

IN THE SUPREME COURT OF SEYCHELLES

THE REPUBLIC

V

MAY ESTRO TIRANT

LEONARD CELESTINE

Criminal Side No. 01 of 2011

Mr. Kumar State Counsel for the Republic

Mr. Joel Camille Attorney at Law for the 1st Accused

Mr. Anthony Juliette Attorney at Law for the 2nd Accused

Dated – 22nd February 2013

JUDGMENT

The aforementioned two accused have been charged as follows;

Count 1

Statement of offence

Conspiracy to commit the offence of Importation of a controlled drug contrary to Section 28(a) read with Section 3 and Section 26 (1) (a) of the Misuse of Drugs Act and punishable under the Section 28 and 29 of the Misuse of Drugs Act and the Second Schedule referred therein.

The particulars of offence are that May Estro Tirant of Mont Buxton, Mahe on or about 10th December 2010 agreed with another person namely Leonard Celestine

of Mont Buxton, Mahe that a course of conduct shall be pursued which, if pursued, will necessarily involve the commission of an offence by them under the Misuse of Drugs Act, namely the offence of importation of a controlled drug having total net weight of 151.6 grams powder containing 80.80 grams of (Diamorphine) Heroin being a controlled drug.

Count 2

Statement of offence

Conspiracy to commit the offence of Trafficking in a controlled drug contrary to Section 28 (a) as read with Section 5, Section 2 and Section 26 (1) (a) of the Misuse of Drugs Act and punishable under Section 28 and 29 of the Misuse of Drugs Act and the Second Schedule referred therein.

The particulars of offence are that May Estro Tirant of Mont Buxton, Mahe on or about 10th December 2010 agreed with another person namely Leonard Celestine of Mont Buxton that a course of conduct shall be pursued which, if pursued, will necessarily involve the commission of an offence by them under the Misuse of Drugs Act, namely the offence of Trafficking in a controlled drug having total net weight of 151.6 grams powder containing 80.80 grams of (Diamorphine) Heroin being a controlled drug by selling, giving, transporting, sending, delivering or distributing, or offering to do any such acts.

Count 3

Statement of offence

Importation of a Controlled Drug contrary to Section 3 and Section 26 (1) (a) of the Misuse of Drugs Act CAP 133 read with Section 23 of the Penal Code and punishable under Section 29 (1) of the Misuse of Drugs Act read with the Second Schedule referred thereto in the said Act.

The particulars of the offence are that May Estro Tirant and Leonard Celestine of Mont Buxton Mahe on 10th December 2010 at DHL Office, Victoria, Mahe with common intention imported into Seychelles a Controlled Drug having total net weight of 151.6 grams powder containing 80.80 grams of (Diamorphine) Heroin.

Count 4

Statement of offence

Trafficking in a controlled drug, contrary to Section 5 read with 14 (c) and Section 26 (1) (a) of the Misuse of Drugs Act CAP 133 and punishable under Section 29 (1) and the Second Schedule referred thereto in the said Act.

The particulars of the offence are that May Estro Tirant of Mont Buxton, Mahe on 14th December 2010 at Quincy Street Victoria Mahe was found in possession of a Controlled Drug having total net weight of 151.6 grams powder containing 80.80 grams of (Diamorphine) Heroin which gives rise to the rebuttable presumption of having possessed the said controlled drug for the purposes of trafficking.

Both accused denied the charges. The prosecution called witness Kathleen Bell an NDEA (National Drugs Enforcement Agency) agent who stated that on the 14th of December 2010 around 08.00 hrs she had proceeded with Assistant Superintendent of Police (ASP) WinsleyFrancoise to the DHL office for observation duty as they had received information that a lady was arriving to collect a parcel. Around 09.30 hrs a white Subaru had approached bearing registration number S 7267 and a lady had disembarked from the said vehicle. She identified the lady as the 1st accused May Estro Tirant. Witness also stated she had recognized the driver of the vehicle as the 2nd accused Leonard Celestine but he had not disembarked from the car. The 1st accused had gone inside the DHL office while the 2nd accused Leonard Celestine had gone and come back again and then while the 1st accused was still inside come back for another round.

