

**IN THE SUPREME COURT OF SEYCHELLES**

**Criminal Side: CO 44/2014**

**[2016] SCSC**

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**THE REPUBLIC**

versus

**BARNSLEY ADRIENNE BACCO**  
1<sup>st</sup> Accused  
**TERRENCE SELWYN LAWRENCE**  
2<sup>nd</sup> Accused

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Heard: 28, 29 Sept, 10 Nov, 2015, 14, 27, 29 Jan 2016

Counsel: Kumar, State Counsel for the Republic  
J. Camille for the 1st accused  
A. Juliette for 2<sup>nd</sup> accused.

Delivered: 26 February 2016

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**JUDGMENT**

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**Dodin J.**

[1] The accused persons stand charged as follows:

***Statement of offence***

*Trafficking in a controlled drug contrary to section 5 read with 14(1)(e) and section 26(1)(a) of the Misuse of Drugs Act CAP 133 and read with section 23 of the Penal Code punishable under section 29(1) of the Misuse of Drugs Act CAP 133 and the Second Schedule referred thereto in the said Act.*

### ***Particulars of offence***

*Barnsley Adrienne Bacco and Terrence Selwyn Lawrence of Rochon Mahe, on the 10th August, 2014 at Perseverence, Mahe with common intention were found in possession of controlled drugs, namely 373.0 grams of Cannabis Herbal materials which gives rise to the rebuttable presumption of having possessed the said controlled drugs for the purposes of trafficking.*

- [2] The forensic analyst Jemmy Bouzin testified that on the 11<sup>th</sup> August, 2014, at around 1330 hours, he received from agent Colin Naiken a brown envelope and a letter of request requesting him to analyse the herbal material contained in the envelope. After completing the formalities, he proceeded to conduct a physical examination followed by chemical analysis of the substance in the envelope. His conclusion which he set out in the certificate of analysis was that the herbal material was cannabis with a total weight of 373 grams. The herbal material was sealed and returned to agent Naiken on the 20<sup>th</sup> August, 2014. The herbal material and certificate of analysis were admitted as exhibits.
- [3] Colin Naiken testified that on the 10<sup>th</sup> August, 2014, he was working as an NDEA agent. He was not on duty however on that day. He received information from an informant that a drug transaction was to take place at Ile Perseverence at around 8 pm that evening. He passed the information to agent Marcel Naiken who informed other agents and asked him to meet them in the International Conference Centre of Seychelles (ICCS) car park. He went there at around 7 pm and met agents Marcel Naiken, Mario Nibourette and Manuel Marie. They proceeded to Ile Perseverence, parked in a hidden place near a roundabout and kept observation.
- [4] He testified that he saw a dark brown Hyundai come and parked close to where the fishing nets are placed. A man got out of the driver's door. Agent Marcel Naiken identified himself as an NDEA agent and that person ran away. Agents Marcel Naiken and Marie chased that man and he and agent Nibourette went to the car. Using torchlight, they saw a person later identified as Terrence Lawrence, the 2<sup>nd</sup> accused, sitting on the rear passenger seat and there was a plastic bag on the rear seat behind the driver's seat.

