his personal consumption so as to negate the presumption. In any event, I do not believe his claim that he was not in possession of the substance in this respect. Besides, I note both of the defence witnesses DW2 and DW3, were not

much helpful to support the evidence of the defendant on any material aspect of his defence. In any event, I do not believe DW3, who is none else than a friend of the defendant, in any aspect of his testimony, as he has been simply trying to help his friend in the entire episode of stop and search.

I will now turn to the submissions of Mr Elizabeth on the issue as to unreliability of evidence due to discrepancy allegedly found in the testimony of the two police witnesses PW1 and PW2. In fact, these two percipient witnesses having recalled their memory; narrated the sequence of events as they individually observed, which led to the arrest of the defendant and seizure of the substance at the material place and time. In this respect, I would like to repeat what this Court had to state in the case of *Republic v Marie-Celine Quatre* [2006] which runs thus:

.... It is pertinent to note that human memory is not infallible. All tend to forget things sometimes; some all the time; others maybe, from time to time. It is normal. Witnesses are not exceptions or superhuman. The ability of individuals differs in the degree of observation, retention and recollection of events. Who is the more credible - the witness who recalls in tremendous detail every bit of what went on when he was involved in or observed some incident, or the one who says honestly that he cannot exactly remember every minute detail? I am not here referring to dishonest witnesses who so often seem to suffer from selective amnesia for reasons best known to them. Of course, a liar ought to have a good memory to keep his lie alive! Obviously, it is a task set the Court to try and distinguish a genuinely forgetful witness from the one who chooses not to remember.

Hence, to my mind, forgetful witnesses though at times give seemingly different or discrepant or even contradictory description on minute details based on their observations of the same incident, they need not necessarily be dishonest all the time, in all cases. Having said that, in the case on hand, I do not find any discrepancy or contradiction or inconsistency in the evidence of either PW1 or PW2 on any material fact or particular that constitutes the offence alleged against the defendant. The discrepancies on trivial details are not uncommon; they are bound to occur as ability of individuals differs in the degree of observation, retention and recollection of events.

The last but not least, is the issue as to the standard of proof. In fact, the standard of proof defines the degree of persuasiveness, which a case must attain before a Court may convict a defendant. It is true that in all criminal cases, the law imposes a higher standard on the prosecution with respect to the issue of guilt. Here the invariable rule is that the prosecution must prove the guilt of the defendant beyond reasonable doubt or to put the same concept in another way, the Court is sure of guilt. These formulations are merely expressions of high standard required, which has been succinctly defined by Lord Denning (then J) in *Miller v Minister of Pensions* [1947] 2 All E R 372 - 973 thus:

It need not reach certainty, but it must carry a high degree of probability.
Proof beyond reasonable doubt does not mean proof beyond the shadow

of a doubt..... If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence "of course it is possible but not in the least probable" the case is proved beyond reasonable doubt, but nothing short of that will suffice.

Having said that, on a careful analysis of the evidence on record first, I find that the prosecution evidence is so strong and no part of it has been discredited or weakened or contradicted by any other evidence on record. I am sure on evidence, that the police officers did not plant the controlled drugs in question on the defendant at any stage before, during or after investigation. Secondly, I am satisfied that the prosecution has proved the case beyond reasonable doubt covering the essential elements of the offences the defendant stands charged with.

In the final analysis, therefore, I find the defendant Roy Bradburn guilty of the offences of -

- (i) "Trafficking in a controlled drug" contrary to section 5 read with section 14(c) and 26(1)(a) of the Misuse of Drugs Act 1990 as amended by Act 14 of 1994 and punishable under section 29(1) read with the Second Schedule to the Misuse of Drugs Act; and
- (ii) "Possession of a controlled drug" contrary to section 6(a) read with section 26(1)(a) of the said Act as amended by Act 14 of 1994 and punishable under section 29(1) read with the Second Schedule to the same Act.

Accordingly, I convict him of the offences under both counts as charged.

Record: Criminal Side No 21 of 2008