

# IN THE SUPREME COURT OF SEYCHELLES

THE REPUBLIC

VS.

**PATRICK BELLARD**

Criminal Side No. 37 of 2009

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Ms. Madeleine for the Republic

Ms. Domingue for the Accused.

## JUDGMENT

Gaswaga, J

- [1] The accused stands charged with one count of Cultivation of a controlled drug, contrary to section 8 read with Section 26(1)(a) of the Misuse of Drugs Act, 1990 as amended by Act 14 of 1994 and punishable under Section 29 and the second schedule of the same Act. The particulars of the offence allege that Patrick Bellard, on the 9<sup>th</sup> September, 2009, at Copolia, Mahe cultivated 29 cannabis plants. The accused denied the charge and the prosecution led evidence of four witnesses while the defence relied on the evidence of the accused alone.
- [2] Briefly, the facts as presented by the prosecution are that on the afternoon of Wednesday the 9<sup>th</sup> of September, 2009 seven officers of the National Drug Enforcement Agency (NDEA) went on routine patrol in the area of Copolia. The team comprised of George Santache (PW4) the dog handler, Kenny Sultan (PW3), Daniel Delcy, Garry Sophola, Marcel Naiken (PW2), Medi Come and Lina Williams. During the search, at about 05:30 pm Santache was alerted by his dog, and indeed he noticed the presence of a person in the nearby bushes to the road. He called the man as he walked towards the place where he was hiding. The man refused to respond and instead ran away.
- [3] The NDEA agents gave chase. Upon reaching a nearby river the man tried to remove some of his clothes and then started climbing up a rock. He launched an attack on agent Santache who had caught up with him first before the other agents. The man got injured by the dog during the struggle that ensued.
- [4] Once put under control agent Naiken administered first-aid services to him. He also searched the man and recovered a bag from him which contained green leaves suspected by the agents to be cannabis. He stated that the leaves were his and had planted them for personal use only. Agent Naiken read him his constitutional rights and effected the arrest whereupon the man cooperated and started negotiating with him and even promised to show the agents the garden where he cultivated those plants. PW2, PW3, and PW4 identified Patrick Bellard, the accused in the dock, as being the man they had arrested at

Copolia with the leaves.

- [5] The accused then led five of the agents up the mountain into the bushes. The agents carried with them handcuffs, tear gas, flashlights and a dog. The female agent and Medi Come remained behind. The terrain was mountainous and so rough and in some places very slippery as it had rained. On several occasions the NDEA agents and accused slipped and fell down. The forest was thick and dark and that the accused told the agents that there were no short cuts to the plantation and further that he knew his way by heart. The path was very narrow and at times the party had to jump from one boulder to another. Agents Garry Sophola and Daniel Delcy backed out after walking for one and a half hours. The rest, Naiken, Santache and Sultan arrived at the plantation at about 08.30 pm. The journey had taken about three hours.
- [6] The garden was a well cleaned square piece of land in the middle of a forest. That unless one knew the existence and actual location of the garden there was no way a person could easily find it as it was shielded by thick surrounding bushes and a boulder. There were about a hundred freshly dug holes, barrels of water and a nursery bed of twenty six (26) small plastic pots containing green plants (PE3). Fifteen big plants (PE3) were also uprooted and placed in a gunny bag which was then carried by the accused all the way down to Sans Souci main road where the agents and accused waited for a car to convey them to Mont Fleuri police station. After the case had been registered and accused questioned he was delivered to Victoria hospital for treatment
- [7]. On the 14<sup>th</sup> of September, 2009 at 09.45 am Jimmy Bouzin (PW1) the forensic analyst received a large white envelope and one black carton box with twenty six (26) plastic containers as well as a forwarding letter (PE1) dated 14<sup>th</sup> September, 2009 from agent Naiken. He conducted a physical analysis which included an examination of the height, appearance and other characteristic features of each of the plants presented. This was followed by a chemical analysis involving two separate tests done on samples taken from each of the forty one (41) plants and plant parts. All the above tests confirmed that the samples were cannabis plants (See analyst report PE2). All the exhibits were placed in a security bag and sealed and returned to agent Naiken on the 16<sup>th</sup> of September, 2009 who kept it under safe custody before producing and exhibiting same in court. Agent Naiken also signed on the report before identifying the exhibits and sealing them in the envelope with a security seal ID E337737. The Court is satisfied with the manner in which the drugs were handled right from the garden, all through the police custody and analysis process till tendering of the same in court.
- [8] It is noteworthy that the charges herein were not based on the package of leaves retrieved from the accused when being arrested but the plants uprooted from the garden. For the package of leaves was reported lost by agent Naiken while in the forest.
- [9] Put to him by the defence counsel that only two agents, excluding the witness, accompanied the accused to the garden Naiken denied. He also refuted the allegation that he had ordered four of the agents to take the accused to and show him their (agents' or NDEA's) plantation. Agent Santache (PW4) corroborated Naiken and Sultan on this

