

IN THE SUPREME COURT OF SEYCHELLES**THE REPUBLIC****VS.****AARON SIMEON**Criminal Side No. 83 of 2008

Mr Durup standing in for
Mr Esparon for the Republic
Mr Hoareau for the Accused

JUDGMENT**Burhan J**

The accused Aaron Simeon has been charged for trafficking in controlled drug contrary to section 5 of the Misuse of Drugs Act, read with sections 14 (d) and 26 (1) as amended by Act 14 Of 1994 and punishable under the second schedule of the said Act read with section 29 of same.

The particulars of the offence state that the accused Aaron Simeon of Plaisance Mahe, on the 10th of October 2008 was found in possession of a controlled drug namely 2.44 grams of Diamorphine (Heroin) which gives rise to the rebuttable presumption of having possessed the said drug for the purpose of trafficking.

According to the evidence of the main prosecution

witness Lance Corporal (LC) Freddy Isaac, on the 10th of October 2008 accompanied by Police Constable (PC) Labiche, Sergeant Souffe, Police Constable Steve Jupiter and a few other police officers they had conducted an operation around 7 and 8 pm at Les Mamelles. At Les Mamelles, they had gone down to Plaisance to a place called "Tol". This place was near the public road opposite Mohan Shopping Centre. The people present had taken to their heels on seeing the police. Witness had entered into an alley accompanied by PC Labiche and had seen the accused sleeping in the bushes. He was wearing trousers and had a dark blue bag marked Adidas which was on his back. They had informed him they were police officers and searched his bag and person. They found a few items which they could not identify properly as it was dark. As they had no lighting equipment with them they were able to properly identify only the larger items. They had informed him they were taking him to the Mount Fleuri police station. On arrival they had searched him and the bag as well. The bag contained a mobile phone charger, a roll of bandage and a few other items. In the station they were able to identify "little piece of plastic bag" in which there was some white brownish in colour powder and a smaller one containing some herbal materials. He had taken possession of these two items and the accused was informed of the detection and was thereafter brought to the Central police station. He had kept the items under

lock and key in a locker at ADAMS in a store. Thereafter he had taken it for analysis to Dr Jakaria the Government Analyst. The exhibits were taken for analysis on the 13th of October 2008 and brought back the next day. Thereafter he had returned it to the ADAMS unit.

Witness identified the sealed white envelope with seals intact as the white envelope he received from Dr Jakaria as P2 and the brown envelope inside as exhibit P2 (a). He identified the red plastic bag which he detected as exhibit P2 (b) the herbal material as P2 (c) piece of cling film as exhibit P2 (d) and the powder material as P2 (e).

Under cross examination witness stated the red plastic bag was found in the bag of the accused. Inside was the brown powder, the other was a piece of cling film containing some herbal material. He stated the herbal material was separate to the powder. He stated after arresting the accused the bag was next to him on the back seat. At the Mount Fleuri police station he had searched the bag of the accused personally. The other officers LC Isaac and Jupiter were also present. He denied the suggestion that he had placed the powder in the bag of the accused. He stated that there was light where the vehicles were parked but not sufficient to conduct a search.

Dr Jakaria giving evidence corroborated the fact that he received the said exhibits for analysis from LC Freddy Isaac. He identified the evidence envelope P2 (a) in which the exhibits were brought and the white envelope P2 in which he sealed and handed the exhibits back to witness LC Isaac. He identified the exhibits examined by him in open court namely the light brown powder and the herbal material. He tendered his report as P4 which identified the light brown powder as heroin of 4% purity which he stated was one of the lowest he had analysed. He also stated that the herbal material analysed turned out to be tobacco.

Sergeant Maryse Souffe stated that she had participated in the said raid at Plaisance Les Mamelles. She stated that she remained near the vehicles while the other police officers went into a lane. About 10 minutes later LC Isaac and Labiche returned with the accused. She corroborated the fact that the accused was thereafter taken to the Mount Fleuri police station and searched. While the accused bag was being searched LC Isaac and Jupiter were also present. She had seen the powder found in a plastic in the bag of the accused and identified it in open court. She identified the bag P2 (b) as well.

Under cross examination she too stated there was a little light where the vehicles were parked. She was cross

examined at great length about the seating arrangements in the car and as to why the search on the bag was not conducted in the vehicle. She corroborated LC Isaacs evidence on the seating arrangements in the vehicle and further stated although it was not physically impossible to have conducted the search on the bag in the vehicle, as it was night it was more appropriate to have searched it under the light, so she had given the order that it be searched at the police station (vide page 13 of proceedings of 1st June 2009 1.45 pm).

