

Republic v Ladouceur

(2009) SLR 19

David ESPARON for the Republic
Anthony JULIETTE for the accused

Judgment delivered on 17 August 2009 by:

PERERA J: The accused stands charged on three counts. Count 1 with the offence of trafficking in a controlled drug, namely 459 gms and 960 mg of cannabis resin, Count 2 with the offence of resisting arrest, and Count 3 with assaulting a police officer.

As regards Count 1, P.C. Davies Simeon was on duty at the La Digue Police Station on 26 November 2001. Around 6 pm he was informed by the officer in charge, Sgt. Amade that there was drug dealing in a room occupied by the accused in the property of one Medine Camille. Before entering the premises, he and three other police officers observed the movements from behind a bush near the house. There was sufficient light to identify persons. He saw the accused standing in front of the house and collecting money from people. He was giving something in return. There were about six persons who had come to that house. The police officers then decided to search the premises. When he was about to enter, the accused tried to close the door, but he managed to get in. Then the accused jumped on him and struggled. While struggling, he stated that the drugs were in the other room. At the same time, he heard the accused say "ouch". He then noticed that the head of the accused has been injured and that it was bleeding. When he handcuffed him, he agreed to a search of the room, which was an extension to the main house with only one entrance. P.C. Simeon stated that he saw two black substances on the floor near the door of the bathroom. They were wrapped in cling film. On one, it was engraved "maza gold". Then he saw another black substance on his bed, and a plastic bag with money in local and foreign currencies. There were four notes of R 100, one of R 50, and twelve of R 25. There was also a pen knife. He then kept all the exhibits in his possession. At the police station, formal entries were made, and the exhibits were kept in the locker, the keys of which were in his custody.

On 28 November 2001, he brought them to Mahe for analysis. He obtained the request letter from Inspector Hermitte and took the exhibits to Dr Gobine for analysis. PC Simeon stated that the exhibits were in his sole custody from the time they were seized, until they were given for analysis. Dr Gobine got him to sign on the letter of request (P2).

On 3 December 2001 he went back to collect the report and the analysed drugs. The drugs were placed by Dr Gobine in a plastic bag and in an envelope, which was sealed, and signed by him. The report was admitted as (P3). He then took them back to La Digue and kept them in his locker.

P.C Simeon was transferred to Mahe in 2002. He brought those exhibits and gave them to the Adams Unit. He left the police force thereafter, and hence did not see those exhibits thereafter.

On being cross-examined, P.C. Simeon denied that the case against the accused was fabricated. He maintained that drugs were found in the room occupied by the accused. As regards the injury, he denied that he assaulted the accused, but stated that it happened while both of them were struggling.

L/C Daniel Dugasse corroborated the evidence of P.C. Simeon. He too stated that the officers observed the drug transaction from the bushes. He saw clearly money being exchanged. He saw about 15 to 20 persons there. He also stated that the accused tried to close the door, but they managed to enter. Then the accused "attacked" P.C. Simeon by fighting with him to prevent him from entering. L/C Dugasse stated that the accused got hold of P.C. Simeon and "squeezed him". Then PC Pillay hit the accused with a torch, but as he ducked, it hit him on his head.

L/C Dugasse also corroborated PC Simeon as regards the seizing of two black substances wrapped in plastic from the floor of the bathroom, and another black substance from the top of the bed. He also stated that there was also a pen knife, a transparent plastic bag and money in local and foreign currencies. The accused was taken to the hospital to get the injury attended to.

On being cross-examined L/C Dugasse stated that although they saw money being received by the accused, they could not see what was being handed over to those persons, and it was for that reason that they went into the room. He stated that what he called "items" in the statement to the police, was money.

S.I. Ahmed Emmanuel was the officer in charge of the La Digue Police Station on 26 November 2001. He too corroborated PC Simeon and L/C Dugasse as regards the observations made from outside the house, before conducting the raid. He however did not stay there, but only dropped the officers and went back to the police station. Subsequently he received a telephone call stating that the accused was arrested. He went back and brought the accused to the police station. Later after getting his injury attended to, he elected to give a statement. He recorded it, and PC Simeon signed as witness.