The 1st accused had been inside the office for around 15 minutes and eventually when she did come out of the DHL office she had a carton box in her arms and had gone in the direction of the traffic light. When the 1st accused had seen witness she had spoken to her and asked how she was and had a short conversation and then proceeded on her way. Witness had followed her unobserved by the 1st accused who had crossed the road and walked through market street to Quincy street and had stood near the ex Air Seychelles office. The 1st accused had stood there for about an hour. Witness and other agents had continued to observe her. Thereafter witness agent Kathleen Bell had approached her and after formally introducing herself as an NDEA agent had invited the 1st accused to accompany her in to the NDEA office which she had done and thereafter the 1st accused with the carton box had been taken by vehicle to the NDEA office. While she was travelling in the jeep the 1st accused had received a call and the 1st accused had informed them it was the 2nd accused Leonard who was calling her. Around 11.30 hrs in the office

another call had been received by the 1st accused and she had informed them it was Leonard the 2nd accused who was calling her. Thereafter the 2nd accused Leonard Celestine too had come to the NDEA office at the request of the NDEA officers who had gone to meet him. Both the 1st and 2nd accused were questioned and brought to the office and the carton box opened in their presence. Inside were some wooden crafts of elephants, rhinoceros, a panther and a wooden deer, 2 pieces of cloth and a mobile phone Nokia. They had proceeded to open the wooden crafts. In the biggest elephant in its middle there was a piece of foil and a clear plastic containing a substance they suspected to be controlled drug heroin. In the smallest elephant too there was a clear plastic containing a substance they suspected to be a controlled drug heroin. Nothing illegal was found in the other wooden crafts. Witness identified the exhibits P4 and P5 and the contents (a), (b) and (c) as the controlled drug taken into custody by her and handed over to the Government Analyst for analysis.

Under cross examination she stated that the 2nd accused had passed by twice after dropping the 1st accused at the DHL office. While the 1st accused had been walking after collecting the parcel she had come across two persons and the 1st accused had told them she did not know where the parcel came from. She had also met a lady and had told her that she had received a parcel and did not know from where it had come from. She had showed the lady what was inside the parcel and told her she had got a beautiful phone. While standing near the Kreole spirit building a rasta man had come and given her a handshake and a taxi came and stopped but she had not got into it. She stated the 1st accused was acting normal. Witness further clarified the fact that while the 1st accused was been taken to the NDEA office the 1st accused had received a telephone call and she had told them it was the 2nd accused who had called. Again at the NDEA office, the 1st accused had received a

call and they had put it on the speaker phone and a male voice had asked where she was and she had answered that she was in Quincy street and she had told them the caller was Leonard the 2nd accused. After finding the controlled drug both accused had been cautioned and their constitutional rights explained to them after being placed under arrest. Witness further stated under cross examination that she was aware that the 2nd accused was a “pirate” taxi driver. She stated the parcel had come in the name of May Estro.

ASP Winsley Francoise corroborated the evidence of agent Kathleen Bell and identified the 1st accused as the lady who had got down at the DHL office to collect the parcel and the 2nd accused as the person who had driven her in the white Subaru to the said office. He stated specifically they had not arrested the 1st accused (proceeding of 5th July 2011 9.00 a.m. pg 9) but had invited her to the NDEA office and she had voluntarily come. He too stated prior to opening and finding the contents in the box and being placed under arrest the 1st accused had received two phone calls which she stated were from the 2nd accused. A fact not contested in the defence of the 2nd accused (proceedings of 5th July 2011 9.a.m pg 23). He too identified the exhibits in the case and the controlled drug taken into custody from the carton box in the possession of the 1st accused. He further stated as per the documents marked P9 and P10 he requested particulars of a phone number which according to documents P9 and P10 was 507543 which he stated belonged to the 2nd accused (proceedings of 5th July 2012 at 9 a.m. pg 22).

Witness Corine Clarisse working for Hunt and Dentel stated she was in charge of the DHL office and on the 13th of December 2010 she had called May Estro to state that a parcel had arrived for her in her name. It is apparent on perusal of the parcel namely the carton box P6 it contains the name of the person to whom the

parcel was to be delivered to namely May Estro and the address Mont Buxton Mahe island, Seychelles and the contact telephone number is given as 248 564207. Witness identified the said carton box P6 in open court. The evidence of Corine Clarisse is that she had contacted and spoken to the 1st accused on the contact details given and the 1st accused had stated that she was no longer May Estro but Tirant. The marriage certificate marked P11 further confirms the fact that the 1st accused had married a Paul Brian Tirant. Witness had requested her to bring her birth certificate to clear the parcel. She had submitted the marriage certificate for proof of her identification and they had thereafter given the parcel to her.

