

IN THE SUPREME COURT OF SEYCHELLES

REPUBLIC

V

1. NATACHA BREUGELMANS

2. KENNETH BIBI

3. NERESIA POOL

4. DORIAN HOAREAU

Criminal Side No: 27 of 2010

Mr. D. Esparon Principal State Counsel and Ms Brigitte Confait State Counsel for
the Republic

Mrs. A. Amesbury Attorney at Law for the 1st Accused

Mr. N. Gabriel Attorney at Law for the 2nd Accused

Ms. Lucy Pool Attorney at Law for the 3rd and 4th Accused

JUDGMENT

Burhan J,

The aforementioned four accused in the case were charged as follows;

Count 1

Importation of a controlled drug to section 3 as read with section 26 (1) (a) of the
Misuse of Drugs Act as amended by Act 14 of 1994 and Punishable under section

29 (1) of the said Misuse of Drugs Act read with the Second Schedule of the said Act.

The particulars of the offence are that Natascha Maria Breugelmans on the 28th March 2010, at the Seychelles International Airport, Mahe imported in to Seychelles a controlled drug namely 112.3 grams of Illicit Heroin (Diamorphine).

Count 2

Trafficking in a controlled drug to section 5 as read with section 2 and section 26 (1) (a) of the Misuse of Drugs Act as amended by Act 14 of 1994 and Punishable under section 29 Misuse of Drugs Act read with the Second Schedule referred therein.

The particulars of the offence are that Natascha Maria Breugelmans between 29th and 31st March 2010 at Anse Aux Pins Mahe was trafficking in a controlled drug by transporting, delivering and selling 112.3 grams of Illicit Heroin (Diamorphine) being a controlled drug to one Kenneth Randolph Bibi.

Count 3

Trafficking in a controlled drug contrary to Section 5 read with Section 14 (c) and Section 26 (1) (a) of the Misuse of Drugs Act as amended by Act 14 of 1994 and Punishable under Section 29 of the said Act.

The particulars of the offence are that Kenneth Randolph Bibi on the 31st March 2010 at Anse Royale Mahe was trafficking in a controlled drug by virtue of having

been found in possession of 112.3 grams of Illicit Heroin (Diamorphine) which gives rise to the rebuttable presumption of trafficking in a controlled drug.

Count 4

Aiding and abetting the trafficking of a controlled drug contrary to Section 27 (a) of the Misuse of Drugs Act as read with Section 5 and 26 (1) (a) of the Misuse of Drugs Act (Cap 133) and Punishable under Section 29 Misuse of Drugs Act and the Second Schedule referred therein.

The particulars of the offence are that Neresia Marie Pool and Dorian Hoareau on 31st March 2010 aided and abetted Kenneth Randolph Bibi to sell, transport, distribute 112.3 grams of Illicit Heroin (Diamorphine) being a controlled drug.

Count 5 alternative to Count 4

Conspiracy to commit the offence of Trafficking in a controlled drug contrary to Section 28 (b) as read with Section 5, Section 2 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 the of the offence are that Neresia Marie Pool and Dorian Hoareau on or about the 31st March 2010 agreed with one another and with a person namely one Kenneth Randolph Bibi 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 of 112.3 grams of Illicit Heroin (Diamorphine) being a controlled drug.

Count 6 alternative to Count 1

Conspiracy to commit the offence of trafficking in a controlled drug contrary to Section 28 (b) 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 the offence are that Natascha Maria Breugelmans on or about the 29th March 2010 agreed with a person namely one Kenneth Randolph Bibi 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 of 112.3 grams of Illicit Heroin (Diamorphine) being a controlled drug.

All four accused denied the charges and trial against the accused commenced on the 15th of July 2010. During the trial the 1st accused Natascha Breugelmans pleaded guilty to count 2, the offence of trafficking in a controlled drug namely 112.3 grams of Heroin and was sentenced to a term of 10 years imprisonment while after the close of the prosecution case the 2nd accused Kenneth Randolph Bibi pleaded guilty to count 3, the offence of trafficking in a controlled drug namely 112.3 grams of Heroin and was sentenced to a term of 10 years imprisonment.