Police Constable Serge Labiche corroborated the evidence in respect of the arrest of the accused but stated he did not go to the police station where the search on the bag was conducted as he was dealing with other people at the scene. Thereafter the prosecution closed its case.

As a prima facie case had been established by the prosecution the defence was called. The accused in defence gave a statement from the dock.

He stated on the 10th of October around 6.30 pm he had gone to spend the weekend at his grand mother's house. He had disembarked at Plaisance in order to go to a friends place to collect a movie. While he was waiting for him he heard a gun shot and saw people running around.

He stated he remained sitting as he had nothing to do with what was happening. Thereafter LC Isaac and PC Labiche had arrived and asked him what he was doing there. He had answered he was waiting for a friend to pick up a movie. They had said;

“that it was a long time since they were looking for me and my name was on their list”.

They had then searched him and in his bag but had not found anything in his bag,. He stated further that the neighbours were looking. They had then said they will not continue their job here and that they were taking him to Mount Fleuri police station. He had gone to the Mount Fleuri police station with Marie Souffe, LC Isaac and PC Jupiter. At the station the police officers were helping to search him and his bag. Lance Corporal Legaie was also present. They had given him his phone and while he was switching it on Lance Corporal Isaac had told him

“Here I have removed this from your bag.”

He had stated he did not have any drugs in his bag but then the Lance Corporal had told him, he was in the police force he had been giving them a hard time. They had thereafter done their procedures but he had refused to sign anything. They had taken him to the ADAMS base to Inspector Ron Marie. He had wanted Rs 50,000/= to remove the charge against him. He had told them to prosecute him as he had a clear conscience before God. Thereafter he had been taken to Central police station.

Having thus carefully analysed the evidence before court it is clear that the defence of the accused is that the controlled drug was “planted” on him. The reason given is that as he was an ex officer of the police force he had been giving the police a hard time. However it is apparent that the accused in this case is not a lay person or a person below average intelligence, being attached earlier to the police force he should have been well aware of his rights and the serious nature of the act of “planting” a controlled drug on an innocent person. However he has not sought to complain against Lance Corporal Isaac to the higher authorities in the police force. There is no evidence before court, that any disciplinary action in respect of this detection was taken against LC Isaac for “planting” a controlled drug on the accused nor is there any evidence to show that any disciplinary action is even pending against the officer concerned.

Learned counsel for the accused in his submissions stated that the officers were able to detect the herbal material in the bag, at the scene at “Toll” in Plaisance but had detected the powder only in the police station. This is not in accordance with the evidence of LC Freddy Isaac. With regard to the detection itself LC Freddy Isaac states that when he searched the bag of the accused at the scene at “Toll”, he found a mobile phone charger, a roll of bandage

and a few other items and a little piece of plastic bag rolled (vide pg 5 of the proceedings of 2nd April 2009). Inside were some powder white brownish in colour and a smaller one containing herbal material. It is clear from his evidence given under cross examination that there was a red plastic with white powder and a cling film with some herbal material separately

(vide page 2 proceedings of 25th May 2009 at 1.45 pm). It was this officer who had searched the bag on the scene at "Toll" and not the other officers and hence it would be him who would know best what the contents of the bag and not the other officers, especially considering the light conditions prevailing at the time of search.

The explanation given by the police in regard to why the accused was taken to Mount Fleuri police station to be searched is quite acceptable to court. Firstly the quantity of powder is only 2.44 grams and quite obviously small in size, the officers had gone on the raid in the evening hours when it was dark. Further the officer's state that the lights of surrounding houses were on, a fact not contested by the defence. There were other items in the bag as well. Further having found these suspect items though the herbal material later turned out to be tobacco, the officers thought it fit to conduct a proper search on the accused and the bag in better light conditions, rather than at the scene which had long grass and was dark. It is perfectly acceptable to court that the accused under these circumstances would be taken to the police station

to be properly searched under better light conditions. Learned counsel in his submissions, has moved court that the evidence of Sergeant Mary Souffe be kept aside but it is her evidence that is most important in regard to this issue, as it was she as the superior officer and not Lance Corporal Freddy Isaac who had given the order that the accused be taken to the Mount Fleuri police station to be searched, due to the prevailing light conditions.