- [5] He testified that he picked up the plastic bag and told the person there to get out and place his hands on the car. He did as he was told and at the same time agents Marcel Naiken and Manuel Marie returned with the other man now identified as Barnsley Bacco, the 1<sup>st</sup> accused. He opened the plastic bag in front of the two accused persons and inside he found 2 clear plastics containing 6 packets wrapped in cling film containing herbal material which he suspected to be drugs. He informed the two accused that they were being arrested for the offence of possession of drugs. He kept the drugs in his possession and they proceeded with the 2 accused persons to the NDEA station for formalities.
- [6] On the 11<sup>th</sup> August, 2014, he took the plastic bags and their contents which had been placed in a brown evidence envelope together with a letter of request to the forensic laboratory and handed over to Mr Bouzin for analysis. On the 20<sup>th</sup> August, 2014 he went to the forensic lab and collected the exhibits together with a certificate of analysis issued by Mr Bouzin which he handed over to the exhibit officer for safekeeping until the same were returned to him to take to Court. He identified the exhibits produced in Court by Mr Bouzin as the same that were recovered from the car driven by the 1<sup>st</sup> accused on the day of the arrest but stated that there were 8 packets instead of 6 as he had maintained previously.
- [7] In cross examination, the witness agreed that he had ceased working as an NDEA agent for almost 1 year and that all the other agents who took part in the operation were off duty at the time. Agent Marcel Naiken was in charge of the operation. The witness maintained that he never said and was not aware whether sanction was obtained from the NDEA for the operation. He denied that the informant was in the car driven by the 1<sup>st</sup> accused but admitted that the informant was in the car with the NDEA agents and stayed in the NDEA car during the operation but denied that the informant was one Francisco Zialor.
- [8] The witness admitted that gunshots were fired and he believed 2 gunshots were fired but denied that the 1<sup>st</sup> accused was beaten. He admitted that the 1<sup>st</sup> accused was restrained when he was brought to the car and that agent Marcel Naiken said that he was resisting arrest. He admitted that the 1<sup>st</sup> accused was taken to hospital that night but he did not recall if it was himself who took the 1<sup>st</sup> accused to hospital. He further admitted that the

two accused were subjected to body searches and the car was also searched but nothing illegal was found. He agreed that no fingerprint was taken for analysis to determine whether any of the 2 accused persons handled the exhibit.

[9] In re-examination the witness stated that he made a mistake because he was under pressure and stated before that there were 6 packets when in fact there were 8.

[10] Manuel Marie testified that he has been an NDEA agent for 7 years. On the 10<sup>th</sup> August 2014 he was off duty and had come to buy food in town when he received a call from agent Colin Naiken informing him that he had information that a drug transaction was about to take place. He went and met Colin Naiken at the ICCS car park where there were also agents Marcel Naiken, and Manuel Marie. They got into an NDEA vehicle and went to Ile Perseverance arriving there at around 8pm. They hid the vehicle and waited. At around 10 past 8 a vehicle came and parked close to where they were and the driver now identified as the 1<sup>st</sup> accused, got out and seemed to go to the bush to pass water. Agent Naiken and the witness went towards that person but the person ran away as they approached him. They ran after him and caught him but he kept struggling and they had to call for the assistance of Mario Nibourette. Marcel Naiken fired a warning shot from his pistol and then they pressed the man down and Marcel Naiken put handcuffs on him and then he was brought to the car.

[11] When he was approaching the car he saw another person now identified as the 2<sup>nd</sup> accused disembarking from the car. Colin Naiken searched the car then showed them a plastic bag containing several small packets wrapped in cling film. There were 8 packets in all which were opened and shown to the two accused. The plastic was opened on the front passenger seat. Colin Naiken arrested both accused persons for the offence of possession of controlled drugs and then they were taken to the NDEA headquarters.

[12] In cross-examination the witness admitted that he made a mistake in his statement which stated the incident happened on the 11<sup>th</sup> August 2014 and that he was off duty on the 11<sup>th</sup> August, 2014. He further stated that he received the call when he was near Barrel discotheque and he was told to proceed to ICCS car park and then arrangement for the operation was made in the SPTC car park. He further admitted that there was an informant who accompanied them on the operation but he does not know the name of the

informant who communicated with only Colin Naiken. He maintained that when the man got out and went to pass water, Marcel Naiken called out NDEA whilst approaching the man.