This judgment therefore concerns the charges against the 3rd accused Neresia Pool and the 4th accused Dorian Hoareau as contained in count 4 and the alternative count 5. The prosecution opened its case by calling the Government Analyst Mr. Jimmy Bouzin who stated that on the 6th of April 2010, he received the exhibits

from agent Alex Dufrene and after conducting the usual receiving procedures he had proceeded to analyse what was contained in the large brown envelope. He stated there were 2 small red plastic bags containing ten and four cylindrical masses of a light brown substance also referred to in his evidence as bullets (Pg 12 of proceedings of 15th July 2012). Each was packed in 2 pieces of transparent plastic and several layers of cellotape. He stated the 14 cylindrical masses of light brown substance gave a total weight of 112.3 grams. The preliminary test Marquise reagent test was carried out and a positive result was obtained and the presence of Heroin was confirmed by the thin layer chromatography test. He explained in detail how the tests were done and stated the percentage purity of the substance was 40%. He had drawn up a report of his findings and identified the document P1 as his report and identified his signature on same. He thereafter in open court read out in detail the contents of his report. After analysis the exhibit was returned to agent Alex Dufrene in a sealed envelope. He identified the sealed bag in open court stating the seals placed by him were intact. Witness thereafter identified the exhibits in open court as those exhibits handed over to him by agent Alex Dufrene and analysed by him. The exhibits were identified by witness and produced through him as items the brown evidence bag as Item 2, the red plastic bag containing the ten bullets as Item 3 and bullets Item 3 (1 to 10), and the plastic bag with 4 bullets as Item 4 and the 4 bullets as I4 (1 to 4). Thereafter after identification by the detecting officer Alex Dufrene the items I3 was marked as exhibit P4 and I3 (1 to 10) marked as exhibits P4 (1 to 10). The plastic bag marked as Item I4 was marked as exhibit P5 and the contents items I4 (1 to 4) marked as exhibits P5 (1 to 4), (pg 5 and 7 proceedings of 9th August 2010. 9 a.m).

Under cross examination the Government Analyst Mr. Bouzin further clarified tests conducted by him on the substance and stated what he examined was a

compressed mass of powder and therefore when testing referred to it as powder but the state they were brought to him it was hard compressed powder. He further stated that when the objects were brought to him they were sealed and whoever brings the substance for analysis brings it sealed and it is opened by him and the contents confirmed in the presence of the person bringing the substance. He further explained that the exhibits in the case were kept in his safe custody and the keys were with him throughout.

According to the evidence of agent Melissa Malbrook which was corroborated by the evidence of agent Kenneth Joseph and agent Mickey Barbier an observation on the house of one Helm Sounadin and his girl friend Neresia Pool situated at Anse Royale had commenced on the 31st of March 2010 around 7 p.m. They noticed two men and a woman inside. Every time a dog barked or a vehicle stopped the persons inside would check it out. They observed the front door been closed and a person looking outside from a window with a torch when a dog had started barking. They had contacted Lance Corporal Hoareau and informed him what they were observing. After some time agent Hoareau had come with his team comprising of Mickey Barbier and agent Naiken in two jeeps. They had raided the house immediately. Certain agents had gone through the window as the door was locked. The persons inside the house identified themselves as Neresia Pool, Kenneth Bibi, Dorian Hoareau, Tamara Hoareau and Guy Hoareau. They had asked Neresia Pool whether she had anything illegal in her house. She had stated there was nothing. On being questioned she had stated there was SR.20.000 in the house. On searching they had found a large amount of money which the accused could not account for. They had not been satisfied with the search based on information received and had left but kept two agents namely Kenneth Joseph and agent Sophola who stayed behind unobserved by the persons in the house for further

observation and who had continued to be in phone contact with them. They had gone to La Relax and parked.