When that statement was sought to be admitted in evidence, counsel for the accused objected on the ground that it was an involuntary statement and that it was obtained by oppression and intimidation by assaulting. This Court, by ruling dated 25 May 2005, overruled that objection and allowed the statement to be admitted in evidence. That statement (P4) is as follows-

I wish to state to the Police that today Monday the 26th day of November in

the year 2001, I left La Digue to Praslin at 07.30 hrs on a ferry named Silhouette. At around 09.00 hrs in the morning I board Cat Coco to Mahe. I arrived on Mahe at 10.00 hrs. Whilst on Mahe I went to town at Market Street where I bought a pair of sandals at a shop near Lovenut. I roam about until 13 00 hrs where I took a bus to Plaisance at the bus stand. Arriving at Plaisance at 13.20 hrs I disembark at Fiennes Institute (Kazern). I took the church lane and I met some people unknown to me. Amongst those people there was two rasta man and few had long beard like Muslim. I approached one of the man with long beard whom I don't know his name and I told him that I was willing to buy piece of "Chalas" for the value of R5000/-. He told me to wait, where he later came back with two pieces of hashish and I pay Rs5000/-. I took the hashish, which was wrapped in a plastic and went away. At 16.00 hrs I board Cast Coco for La Digue. I arrived on La Digue at 17.45 hrs and I went straight away home at Anse Reunion. After taking a rest I took out the two pieces of hashish in my bag and I place it in the bathroom floor. At 19.00 hrs, I saw three Police Officer came running to my house, I became panic and they informed me that a search will be carried out in my house. At that time I was in a room that I am renting from Medine Camille. I push the door to prevent them from getting inside and they also force the door open. They made me witness the search where a Police Constable picks up the two piece of hashish on the bathroom floor. I was arrested. In the room there was also a pen knife and a small piece of hashish near a white plastic bag labeled DAISY containing some money. I was brought to La Digue Police Station where I was detain in cell.

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SI Emmanuel was further cross-examined as regards the items which PC Simeon had seized. He stated that he was informed that there were "two blocks of hashish, a pen knife and another smaller piece" of hashish.

Dr Philip Gobine, the analyst, was called to testify regarding the analysis of the exhibits in the case. Mr Juliette, counsel for the accused stated that he did not challenge his expertise. Dr Gobine then proceeded to testify that on 28 November 2001, he took possession of the following items from PC Davies Simeon -

Item No 1 One piece of resinous material wrapped in clear red cling film and further wrapped in clear transparent plastic.

In his report, he further described that item, as -

Having a length of 15.2 cms, possessing a black outer surface and light brown within. The piece of resinous material has a small golden emblem written "*mazar gold*" embossed on the surface. Weight: 204 gm 900 mg – cannabis resin.

Item No. 2 One piece of resinous material wrapped in clear transparent plastic.

In his report he further states –

Having a length of 15 p cms possession a black outer surface and light brown within
Weight: 247 g. 810 mg – cannabis resin.

Item No. 3 One slice of resinous material having a thin film of clear red cling film adhered to its sides.

In his report, he further states –

Having a length of 10.3 cms. The slice of resinous material has a black outer surface and light brown within weight 7 g. 250 mg. – cannabis resin.

Item No 4 One red multipurpose pen knife having a length of 8.9 cms when folded. The large blade of the red multipurpose pen knife has thin streaks of dark brown resinous material on its surface, containing cannabinoids.

Dr Gobine described the testing protocol adopted by him in his analysis. He corroborated the evidence of PC Simeon as regards the handing over of the exhibits, and the handing back with the report. He identified his signature on the request letter, and the certificate. When the prosecution sought to produce the report as an exhibit, Mr Juliette stated that he had no objection, and also that he had no cross- examination.

