

IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CO 62/2010

[2014] SCSC 111

THE REPUBLIC

versus

JADEL VICTOR

Accused

Heard: 29 Sept 2011, 6, 7 February 2013, 22 March 2013, 27 September 2013.

Counsel: Chinnasamy Jayaraj, Principal State Counsel for the Republic
Basil Hoareau for the accused

Delivered: 7 March 2014

JUDGMENT

Dodin J

[1] The Accused, Jadel Victor, stands charged one count of Trafficking in 39.6 grams of cannabis herbal material contrary to section 5 read with sections 14(d) 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 Act.

[2] The particulars of offence states that on the 28th September, 2010 at Tamatave Estate, Grand Anse Praslin, the Accused was found in possession of the said drugs giving rise to

the rebuttable presumption that the Accused possessed the said drugs for the purpose of trafficking.

- [3] Kanchanjari Meghjee, a forensic analyst, testified that on the 30th September, 2010, agent Kenneth Joseph of the NDEA brought to the forensic lab at Mont Fleuri, and handed over to her an envelope containing some herbal material and a letter of request for analysis signed by ASP Winsley Francoise. After verifying the exhibit and signing the letter of request, she proceeded to conduct the analysis. The herbal material was semi-dried and consisted of leaves, stalks and seeds. The analysis confirmed the herbal material to be cannabis with a weight of 39.6 grams. After the tests she sealed the exhibit in an exhibit bag and made a report the next day. On the 4th October, agent Joseph collected the exhibit and the report. She identified the exhibit brought to Court as the same she analysed on the 30th September, 2010 except that the material is now dark brownish in colour and moisture has caused the envelope to disintegrate.
- [4] Kenneth Joseph, who was an NDEA agent in 2010, testified that on the 28th September, 2010, he was on patrol at Tamatave Estate, Praslin together with agents Masandra Botsoie, Ricky Charles and Berard Hoareau. Agent Hoareau was the team leader. At about 11.20 am they went to a house in the area and searched a group of people who were at the house but did not find anything illegal. They left the place but decided to come back and keep observation of the place. Agents Charles and Hoareau took the vehicle and went to the police station whilst the witness and agent Botsoie took a path in the bushes and went back a place close to the Accused's house for observation.
- [5] Their hiding place was behind a rock and some bushes above and behind the Accused's house. After some time they saw the Accused go to a spot about 10 meters from the house where palm leaves had been spread to dry. The accused lifted one of the leaves and passed his hand in some herbal materials which they saw under the palm leaf. He called agent Hoareau for directions and he was told to wait until he arrived because there were other people at the house. When agent Hoareau arrived, the accused had left the site.
- [6] They then went to fetch the accused and took him to the place where they had seen him lift the palm leaf and there they lifted the same leaf and showed him the herbal material.

The Accused was then arrested and taken to Baie Ste Anne Police Station on suspicion of being in possession of controlled drugs.

- [7] The drugs were kept in his possession and on the 30th September, 2010, he took it to the forensic lab for analysis. He handed it over to Mrs Meghjee together with a request for analysis and he collected the same with the report of analysis on the 4th October, 2010. Agent Joseph identified the exhibit in Court as the same that was recovered from the Accused's place under the palm leaf which the Accused had passed his hand through.
- [8] In cross-examination, agent Joseph denied that he had stayed behind alone to observe the Accused's house. He also maintained that he did not know Dick Volcere and that he was not aware if Dick Volcere or any other person was arrested on that day at the Accused's place.
- [9] Masandra Botsoie, who was an NDEA agent in 2010, testified that on the 28th September, 2010, whilst on Patrol at Tamatave Estate, Praslin, together with agents Joseph, Hoareau and Charles, they came across a group of people at the house of the Accused and they decided to search those persons but nothing illegal was found on them. Then their team leader, agent Hoareau, instructed agent Joseph and herself to conduct observation of the house and they located themselves some 10 meters from the house to watch.
- [10] Sometime later, they saw the Accused come to a leaf amongst several which were spread on the ground to dry, lifted it and they could see herbal material under it. They called agent Horeau who told them to wait but when agent Hoareau arrived the Accused had left. Then they left their hiding place and went to the leaves. Agent Hoareau went to get the Accused and brought him to the place where he had lifted the palm leaf and showed him the herbal material after which the Accused was arrested and taken to Baie Ste Anne Police Station.
- [11] In cross-examination, the witness denied that another person was arrested at the house of the Accused but later stated that she did not recall whether another person was arrested at another house or on the steps of the Accused's house. She also denied that she had left the scene and had not been observing the Accused's house.