About 10 to 15 minutes later agent Joseph had informed them that the people in the house were embarking in a car and leaving the house. They had begun to follow the said car. When they were passing Anse Royale near the Les Cannelles junction near the beach park, agent Naiken who was also following the car had over taken it and made a U turn in front of the car and parked face to face with the car with his lights full on. She had seen agent Dufrene get own and pick up a red plastic bag near the vehicle. He had opened it and looked at the contents. One bag contained 4 capsules while the other contained 10 capsules which they suspected to be controlled drug .The persons in the car were Neresia Pool, Kenneth Bibi and Dorian Hoareau. The driver of the vehicle was Dorian Hoareau next to him in the passenger seat was Kenneth Bibi while Neresia Pool was in the back seat. Witness stated that the plastic bag was thrown just outside the passenger seat in front on the ground. The exhibits were shown to witness and she too identified the exhibits in open court. The three persons in the vehicle namely Neresia Pool, Kenneth Bibi and Dorian Hoareau had been arrested and the money taken into custody from the house taken to the NDEA office. She stated that the money taken into custody was SR100.460.00, \$3500 and 2960 Euros.

Thereafter on information they received, they had gone to La Rossette Hotel at Anse Aux Pins and had gone to one of the rooms and arrested the 1st accused Natasha Breugelmans on the suspicion that she had brought illegal drugs from Kenya. They had proceeded to search the said room. They had found about thirty \$100 notes and a camera and a camcorder. In the toilet there was soap that seemed to have been bitten up and there was feaces everywhere and toilet paper. They had

taken the money into custody. Agent Mellissa thereafter produced the money taken into custody the 4 mobile phones and 2 Sim cards.

Agent Alex Dufrene confirmed the fact that near the Anse Royale church they had turned and stopped in front of the vehicle facing it and observed the other vehicle from the lights of their vehicle and noticed the 2nd accused Kenneth Bibi throw something out of the car from the passenger side. He affirmed the fact that he had picked up what was thrown and noticed capsules which he suspected to be controlled drugs and kept it in his possession. Both Dorian Hoareau and the Neresia Pool who were also in the car were arrested. Thereafter he had sealed the exhibits and kept it in his locker and no other person had access to it. Subsequently he had handed the suspect controlled drug over to the Government Analyst for analysis. He stated that the delay in handing the exhibits over was because he had not gone to work the next day a Friday and when he had contacted the Government Analyst on Monday he had asked him to come the next day which was the 6th of April 2012. He had collected the exhibit from the Government Analyst which were in a sealed exhibit bag and 3 days later and handed it over to Sergeant Seeward. It is apparent that he had thereafter brought the exhibits with the seals placed by the Government Analyst intact to the court house on the day of the trial and handed them over in open court to the Government Analyst Mr. Bouzin for production in court. The fact that the seals placed by the Government Analyst on the exhibit bag were still intact was confirmed by Mr. Bouzin the Government Analyst in his evidence.

Witness Ryan Dominique Fred stated he was working at Island Time Car Centre and that the accused Neresia Pool had hired vehicle bearing registration number S 16890 Kia Picanto, yellow in colour from them for 10 days from the 30th of March

to the 9th of April 2010. He identified the accused Neresia Pool by name in open court. He had collected the vehicle from the NDEA office after they had taken it into custody. Agent Mickey Barbier too gave evidence in respect of the raid on the house and the events leading to the arrest of the 2nd 3rd and 4th accused was on similar lines to agent Malbrook's evidence and further stated that Dorian Hoareau the 4th accused was the son of the 3rd accused Neresia Pool.