At the end of the prosecution case however, Mr Juliette made a submission of no case to answer on Count 1 on the sole ground that the substances allegedly recovered from the accused had not been produced by the prosecution as exhibits in the case, and that consequently, the accused could not be called upon to present a defence, as he would be prejudiced in any defence he would put forward. However, no submission was made in respect of Counts 2 and 3. Admittedly, all the exhibits that were analysed by Dr Gobine were lost in a break-in at the police station before the trial commenced.

This Court, by ruling dated 9 March 2007, ruled that there was a case to answer on all three counts. As regards Count 1, the Court, relying on several authorities stated that the prosecution had adduced evidence to establish the chain of custody of the exhibits from the time they were recovered from the accused, until they were analysed and returned to the police with the certificate. The Court also observed that the counsel for the accused had not challenged the expertise of Dr Gobine, and raised no objections to the production of the certificate. Further, counsel for the accused did not cross-examine Dr Gobine. Hence, the accused was not challenging the veracity of the analysis of the drugs, but relying on a possible prejudice being caused to his defence

due to their non-production in Court. In that respect the Court relied on the case of *Noel v R* (1983 – 87) 2 SCAR 221, which in essence, did not establish the principle that material found in the possession of an accused and subsequently analysed must necessarily be produced in Court at the trial as an exhibit, but rather that it was sufficient for the prosecution to prove that “the material was so found, that it was analysed, and that it was a dangerous drug”. As regards the possible prejudice to the defence, the Court relied on the case of *R v Hamer* (2004) 4 CHRLD 385, in which the Court of Appeal of New Zealand stated –

It is not correct to maintain that a criminal trial cannot proceed, and there is a breach of section 24(d) of the Bill of Rights Act, *merely because certain material or testimony* which might possibly have contradicted the prosecution case is unobtainable or has been contaminated. Rather there are two relevant considerations:-

Firstly, whether the evidence has been lost because of acts or omissions by the police *involving bad faith*, and secondly, *whether it is possible that the lost evidence would have been of real assistance to the defence in creating or contributing to a reasonable doubt as to guilt.*

In the present case, after the submission of no case to answer was overruled, the Court called upon the accused to present his defence, and make his election under section 184(1) of the Criminal Procedure Code. At that stage, counsel for the accused made an application to have access to the “exhibits” for the purpose of re-analysing them by Dr Jackariya, the analyst who succeeded Dr Gobine. This Court, by ruling dated 21 January 2008, dismissed that application, holding inter alia that the accused was seeking to “have non existing drugs to be analysed”. Thereupon counsel for the accused in the presence of the accused, sought a date for the defence, and was given 3 March 2008 at 1.45 pm. On that day, again in the presence of the accused, the case was fixed for mention on 14 March 2008 at 1.45 pm, and again on 19 March 2008 at 1.45 pm, when the case was fixed for continuation on 6 June 2008 at 1.45. On 19 March 2008 and on 6 June 2008, the accused was absent. Although counsel for the accused had undertaken to inform the accused to be present, he was absent when the case was mentioned. A further mention date was given for 8 July 2008. On that day, I was on overseas leave, and hence the case came up before Gaswaga J. On the application of counsel for the prosecution, and Mr F Elizabeth standing in for Mr Juliette, the case was fixed for continuation for the defence on 28 and 29 May 2009. Since 19 March 2008 the accused defaulted appearance and on each subsequent date for mention, after 28 May 2009, a total of four warrants of arrest were issued for his apprehension, as he was on bail. In the last warrant issued on 30 July 2009, the police officer has reported that efforts had been made to trace the accused in the district of Anse Aux Pins and La Digue, but that he could not be located. Those two addresses were given to Court by Mr Juliette who himself stated that he had not been contacted by the accused as regards the position of the case.

