

**IN THE SUPREME COURT OF SEYCHELLES**

**Criminal Side: CO 26/2011**

**[2014] SCSC**

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**THE REPUBLIC**

versus

**FRANCIS BARREAU**

Accused

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Heard: 26 & 27 August 2013

Counsel: Benjamin Vipin, Principal State Counsel for the Republic  
Basil Hoareau for the accused

Delivered: 19 March 2014

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**JUDGMENT**

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**Robinson J**

[1] The accused, Francis Barreau, has been charged on an Amended Formal Charge, dated 7th May 2013, as follows —

On count 1, the statement of offence was "Possession of a controlled drug contrary to section 6 as read with sections 15 (1) and 26 (1) (a) of the Misuse of Drugs Act as amended by Act 14 of 1994 and punishable under the Second Schedule read with section

29 of the same.". The particulars of the offence were that "Francis Barreau of Cote D' Or, Praslin, on the 13th day of May 2011 at Baie Ste Anne, Praslin, was found in possession of a controlled drug weighing 3.14 grams containing 1.25 grams of heroin (diamorphine).".

On count 2, the statement of offence was possession of a controlled drug contrary to section 6 as read with sections 15(1) and 26 (1) (a) of the Misuse of Drugs Act as amended by Act 14 of 1994 and punishable under the Second Schedule read with section 29 of the same.". The particulars of the offence were that "Francis Barreau of Cote D' Or, Praslin, on the 13th day of May 2011 at Baie Sainte Anne, Praslin, was found in possession of a controlled drug weighing 0.09 grams of cannabis herbal materials.".

- [2] The accused pleaded not guilty on each count on 26th August 2013. The accused is represented by defence counsel Basil Hoareau.
- [3] The trial took place on 26th and 27th August 2013. The prosecution adduced evidence by calling 4 witnesses, namely, Mr. Jemmy Bouzin, the first prosecution witness (PW1), agent Timothy Hoareau, the second prosecution witness (PW2), agent Terry Florentine, the third prosecution witness (PW3), and agent Leeroyd Dugasse, the fourth prosecution witness (PW4).
- [4] At the close of the case for the prosecution, the accused elected to make an unsworn statement from the dock, and did not call witnesses or other evidence.
- [5] At the close of the case for the defence, both counsels made oral submissions and the case was adjourned for judgment.

The case for the prosecution

#### The evidence of Jemmy Bouzin

- [6] PW1, the Forensic Government Analyst, testified that he received an exhibit bag with letters of request in relation to this case (exhibit P1), bearing CB No 117/11, from PW2

on 3rd May, 2013 at around 10:20 am. He explained the tests that he subsequently carried out on the exhibits. PW1 stated that he weighed the "*lump of a brownish substance*" and it gave a net weight of 3.14 grams. Thereafter, he identified the brownish substance to contain heroin, also known as diamorphine, with a heroin content of 1.25 grams (purity of 40 per cent). With regards to the herbal materials, PW1 concluded that the herbal materials were cannabis with a net weight of 0.09 grams. The Forensic Science Laboratory (FSL) report of PW1, dated 3rd May, 2013, was produced and admitted as exhibit P2.

- [7] PW1 testified that he replaced the exhibits in the exhibit evidence bag in which he had received them. He re-sealed the exhibit evidence bag with yellow evidence tape bearing his signature and kept it in his custody until 6th May, 2013 at 9:00 am. On 6th May 2013, at 9:00 am, PW2 collected the exhibits and the FSL report (exhibit P2). PW1 identified the sealed exhibit evidence bag in which he had replaced the exhibits in as exhibit P4, and stated that the seal was intact.
- [8] PW1 testified that the exhibits were first analysed, on 16th May, 2011, by Dr. Purmanan, the then Forensic Government Analyst. PW1 produced the report generated by Dr. Purmanan as exhibit P3. According to exhibit P3, the first exhibit, the lump of a brownish substance (in a humid state), wrapped in clear plastic, had a net weight of 3.222 grams. The brownish substance was identified to be heroin of 44.2 percent purity, with a heroin content of 1.41 grams. The second exhibit, the herbal materials, was identified as cannabis with a net weight of 0.112 grams.
- [9] PW1 identified in open Court the contents of exhibit P4. PW1 identified the open evidence envelop, in which he received the exhibits, bearing CB No. 117/11, Baie Sainte Anne, Praslin, and produced as exhibit P5. PW1 identified the open medium brown evidence envelop which contained a piece of clear plastic evidence bag enclosing a lump of a brownish substance, and produced the medium brown evidence envelope as exhibit P6. PW1 stated that the brownish substance wrapped in the clear plastic was that brought to him for analysis, analysed by him, and identified to contain heroin and produced as exhibit P7. He identified the herbal materials, cannabis, wrapped in white paper, and

produced as exhibit P8.