- [12] Berard Hoareau, and NDEA agent, testified that on the 28th September, 2010, he was team leader in a patrol detail consisting of agents Joseph, Charles and himself when he received information that a drug transaction was taking place at a place known as Low Cost at Tamatave Estate, Praslin. Upon arriving there they went to the Accused's house where there were several people and searched them. Agent Charles found some drugs on a person named Dick Volcere and he was arrested and taken to Baie Ste Anne Police Station.
- [13] Before going to the police station, he instructed agents Joseph and Botsoie to stay back and maintain observation of the Accused's house. After some time he received a call from agent Joseph and as a result of the call he went to the Accused's place. There he saw the Accused up a coconut tree and asked him to come down and accompany him to the leaves behind the house where agent Joseph came out from his hiding place and showed him a leaf which when he lifted it there were herbal materials under it. The Accused was then arrested and taken to Baie Ste Anne Police Station.
- [14] In cross-examination, the witness denied that agent Botsoie also went to Baie Ste Anne Police Station with Dick Volcere. He maintained that they had all left the Accused's house and gone to where their vehicle had parked before he instructed the two agents to go back to keep observation on the house.
- [15] The Accused chose to give an unsworn statement from the dock. He stated that on the 28th September, 2010, he was sitting on the steps of his house when he saw agents Ricky Charles, Kenneth Joseph and a lady coming to his house. They informed him that they were NDEA agents and proceeded to search the persons who were there. They found nothing on him but found some stuff on Dick Volcere. They handcuffed Volcere and they gave agent Joseph the key to take Volcere to the vehicle. He followed them to the vehicle. Ricky Charles was driving and Dick Volcere was placed at the back between two agents.
- [16] Later when he was up a coconut tree someone called him to come down which he did and he was handcuffed and asked to follow them to a small house further up. There they told him that there were stuff under a palm leaf and they arrested him. He stated that the herbal material which were under the leaf were not his.

- [17] Dick Volcere testified that he knows the Accused and on the 28th September, 2010, he was sitting on the steps talking to the Accused at the Accused's and his grandmother's house. He saw 3 men and a woman come and the Accused said that they were NDEA agents. The persons also identified themselves as NDEA agents and told them that they were to conduct a search on them. They found a paper in his back pocket which had a little herbal material inside. They did not find anything on the Accused. They also searched the house of the Accused and did not find anything.
- [18] After the search, he was placed in handcuffs and 2 men and the lady took him to the road where a Terios jeep was parked whilst the other man went behind the house. One man drove the jeep and he was placed in the back seat between 2 agents and taken to Grand Anse Praslin Police Station. At the station he was placed in a cell and he does not know what happened to the Accused.
- [19] The Court went on a locus in quo where the Accused and the prosecution witnesses showed to the Court their respective movements and the places they had testified to have been at the relevant time. The Court was able to observe the various locations pointed out by the Accused and the witnesses which were referred to in their evidence.
- [20] Both counsels made lengthy submissions in support of their respective case. Learned counsel for the Republic rehearsed the evidence adduced in the case and submitted that the prosecution has proved beyond reasonable doubt that the Accused has committed the offence of trafficking as charged. He submitted that with respect to the drugs, there has been no break in the chain of custody and that the drugs produced in Court were the same that was recovered by agent Joseph at the house of the Accused.
- [21] Learned counsel submitted further that possession has been proved by the prosecution in that the evidence of the agents established that the drug drugs were found under a palm leaf very close to the Accused's house and that agent Joseph testified that they witnessed the Accused come up to that leaf and ran his hand through the herbal materials. This established the element of knowledge of the Accused that the herbal materials were under his control and he knew that the herbal materials were controlled drugs.

- [22] Learned counsel submitted that the evidence of the prosecution was not contradicted despite rigorous cross-examination of the prosecution witnesses and that their evidence was consistent and credible whilst the Accused only made a dock statement which should not be given material importance.
- [23] Learned counsel concluded that the weight of the drugs being 39.6 grams gave rise to the presumption of trafficking which was not rebutted by the Accused and hence moved the Court to find the Accused guilty as charged.
- [24] Learned counsel for the Accused submitted that the prosecution has failed to prove a case against the Accused beyond reasonable doubt and that the evidence of the 3 witnesses the prosecution relied on were full of inconsistencies, which showed that they fabricated the story to link the Accused to the drugs.
- [25] Learned counsel submitted that the defence took issue with the elements of possession which had not been proved by the prosecution since only agent Joseph said he saw the Accused running his hand through the herbal material but that the witness had lied only to attempt to link the Accused with the drugs. Learned counsel submitted that it is not disputed that the same drugs that were found under the leaf were analysed and produced in Court but the drugs did not belong to the Accused as the evidence showed that when the agents went to the Accused's house a second time, the Accused was up a coconut tree and was asked by agent Hoareau to come down, then he was handcuffed and taken to the back of the house and showed the drugs.
- [26] Learned counsel submitted that since agent Joseph's version cannot be believed and is not supported by the evidence of the other agents, there is no evidence that the Accused touched the drugs which would have then demonstrated that he had knowledge and custody of the same.
- [27] Learned counsel further submitted that agents Hoareau and Botsoie contradicted each other since agent Botsoie testified that she had to stand up to see the Accused whilst agent Joseph said he had to kneel. He submitted that agent Joseph testified that he was told not to stop the Accused because there were other persons at the house but agent

Botsoie testified that agent Joseph had a pistol and no evidence was adduced to show that there were other people at the house when the Accused was apprehended.