Learned counsel for the accused cross examined the witnesses at length in respect of the seating arrangements and as to the custody of the accused bag when he was being transported from the scene to the Mount Fleuri police station. It is clear when one takes the evidence of LC Freddy Isaac and Sergeant Souffre that LC Isaac and the accused were in the back seat and the bag was by the side of LC Freddy Isaac the detecting officer. It was very much in his custody though it may not have been on his lap or he may have not been touching or handling it throughout. This court is satisfied on the evidence given by these two officers in this respect.

Another matter raised by the defence was the fact that, even though the total weight of the substance was 2.44 grams only between 4 percent of the constituent substance was the active ingredient. However this question has been clearly dealt with by the Seychelles

Court of Appeal in the case of ***Terrence Alphonse v Republic SCA Cr.6 of 2008***, where Bwana JA held that in the case of heroin “The entire powder is taken and weighed together. It cannot be separated by weighing the different chemical components..... The law and the courts should not be moved to assume or adopt some arithmetical-cum-scholastic exercise divorced from the realities of the underworld drug business.” Therefore for all purposes this court has to consider the total weight mentioned in the charge.

Learned counsel also contended that only if 100% Diamorphine is detected will one be liable for being in possession of the said controlled drug. If it was an impure product it would not be Diamorphine but a preparation of another product containing Diamorphine. However the evidence of Dr Jakaria does not show that in this instant case the product taken into custody was a preparation of another product (emphasis added) containing Diamorphine. For all purposes the product was Heroin of 4 % purity. Therefore the contention of learned counsel cannot be accepted.

Furthermore the evidence of the prosecution witnesses clearly indicate that the accused was attempting to lie low in the tall grass and avoid detection. As to whether he was lying down or sitting down is not a material

contradiction that shows that the witnesses were telling untruths. What is apparent from the evidence of the prosecution, is that the accused was attempting to conceal himself in the long grass from the police.

For the aforementioned reasons the defence of the accused, that the drugs were “planted” on him and the other aforementioned defences are unacceptable to court.

When one considers the evidence before court, led by the prosecution, it is clear that the evidence of the detecting officer Lance Corporal Freddy Isaac with regard to finding the controlled drug in the bag the accused was carrying on his back can be believed and accepted by court. Though subject to lengthy cross examination, no material contradictions in his evidence have emerged for him to be disbelieved. In fact several material aspects of his evidence have been corroborated by the other prosecution witnesses namely Sergeant Mary Souffre and others. The court is therefore satisfied that the prosecution has proved beyond reasonable doubt that the controlled drug was in the possession of the accused.

The concept of possession connotes two elements, the element of custody or mere possession and the element of knowledge as held in the case of ***DPP. v Brooks (1974) A.C. 862***

With regard to the element of knowledge of the accused, it is in evidence that the accused was attempting to hide in the tall grass to avoid being detected by the police officers. It could be inferred from this action and the relevant circumstances of this case that the accused had the necessary knowledge that he was in fact in possession of a controlled drug. For the aforementioned reasons court is satisfied that the prosecution has established or proved the elements of possession and knowledge beyond reasonable doubt.

The defence has not sought to contest the chain of evidence in this case. In any event Dr Jakaria the Government Analyst, identified in open court the powder brought to him for analysis by LC Isaac and analysed by him. He stated the powder tested positive for Heroin a controlled drug. His analyst report P4 corroborates this fact. LC Isaac too identified in open court the said drug, as that detected in the bag of the accused and sent for analysis by him. Further Dr Jakaria's evidence and report clearly establishes the fact that the powder taken into custody from the accused was a controlled drug weighing 2.44 grams. The quantity detected in the possession of the accused attracts the rebuttable presumption that the accused was trafficking in a controlled drug. The accused has failed to rebut the said

presumption.

It is to be observed that even though learned counsel for the defence has not raised any objection at any stage of the trial or even in his submissions, the appropriate section the accused should have been charged is 14 (c) of the Misuse of Drugs Act Cap 133. However the particulars of the offence clearly state the details of the offence with which the accused has been charged with and the cross examination indicates that no prejudice has been caused to the accused, as it is apparent that both counsel and the accused have been aware of the fact that the controlled drug in this instant case was Heroin.

For the aforementioned reasons this court is satisfied that the prosecution has proved all the necessary elements of the charge beyond reasonable doubt. The accused is found guilty as charged and convicted of same.

M.N. BURHAN

JUDGE

Dated this 14th day of October, 2009.