- [10] In cross examination, PW1 explained the difference in weight of the heroin (0.16 grams) from the time it was first analysed by Dr. Purmanan to the time of its second analysis. He stated that a sample of the heroin was used for analysis, and in his opinion the exhibit analysed by Dr. Purmanan, was the same exhibit analysed by him.
- [11] PW1 also explained the difference in weight of the cannabis herbal materials from the time they were first analysed by Dr. Purmanan to the time of their second analysis by him. He stated that a very minute amount, of the herbal materials, was used for analysis, and in his opinion the exhibit analysed by Dr. Purmanan was the same exhibit analysed by him.

#### The evidence of Timothy Hoareau

- [12] The prosecution called PW2, a police officer attached to the Criminal Investigation Department of the Police Force. PW2 deposed that on 13th May, 2011 he worked in the National Drug Enforcement Agency (hereinafter referred to as "the NDEA"). On 13th May, 2011, he was on duty on Praslin, in the company of colleagues, namely, PW3, PW4 and agent Joel Barra. PW2 had received information about the involvement of the accused in the selling of drugs at the house of Merna Camille. PW2, PW3, PW4 and agent Joel Barra proceeded to the house of Merna Camille at Baie Sainte Anne, Praslin to effect a search.
- [13] PW2 stated that when he, PW3, PW4 and agent Joel Barra reached the house of Merna Camille, they heard people calling out '*NDEA bloke*'. People were running in all directions. Some people ran behind the house of Merna Camille and some jumped over the wall. PW2 stated that he and PW4 approached the front door of the house and PW3 approached the back door of it. When PW2 and PW4 reached the front door, they identified themselves as NDEA agents. PW2 forced open the door and he and PW4 went inside the house.
- [14] Inside the house, PW2 and PW4 saw a figure standing in the vicinity of the bathroom.

Outside of the bathroom, the house was a bit dark. PW2 turned on his torch and shone it at the figure. PW2 noticed the accused. The right hand of the accused was closed. When PW2 approached, the accused headed for the toilet. PW2 saw the accused throw 'something which was in plastic' in the toilet. The accused tried to flush down the toilet what he had thrown in it, but PW2 managed 'to grab' it. PW4, who was close by, turned on the light of the bathroom.

- [15] PW2 opened, in the presence of the accused, the article he had secured from the toilet. PW2 stated that it was a brownish substance, not powdery, but a '*sort of a lump*'. PW2 then noticed a white paper in the bathroom sink. Inside the white paper were some herbal materials. PW2 secured both items and kept them in his possession. PW2 also secured an amount of money to the sum of Seychelles rupees 1,345.00 from the house. PW4 handcuffed the accused. The accused was arrested and a case, CB No. 117/11, was registered against the accused.
- [16] On 16th May, 2011, PW2 handed the exhibits to Dr. Purmanan at the Forensic Science Laboratory for analysis, together with three copies of letters of request. PW2 identified and produced the letter of request as exhibit P9. On 18th May, 2011, at around 11:30 am, PW2 collected the exhibits, given for analysis, from Dr. Purmanan, together with the FSL report. PW2 took the exhibits to the NDEA, and they were kept by Sergeant Evans Seeward.
- [17] PW2 testified that the exhibits were produced and admitted in the part heard trial presided by the then Judge Duncan Gaswaga (hereinafter referred to as the "Part Heard Trial"). Pursuant to an order of this Court, PW2 collected the exhibits together with a form, on 2nd May, 2013, from the Supreme Court. PW2 identified and produced the form as exhibit P10. Exhibit P10 bears on its face the signature of PW2, the Assistant Registrar, and, the witness, Chantal Leste.
- [18] PW2 took the exhibits to the NDEA and locked them in his drawer until 3rd May, 2013. Because the trial was to start afresh, and Dr. Purmanan had left Seychelles, the exhibits were re-analysed by PW1. On 3rd May, 2013, he handed the exhibits together with three

letters of request to PW1 at the Forensic Science Laboratory for re-analysis. On 6th May 2013, at around 10:00 am, he collected the exhibits, given for re-analysis, from PW1, together with the FSL report. PW2 took the exhibits to the NDEA, and they were kept by Sergeant Evans Seeward until they were produced in Court.

