

IN THE SUPREME COURT OF SEYCHELLES

REPUBLIC

VS

DARREL ZIALOR

Criminal Side No.: 15 of 2011

Mr. Subramaniam for the Republic

Mr. Camille for the Accused

JUDGMENT

DODIN J.

1. The Accused, Darrel Zialor is charged with one count of trafficking in a controlled Drug contrary to section 5 read with sections 14 and 26(1)(a) of the Misuse of Drugs Act and punishable under section 29(1) read with the Second Schedule of the same Act.
2. The particulars of the offence are that Darrel Zialor who resides at Mont Plaisir, Anse Royale, on 11th March, 2011, was found in possession of 1550.4 grams of Cannabis herbal material giving rise to the presumption that he possessed the drugs for the purpose of trafficking.

3. The forensic analyst Mr Purmanan testimony that the herbal materials in a striped tarpaulin placed inside a large bin liner and a small partly used cigarette which were brought to the forensic lab for analysis by Agent Ricky Charles on the 15th March, 2011, were cannabis herbal material was not contested by the Defence and the certificate of analysis and the herbal materials were admitted as exhibits. However the other witnesses called by the prosecution were examined and cross-examined at length on the issue of whether the Accused was the person identified by the agents and the manner of recovery of the drugs.
4. Agent Ricky Charles testified that on 11th March 2011 whilst on patrol they received information that a drugs transaction was taking place at the house of the accused at Cap Bonm Jean. Agent Joseph who knew the accused and the location of the house of the accused, guided them there where they observed a man and a woman sitting inside the house of the accused. As they approached the house, the man identified as Darrel Zialor, the accused, got up and ran out of the house towards a detached store and near the store he picked up a white and blue striped tarpaulin and ran away with it. The witness testified that together with agents Joseph and Louise they gave chased to the accused who ran down a ravine.
5. Further down the slope the accused dropped the tarpaulin and continued running towards the bush. The witness tripped and fell and feeling pain in the leg. He called out to the other agent who stopped chasing the accused and returned to assist him. The accused disappeared into the bush. The witness then picked up the tarpaulin and assisted by the other agent climbed back to

the house. At the house they spoke to a lady whom they identified as Fina Zialor, the wife of the accused. They also opened the tarpaulin in the presence of the lady and inside they found herbal material which they presumed to be herbal cannabis. They searched the house but nothing illegal was found inside the house. However near the step outside the house a small piece of rolled cigarette was found and was also collected and taken for examination.

6. At about 10 pm the same day, he saw the accused at the NDEA head quarters and he opened the tarpaulin and asked him if those items were his but the accused did not answer. On the 15th March, 2011, he took the exhibits to the analyst and retrieved the same on the 17th March, 2011 together with the analyst report both of which were produced as exhibits.
7. The witness was rigorously cross-examined but he maintained that the person he saw running with the tarpaulin was the accused. He denied that the NDEA had planted the drugs at the accused's place.
8. Agent Kenneth Joseph testified that on March 11th 2011, he led the NDEA agents in 3 jeeps to the accused's house after they had received information that a drugs transaction was being conducted there. He testified that when he reached the accused's driveway he observed the accused through an open window sitting in the house with his wife, Fina. He knew the accused well since childhood. He testified that he went to the back of the house whilst agents Charles and Louise went to the front. Upon reaching a wall close to the house, he saw the accused run towards a store, picked up a white and blue striped tarpaulin and ran towards the bush. He saw agents Charles and Louise chase

the accused down a ravine where the accused dropped the tarpaulin and ran into the bush where he lost sight of him. At about the same time he saw agent Charles fall and heard him scream. Agent Louise stopped running and returned to where agent Charles had fallen. Afterwards agent Charles picked up the tarpaulin and both agents returned to the house.

9. The witness testified that after the tarpaulin and contents were shown to the accused's wife, the agents searched the house but he did not take part in the search. The accused's wife was later arrested and taken to NDEA headquarters.

10. Agent Siguy Marie testified that on the 11th March, 2011, he was in one of the vehicles that went to the accused's place. When he reached the house he saw agent Lisa Larue who informed him that a person had ran down the slope towards the bush and that the other agents had been chasing him. When he went to the ravine close to a store, he observed agent Charles coming up the ravine with a striped blue and white tarpaulin accompanied by agent Louise. They then went to the house and showed the tarpaulin to a lady who was there with 2 children, then they searched the house. After the search, they asked the lady to accompany them to NDEA headquarters.