Agent Joseph in addition to corroborating the evidence of agent Malbrook stated that while he was watching the house with agent Sophola after the other agents had left after searching it, he noticed the 2nd accused go to the back of the house dig and take something out of the soil. Another man and a woman had embarked into the car and witness identified them as Neresia Pool and Dorian Hoareau. The car number was S16890. Dorian was driving and Neresia was sitting behind the passenger seat. Thereafter they had proceeded and picked up the accused Kenneth Bibi who was standing on the main road waiting for them. Meanwhile agent Joseph had been informing agent Hoareau what was happening by phone. He had seen the two NDEA jeeps following the vehicle. About 15 minutes later agent Mickey Barbier had come back and picked them up and when he went to the scene of detection the accused had already been arrested. He too corroborated the evidence leading to the arrest of the accused Natascha Breugelmans in the room at Hotel Rosette at Anse Aux Pins. This was the evidence of the prosecution.

When one considers the defence both the accused chose to remain silent and not call witnesses. In terms of article 19 (2) (h) of the Constitution of the Republic of Seychelles no adverse inference should be drawn by the accused exercising their right to silence.

The main contention of the defence as borne out in the written submissions and cross examination are that;-

- a) the charges are defective and bad in law as the accused have not been charged with the exact weight of heroin as the accused have not been charged with the pure weight as required in the case of ***Aaron Simeon v the Republic SCA 23 /2009***.
- b) there is no evidence to implicate the two accused in the case in respect of the charge of aiding and abetting the accused Kenneth Bibi in transporting the said drug or that the 3rd and 4th accused had any knowledge that he was transporting a controlled drug.
- c) that Kenneth Bibbi was pressurized by sergeant Dogley to implicate the accused Nerisia and Dorian Hoareau and it was for that reason he had implicated the accused.
- d) the NDEA agents were out to get the 3rd and 4th accused at all costs as the accused's daughter and uncle who were in the house were not made accused in the case.
- e) that the accused should be acquitted as the exhibits had got lost.
- f) the accused should be acquitted as they were unable to have a trial denovo after changing their counsel and were not allowed to reopen their defence.

With regard to ground (a) court is not precluded from finding the accused guilty on the lesser quantity of heroin as was done in the very case referred to by learned counsel i.e. the case of ***Aaron Simeon*** (supra) and as the Government Analyst states in his evidence that the percentage purity was 40% this court is not precluded from finding the accused guilty of an offence concerning the lesser pure quantity namely 44.92 grams of heroin. It is to be noted that the said quantity in

any event attracts the presumption of trafficking as per section 14(c) of the Misuse of Drugs Act CAP 133. Therefore learned counsel for the accused contention that the charge sheet is defective and bad in law as the pure quantity has not been mentioned bears no merit.

Archbold Pleading, Evidence and Practice in Criminal Cases 42nd edition at page 2307 onwards states that aiders and abettors are those who are present at the commission of the offence, and aid and abet its commission. It requires the presence of the person such presence may be either actual or constructive, it requires participation in the act which may be direct or indirect participation and such participation should be the result of a concerted design to commit a specific offence. It is settled law that aiding and abetting is a separate and distinct offence and that a person may be convicted of abetting an offence even though the principal offender has been acquitted. In this case however the principal offender Kenneth Bibi has been convicted on his own plea.

It is to be borne in mind that trafficking of a controlled drug as set out in count 4 is based on the definition contained in the interpretation section 2 of the Misuse of Drugs Act and means selling, giving, administering, transporting, sending, delivering or distributing of a controlled drug. Section 14 of the said Act refers to the rebuttable presumption of trafficking in relation to the quantity of a controlled drug found in the possession of a person.