matter when he insisted in cross-examination that three officers, including Naiken, reached the plantation and that they had walked to the place in single file under the guidance and direction of the accused.

- [10] With this evidence the accused was invited to put up a defence under section 184 of the Criminal Procedure Code, Cap 54 since a *prima facie* case had been established.
- [11] In his evidence the accused stated that on the aforesaid date, time and place he was near his banana plantation cleaning up when he saw seven NDEA agents, including Naiken, Sultan, Santache and a woman, come to him suddenly. That agent Santache was at the front with a dog and the others followed closely. The accused was stunned and just looked on. He was informed that they were searching for a thief. That the agents became aggressive. Naiken asked him whether he had seen any one go by his garden to which he answered in the negative. He was also asked whether the small cannabis plantation they had discovered during a patrol was his and he denied and said he was not involved in the cultivation of cannabis.
- [12] It is also the accused's evidence that at that point the agents became more aggressive towards him and informed him that they would be taking him to that garden. The accused refused and became a little bit aggressive to the agents and Santache punched him three or four times on the left side of the face and also loosened the leash and the dog jumped onto his right leg and bit him. He also stated that they never administered any first aid or treatment to him nor read or informed him of any of his rights before effecting the arrest. He categorically denied having been found in possession of cannabis or any leaves and that the search conducted by Naiken yielded nothing illegal but a box of food and a mobile phone. All this, according to the accused, happened in the bushes on his property and therefore not at the river as stated by the prosecution witnesses.
- [13] In his further evidence the accused stated that before starting the journey Naiken came with a big dog and warned that if he tried to run away the dog would be unleashed unto him. That agent Santache with his dog led the way, then accused, followed by agent Sultan who was holding an AK 47 raffle pointed directly at the accused's back. Asked to clarify on how many agents accompanied him the accused said that he walked right behind agent Santache who led the way, agent Sultan and another one came next. They also carried AK 47 raffles. Agent Naiken was also behind. That after walking for a while agent Naiken together with two other agents including the female agent abandoned the journey. Two of the remaining four agents also gave up after some time and returned leaving only agent Sultan and Santache to continue with the trip to the end.
- [14] That the accused suddenly found himself in this garden with the two agents and although there wasn't enough light he managed to see what he described as some sort of small nursery on the ground and some holes which had been dug as well as cannabis plants which had been planted. The agents kept flashing the powerful torches they had carried. It was his evidence that he was forced by the agents to uncover the nursery shed and uproot the small plants in the plastic pots as well as the big plants. That he was also told to crush some of the big plants which were later thrown away and only a few retained, and together with the small ones he placed them in the gunny bag that was found lying

in the garden.