When the 1st accused had collected the parcel they had given her a delivery sheet for her to sign like they do to all other customers. Witness identified the birth certificate shown to her and the delivery sheet signed by the 1st accused. The 1st accused had opened the box in the DHL office itself and after checking its contents had acknowledged the box was for her and had taken the box. Witness Corine Clarisse stated the country of origin for the parcel was Kenya. She further stated under cross examination that the 1st accused had a choice to open the parcel which comes in her name and thereafter reject and refuse to accept it in which case they have to sign a paper. She stated there was also a procedure if they refuse to accept a parcel without opening it. She admitted that the 1st accused had taken delivery of the said parcel by signing the documents and then verified its contents. Witness further stated (proceedings of 1st September 2011 9.00 a.m at pg 18) that she had told the 1st accused while she was looking at the parcel that it was not too late for her to refuse it and they have a procedure for it but the accused had said “no it is okay”.

Mr. George Doffay Director Sales and Customers service from the Cable and Wireless stated that he had monitored a phone bearing number 507543 as requested by a formal order of court and he gave details and print outs of the outgoing and incoming calls between the period 12th December and the 14th December 2010 from the said number and marked the reports as P14 and P15. It appears from his evidence that the said number had not been registered in the name of anyone. According to his evidence it is apparent that calls and SMS from this phone were made on the 11th of December 2010 to 254733341284 and on the 13th and 14th of December 2010 to 254732263266.

Mr Rajesh Naidoo stated he received a Nokia phone from Sergeant Seeward a Nokia 1202 bearing serial number 358291030367547. He produced a print out obtained from the details he was able to obtain from the said phone through a computer with his forensic expertise. On the evidence given by this witness and the fact that his evidence has been previously accepted by courts this court is satisfied beyond reasonable doubt as to his expertise in this field. The said print out was marked as P17 and indicated the telephone number of the mobile phone was 564207 and according to his report was that of May Estro the 1st accused. It is evident from the evidence of the DHL officer Corine Clarisse and the information on the carton box P6 and document P11 and the evidence of Rajesh Naidoo taken together that this was the contact number of May Estro Tirant the 1st accused. It is apparent from the print out P17 at page 4 that the forensic test revealed that the name of one of the “contacts” the 1st accused had registered on her phone was having the number 507543 and named Leo.

Thereafter with the leave of court the statement of the 1st accused was produced through agent Timothy Hoareau as an exhibit P18 after a voire dire was held into

its admissibility. Agent Timothy Hoareau also produced the phone taken into custody from the 2nd accused by him. He further stated that the SIM card had been removed from the phone at the time he took it into custody from the 2nd accused. Thereafter the prosecution closed its case.

Counsel for the 2nd accused made a submission that the 2nd accused had no case to answer which application was rejected by ruling dated 09th of January 2012 and a defence called for from both the accused.

Both accused in defence elected to remain silent. In terms of Article 19 (2) (h) no adverse inference should be drawn from the fact that both accused elected their right to remain silent. Thereafter learned counsel for both the accused made submissions on behalf of the accused. The main contention of both learned defence counsel was that there was no evidence to prove beyond reasonable doubt any of the charges against the two accused.

When considering the charges framed against the accused the term Conspiracy has been defined in section 28 the Misuse of Drugs Act and reads as follows;

“A person who agrees with another or persons that a course of conduct shall be pursued which if pursued-

(a) will necessarily amount to or involve the commission of an offence under this Act by one or more parties to the agreement.

(b) would necessarily amount to or involve the commission of an offence under this Act by one or more of the parties to the agreement but for the existence of facts which renders the commission of the offence impossible,

is guilty of the offence and liable to the punishment provided for the offence.”

The definition the prosecution seeks to rely on in this case is section 28 (a) of the Misuse of Drugs Act. Conspiracy consists of an agreement of two or more to do an unlawful act. Thus according to the particulars of the offence the prosecution in this case has to establish that there was an agreement between the two accused to pursue a course of conduct to commit the unlawful act, which in this case was the importation and trafficking in a controlled drug namely Heroin.