11. Later that evening he went back to the scene in the company of agents Marie and Dugasse and took concealed positions to observe the accused's house. At about 9.10 pm he saw a man with dreadlocks enter the house through the kitchen door. They went to the house and agent Servina knocked on the door and a man who identified himself as Darrel Zialor, opened the door. He was

told that that he was being arrested for possession of the contents of the tarpaulin which they suspected to be drugs and his constitutional rights were put to him. He was taken to NDEA headquarters where agent Charles showed him the tarpaulin and its content but the accused did not say anything.

12. Agent Pierre Servina testified that on the 11th March, 2011, he was in the team led by agent Marie and they went to the accused's place after they had received information that a drugs transaction was taking place there. When he reached the house, he saw agent Charles with a striped tarpaulin coming up a ravine in the company of agent Louise. He saw the agents go into the house and spoke to a lady there and then searched the house but he did not take part and remained outside.

13. In the evening in the company of agents Marie and Dugasse, they went back to the house and took positions to observe the house. At about 9 pm he saw the accused enter the house. The agents approached the house and the witness knocked on the living room door. The accused opened the door and he called out to the other agents who came and agent Marie arrested the accused who was then taken to NDEA headquarters where agent Charles showed him the tarpaulin and its content.

14. In his defence, the accused testified that on the 11th March, 2011, he left his home at about 7 20 am and went to his worksite at Takamaka. He worked as a mason with his uncle Jimmy Etienne. He worked there all day assisted by another person he knew as Unel. Jimmy Etienne left the site at about 8.15 am and returned at 4.30 pm when he was given instructions for work the next day,

then conveyed him to his home arriving there at about 5.30 pm. He noticed that his house was closed and his wife was absent. He went to check at his grandmother's place but his wife was not there either. After waiting for a while he went to gather grass for the goats and when he returned home at about 6.30 his wife was present and told him that NDEA agents had searched the house and said that they had seen him drop a tarpaulin which contained drugs and that they were coming to arrest him.

15. The accused testified that at about 9.30 pm he heard a knock on the bedroom window and then someone called that it was NDEA and asked to open the door. He opened the living room door and agent Marie grabbed him and handcuffed him, then asked him if he was Darrel Zialor. When he confirmed that he was, agent Marie told him that he was being arrested as they had seen him drop a tarpaulin and ran into the bush. The accused denied that he was at home at all during that day or that he was chased by NDEA agents and dropped the said tarpaulin or that he dealt in controlled drugs.

16. In cross-examination, the accused denied that he returned home that day because his child was sick. On a question by the court the accused denied that he was ever shown the tarpaulin and its content at the NDEA headquarters.

17. Fina Zialor testified that on the 11th March, 2011, at about 10am, she heard a knock on the door and when she opened it she saw agent Siguy Marie who informed her that they had come to search the house. They proceeded to do so whilst agent Lisa Larue strip-searched the witness and her two children. Nothing was found. Agent Marie wanted to take away a photograph of her

husband which she refused but he took his driving license and asked her to accompany them to Anse Royale police station.

18. She testified that at Anse Royale police station she saw agent Joseph for the first time and he drove her and her children to NDEA headquarters. There she was questioned by Mr Nicette on the whereabouts of her husband and told her that NDEA had found a tarpaulin about 80 meters from her house which contained salted fish. She was given a phone and asked to call her husband's employer but she refused. She was then asked to give a statement which she also refused. She was then told that if she refused to co-operate her children would be taken away and she would be remanded into custody but later at around 6 pm an agent she did not know told her he was taking them home. She arrived at her home at around 6.30 but had left her keys at the NDEA office and she was taken back to get the keys and was returned to her home.

19. She testified that after she had arrived home the accused arrived carrying grass for the goats. Later that evening, she heard a knock on the door and when the accused opened it, agent Marie came inside and arrested the accused. She maintained that she had not seen her husband from the time he left for work in the morning until he returned with some grass that night.

20. In cross-examination she denied that the accused came home during the day and maintained that a person coming from the road could not see inside the house through the window.

21. From questions asked by the Court, she maintained that she did not tell the accused that NDEA was coming to arrest him when he returned home and that at the time she did not know that the tarpaulin contained drugs as she had known that it contained salted fish.