On considering the evidence in this case it is clear that the officers of the NDEA had raided the house of one Helm Sounadin situated at Anse Royal and at the time the girlfriend of Helm Sounadin the 3rd accused Neresia Pool was present together with her son the 4th accused Dorian Hoareau and the 2nd accused Kenneth Bibbi and

others. Although the 3rd accused had stated that there was only SR 20.000 in the house a large amount of cash both in local and foreign currency was found by the agents and the officers had left however keeping behind agents to continue to observe the said house unknown to the accused who were inside the said house. According to the evidence of agent Joseph he had observed the 2nd accused dig up something from the garden of the house and then get into a vehicle namely a Kia Picanto which the 3rd accused Nerisia Pool had hired and which was being driven by the 4th Dorian Hoareau accused. The 3rd accused had also been in the back of the said vehicle. Agent Joseph had alerted the other agents who had followed and stopped the said vehicle and the 2nd accused had been seen throwing the package containing Heroin out of the window of the said vehicle. It is apparent when one considers the evidence that the initial raid on the house and search had unnerved the 2nd accused who had decided to remove from the house, the quantity of controlled drug which was in his possession at the time of leaving the house and which he was transporting to another place in the said vehicle until he was detected throwing it out of the window. It is clear that this quantity was with him at the time he left the house as the vehicle was followed by the officers of the NDEA soon after it had left and while being followed had made no stops until he was seen throwing the controlled drug out of the vehicle at the time of interception and detection. On the corroborated evidence before court this court is satisfied that the prosecution has established and proved these facts beyond reasonable doubt.

In the case of *National Coal Board v Gamble (1958) 3AER 203 at page 207*

Devlin J held:-

“..... aiding and abetting is a crime that requires proof of mens rea, that is to say, of intention to aid as well as knowledge of the circumstances and proof of the intent involves proof of a positive act of assistance voluntarily done.”

The evidence of the prosecution witnesses further establishes the presence of all three accused i.e. the 2nd, 3rd and 4th accused and their participation in the act of transport of the controlled drug and that such participation was the result of a concerted design to commit a specific offence namely transport the controlled drug to another location and therefore the trafficking of the controlled drug. The positive acts of the 3rd and 4th accused in this case in voluntarily transporting the 2nd accused Kenneth Bibi who had the drugs in his possession clearly shows the intention to aid and abet in the said trafficking of the controlled drug by the accused. It is also apparent that the 2nd accused had waited until the vehicle came to fetch him which was being driven by the 4th accused and it is clear that the intention of those inside the vehicle was to collect him as the 3rd accused had sat at the back of the vehicle to facilitate and provide for the 2nd accused to sit in front of the vehicle with the driver.

When one considers the evidence before court in its entirety it is clear that the 3rd and 4th accused were aiding and abetting and making a concerted effort with the 2nd accused to transport of the said controlled drug away from the house which the NDEA agents had just raided. The fact that they acted in haste soon after the raid by the officers of the NDEA clearly shows the intention of all three accused to transfer the controlled drug to another location. The fact that the 2nd accused threw the plastic bag containing the drugs out of the window when the NDEA officers stopped the vehicle is clearly established by the evidence of the NDEA officers who witnessed it and the fact that the 3rd and 4th accused were with him at the time is also established by the evidence of the detecting officers namely agents Malbrook and Alex Dufrene whose evidence stands corroborated in this respect. Though subject to cross examination no material contradictions were forthcoming in any of the aforementioned areas of evidence that would make one disbelieve the

evidence given by these witnesses. I therefore proceed to accept the prosecution evidence in this regard and am satisfied beyond reasonable doubt that the 3rd and 4th accused did have the requisite knowledge that the 2nd accused was in possession of the controlled drug and was transporting the drug to another location and were aiding and abetting him to transport the controlled drug to another location.

In the case of *Republic v Wilby Robert SC Crim: Side 8 of 1991* it was held the extent and degree of the abettor's activities and their proximity to the actual crime would determine the intention or knowledge in proving the charge of abetting. For the aforementioned reasons when taking the evidence before court in its entirety this court is satisfied that the prosecution has established all the elements contained in count 4 beyond reasonable doubt. Therefore ground 2 raised by learned counsel for the accused is rejected.

