

IN THE SUPREME COURT OF SEYCHELLES

THE REPUBLIC

VS.

SERGE ESPARON

Criminal Side No. 75 of 2008

Mr. Esparon for the Republic
Mr. Hoareau for the Accused
Accused - Present

JUDGMENT

Burhan J

The accused in this case Serge Roland Esparon stands charged with Trafficking in controlled drug, contrary to section 5 read with section 14 and 26 (1) of the Misuse of Drugs Act 1990 as amended by Act 14 of 1994 and punishable under section 29 and the second schedule referred to thereto in the Misuse of Drugs Act 1990 as amended by Act 14 of 1994.

The particulars of the offence are that Serge Esparon, on the 9th day of September 2008, at Baie St Anne Praslin was trafficking in a controlled drug by virtue of having been in possession of a total net weight of 714.6 grammes of Cannabis Resin, which gives rise to the rebuttable presumption of having possessed the said controlled drug for the purpose of trafficking.

The accused pleaded not guilty to the aforementioned charge and trial against the accused commenced on the 13th of March 2009.

The case for the prosecution as borne out by the evidence of the detecting officer Constable Hermitte, was that on the 9th of September 2008, around 6.30 am, while he was on routine patrol with Lance Corporal (LC) Attala, Police Constable (PC) Paul Dubois and PC Alex Pillay, they saw the accused driving a white Terrios jeep bearing registration no S14186 with his girlfriend next to him and at the Baie St Anne School, his girl friend had embarked from the jeep, while he had proceeded on towards Baie St Anne Hospital. When the accused noticed he was being followed, he had attempted to turn back to Baie St Anne (vide pg 5 of proceedings of 25th March 2009 1.45pm) but they had stopped him and two police officers had got into his vehicle, to escort the accused to the Baie St Anne police station. The two police officers who had got into his vehicle had been PC Paul Dubois and Alex Pillay. The accused had driven the vehicle back to the police station.

At the Baie St Anne Police station they had informed the accused that they were going to search the vehicle and witness had conducted a search on the vehicle driven by the accused that day. Witness stated that he had first searched the passenger seat

and gone to the seat behind the front passenger seat, then the booth and then opened the door behind the driver's seat. He had searched under the driver's seat. When he reached under the driver's seat, he noticed a dark machete and on reaching further down he had felt something hard and when he removed it, he noticed something wrapped in an aluminium foil. On opening it, he noticed four slabs of dark substance which he presumed to be controlled drugs. At this stage Lance Corporal Attalla, PC Dubois, PC Pillay and the accused were present observing him. The slabs of dark substance were then seized, the accused arrested and his rights explained to him. The 4 slabs of dark substance were put into an envelope and numbered as CB236-08.

Thereafter witness had taken the slabs for analysis to Dr Jakaria the Government Analyst. The next day the Government Analyst had given the substance back, confirming in his report P2 it was 714.6 grammes of Cannabis Resin. The exhibits had been put into a sealed white envelope which he had thereafter kept in his custody, until being produced in court. Witness identified P1 as the request form given to Dr Jakaria to analyse the said exhibit, he identified document P2 the analyst report that he received from Dr Jakaria. Witness also identified as P3 the white envelope in which the Government Analyst had placed the exhibits and sealed after analysis, its contents P3a as the envelope he placed the exhibits in to be taken for analysis, P3b as the Aluminium foil taken into custody and the slabs of dark substance taken into custody and given for analysis as P3c. Several photographs were marked as P4a to P4h.

Under cross examination he stated that it was Regional Commander Agnes Mondon who gave instructions in respect of routine patrols. He admitted LC Atalla was driving and they had gone to Cot D'or first. He stated it was LC Atalla who was making the decisions that day. He further stated that LC Atalla had received information whilst they were in the jeep, that the accused was trafficking in drugs so they decided to follow him. He admitted he knew the accused by face but not by name and that they had followed the jeep from Marie Jeanne Estate.