[19] PW2 identified exhibit P1 as a copy of the same letter of request prepared for the purpose of re-analysis of the exhibits. PW2 identified exhibit P2 as the same FSL report that was handed to him by PW1 on 6th May 2013. PW2 identified exhibit P3 as the same FSL report that was handed to him by Dr. Purmanan. PW2 identified exhibit P4 as the evidence bag that he sealed the exhibits in after having collected them from the Supreme Court. PW2 identified exhibit P5 (the evidence bag) that Dr. Purmanan had put the exhibits in after he had analysed them. PW2 identified exhibit P6 as the same envelope that he had given to Dr. Purmanan at the Forensic Science Laboratory. PW2 identified the piece of clear plastic wrapping a brownish substance; exhibit P7, as that secured by him. PW2 also identified the herbal materials wrapped in a piece of paper; exhibit P8, as that secured by him.

[20] In cross examination, PW2 was adamant that he had received information that 'Pti Men', the accused, was selling drugs at the house of Merna Camille. He explained that he had received the information during the week of the search, but prior to the search.

[21] PW2 testified that, on reaching the house of Merna Camille, they did not chase after the people who ran because they had come for 'Pti Men', the accused. It was put to PW2 that his evidence was that they identified themselves as NDEA agents after they had disembarked from their vehicle, while in cross examination he had stated that he headed straight for the front door of the house. It was put to PW2 that he was lying to this Court because neither had they identified themselves to anyone, nor was there anyone outside of the house for them to identify themselves to. PW2 explained that there were people outside of the house, but added that he identified himself to the accused after he had broken down the door.

[22] The cross examination of PW2 then concentrated on the issue of the distance between

him and the accused when PW2 first saw the accused standing in the corridor close to the bathroom. It was pointed out to PW2 that his evidence, stating that the accused was quite close, 2 meters away from him, when he first saw him, was a fabrication. The evidence of PW2 in the Part Heard Trial, that the figure was 5 meters away from him, was put to him. PW2 explained that when he first entered the house, the accused was 5 meters away from him, but as he approached the accused, the distance was 2 meters. Learned counsel then put to PW2 that he could not have had access to the corridor of the house without first having gone through the kitchen. PW2 explained that he might have 'passed' through the kitchen.

[23] With respect to the account of the facts involving PW2 and the accused in the bathroom, it was again pointed out to PW2 that his evidence was a fabrication. It was put to PW2 that it was implausible that the accused, after throwing the clear plastic in the toilet, would not have been able to flush the toilet in the time it took for PW2 to put his torch in his mouth and retrieve the item from the toilet. PW2 stood firmly by his account of the facts in Court. He stated that the accused was in front of him but he pushed the accused aside. The accused tried to flush the white plastic down the toilet, but the clear plastic did not flush, and he managed to grab it with his right hand. He deposed that he put his torch in his mouth before grabbing the clear plastic from the toilet.

[24] Further, it was put to PW2 that his evidence was a fabrication because his evidence in the Part Heard Trial referred to 'toilet' and not to 'bathroom'. According to counsel for the accused, the evidence of PW2 in the Part Heard Trial was that the toilet and bathroom were not the same room, and put to PW2 that he was lying to this Court. PW2 explained that the bathroom contained a wash basin, 'a place to take a bath', and a toilet, there being no separation. It was further pointed out to PW2 that his evidence in the Part Heard Trial showed that he was lying to this Court because one Mellisa Malbrook, in her affidavit before the Magistrates' Court and the Supreme Court, had clearly stated from information received from PW2 that the accused went inside the bathroom. PW2 explained that Melissa Malbrook was mistaken because he had informed her that the accused went inside the toilet. PW2 stood by his account of facts in Court.

[25] It was further pointed out to PW2 that, in his statement written on 16th May, 2011, he had stated that he and PW4 had entered the living room, and he had looked in the direction of the bathroom and had seen the accused in the bathroom. PW2 explained that his evidence in Court was correct. He explained that the apartment was very small, the corridor being close to the bathroom.