- [13] In further cross-examination by Mr Juliette, he maintained that he did not know if the other agents were off duty. He maintained that before going on the mission he was told that Barnsley Bacco and Terrence Lawrence were going to do a drug transaction at Ile Perseverence. When confronted with his statement he admitted that he was told that Barnsley Bacco was going to do a transaction at Ile Perseverence and not Terrence Lawrence. He maintained that the 1<sup>st</sup> accused was subdued and arrested by Himself, Marcel Naiken and Mario Nibourette and that Colin Naiken remained at the car.
- [14] Ricky Jeannevole testified that he is the managing director of E-Eye cars and that he rented a car to Barnsley Bacco on the 8<sup>th</sup> August 2014 and he was supposed to return it on the 11<sup>th</sup> August 2014. Mr Bacco is a client of the company and had rented cars from the company many times before.
- [15] Marcel Naiken testified that he is an NDEA agent and that on the 10<sup>th</sup> August, 2014 he was on duty when he received information that a drug transaction was to take place at Ile Perseverence. The information was received by Colin Naiken. A team was formed consisting of himself, Mario Nibourette, Manuel Marie and Colin Naiken, and they met in the Maison Du Peuple car park and proceeded to Ile Perseverence where they hid the car and waited until a brown car came and as they approached the car he saw Barnsley Bacco, the 1<sup>st</sup> accused, get out and ran away. He called out to him to stop but he continued running so he fired a warning shot in the air using his pistol. The 1<sup>st</sup> accused dropped to the ground.
- [16] He testified that when he and Manuel Marie reached the 1<sup>st</sup> accused, the 1<sup>st</sup> accused fought them and they only managed to handcuff him after a struggle. They took the 1<sup>st</sup> accused to the car where he found another man and then Colin Naiken introduced them as NDEA agent and informed the 2 persons that they were going to search the car. Colin Naiken then searched the car and inside he found 2 clear plastics containing 8 wrappings in which there were herbal materials suspected to be drugs. They were opened and shown

to the 2 accused persons. Other vehicles from the NDEA office then arrived on the scene and the 2 accused persons were taken to the NDEA headquarters.

- [17] In cross-examination he maintained that he was on duty that day and he does not recall if Mario Nibourette was on duty but Colin Naiken and Manuel Marie were not on duty. He maintained that he knew the 2<sup>nd</sup> accused as Terrence Lesperence and not Terrence Lawrence. He stated that he did not observe the search of the car and that the 2<sup>nd</sup> accused was only searched at the NDEA office. He maintained that Mario Nibourette remained at the car with Colin Naiken throughout. He denied that there was any informant with them. He denied that he beat up the 1<sup>st</sup> accused and pressed his face into the ground. He maintained that he did not see where the drugs were recovered from the car.
- [18] At the close of the case for the Prosecution, both accused persons opted to remain silent and did not call any witness. I warn myself that the right to silence is a constitutional right accorded to them and no adverse inference can be drawn from the exercise of such right.
- [19] Learned counsel for the prosecution submitted that the prosecution has proved beyond reasonable doubt that the two accused persons were in the car at Ile Perseverance and that drugs were recovered from the said car and therefore the drug were under the control of both accused persons. Therefore it has been established that both accused had common intention to traffic in the said drugs as they have not rebutted the presumption that they possessed the said drugs for the purpose of trafficking.
- [20] Learned counsel admitted that the witnesses had made some errors in their respective testimonies and there are some small contradictions with regards to their respective versions of events but those small mistakes, some of which were corrected, are not fatal to the case. Learned counsel therefore moved the Court to find both accused persons guilty of the offence charged and to convict them accordingly.
- [21] Learned counsel for the 1<sup>st</sup> accused submitted that the prosecution has failed to prove the charge against the 1<sup>st</sup> accused beyond reasonable doubt considering the several inconsistencies in the testimonies of the 3 principal prosecution witnesses who not only contradicted themselves in their own testimonies but also contradicted each other.