22. Jimmy Etienne testified that he was the employer and uncle of the accused. On the 11th March, 2011, he picked him up as usual and took him to the worksite at Bougainville, Takamaka, at about 6.30 am. He left him at the worksite in the presence of other workers, namely Gustave Ismael and Unel Safrance at about 8.20 am. He returned to the site at around 12 noon with food for the workers and all 3 persons were there on site. He remained there until 4.30 pm when he took the workers home, dropping the accused off at about 5.30 pm. He testified that he was informed and that the accused also was informed that his child was sick but that the accused did not leave the worksite that day as there were not many workers.

23. In cross-examination the witness admitted that he could not be sure that the accused never left the worksite during his absence as he only returned to the worksite at noon.

24. Gustave Ismael testified that on the 11th March he was working with Jimmy Construction on a site at Bougainville constructing a retaining wall together with one Unel and the accused. He maintained that on that day the accused worked throughout the day and did not go anywhere until the witness left them at the worksite to catch a bus at 4pm whilst the other two workers waited for transport on site.

25. From a question by the Court, the witness maintained that by the time he left the site at 4pm, his employer, Jimmy Etienne, had not returned to the worksite.
26. Learned Counsel for the prosecution submitted that the prosecution has proved beyond reasonable doubt that the accused had committed the offence charged as the witnesses have given uncontradicted testimonies that the man they saw in the accused's house, who ran outside and picked up the tarpaulin and ran down a ravine into the bush dropping the tarpaulin on the way was no other than the accused. Learned counsel submitted that agent Joseph had known the accused since childhood and that agents Charles and Louise recognized the accused and identified him at the NDEA headquarters and in court.
27. Learned counsel further submitted that the testimonies of the prosecution witnesses were consistent and corroborated one another. Further, the fact that the accused ran away from the house, attempted to take the tarpaulin containing the drugs with him showed that he knew what the content of the tarpaulin was and hence proved he had knowledge that the material inside was controlled drug.
28. Learned counsel further submitted that the defence witnesses contradicted each other on several aspects of the evidence and therefore they cannot be believed. The defence evidence therefore did not raise any doubt in the evidence of the prosecution. Learned counsel referred the court to the cases

of Republic v Accouche and others [1982] SLR 120, and Republic v Ricky Chang-Ty-Sing CR 23/2007 in support of his submission. He therefore moved court to find the accused guilty on the charge of trafficking as charged and convict hi accordingly.

29. Learned counsel for the accused submitted that the prosecution has failed to prove the charge of trafficking against the accused beyond reasonable doubt. Learned counsel further submitted that the prosecution witnesses could not have seen into the house of the accused from their disembarkation point on the main road as the windows to the house were tinted and closed at the time. He submitted that the locus in quo supported the defence contention that the way the accused's house is situated it would not be possible for a person to look into the house from the main road.

30. Learned counsel further submitted that the reason the agents did not catch the accused at the time they came to the house was because the accused was never at the house at that time. He submitted that the evidence show that the accused had gone to work at 6.30 in the morning and returned as he usually did at 5.30 in the evening. Hence the contention that the accused ran away from the house at about 10.30 that morning cannot be true. Learned counsel further submitted that none of the exhibits in question, that is, the tarpaulin or the cigarette was ever shown to the accused's wife as testified by her and that when the agents came in the morning she was the only person at home with the children. The search of the house revealed nothing.

31. Learned counsel however maintained that the main defence of the accused is one of alibi. He submitted that all the defence witnesses, including the accused himself testified that on that day he was at work at Bougainville, Takamaka, and he did not leave the site until he was conveyed back home by his employer. Therefore the accused could not have committed the offence accused of and moved court to find the accused not guilty and acquit him accordingly.

32. In order to prove the offence of trafficking, it is essential that the elements constituting possession be proved and that the presumption of trafficking is not rebutted. The elements of trafficking are knowledge, physical possession and control of the substance in question which must be illicit drugs. The concept of possession is well established in the case of DPP. V Brooks [1974] A.C. 862. The Prosecution must prove the elements of physical possession, that is, custody and knowledge of the substance that turns out to be the controlled drug. In the case of Republic vs. Serge Esparon Criminal Side No. 75 of 2008 the drugs were found in the vehicle of the Accused who attempted to evade the police. It could therefore be inferred that not only did the Accused have physical custody but showed knowledge of the substance in his vehicle by attempting to run away to evade the police who were trying to arrest him.