He testified that PC Dubois had sat in the front passenger seat next to the accused who was driving and PC Pillay had had sat behind the front passenger seat, when accompanying the accused to the station. He denied the defence suggestion that PC Pillay sat behind the driver's seat, in order to plant the drug under the driver's seat. He also denied the suggestion that the reason to say that the search was started from the passenger seat and conducted round the vehicle and that it ended at the driver's seat was to prevent it looking like a "set up".

LC Attalla evidence was that not only the accused's wife, a little girl was also present in the vehicle but both had got down at the school. He further stated he received a call from ASP Agnes Mondon about information that a drug transaction was being done in a white Terrios jeep. He stated that they had not stopped the vehicle earlier and followed it, as they had wanted the accused to first drop his wife and child and as they wanted him alone. PC Paul Dubois and PC Pillay were also called to give evidence to corroborate the evidence of PC Hermitte. PC Pillay

categorically denied that the drugs were planted by him. Thereafter the prosecution closed its case.

The accused made a statement from the dock and called witnesses Alvin Tirant and Jean Baptiste and produced documents D1, D2 and D3 to establish the fact that he had been successful in the case filed against the police. When one considers the defence of the accused, his defence is centred on the fact that the controlled drug found under his seat was placed there by PC Pillay and was done on the instructions of the Superintendent of Police Agnes Mondon who was in charge of Praslin, against whom admittedly he had successfully filed a case in respect of an earlier raid conducted by her police officers and been paid compensation. Learned counsel in his submissions mentioned it was for this reason namely to “set up” the accused that the police officers got into the vehicle and made the accused drive it to the Baie St Anne police station and had then searched the vehicle, without searching it at the place where they had first stopped it. However PC Hermitte states categorically (vide page 53 of proceedings of 25th March 1.45pm) that the vehicle was searched on the main road in front of police station in public view as earlier there were earlier allegations of “planting” drugs on the accused. Furthermore when one considers the facts of this case specially the somewhat large quantity of controlled drug detected, it is very unlikely that the police would have had access to such a quantity in order to frame the accused. Further when one considers the defence in this case it is to be noted that the

accused has on several occasions filed cases against the police and in fact been successful to an extent. Therefore it cannot be said that the accused was a person unaware of his rights. However in this instant detection, he has not sought to file an action against the police or even complain to the higher authorities that he had been framed, despite the serious nature of such an act. Therefore the defence contention that the controlled drug was planted by the police cannot be accepted.

Learned counsel for the defence in his submissions took up the position that although section 18 of the Misuse of Drugs Act states that when a drug is found in a vehicle it is presumed that the owner or the person in charge of the vehicle for the time being is in possession of it until the contrary be proved, in this instant case the prosecution has failed to exclude the possibility that the other person (namely the wife of the accused) who had been in the vehicle prior to the detection had placed the drug under the driving seat. Therefore the prosecution had failed to prove that the drugs were in the exclusive possession of the accused, as they had failed to exclude the aforementioned possibility.

According to the prosecution and not contested by the accused, is the fact that at the time of arrest the accused was alone in the vehicle and the two persons with the accused when the jeep was being followed was the accused wife and a child. Both had

alighted from the vehicle prior to the detection. During cross examination the suggestion made was that PC Pillay had placed the drugs under the driver's seat. It appears when considering the submission made in this respect, that the defence is unsure of itself as to whether it was PC Pillay or the accused wife who had placed the controlled drug under the driver's seat. For the aforementioned reasons, the defence dual contention that the drugs were introduced either by the other person namely the wife of the accused who had been in the vehicle prior to getting of it or by the police cannot be accepted.

The accused also called two witnesses one admittedly a drug user who testified that PC Pillay who they knew but casually, had confided that he had "set up" the accused and further stated that Mr Pillay was dealing with hashish himself.