- [15] The accused then carried the bag all the way down to Sans Soucis where they met with the other two agents. That agent Santache used his phone to call agent Naiken. Shortly thereafter agent Naiken arrived in a red jeep followed by other cars. He was accompanied by the two agents who had stayed with him. The accused was driven to Mont Fleuri police station in Naiken's jeep where the plants were removed, viewed and recorded in the police exhibit book. Most of the plants had been crushed because the accused fell down several times while carrying the bag. The accused also claims that at the police station he only saw the stems of the big plants being removed from the bag but not the leaves or any of the small plants. He was then conveyed to the Victoria hospital for treatment and also allowed to make a phone call to his wife before being handed over to the police.
- [16]. There is undisputed evidence on record that on that day and time the accused and some NDEA agents went to the above described garden and recovered the cannabis plants (PE3); that the ownership of the land on which the plantation was found is not established; and that the accused was not at any one point in time seen cultivating the plantation.
- [17] For it has been held that for a person to be convicted of the offence of cultivation of a controlled drug the prosecution should prove beyond a reasonable doubt that there was an overt act. It was observed by the Court of Appeal in **Alcide Bouchereau Vs Rep. SCA No. 11 of 2008** that *"if cultivation has not been defined in the Misuse of Drugs Act, its meaning may be obtained from English decisions which are of persuasive authority"*. This case quoted the authority of **R Vs Farr [1982] Crim. L.R. 745**, wherein it was held that *"it is enough if it may be shown that the defendant played some identifiable part in the production process"*. The **Bouchereau** case required evidence of participation by the accused in the *"tilling, manuring, watering or doing any act to connect him with the offence of cultivation."*
- [18] Failure to identify a part played by the accused in the production process has led to dismissal of charges in various cases in and outside this jurisdiction. The facts in the **Bouchereau case** were somewhat similar to the ones at hand. When the police arrived at Bouchereau's home in response to a report made by his neighbor that he had injured some dogs, he ran away and was only arrested after a second chase. But while going around the police found some cannabis leaves exposed for drying behind his house. The accused told them they were his but that they had been picked up from a plantation where he could take them. He also explained he had found that place accidentally while looking for latanier leaves and stole only two branches to dry and smoke.
- [19] In **Rep. Vs Jean Gill (1983) SLR 22** the police retrieved 17 cannabis plants in separate plastic bags in a vegetable garden near accused's house also found on his property. He was doing carpentry work at the time under a shed. It was held by Seaton, CJ that *"whereas the prosecution had proved that 17 plants of cannabis were unlawfully cultivated on the accused's land they had failed to establish any overt act to connect the accused with the crime"*. In reaching this decision the learned Chief Justice followed the principle laid down in the Mauritian case of **Rampersad Vs The Queen**

**(1975) M.L.R 5** wherein the supreme court had this to say while reversing a conviction entered on the offence of cultivating gandia plants (cannabis):

*“we consider that mere ownership of a plot of land on which a plantation of gandia is found does not ‘per se’ justify an irresistible inference that the owner of the land is guilty of cultivating gandia. The prosecution must at least establish that the accused party was aware of the presence of the plantation on his land and had something to do with the cultivation thereof. In other words some overt act must be established to connect the owner of the land with the cultivation of the plants found thereon”.* (underlining mine)

[20] Following the same reasoning, Perera, J (as he then was) in the case of **Rep Vs Marie-Nanette Julie Crim Side No 46 of 2006** acquitted the accused and stated thus: *“there is no evidence that the accused was found ‘cultivating’ the cannabis plants, by doing some overt act. Hence ... there is insufficient evidence, even on a prima facie basis to maintain an essential element of the offence charged (of cultivation).”* Similarly, the Supreme Court (**Rep Vs Vincent Matatiken Crim. Side No.3 of 2009**) acquitted the accused although he is said to have stated that the plantation in question was his. Burhan, J emphasized that in respect of the above authorities, mere ownership of land or plantation did not establish the offence of cultivation.

[21] Back to the facts of the present case, I have had the opportunity to diligently evaluate the evidence as adduced by all the prosecution witnesses as well as the accused. Their demeanor too was carefully and closely observed. Having tested the entire evidence in this case on the touchstone of reliability, credibility and trustworthiness I found the testimonies of Bouzin, agents Naiken, Santache and Sultan to be truthful and cogent. The inconsistencies that were pointed out by the defence were minor and of no consequence as they do not go to the root of the case. In any case I would have been so surprised to see that the agents say exactly the same thing much as they had gone to the plantation together.

[22] On the other hand I found the accused’s testimony to be tainted with falsehoods. I did not believe him when he said that agent Naiken was not part of the team that went up to the garden. Naiken struck me as a person who was knowledgeable about the whole mission and his evidence was corroborated by agents Santache and Sultan. Even if one were to side with the accused on that aspect for a moment, which I do not, still I find ample evidence supporting the prosecution story.

[23] The accused also voluntarily led the arresting party to the garden. It is also inconceivable how the accused could say that he was on his property working in the garden, and not the bush, when he was arrested, assaulted, and forced to follow the officers to their garden of cannabis. This is implausible, farfetched and unbelievable. Save for the accused, none of the agents could locate that garden which was in the middle of a thick forest belonging to no one otherwise they would have been able to take the court there in order to further concretize the prosecution case. I have not seen any compelling reason for the agents to target the accused or act this way. Neither has the accused assigned any reason for his allegation of the agents picking on him of all people to take to that garden.