In R v Anderson [1986] AC at page 39 para E, Lord Bridge stated;

“But beyond the mere fact of agreement, the necessary mens rea of the crime is, in my opinion, established if, and only if, it is shown that the accused, when he entered into the agreement, intended to play some part in the agreed course of conduct in furtherance of the criminal purpose which agreed course of conduct was intended to achieve. Nothing less will suffice; nothing more is required.”

When one considers the case for the prosecution against the 1st accused May Estro Tirant the evidence of the officer in charge of DHL clearly implicates the 1st accused May Estro Tirant as the person who had come to the office and cleared the parcel a carton box addressed to her, containing the controlled drug which was brought into the country from Kenya via courier DHL. She further states the 1st accused had verified its contents prior to taking the parcel away and that she had told the 1st accused while she was looking at the parcel that it was not too late for her to refuse it and they have a procedure for it but the accused had said “no it is okay”. The evidence of Kathleen Bell and Winsley Francoise who had kept the 1st accused under close observation (close enough to hear the conversation she had with passer bys) from the moment she left the DHL office till she was taken to the NDEA office and the carton box opened, clearly establishes the fact she was in

exclusive possession of the said parcel until it was taken into custody. Though she had met two persons, a lady and a rasta man she had known, as they were closely observing the 1st accused the evidence of the NDEA officers clearly establishes that the said carton box was always in her possession. Witness Kathleen Bell's evidence confirms the fact that the controlled drug was found in the wooden crafts inside the carton box which was cleared from DHL by the 1st accused and in her possession at the time of detection. Her evidence is corroborated by that of ASP Winsley Francoise.

The Government Analyst Mr. Purmanan confirmed the fact that the exhibits brought to him for analysis by officer Kathleen Bell were analysed and found to contain heroin with a total pure weight of 80.80 grams. His report P1 confirms this fact. Witness Kathleen Bell further testified that the exhibits taken into custody were sealed by her and the seals were intact at the time she handed the exhibits to the Government Analyst for analysis who had opened the seals to verify the contents prior to analysis. The Government Analyst identified the exhibits in open court as those brought by agent Kathleen Bell for analysis and as the exhibits analysed by him and identified as controlled drug Heroin. He further stated that the seal placed by him on the police evidence bag P2 when he had returned the exhibit to Kathleen Bell after analysis was not tampered with. On consideration of the aforementioned evidence I am satisfied that the chain of evidence in regard to the exhibits from the time of detection to the time of analysis and production in court has been established by the prosecution beyond reasonable doubt.

Further there is evidence to show that it was the 2nd accused who had brought the first accused in his vehicle that day. There is evidence to show that it was the 2nd accused who had dropped her at the DHL office where she collected the carton box containing the controlled drug. There is evidence to the effect that that the 2nd

accused had circled the DHL office twice while the 1st accused was taking delivery of the said parcel containing the controlled drug. There is evidence to indicate that the 2nd accused had phoned the 1st accused twice soon after she had collected the controlled drug from the DHL. The evidence of Winsley Francois indicates that during investigation it was revealed that the telephone number 507543 was that of the 2nd accused. It is apparent it is for this reason that details of the said number were requested by him by documents P9 and P10 from Cable and wireless. The evidence of Rajesh Naidoo and his report P17 indicates that the said telephone number 507543 was a “contact” of the telephone number of 1st accused and registered as a contact of hers under the name of Leo, the 2nd accused name being Leonard Celestine. Further the evidence of Mr. Dofffay indicates that SMS and calls to Kenya from phone 507543 to 254732263266 and 254733341284 between the crucial period the parcel arrived i.e. the 11th of December and the 14th of December 2010. The report of Rajesh Naidoo indicates that an SMS had been sent from one of the aforementioned Kenyan numbers i.e. tel no 254732263266 to the number used by May Estro Tirant the 2nd accused 564207 as well reading as follows “ple are dangerous people. We need to send more phone and crafts if the samples are ok. Maggie wanja” (pg 6 of report P17) sent at a crucial time the time the parcel was to arrive in the Seychelles i.e. the 13th of December 2010. The evidence of Corine Clarisse establishes the fact that the parcel a carton box P6 came from Kenya and P6 clearly indicates the parcel was addressed to May Estro and the contact details including the telephone number 028 564207 provided. Witness Corine stated she was therefore able to contact May Estro by phone and inform her of the arrival of the parcel. It is also in evidence that the SIM in the mobile phone used by the 2nd accused had conveniently been removed and there is nothing in the evidence of the prosecution to even suggest that the 2nd accused had been “hired” as a “pirate” taxi driver that day.