- [22] Learned counsel pointed out that all 3 NDEA witnesses gave different locations where they allegedly assembled to go on the operation. They were all off duty although Marcel Naiken maintained that he was on duty. If he was on duty why was there no direction from the NDEA authorising the operation. He submitted that Manuel Marie and Colin Naiken eventually admitted that an informant accompanied them on the operation but that Marcel Naiken maintained that no informant accompanied them.
- [23] Learned counsel further submitted that it is logical for the 1<sup>st</sup> accused who got out to pee to run when he saw two men in civilian clothes running towards him in the dark. Colin Naiken stated that maybe 2 gunshots were fired but Manuel Marie and Marcel Naiken said only one gunshot was fired.
- [24] Learned counsel further submitted that the drugs were allegedly found on the back seat of the car behind that driver's seat and the 2<sup>nd</sup> accused was on the back seat on the passenger's side. The 1<sup>st</sup> accused must have been driving the car and this is evidence that there was someone else in the front passenger seat and the witnesses are not telling the truth and it is possible that neither accused knew that that package contained drugs.
- [25] Learned counsel moved the Court to find that the prosecution's case is so weak and it cannot be concluded beyond reasonable doubt that the 1<sup>st</sup> accused who was just the driver of the car and did not know if there was anything on the rear seat, committed the offence as charged. He moved the Court to find the 1<sup>st</sup> accused not guilty and to acquit him accordingly.
- [26] Learned counsel for the 2<sup>nd</sup> accused adopted the submission made on behalf of the 1<sup>st</sup> accused and added that the 2<sup>nd</sup> accused was an innocent passenger in a car driven by the 1<sup>st</sup> accused. Even if there was a package on the rear seat, he had no knowledge of its content and therefore without knowledge he cannot be held to have possession of the same.
- [27] Learned counsel hence moved the Court to find that the case against the 2<sup>nd</sup> accused has not been proved beyond reasonable doubt and therefore acquit the 2<sup>nd</sup> accused accordingly.

- [28] In this case both accused persons have been charged with trafficking by reason of having the said drugs in their possession and hence the presumption of trafficking based on the amount of drugs in question being 373 grams of cannabis herbal material. It is material fact that neither accused had the drug on his person and that the package was allegedly lying on the rear passenger seat behind the driver's seat. None of the accused persons admitted that the drug was his.
- [29] The concept of possession consists of two elements; custody and knowledge as was 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 the disposition and use of the drugs. See the case of R v Warner (1969) 2 AC 256. A person must have exclusive access to the place where the drugs are to the exclusion of all others for the element of possession to be established.
- [30] 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 drug consists 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. The same principle applies to drug found in a vehicle with several persons but not in the exclusive possession of one person although if the drug was open to view by all the occupants of the vehicle then it can be construed that they all had knowledge of the same and the concept of common intention would apply.
- [31] In this case the 2 accused persons did not have the drug on their person. The 1<sup>st</sup> accused was not in the vehicle when the drug was recovered and in fact even if it is not contested that he was the driver of the vehicle, according to Colin Naiken he was not even near the vehicle when the search was conducted and the package was found. This of course contradicts the version of Marcel Naiken who testified that the search was conducted after the 1<sup>st</sup> accused was brought to the car but then also Marcel Naiken admitted in cross-examination that he did not witness the search.



- [32] The 2<sup>nd</sup> accused was in the car and the package was on the rear passenger seat on the driver's side. The prosecution must in such circumstances prove that the 2<sup>nd</sup> accused was not a mere passenger but a participant in the transaction. It cannot be presumed that a passenger of a vehicle must know the content of any package found in the vehicle and it can be reasonably concluded that it is not even his business to know unless the prosecution can prove otherwise. In other words, merely being in close proximity to a drug is not enough to prove constructive possession or common intention.
- [33] It is also possible that even if a person has knowledge that another person was carrying drugs or was conducting a drug transaction, knowledge alone is not sufficient to establish guilt as the person must also have some degree of control over and claim to the drugs. In the case of Solway v R (1984) 11 A Crim R 449 a guest at a party left marijuana in a bathroom cupboard. During a raid some time later, a resident of the house told police that he knew the drugs were there and that he had intended to dump them. He was found not guilty of possession because he had laid no claim to the drugs and had exercised no control over them.
- [34] In this case, there were some material discrepancies in the testimonies of the material witnesses. Manuel Marie and Colin Naiken admitted that the informant accompanied them on the operation whilst Marcel Naiken maintained that there was no informant with them. Manuel Marie testified that Mario Nibourette assisted them to subdue the 1<sup>st</sup> accused leaving Colin Naiken alone at the car with the 2<sup>nd</sup> accused who was seated in the car whilst Marcel Naiken and Colin Naiken maintained that Mario Nibourette was always at the car with Colin Naiken. All 3 witnesses gave a different venue at which they assembled to plan the operation. According to Marcel Naiken, the 1<sup>st</sup> accused got out of the car and ran but according to Manuel Marie, the 1<sup>st</sup> accused got out and went for a pee and according to Colin Naiken and Manuel Marie the 1<sup>st</sup> accused only started to run when the agents approached him and called out that they were NDEA agents. This also contradicts Marcel Naiken's testimony that Colin Naiken only introduced them as NDEA agents after the 1<sup>st</sup> accused had been subdued, handcuffed and taken to the car.