[26] Then the cross examination of PW2 centered on counsel putting the version of the accused to PW2. It was put to PW2 that the accused was sitting in the living room when PW2 kicked the door twice; that the accused came to the kitchen window when he heard the kicking; that the accused saw PW2 kicking the door; that the door broke open; that PW2, PW3 and PW4 entered the house through the front door; that inside the house, they took the accused, who was found in the kitchen, outside of the house; that outside of the house they conducted a search on the accused, but nothing was found on him; that PW2 went back inside the house, while PW3 and PW4 remained outside of the house with the accused; that PW2 after some time came back outside, and informed the accused that he was being taken to the Baie Sainte Anne Police Station; that at the Station, PW2 showed something to the accused saying that it was found in his house; that the clear plastic and the herbal materials were not found in the possession of the accused; and that at no point in time were PW2 and the accused together in the toilet. PW2 stood firmly by his account of facts in Court.

[27] In re-examination PW2 reiterated that the shower, wash basin and toilet were in one room.

#### The evidence of Terry Florentine

[28] The prosecution then led the evidence of PW3. PW3 is a supervisor in the NDEA based at the airport. Before being stationed at the airport, he worked in the Patrol Unit. PW3 was on duty on Praslin, on 13th May, 2011, in the company of colleagues, namely, PW2, PW4 and agent Joel Barra. PW3 had received information from PW1, the team leader, that a drug transaction was taking place at the house of Merna Camille.

[29] PW3, PW2, PW4 and agent Joel Barra proceeded to the house of Merna Camille at 1:10



pm by jeep. When they arrived at the house of Merna Camille, they disembarked from their jeep. They heard someone shout, '*NDEA bloke*'. There were lots of people at the house. People were running in different directions. PW3 stated that he ran at the back of the house alone. He saw a door which was open. He went inside the house, 'to that part of the house where there was a toilet together with a shower'.

[30] The rest of his testimony confirmed some aspects of the testimony of PW2, such as, PW3 saw PW2, PW4 and a man, whom he later identified as the accused, in the toilet; that PW2 was bent over the toilet, and his torch was in his mouth; that he saw PW2 remove a small clear plastic, which contained a dark brown substance, from the toilet. In addition, PW3 stated that there was no light in the room, except for the light coming from the torch of PW2. PW3 then saw the accused trying to get away from the toilet. PW4 got hold of the accused, and turned on the light in the bathroom. He confirmed the evidence of PW2 that, after the light was turned on, PW2 removed a piece of white paper that was in the wash basin. He added that PW2 opened the piece of white paper and the clear plastic in his presence (PW3) and that of PW4 and the accused. The piece of white paper contained some herbal materials suspected to be a controlled drug and the piece of plastic contained a brown substance suspected to be heroin.

[31] PW3 stated that PW2 arrested the accused for being in possession of a controlled drug. The accused was cautioned and his constitutional rights were read to him. Thereafter, PW3 went to assist agent Joel Barra as there was some commotion coming from the outside of the house. They then took the accused to the Baie Sainte Anne Police Station, and a case, CB117/11, was registered against him.

[32] PW3 identified the piece of clear plastic wrapping a brownish substance; exhibit P7, as that seized by PW2 from the toilet. PW3 identified the herbal materials wrapped in a piece of paper; exhibit P8, as that seized by PW2 from the wash basin.

[33] The cross examination of PW3 further confirmed some aspects of the testimony of PW2, such as, on 13th May, 2011, they proceeded to the house of Merna Camile after they had been informed by PW2 that a drug transaction was taking place at the said house. In

addition, when he arrived at the house of Merna Camille, he disembarked from the vehicle and headed to the rear of the house. PW3 saw people run behind the house and jump over the tall wall behind the house, but he did not chase after them.

[34] PW3 deposed that it was not the first time that he had been to the house. PW3 could not recall everything about the house, but recalled that there was a backdoor. He could also not recall if he had, from the backdoor, gone to the kitchen on the material day. When he went inside the house, he headed for the bathroom, and was the last person to reach it. The bathroom was quite large and they could all fit inside it. He indicated the size of the bathroom to Court - approximately 3 meters in width and 2 meters in length. PW3 confirmed the evidence of PW2, that the bathroom was composed of a toilet, a washbasin and a shower. When PW3 went in the bathroom he saw PW2 facing the toilet and taking the piece of plastic from inside of it, but he had not previously witnessed the accused throw the plastic in the toilet. PW4 handcuffed the accused, who tried to escape.