[24] Moreover, it appears like the agents were in Copolia on that day for a different mission. In cross examination agent Santache stated that while in the car agent Naiken had briefed the agents about a robbery which had taken place in Copolia. That the tracking started from the house that had been broken into until the point when the tracker dog alerted the handler and the accused was spotted in the bush. It is clear that the agents were not specifically after the accused but the objects and or any person that had been in that house. The accused, who seemed unconnected to the robbery case, was unlucky to have been detected and spotted in the bush where he was apparently hiding presumably for a different reason.

[25] If he was an innocent man why did he hide in the bushes when the NDEA agents were patrolling the area and later on run away even when called by the agents? Was he concealing some illegal things from the agents? The conduct of an accused before, during and or after the commission of an alleged crime may be a good and strong pointer to his guilt. The accused's conduct herein raised suspicion. No wonder later when apprehended a package of herbal material suspected to be cannabis was found on his body.

[26] In the cases of Vincent Matatiken, Jean Gill, Rampersad, and Marie-Nanette Julie the defendants were brought to the plantation by the officers. In Bouchereau and this case the accused had voluntarily led the officers to the plantation without any coercion. The supreme court in the former case dismissed the charges on the basis that there was no evidence of ***“tilling, manuring, watering or doing any act to connect him with the offence of cultivation”***. With the greatest respect I beg to differ with this position. In my view, ***“doing any act to connect him with the offence of cultivation”*** covers a person who has not only the knowledge of existence and location of the cultivation but also ***leads and shows the officers the plantation*** which is in the middle of such a thick and far away forest abandoned or not belonging to anyone unknown to the authorities. He had the option to remain silent or not even take the agents to the plantation. In such circumstances ownership of land is immaterial. Illegal cultivation could be done on ones land without their knowledge and or permission.

[27] Such link cannot be looked at and treated lightly if this law is to be meaningfully interpreted and implemented. And I think this is the reason why Domah, JA, in the appeal of Bouchereau stated thus ***“in our view, if the reasoning is that for cultivation, one necessarily needs to prove that the person should have been involved with ‘tilling, manuring, watering or doing any act to connect him with the offence of cultivation’, that will amount to giving that word undefined in the misuse of Drugs Act a definition that is overly restrictive. On a matter as dealing in dangerous drugs, which has assumed such dire importance for our society, we thought of expressing that view.*** (underlining mine)

[28] It should be observed that in real life, while committing offences the perpetrators will not only try to distance themselves from the criminal acts but also destroy and or conceal any trail of evidence. Catching the accused in the ‘process of cultivation’, as the above authorities tend to suggest, may be quite difficult if not impossible given that its criminal in itself and they are always on the lookout. Therefore, such revelations made to the agents, and yielding incriminating evidence should not be ignored but used

to offer the best and strongest inference. How did the accused come to know about the existence of this garden? How could he be so sure that it belonged NDEA agents? One also wonders why he was trying to create a distance between himself and the garden while giving evidence. Further, the accused himself stated that he was a farmer, used to work on his three acre piece of land at Copolia. It will be recalled that this was a well maintained garden and barrels of water had been found on site. The accused had been arrested with fresh cannabis leaves.

[29] Taking all the aforementioned pieces of evidence together there is only one logical and irresistible inference that can be drawn by the court; that the accused was involved in the cultivation of the pertinent cannabis plants. There is ample evidence to connect him to this garden. Although nobody saw him cultivate the plants or do any overt act, the inculpatory facts herein treated as a whole are incompatible with his innocence and are also incapable of any other reasonable hypothesis than that of guilt. The court is satisfied that this inexorable inference of guilt has not been in any way or by any other circumstances weakened or destroyed and, it is further held that any other alternative possibility that might point to the innocence of the accused has been fully excluded by the prosecution.

[30] In conclusion therefore, I am satisfied that the prosecution has proved all the ingredients of the offence alleged herein beyond a reasonable doubt. The accused is found guilty and accordingly convicted as charged.

**D. GASWAGA**

**JUDGE**

Dated this 30<sup>th</sup> day of June, 2010