It is apparent that there was no special or close bond of friendship between PC Pillay and them. Thus it is highly unlikely that such a sensitive matter would be discussed by any police officer with persons with whom only a casual friendship exists. PC Pillay categorically denies that his drinking partner was Mr Tirant. These witnesses themselves admit that they were not on close terms with PC Pillay but knew him on a casual basis but yet he had chosen to confide with them. Had this been the truth it is clear that the accused, a person well aware of his rights would have complained to the higher authorities immediately, specially

having such witnesses to support him. It is apparent that why he did not do so, was because these witnesses were non-existent at that time but subsequently introduced by the accused to bolster his case.

Learned counsel repeatedly suggested to the witnesses, that they were all testifying that the search commenced from the passenger seat next to the driver's seat and came round the vehicle via booth to the driver's seat, to deliberately hide the fact that the drugs had been "planted". He went on to suggest to the witnesses that they were deliberately doing this as if they had said they went direct to the driver's seat and searched the driver's seat, it would be obvious to court that the drugs had been "planted". If one is to accept this line of reasoning it would always be a "no win" situation for the prosecution as even if they said the search began at the driver's seat, the defence would always suggest the drugs were "planted". For all the aforementioned reasons it is clear, the defence that the drugs were planted by the PC Pillay has no merit.

Learned counsel for the accused in his submissions stated that the evidence of Mr Pillay could not be believed as he was constantly stating "I cannot recall". Witnesses are not expected to recall each and every detail of the said detection and may not recall or may not be accurate in their descriptions of details, however it cannot be said that the evidence of this witness

cannot be accepted as he was speaking untruths, as on all material aspects of the detection, his evidence corroborates that of the other officers. Though there may be discrepancies in the evidence in respect of the location they set off from on patrol that day these minor discrepancies could be put down to human error and does not indicate the witnesses were lying.

When one considers the evidence led by the prosecution, the main witness for the prosecution who made the detection was LC Hermitte and not PC Pillay, whose evidence on the main issues in respect of the detection, is corroborated by the evidence of the other witnesses for the prosecution and thus can be accepted. It is clear when one considers the evidence of the prosecution in this case, that the prosecution has not sought to rely on any finger print evidence but relies on the sworn testimony of the police officers and the exhibits recovered to establish its case. When one considers the evidence of Mr Hermitte, his evidence that he found the controlled drug namely Cannabis Resin under the driver's seat of the vehicle which was being driven by the accused, stands corroborated by the supporting witnesses called by the prosecution. The corroborated evidence of Mr Hermitte also shows that the accused was the sole occupant of the said vehicle at the time of detection. The prosecution has established that the accused was the only person in the vehicle at the time of the detection, a fact not contested by the accused and that the accused was driving the said vehicle at the time the controlled

drug was found under the seat of the driver. Being the sole occupant at the time of detection and being in charge of the said vehicle for the time being, the presumption in terms of section 18 of the Misuse of Drugs Act is that the drug was in his possession.

Section 18 of the Misuse of Drugs Act states as follows;

“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”.

This court is therefore satisfied that the prosecution has proved beyond reasonable doubt that the controlled drug was in the exclusive 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 on seeing the police officers and when he had noticed he was being followed had attempted to turn his vehicle back to Baie St Anne but they had stopped him and two police officers had got into his vehicle and asked him to drive to the police station. It could be inferred from his aforementioned action and the relevant circumstances of this case that the

accused had the necessary knowledge that he was in fact in possession of the 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 accused in defence has not sought to contest the chain of evidence. Be that as it may, witness Dr Jakaria identified the exhibits in open court as the controlled drug brought to him for analysis by PC Hermitte and those analysed by him. He stated that his analysis of the said exhibit revealed that it was Cannabis Resin, his report P2 affirms the weight and identity of the exhibit. Mr Hermitte in open court identified the exhibits as those found under the driver's seat of the vehicle which the accused was driving, taken into custody by him and given for analysis.

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.

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 3rd day of December, 2009.