On 10 August 2009, when the case was taken up for continuation, I informed counsel

that I am due to retire from service, effectively from 24 August 2009 and hence inquired as to what stand they took. Mr Juliette then moved to withdraw his appearance on the ground that he had no instructions, and stated that he had no objection to the case proceeding. Consequently, counsel for the prosecution relied on article 19(2)(i) for the Constitution, read with article 19(12) and also section 133 A of the Criminal Procedure Code as regards trials in the absence of accused persons. Accordingly, I decided to act under section 133 A of the Criminal Procedure Code, as amended by Act No 17 of 2008. Under that provision, the Court that decides to proceed with the trial should be satisfied

That the summons or other process requiring the person to appear at the time and place appointed for the trial has in accordance with law, been served on such person and that –

- (a)
- (b) *He does not appear in Court; or*
- (c)

- (2) The commencement or continuance of a trial under this section, shall not be deemed or be construed to affect or prejudice the right of such person to be defended by an Attorney at law at such trial.

In that respect, the accused was present in Court on 21 January 2008 when the case was fixed for hearing of defence on 3 March 2008. He was present on that day when the case was fixed for mention on 14 March 2008 to fix a date for continuation. Thereafter he defaulted appearance, and according to Mr Juliette, he did not contact him or attempt to ascertain the progress of the case to present his defence. One of the conditions of his bail order, made on 29 November 2001 was –

- (a) That he reports to the Central Police Station at least once a week starting from the 1 December 2001 when he is on Mahe and thereafter to La Digue Police Station whenever he is on La Digue.

Hence I am satisfied that the spirit of section 133 A of the Criminal Procedure Code has been satisfied as he was present in Court when the first date to present his defence was given. The continued inability of the police to locate him on the warrants attracts the reasonable presumption that he is absconding. Further, as regards the provision under subsection (2), Mr Juliette appeared to defend him, and was ready to continue if he had instructions. Hence, the accused by his own conduct, has deprived himself of the benefit of that provision.

Section 133 (3) provides that –

Where in the course of or after the conclusion of the trial of an Accused person under paragraph (b) of Section (1) the Accused person appears before the Court and satisfies that Court that his absence from the whole

or part of the trial was bona fide.

Then -

(a)

(b) Where the trial has been concluded, the Court shall set aside the conviction and sentence, if any, and order the accused be tried *de novo*.

In this case, it may not be possible for this case to be heard *de novo* before another judge, as the exhibits have been lost at the police station after the drugs were analysed, and also as Dr Gobine, the analyst, is no longer available to testify as he is permanently incapacitated due to an illness.

It was in those circumstances that I decided to continue with the trial in the absence of the accused. In this respect, I have considered the evidence for the prosecution, and the defence impliedly presented by the accused in cross examining the prosecution witnesses, and the submissions made by his counsel in making a no case submission. I am satisfied beyond a reasonable doubt that the drugs, as charged in Count 1 were seized from the possession of the accused. He was the sole occupant of the room which he had rented. That room had only one entrance. He closed the door of that room when police officers came to search. Hence he had knowledge that the substances in his possession were illicit drugs. As regards the presumption of trafficking, the accused has not rebutted it even impliedly. In fact the presence of a pen knife with streaks of cannabinoids attached to it, and the evidence that persons were seen engaged in monetary transactions, and the presence of currency notes in a plastic bag together with drugs on his bed, provide overwhelming evidence that he was engaged in trafficking. The absence of the drugs in Court as exhibits, in these circumstances will not provide "real assistance to the defence in creating or contributing to a reasonable doubt as to guilt". Hence I convict the accused with the offence of trafficking, as charged in Count 1.

As regards Count 3, there was no positive evidence that the accused assaulted PC Simeon. At best there was a struggle, and it was the accused who was injured on the head. Hence I find it unsafe to convict him for the offence of assault on a police officer. He is therefore acquitted under Count 3.

There is however sufficient evidence that the accused resisted arrest by closing the door and struggling to prevent the police officers from entering to search the room. I therefore convict him under Count 2.

Record: Criminal Side No 49 of 2001