[35] The principle of proof 'beyond reasonable doubt' as is applicable in law is the same in most Commonwealth jurisdiction and expressed in the case of Woolmington v DPP [1935] UKHL 1 by Viscount Sankey in his "Golden thread" statement:

*"Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."*

[36] The standard that must be met by the prosecution's evidence in a criminal prosecution is that no other logical explanation can be derived from the facts except that the accused committed the crime, thereby overcoming the presumption that a person is innocent until proven guilty. In this case, the prosecution must prove beyond reasonable doubt that the 2 accused persons knew that the package was in the car and that it contained controlled drugs and that the both had some degree of control over the same and claim of possession over it.

[37] In this case even without considering the various contradictions in the evidence of the prosecution, there is still difficulty in determining whether either or both of the accused persons had all the required *actus reus* and *mens rea* to establish possession and hence the presumption of trafficking as required by law. When there is real doubt as to any material issue which is fatal to any element of the offence, such doubt must be interpreted in favour of the accused persons.

[38] In the case of R v Starr [2000] 2 SCR 144 [Canada] the trial judge stated following which is also true to our jurisdiction:

*"It is rarely possible to prove anything with absolute certainty and so the burden of proof on the Crown is only to prove the guilt of the accused beyond reasonable doubt. What, then, is proof beyond a reasonable doubt?"*

*The words "reasonable doubt" are used in their everyday, ordinary sense and not as a legal term having some special connotation. The words have no magic meaning that is peculiar to the law. A reasonable doubt is an honest, fair doubt, based upon reason and common sense. It is a real doubt, not an imaginary or frivolous one resting on speculation or guess rather than upon the evidence you heard in this courtroom.*

*So you can see, the words "reasonable doubt" are ordinary words we use in our everyday language. So if you can say, I am satisfied beyond a reasonable doubt, the Crown has met the onus upon it. If you cannot say those words -- if you cannot say, I am satisfied beyond a reasonable doubt, the Crown has not met the onus on it, and the accused is entitled to have your doubt resolved in his favor."*

- [39] The contradictions in this case are serious and they put the credibility of the witnesses in question and raise serious doubts as to their veracity. It is of course almost unheard of for witnesses to give exactly the same testimonies even when they observe the same events. Each may understand or interpret the even from their own perspectives and understandably there would be minor inconsistencies which can be explained away and which would not give rise to reasonable doubt. In this case however when these inconsistencies are considered alongside the fact that the package was allegedly lying on the seat of the car, and there is no evidence as to who placed it there and no evidence that either accused handled the package at any time there is serious doubt as to whether either of the 2 accused had the required level of access and control or even knowledge of the package and its content.
- [40] Considering the serious nature of the contradictions in this case and the lack of evidence clearly linking either accused to the package and its content as being exclusively theirs I find that the case against both accused persons has not been proved to the satisfaction of the Court and hence not proved beyond reasonable doubt by the prosecution.
- [41] Consequently I find both accused persons not guilty of the charge of trafficking of a controlled drug and both accused persons are acquitted accordingly.

Signed, dated and delivered at Ile du Port on 26 February, 2016.

G Dodin  
**Judge of the Supreme Court**