One must caution oneself that the admissions and facts in the retracted statement of the 1st accused could only be used as evidence against the 1st accused and it is trite law that as the statement has been retracted one must look for corroboration of the material facts pointing to the guilt of the 1st accused. The evidence of Corine Clarisse that it was the 1st accused who collected the parcel containing the controlled drug from the DHL office which was in the name of the 1st accused and the evidence of agent Kathleen Bell and WinsleyFrancoise corroborated the fact that the parcel was in her possession at the time of detection.

On an analysis of the prosecution evidence this court is satisfied that all the aforementioned evidence led by the prosecution could be accepted by court as it is supported by documentary evidence as well. Although each of these strands of evidence on their own may not sustain a conviction these pieces of evidence taken together or when the evidence is taken as a whole, this court is satisfied beyond reasonable doubt that the inculpatory facts are incompatible with the innocence of both accused and incapable of explanation upon any other reasonable hypothesis other than that of the guilt of the accused. Further this court is satisfied there exists no other co-existing circumstances which would weaken or destroy the inference of guilt. Further this court is satisfied that the prosecution evidence as a whole has excluded any alternative possibility that might point to the innocence of the accused.

Therefore on consideration of all the above evidence this court is satisfied beyond reasonable doubt that there was an agreement between the two accused to pursue a course of conduct to commit the unlawful act namely the taking delivery and transferring the controlled drug thereby trafficking in a controlled drug namely Heroin 80.80 grams (pure quantity). The aforementioned items of direct and

circumstantial evidence against both the accused in the view of this court clearly establishes beyond reasonable doubt that there was an agreement between the two accused and both accused intended to play a part in the agreed course of conduct in furtherance of the criminal purpose namely the taking delivery of the controlled drug heroin from the DHL office or trafficking in Heroin. Therefore this court is satisfied that the prosecution has proved all the elements contained in the charge and particulars of offence in count 2 against both the accused beyond reasonable doubt.

Further this court is satisfied on considering the aforementioned evidence given by the prosecution witnesses that the prosecution has proved beyond reasonable doubt that the controlled drug set out in the charges namely Heroin was in the possession of the 1st accused at the time of detection. 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 could be inferred from the acts and the relevant circumstances of this case that the accused had the necessary knowledge that she was in fact in possession of a controlled drug when one considers the SMS referred to earlier sent to her and subsequently deleted, seen at pg 6 of the report P17 sent from tel no 254732263266. In the light of all this evidence the exculpatory facts contained in her statement under caution are self serving and in the view of this court bear no merit. The quantity detected in the possession of the 1st accused on which count 4 is based, attracts the rebuttable presumption that the accused was trafficking in the controlled drug. The 1st accused has failed to rebut the said presumption. I am therefore satisfied that the prosecution has proved all the essential elements of the charge and particulars of offence contained in counts 4 against the 1st accused beyond reasonable doubt.

The term import has been defined in the Interpretation Ordinance Cap103.

“Import” means to bring or cause to be brought into Seychelles.

When one considers the prosecution evidence in its entirety it is the view of this court that the prosecution has failed to prove that t both the accused were actually and physically involved in the active importation of the controlled drug or that there was a conspiracy to import the controlled drug. Although a strong suspicion does arise in respect of both the accused this court is of the view that the prosecution has failed to prove beyond reasonable doubt the charges of importation against both the accused. Therefore this court proceeds to acquit both accused on counts 1 and 3.

As this court is satisfied that the prosecution has proved the charge and particulars of offence against both accused in count 2 beyond reasonable doubt, it proceeds to find both the accused guilty of the said charge and proceeds to convict them of same. Further as this court is satisfied the prosecution has proved the charge and particulars of offence contained in count 4 against the 1st accused beyond reasonable doubt it proceeds to find the 1st accused guilty of the said charge and convict her of same.

M. BURHAN

JUDGE

SUPREME COURT OF SEYCHELLES

Dated this 22nd day of February 2013