33. In the cases of Republic vs. Sanders Vital Criminal Side No. 63 of 2008 and Republic vs. Raymond Patrick Francis case no: Cr 11 of 2010 the Accused persons were seen to throw away the plastic bags which had been seen in their hands prior to being apprehended. These two cases have more elements in common to the present case in that the illicit substances were at one point

observed in the hands of the accused persons before they were discarded, except that in both of the above cases the accused persons were immediately arrested whilst in this case no arrest was made at the time the items were found. It is therefore essential that the accused in this case be placed at the scene of occurrence in order for the prosecution to prove the offence charged.

34. The defence of the accused in this case is one of alibi. When an accused asserts an alibi defense, the defense of the accused shifts to proving that the accused is innocent rather than merely not guilty. Without an alibi defense, the accused can argue that the prosecution has failed to prove its case beyond a reasonable doubt which to certain extent can still be done. With the alibi defense, the success of the accused's case rests on the belief that the prosecution has the wrong person or as alleged in this case, that prosecution is relying on false or fabricated evidence. If the accused's alibi defense is sufficient to raise a reasonable doubt as to his guilt, the burden is on the prosecution to disprove the alibi defense beyond a reasonable doubt. When presenting an alibi defense, the entire case may well turn on how well or how poorly the alibi witnesses withstand cross-examination.

35. In the actual case the defence of the accused is not even that the prosecution is prosecuting the wrong person but that the case against the accused is fabricated and it was a set up to fix the accused on a false charge of trafficking in drugs. I have considered the evidence adduced by the prosecution. It is not disputed that the exhibits brought to court were real and that the herbal material in question was cannabis. The evidence of how the witnesses arrested

the accused later that night have also not been challenged except to the extent that the prosecution maintained that he was first apprehended by agent Servina before he was formally arrested by agent Marie whilst the defence maintained that he was apprehended and formally arrested by agent Marie only.

36. The major contention has been on what exactly happened at around 10.30 to 11 am that day. The prosecution's case is that they went to the accused's house and observed the accused in the house but that the accused ran out and grabbed a tarpaulin near a store and ran down a ravine with it before dropping it and disappearing into the bush. Despite strenuous cross-examination of all the witnesses, the witnesses maintained their testimony and no major discrepancies were evident.

37. When considering the evidence of the defence, some serious discrepancies became immediately apparent. The accused denied that he had been informed that day that his child was sick maintaining that his phone was not functioning that day. Jimmy Etienne however maintained that they had been informed that day that the accused's child was sick. Fina Zialor testified that she did not tell the accused anything about the NDEA agents threatening to come and arrest the accused that evening whilst the accused testified that he was told by his wife that NDEA agents were coming to arrest him. Jimmy Etienne testified that he was not at the worksite from 8.30 to 12 noon whilst both Gustave Ismael and the accused maintained that Jimmy Etienne was not back to the worksite until after 4.30 pm. The accused testified that Jimmy Etienne waited for someone by the name of Gustave to go somewhere that morning and that

he was assisted on site that day by one person named Unel. Yet Gustave Ismael testified that he was on site all day that day.

38. Taking all the above contradictory testimonies, it becomes clear that the witnesses who testified in defence of the accused could not have been speaking the truth. Neither Jimmy Etienne nor Gustave Ismael could have testified that the accused did not leave the worksite because they were not themselves at the worksite and Gustave Ismael clearly lied about his presence at the worksite that morning. I must therefore conclude that the alibi defence of the accused has been so compromised by his own witnesses that the evidence of the defence witnesses cannot be believed by any reasonable court. For these reasons therefore I reject the evidence of the accused and his witnesses in their entirety.

39. On the other hand I find the testimonies of the witnesses for the prosecution to be strong, well corroborated and credible. I find that the accused had been to his house on the 11th March, 2011, sometime after 9 am and he was the person identified by the witnesses, particularly by agent Joseph who knew the accused from childhood. I accept the evidence of the witnesses for the prosecution that the window to the house was open when they arrived and note that the locus in quo also showed that if the window and curtain were open a person could be clearly identified from the main road.

40. I find that the prosecution has successfully proved beyond reasonable doubt that the accused had knowledge of the content of the tarpaulin he was seen to pick up and ran away with and that the said content was the cannabis herbal

material produced in court. Consequently I find the accused guilty of the offence of trafficking in 1550.4 grams of cannabis herbal material, a controlled drug, contrary to section 5 read with sections 14 and 26(1)(a) of the Misuse of Drugs Act, and I convict him accordingly as charged.

Judgment is entered accordingly.

C. G. DODIN

JUDGE

Dated this 25th day of January, 2013.