The next ground raised by learned counsel for the defence was that Kenneth Bibbi was pressurized by sergeant Dogley to implicate the accused Nerisia and Dorian Hoareau. This court is well aware that the statement of one accused cannot be used against another accused and is in agreement with learned counsel for the defence in this regard and therefore does not in any way rely on any facts contained in the statement under caution made by the 2nd accused Kenneth Bibi as evidence against any of the other accused in the case and will proceed to disregard such evidence.

The next contention of learned counsel for the defence in her submissions is that the agents of the NDEA were out to get the 3rd and 4th accused at all costs as the accused's daughter and uncle who were in the house were not made accused in the case. The facts of the case as borne out by the evidence of the prosecution clearly show that no arrest was made at the time of entering the house and the NDEA

agents had left without arresting anybody which clearly indicates they were not interested in framing or planting any evidence on the accused. It is to be noted that the daughter of the 3rd accused and her uncle were not in the car at the time the drugs were thrown out by the 2nd accused and therefore this court sees no hidden agenda in the arrests of any of the accused as suggested by learned counsel.

Learned counsel for the 3rd and 4th accused next contended that the accused should be acquitted as the exhibits had got lost. It is to be noted that the exhibits were produced in open court and viewed by court and all present at the time it was produced. The exhibits had been produced in court in the presence of the accused and their learned counsel Mr. Gabriel who had examined the exhibits and conducted his cross examination and completed same at the time the exhibits were available and the defence of the accused closed prior to the exhibit being lost. Therefore it cannot be said that any prejudice had been caused to the accused.

The mere fact that the accused wanted a change of counsel at the last minute does not mean that they are entitled to a trial de novo. While the Constitution provides for them to have a counsel of their choice they must not misuse this provision by changing counsel at the last minute expecting a brand new trial to start for their convenience and pleasure. Therefore this court sees no merit in the contention of the defence that the accused should be acquitted as they were unable to have a trial denovo after changing their counsel. On the 20th day of February 2012 when learned counsel for the defence informed court she was going to make submissions on no case to answer learned counsel for the prosecution Mr. Esparon brought it to the notice of court that the case had reached final submission stage. In order to clarify court called for the proceedings and it was noted that as far back as the 4th of August 2011 according to the proceedings the three accused present in court that

day according to the record were Kenneth Bibi, Neresia Pool and Dorian Hoareau referred to in the proceedings as the 1st, 2nd and 3rd accused respectively (as the 1st accused Natascha Breugelmans had pleaded guilty and been sentenced by then and was not present in court) had already committed themselves in their defence by stating they would remain silent and not call witnesses in the presence of their earlier counsel. Therefore unless a formal order is made by court setting aside this defence stated by the accused what remains for the defence was therefore only final submissions. It is also apparent that after the accused had formally stated their defence it was discovered that the exhibits were not available and the new counsel for the accused wished to reopen the defence. This would amount to permitting the accused a trial de novo in respect of their defence which would be unfair and prejudicial to the prosecution and the new defence if permitted would be based on fortuitous circumstances namely the loss of exhibits arising after the conclusion of the trial. Therefore for these reasons and those contained in the ruling of 19th April 2012 this court finds no merit in learned counsel for the defence contention that the accused should have been permitted to start their case de novo or to reopen their defence de novo.

For the aforementioned reasons this court proceeds to reject the defence of the 3rd and 4th accused. On consideration of the evidence this court is satisfied that the prosecution has proved all the elements of the charge and particulars of the offence in count 4 beyond reasonable doubt. This court is satisfied that the quantity mentioned in the charge as per the Aaron Simeon case should be the pure quantity of Heroin which is 44.92 grams which fact the prosecution has established beyond reasonable doubt. As the prosecution has established all the elements of the 4th charge against the 3rd accused Neresia Pool and the 4th accused Dorian Hoareau

beyond reasonable doubt, this court finds the 3rd and 4th accused guilty of the said charge and proceeds to convict them of same.

M.N BURHAN

JUDGE

Dated this 30th day of January 2013.