[28] Learned counsel for the Accused further testified that the evidence of the Accused had not been challenged and was corroborated by the evidence of Dick Volcere and both maintained that only agent Joseph remained behind whilst the 3 other agents went with Dick Volcere to the police station. He submitted that since the defence evidence was not challenged, it is deemed accepted by the prosecution. Learned counsel referred the Court to the case of Patrick Bellard v/s The Republic SCA No: 21/2010 in support of his submission.

[29] Learned counsel hence moved the Court to find that the prosecution has failed to prove the case against the Accused beyond reasonable doubt and to dismiss the charge against the Accused accordingly.

[30] Both the prosecution and the defence are not disputing the fact that drugs were found under a leaf near the house of the Accused on the 28th September, 2010 and that the same drugs were analysed by Mrs Meghjee as cannabis herbal material weighing 39.6 grams and that the drugs produced in Court as exhibit were the same that were recovered on that day. The question to be determined is whether the drugs were in the possession of the Accused and hence whether the prosecution has proved the elements of possession as required by law.

[31] The concept of possession consists of two elements; custody and knowledge as was well established in the case of DPP. V Brooks [1974] A.C. 862. A person has possession of drugs if he or she has actual physical control of the drugs such as having the drugs in his or her hand or if the drugs are on that person. A person also has possession of drugs if he or she has the power and intent to control disposition and use of the drugs. See also R v Warner (1969) 2 AC 256.

[32] According to the testimonies of agents Joseph and Botsoie, the Accused was witnessed going to the leaf where the drugs was situated, lifted up the leaf and ran his hand through the herbal materials under the leaf. The Accused however stated in his defence that after the agents had taken Dick Volcere away, he returned to the house and was up a coconut tree when he heard someone calling him. When he climbed down, he was handcuffed and taken to a small house

where there were palm leaves drying and he was told that there were stuff under a leaf and he was arrested. The testimony of Dick Volcere is not at all useful to the Court on this issue as it is common ground that by then he had already been taken to Baie Ste Anne Police Station.

[33] In the case of *Noel v Republic SLR 1992 No 41* the Court concluded that in the case where there is no exclusive access to the drugs on one's premises or where the drugs consist of a common pool which is accessible to all the occupants of the premises, all the persons would be suspects but none could be singled out as having possession. In the actual case, the evidence adduced is different as there is evidence that observations of the Accused visiting the hiding place and accessing the drugs were made by agents Joseph and Botsoie.

[34] The defence had indeed attempted it's best to get the prosecution witnesses to admit that only agent Joseph remained to conduct observation but the evidence of the prosecution witnesses could not be shaken in that respect. I note the small discrepancies in the accounts of agents Botsoie and Joseph, notably, that one stood to observe the Accused whilst the other knelt but I do not find such this variation to be serious or fatal to their respective testimonies.

[35] Having observed the witnesses testify, I find the evidence of agents Joseph, Botsoie and Hoareau to be credible and truthful. The *locus in quo* revealed that the version of events testified to by the agents were most likely truthful. The Accused's version of events at the locus in quo did not match his dock statement. According to the Accused's dock statement, sometime after he had left the agents vehicle he went and climbed a coconut tree from where he was asked to come down and then he accompanied agent Hoareau to the place where the drugs were hidden. But at the locus in quo, the Accused attempted to show that he was at or close to the spot where the agents had testified that they had hidden before climbing the coconut tree. I do not believe that the Accused had simply failed to state that important fact in his dock statement and that it was more likely that the Accused had not been aware of the agent's whereabouts and only attempted to state this new location after the agents had shown the Court where they were hiding. In fact, I find the Accused's dock statement to be sketchy and lacked credibility and I reject his statement accordingly.

[36] I accept entirely the evidence of the prosecution witnesses which I find to be cogent, credible and reliable. I find that the Accused alone had been to the palm leaves where the drugs were hidden and the fact that he knew exactly which one of the leaves to lift up to shuffle the drying herbal

material showed that he had exclusive control of the drugs and he knew that the herbal materials were drugs as the same had been hidden from view under a palm leaf.

[37] Consequently, I am satisfied that the prosecution has prove its case against the Accused beyond reasonable doubt and therefore I find the Accused guilty of the offence of trafficking in 39.6 grams of cannabis herbal material contrary to section 5 read with sections 14(d) and 26(1)(a) of the Misuse of Drugs Act as amended by Act 14 of 1994 and I convict the Accused accordingly.

Appeal against conviction, 30 working days.

Signed, dated and delivered at Ile du Port on 7 March 2014

G Dodin
Judge of the Supreme Court