[35] It was pointed out to PW3 that his version was implausible. It was put to PW3 that it was not possible for PW3 to have seen PW2 remove anything from the bathroom, unless PW3 had followed PW2 in the bathroom, and was present when the accused threw the thing in the toilet. Counsel, further, put to PW3 that, in any event, whatever was thrown in the toilet would have been flushed down. PW3 stood firmly by his version of facts.

[36] The version of the accused was put to PW3, which stated that PW3 did not go through the backdoor; that the three agents went through the front door kicked open by PW2; that when the front door was being kicked open by PW2, the accused was in the kitchen; that PW2 and PW4 took the accused, who was found in the kitchen, outside of the house; that the accused was searched outside of the house, and nothing was found on him; that PW2 went back inside the house; that after some time, PW2 came out of the house and said that the accused was to be taken to the Baie Sainte Anne Police Station; that the accused was shown the piece of clear plastic and the piece of white paper containing the herbal materials for the first time at the Baie Sainte Anne Police Station; and that the clear plastic and piece of white paper were not found on the accused. After being alerted to the version of the accused, PW3 remained adamant that his version was consistent with the

truth. He stated that the exhibits were shown to the accused in the bathroom when PW4 switched on the light.

#### The evidence of Leeroyd Dugasse

[37] The prosecution led the evidence of PW4. PW4 is an investigating officer in the NDEA. On 13th May 2011, PW4 was on duty on Praslin. On 13th May 2011, he, PW2, PW3 and agent Joel Barra raided the house of Merna Camille. They had received information that a drug transaction was taking place at the house of Merna Camille.

[38] PW4 stated that when they approached the house of Merna Camille, there were a few people in the compound. Those people ran all over the place when the NDEA approached the house. PW4 heard them say, '*NDEA Bloke*'. PW4 followed PW2 to the house. PW4 stated that PW2 called out '*NDEA open the door*'. Because no one opened the door, PW2 broke open the door. When the door opened, they both went inside the house to the sitting room.

[39] PW4 and PW2 saw the accused standing in the corridor. They went towards the accused, who dropped something in the toilet and, then, flushed it. When the accused flushed the toilet, PW2 put his hand in the toilet and retrieved the item from the toilet. PW2 removed a plastic which had something wrapped in it. PW2 opened the plastic. It contained a substance suspected to be heroin. Then PW2 did a search and found a piece of paper, which had some herbal materials in it, suspected to be cannabis. PW4 handcuffed the accused because he tried to escape. The accused was arrested, cautioned and his constitutional rights were read to him. They secured Seychelles rupees 1,300.00 from the house. The accused was taken to the Baie Sainte Anne Police Station and a case, CB number 117/11, was registered against the accused.

[40] PW4 identified the clear plastic containing the brown substance; exhibit P7, as the same substance secured by PW2. PW4 identified the herbal material wrapped in a piece of paper; exhibit P8, as that seized by PW2 from the wash basin.

[41] PW4 stated in cross examination that when they reached the house of Merna Camille,

somebody at the house of Merna Camille shouted very loudly, '*NDEA bloke*'. When they reached the front door of the house, PW2 banged on the door and shouted, 'NDEA open the door'. Because nobody opened the door, PW2 forced it open using the side of his body, from his shoulder to his legs. PW4 stated that they then went inside. PW4 saw the accused in the corridor running towards the bathroom. Counsel put to PW4 that he could only get access to the corridor by walking through the kitchen. PW4 explained that it was not the case. You had to walk through the living room to get access to the corridor. It was, further, pointed out to PW2 that in his statement recorded on 16th May, 2011, he had stated that from the viewpoint of the living room there was one part of the house that looked darker and it was there that he saw the accused standing in the bathroom next to the toilet. PW4 stated that that part of his statement was correct and his evidence in Court incorrect.

