IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CO 12/2015

[2015] SCSC 491

THE REPUBLIC

versus

MERVIN MICHEL RENAUD
Accused

Heard: 12 October 2015

Counsel: Mr. Thachet, State Counsel for the Republic
Mr. Caesar for the accused

Delivered: 23 October 2015

RULING

Akiiki-Kiiza J

[1] The accused person is charged with a single count of *Trafficking in a Controlled Drug Contra Section 5 of the Misused of Drugs Act read with Section 14 (1) (c) (ii) and Section 26 (1) (a) of the same Act and punishable under Section 29 read with the Second Schedule to the same Act.*

[2] It is alleged that he, on the 6/9/14 at Roche Caiman was Trafficking in a Controlled Drug by virtue of having been found in possession of a substance containing Diamorphine (Heroin) having a net weight of 9.8 grams with 33% of purity and having total heroin

content of 3.2 grams, which gives rise to a rebuttable presumption of having possessed the purpose of trafficking.

[3] The prosecution called a total of 6 witnesses, 4 of whom were NDEA Agents and other 2 were relatives of the accused person.

[4] After closing the case for the prosecution, Mr. Caesar, the learned counsel for the accused submitted, for no case to answer in respect of the accused person. Hence this ruling.

[5] The law regarding a successful submission of no case to answer was set out in an English **PRACTICE NOTE** reported in **[1962] 1AER 448** as follows:-

1) *When there has been no evidence to prove an essential element in the alleged offence, or;*
2) *When the evidence adduced by the prosecution has been so discredited as a result of cross examination or is so manifestly unreliable, that no reasonable tribunal could safely convict upon it.*

The above was adopted by this court, per SAUZIER, J, in the case of **R VS STEVEN [1971] SLR 137**. Also see the East African Court of Appeal case of **RAMANALAL BHATT VS R [1957] EA 334**.

[6] Apart from the above 2 situation, a tribunal should not, in general, be called upon to reach a decision as to the conviction or acquittal until the whole of the evidence which either side wishes to tender in has been so tendered.

[7] At this stage the word to use is *"might"* convict on the evidence adduced by the prosecution. If it might convict (not yet beyond reasonable doubt) then the court should find that there is a *prima facie* case made out by the prosecution and call the accused to make his defence.

[8] Having said that, the learned counsel for the accused based his submission mainly on the first limb laid down in the **PRACTICE NOTE** and **R VS STEVEN** cited above. That is to say that the elements of the offence charged by the prosecution have not been established by the prosecution evidence.

[9] The essential elements of Trafficking in a Controlled Drug *Contra Section 5 14 (1) (c) (ii) and Section 26 (1) (a) of the Misuse of Drugs Act*, include the following:-

i. There must have been possession of the drugs.
ii. The amount must be more than 2 grams.

[10] As to what amounts to possession, this has been explained by the courts. In the case of **LIVETTE ASSARY VS REPUBLIC SCA CRIMINAL APPEAL 18/10**, the court held that in a case of possession of a Controlled Drug;

1. *The court must be satisfied that the accused possessed the Controlled Drug and has knowledge of it.*
2. *Possession of a Controlled Drug may be established through a continuous act that involves either physical custody or the exercise of control.*

In the ordinary use of the word *"possession"* it connotes one has in his possession whatever is, to their own knowledge physically in their custody or under their physical control **(See Republic V Marengo SSC 11/2003).**

[11] In the case of **DARREL CHOISY VS THE REPUBLIC SCA 11/09** the Court of Appeal per Fernando J. A held to the effect that, the possession of drug must be **exclusively** in the custody of the accused. In other words, there must be evidence on the record to show that the accused was in exclusive possession of the drugs.

[12] The burden to prove this was on the prosecution . The learned Justice of Appeal had the following to say:-

".....the burden was on the prosecution whose duty it was to prove exclusive possession on the part of the appellant to exclude the possibility of any other person claimed was found in the wardrobe"

In our case, the drugs claimed by the police found in the box, must be proved to have been in the room used by the accused exclusively but with no any other person.

Honourable Justice Fernando J. A, went further and stated that:

" I am of a view that the prosecution is obliged to establish by cogent and reliable evidence that the appellant was in exclusive and conscious possession of the dangerous drug in order to sustain a conviction. Exclusive procession is the *factum* ***which is required to be proved beyond reasonable doubt. Possession implies dominion and consciousness in the mind of the person having dominion over an object that he has it and that he can exercise it. Possession must be conscious possession and not merely the physical presence of the accused in the proximity to the object unless where the presumptions under the misuse of Drugs Act was to apply. The fundamental basis of the concept of exclusive possession requires the exclusion of third parties"***

[13] In the instant case, there is no physical evidence to show that the 9.8 grams of drug substance with a purity of 3.2 grams of heroin was found on him or with him. It was allegedly recovered by the NDEA Agents in his absence from a room sometimes used by the accused. The room was also in PW6's house.

[14] The next question is was the drug allegedly found in the box (exhibit PE10) and in the room (upstairs) in exclusive possession of the accused person? In other words did the accused use the room upstairs alone? The evidence from the prosecution shows that the

house belonged to PW6, the accused' s grandfather. The prosecution evidence also shows that the box, according to NDEA Agent was recovered from one of the rooms upstairs in PW6's house. The box was recovered in accused' s absence. Both PW6 and PW4, say that the accused uses the room upstairs, on part time basis, 2 or 3 times a week and mainly for exercising. According to PW4, he sometimes also uses the same room to exercise. Both PW6 & PW4 said they did not know about the box (PE 10) before the NDEA came to the house on the material day and claimed to have recovered it form the room. It was recovered in their absence.

[15] Applying **Darrel Choisy** case to the above circumstance, it is clear that the accused did not have exclusive procession or use of the room where the drugs were allegedly found by the NDEA Agents. In the case of **R V Andre Hoareau (1984) SLR 18** it was held that, mere occupation of the house by the accused did not lead to the inference that the accused had knowledge of the presence of the drugs in the house and the prosecution had to exclude any alternative possibility that might point to the accused person's innocence.

[16] It is my considered view that the prosecution has not adduced cogent evidence to prove that the accused had exclusive use of the room where the drugs were allegedly found by the NDEA Agents as the same room was admittedly also being used by PW4 for exercise purposes. Also there is no proof that he had knowledge of the presence of the drugs in box (PE 10) found in the room by the NDEA Agents.

[17] In the circumstances it is my finding that the essential ingredient of possession of the drugs in the box (PE10) has not been established by the prosecution evidence. I find that there is no *prima facie* case made out against the accused sufficient enough for the court to call upon him to make his defence. The case is dismissed under *Section 183* of the

Criminal Procedure Code under Article 19 (2) (a) of the Constitution. He is accordingly acquitted.

Signed, dated and delivered at Ile du Port on 23/10/15

D Akiiki-Kiiza

Judge of the Supreme Court