- [42] Learned counsel then put to PW4 that the only reason for so many inconsistencies in their evidence was because it was a fabrication. The version of the accused was put to PW4, which stated that, on 13th May, 2011, they went to the house of Merna Camille; that when they reached the house of Merna Camille, they disembarked from their vehicle and headed for the front door; that PW2 kicked open the front door; that the accused who was in the living room went to the kitchen and looked through the kitchen window; that the accused saw them outside at the same time that PW2 managed to kick open the door; that they all went inside the house; that the accused was in the kitchen when they went inside the house; that the accused, who was found in the kitchen, was taken outside of the house; that they searched the accused and found nothing on him; that PW2 went back inside the house; that PW2 came back outside and informed the accused that he was going to be arrested and taken to the Baie Sainte Anne Police Station; that at the Baie Sainte Anne Police Station, the accused was shown the clear plastic and the herbal materials; that, on 13th May, 2011, the accused was not in possession of the clear plastic and the herbal materials; that PW2 was not in the bathroom with the accused; and that at no point in time did PW4 see PW2 retrieve any object from the toilet. PW4 stood firmly by his account of facts in Court.

The case for the defence

- [43] The accused exercised his right to make an unsworn statement from the dock. The statement of the accused from the dock is not sworn evidence which can be cross-examined, but nevertheless I may attach to it such weight as I think fit, and that I should take it into consideration in deciding whether the prosecution have made out their case: Anthony David Frost & George Talbot Hale (1964) 48 Cr.App.R 284 at page 291.
- [44] The accused stated that on the day of the incident he was at home in the kitchen. The television set was in the living room. When he was in the kitchen he heard knocking on the door. He stood up to see who was knocking on the door. The door broke open by force. The accused saw four persons and recognised them as NDEA agents. PW2 was the first person to enter the house. PW2 told the accused not to move. PW2 headed for the bathroom. PW2 told the other three agents to search the accused, which search was done, and after the search, the accused was taken outside of the house by the three agents, through the broken door. The accused stated that PW2 remained in the house for about 5 to 6 minutes. He then returned to and searched the kitchen. He came out of the house and told the other three agents to take the accused to the Police Station.
- [45] At the Baie Sainte Anne Police Station, PW2 instructed the officers at the Station to put him in a cell. The officer ascertained from PW2 why the accused was to be placed in a cell. It was when he was in the cell that he saw PW2 pull out a plastic and show it to the police officer. The accused stated that when they searched the house they never told him that they have found anything at the house. He was shown ' [t]his thing' at the Police Station. The accused, further, stated that the other three agents had not seen the plastic before; they were puzzled when the plastic was pulled out. They all came to look at it. PW2 then placed the plastic bag in his pocket and left with it.

#### Submission

- [46] The prosecution reviewed the evidence on record and submitted that there were neither material inconsistencies nor discrepancies in the evidence of PW2, PW3 and PW4, and

that cross examination had not damaged their evidence, nor did it show that any material aspect of their evidence was unreliable.

[47] The accused disputed the concept of possession as it should apply to this case. With regards to the heroin and the cannabis herbal materials, there was no challenge from the accused in relation to the laboratory analysis of them. In his submissions, counsel for the accused reviewed the evidence and submitted that cross-examination had significantly discredited the testimony of PW2, PW3, and PW4, and that, on the whole, the material aspect of their evidence did not reflect the truth of what had happened. He submitted that their evidence was fabricated. According to him, the version of the accused was consistent with the truth.

[48] The main material inconsistencies that counsel for the accused drew attention to were —

- the evidence of PW2 that the accused ran to the bathroom, while during cross examination, in the Part Heard Case, PW2 stated that the accused ran to the toilet. On this point, he pointed out that PW2 had stated, in cross-examination in the Part Heard Case, that the toilet and bathroom were not the same room. He contended that the explanation of PW2, being that the bathroom and toilet were separate, but in the same room, was a failed attempt by PW2 to explain this inconsistency;
- the evidence of PW2 that when he entered the house the accused was standing in the corridor close to the bathroom, while in the Part Heard Case, PW2 stated that the accused was standing in the bathroom and not in the corridor. He, further, pointed out that PW2, in his statement written on 16th May, 2011, stated that he and PW4 had entered the living room, and PW2 had looked in the direction of the bathroom and seen the accused in the bathroom;
- the evidence of PW2 that when he entered the house the distance between him and the accused was 2 meters, while in the Part Heard Case he stated that the distance between him and the accused was 5 meters. According to counsel, the evidence of PW2 was implausible because the distance of 2 meters or 5 meters between PW2 and

- the accused, and the time of day (around 1 pm) would not have necessitated the use of a torch by PW2. On this point, he, further, submitted that it was implausible that PW2 had used a torch at all;
- the account of facts involving PW2 and the accused in the bathroom, notably that PW2 stated that he had put his torch in his mouth in order to free his hands and secure what the accused had thrown in the toilet. He submitted that, had the accused dropped something in the toilet, PW2 would instinctively have pushed the accused aside, and used his left hand to secure the item dropped in the toilet. He laid great emphasis on the fact that PW2, PW3 and PW4 had stated in Court that the incident happened quickly and, therefore, PW2 would not have had the time to put his torch in his mouth;
  - with regards to the evidence of PW3, counsel pointed out that its aim was clearly to reinforce the evidence of PW2 and PW4. He submitted that, because the evidence of PW3 was that the incident happened quickly, it would not have been possible for PW3 to have witnessed PW2 retrieve anything from the toilet, unless PW3 had followed PW2 in the toilet and was present when the accused threw the article in the toilet. He further submitted that the evidence of PW3 that someone shouted NDEA would have caused the accused to get rid of the drugs, if, indeed, he did have the drugs;
  - With regards to the evidence of PW4, learned counsel submitted that the evidence of PW4 that he saw the accused standing in the bathroom next to the toilet is material, because a distance of 5 meters between them (PW2 and PW4) and the accused would have made it impossible for PW2 to retrieve anything from the toilet because it would have been flushed by the time he reached the toilet. It was, further, urged that there was a material discrepancy in the evidence of PW2 and PW4, because PW2 had stated that when he entered the house, the accused was standing in the corridor close to the toilet, while PW4 had stated that the accused was standing in the bathroom.

## Discussion

[49] Against that background, I now consider the two charges against the accused —

Count1

- (i) possession of a controlled drug contrary to section 6 as read with sections 15 (1) and 26 (1) (a) of the Misuse of Drugs Act as amended by Act 14 of 1994 and punishable under the second Schedule read with section 29 of the same; and

Count 2

- (ii) possession of a controlled drug contrary to section 6 as read with sections 15 (1) and 26 (1) (a) of the Misuse of Drugs Act as amended by Act 14 of 1994 and punishable under the Second Schedule read with section 29 of the same.

[50] I set down the principle relating to the concept of possession as it should apply to this case. In DPP v Brooks (1974) AC 862, I read the following —

"in the ordinary use of the word 'possession' one has in his possession whatever is, to one's own knowledge, physically in one's custody or under one's physical control."

[51] Three ingredients are required to be proven, by the prosecution, before an offence is made out under count 1 and count 2, respectively —

- (i) the item must be in the physical custody or control of the accused;
- (ii) the accused must know, or at least could reasonably have known, of the existence of the item : see Lewis (1988) 87 Cr.App.R. 270; and
- (iii) the item must be a controlled drug.

[52] As regards the heroin and the cannabis herbal materials, on count 1 and count 2, respectively, there was no challenge in relation to their laboratory analysis. It is proposed to deal with count 1 and count 2 together. I have considered the evidence and the submissions of counsels with care. It was not disputed that the accused was the only



person occupying the small house at the time of the search. The main contention of the defence was that the accused has been framed or set up by PW2, PW3 and PW4. On close inspection of the record, I note that the line of defence put intensively to PW2, PW3 and PW4 was that PW2 broke down the front door of the house. Then, PW2, PW3 and PW4 went inside the house. The accused, who was found in the kitchen, was taken outside of the house. They searched the accused outside of the house and found nothing on him. PW2 went back inside the house and, after some time, came back outside and said that the accused was being taken to the Baie Sainte Anne Police Station. PW2 confronted the accused with the exhibits at the Baie Sainte Anne Police Station. I have considered the unsworn statement of the accused and note that some aspects of it contradict his line of defence. The accused stated in his unsworn statement from the dock that he was searched in the kitchen by PW3, PW4 and another agent, and that nothing was found on him. This line of defence was neither raised, nor put to PW2, PW3 and PW4 in cross examination of the said witnesses.

[53] When I consider the evidence of the prosecution, the question arises as to the consequences of the inconsistencies and discrepancies in the evidence of PW2, PW3 and PW4, as pointed out by counsel for the accused in his evidence and submissions in Court. I bear in mind that, in criminal cases, discrepancies in the evidence of witnesses are bound to occur. The lapse of memory over time, coloured by experiences of the witnesses, may lead to inconsistencies, contradictions or embellishments: Roy Beeharry v The Republic CR SCA 28/2009 at paragraph 15. I also bear in mind that "police officers are not conferred with some kind of immunity to unreliability or to lying": Roy Beeharry v The Republic, supra.

[54] I have considered the evidence of PW2 and am satisfied that cross examination did not show that any material aspect of his evidence was unreliable as pointed out by counsel for the accused. It was clear to me that PW3 and PW4 were present at the material time, and corroborated the material aspects of the evidence of PW2. The evidence of PW3 and PW4 withstood very intense and lengthy cross examination by counsel and there were no material contradictions to undermine their evidence.

[55] PW2 stated that he broke down the door and that he and PW4 went inside the house. PW2 shone his torch in the vicinity of the bathroom and noticed the accused. The right hand of the accused was closed. The accused headed for the bathroom and threw something in the toilet and flushed it. PW2 pushed the accused aside. The water did not dispose of the item that the accused had thrown in the toilet. PW2 put his torch in his mouth and secured a clear plastic wrapping a brown substance from the toilet. PW4 confirmed the evidence of PW2 in that he saw the accused throw something in the toilet and flush it, and that because the water did not dispose of the item, PW2 was able to retrieve it. PW3 did not witness the accused throw something in the toilet, but confirmed the evidence of PW2 and PW4 in that PW2 retrieved a small clear plastic from the toilet. On opening the clear plastic, in the presence of the accused, they noticed a brownish substance, which they suspected to be heroin. Dr Purmanan, in his analysis report (exhibit P3), described the brownish 'lump' as 'a brownish substance (in humid state) wrapped in clear plastic', which to my mind was consistent with the fact that the brownish substance had been in contact with water. No reason was given by the defence to indicate that Dr. Purmanan had mistaken that fact. With regards to the element of knowledge, it is evident that the act of the accused, in flushing down the toilet an item in his possession, was an attempt to dispose of said item and proved that the accused knew that he was in possession of a controlled drug.

[56] The evidence that PW2 secured the piece of white paper from the wash basin was corroborated by PW3 and PW4. On opening the white paper in the presence of the accused, they noticed that it contained herbal materials suspected to be a controlled drug. I am satisfied that the following facts infer that the accused was in possession, and had knowledge that he was in possession, of a controlled drug —

- (i) because the accused was the only person occupying the small house at the material time;
- (ii) because the piece of white paper was lying in open view in the wash basin;
- (iii) because the accused would have the power to remove the controlled drugs from the wash basin and do with it what he would have wished;
- (iv) because of what the accused had overtly done in throwing the exhibit (clear plastic wrapping a brownish substance) in the toilet and flushing in order to dispose of it.

[57] For those aforementioned reasons, I am satisfied that the prosecution has proved beyond reasonable doubt the element of possession and knowledge against the accused on count 1 and count 2, respectively.

[58] The chain of custody of the exhibits was clearly established from the evidence of PW1 and PW2. PW1 identified the exhibits (exhibits P7 and P8) in open Court as those brought to him for re-analysis by PW2, and re-analysed by him. PW1 identified the exhibits as the same exhibits previously analysed by Dr. Purmanan. PW2 identified the brownish substance as that secured by him from the toilet and handed over by him to Dr. Purmanan for analysis and PW1 for re-analysis. PW2 identified the herbal materials in open Court as that secured from the wash basin, and handed over by him to Dr. Purmanan for analysis and PW1 for re-analysis. PW3 and PW4 identified in Court the brownish substance as that secured from the toilet. PW3 and PW4 identified in Court the herbal materials as that secured from the wash basin. This Court is satisfied, on the facts and circumstances of this case, that the chain of custody with respect to the detection, taking into custody, analysis and production in Court of the exhibits has been established beyond reasonable doubt by the prosecution.

## Decision

[59] For all the aforementioned reasons, this Court proceeds to accept the corroborated evidence of the prosecution. I reject the version of the defence.

On count 1, I am satisfied that the prosecution has proved beyond reasonable doubt the elements of a charge of possession of a controlled drug, namely heroin, against the accused. This Court finds the accused guilty of being in possession of 1.25 grams of heroin, and convicts him of same.

On count 2, I am satisfied that the prosecution has proved beyond reasonable doubt the necessary elements of a charge of possession of a controlled drug, namely cannabis

herbal materials, against the accused. This Court finds the accused guilty of being in possession of 0.09 grams of cannabis herbal materials, and convicts him of same.

Signed, dated and delivered at Ile du Port on 19 March 2014

F Robinson  
**Judge of the Supreme Court**