

**IN THE SUPREME COURT OF SEYCHELLES**

**Criminal Side: CO57/2014**

**[2016] SCSC458**

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**THE REPUBLIC**

versus

**GERVE JEROME**

Accused

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Heard: 5, 6, 20 November, 2015, 12 February 2016.

Counsel: G. Thachett, State Counsel for the Republic  
N. Gabriel for the accused

Delivered: 1 July 2016

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**RULING**

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Dodin J

**[1]** Learned counsel for the accused moved the Court to rule that the accused has no case to answer on the charge of trafficking in 13.79grams of heroin (diamorphine) contrary to section 5 read with section14(c)(ii) of the Misuse of Drugs Act.

**[2]** Learned counsel submitted that the submission is based on 2 grounds, namely;

- a.** That there has been no evidence to prove an essential element of the offence; and
- b.** That the evidence of the prosecution has been so discredited or so manifestly

unreliable that no reasonable Court could safely convict on it.

- [3] Learned counsel relied on the cases of *R v Steven SLR 9 of 1971 (and) R v Olsen 1973 SLR 189* in support of his submission.
- [4] Learned counsel mainly focused on the evidence of NDEA agents Mervyn Larue and Jacques Tirant who were the two agents at the scene and who arrested the accused. Learned counsel submitted that the two agents gave conflicting accounts of what they saw on the 15<sup>th</sup> July, 2014. Learned counsel submitted that agent Larue testified that he saw one object being thrown down by the accused whilst agent Tirant testified that he saw the accused drop 3 pieces of plastic and he collected and seized 3 pieces of red plastic from the same site, a tree trunk, where agent Larue and himself had seen the objects thrown.
- [5] Learned counsel submitted that agent Larue further testified that he was unable to recall whether the accused was read his rights under the Constitution and he could not explain why there were three plastic bags when he had only seen one object being thrown down by the accused. Learned counsel admitted that the accused stated in his statement that he saw agent Larue and not agent Tirant pick up one plastic which he opened and not agent Tirant who did that.
- [6] Learned counsel hence concluded that the evidence of the two main witnesses have been so discredited that no reasonable Court or tribunal could safely convict on it. He therefore moved the Court to rule that there is no case to answer and to acquit the accused accordingly.
- [7] Learned counsel for the Republic submitted that it is admitted that agent Tirant testified that he saw the accused drop 3 pieces of red plastic whilst agent Larue in cross-examination stated that the accused was seen dropping one object but maintained that he witnesses agent Tirant pick up 3 objects. Learned counsel submitted that this is a minor discrepancy as to the number of items collected which can be discarded by the Court and other than this small discrepancy, the evidence of all the witnesses was cogent, consistent and uncontroverted which established a strong case against the accused when all the evidence is considered.

[8] Learned counsel submitted that the prosecution has established a prima facie case against the accused by establishing his identity which is not in dispute. He was seen throwing the objects to the ground which established that he had physical possession of the same and that the contents of the plastics were shown to the accused, then sent for analysis which established that the plastics contained 13.79 grams of powder containing 26% of pure heroin (diamorphine) a net weight of 3.58grams which gives rise to the rebuttable presumption that he had the same for the purpose of trafficking.

[9] Learned counsel referred the Court to the following authorities in support of his submission; Archbold, Criminal pleading, Evidence and Practice, 2002, paragraphs 26-54. DPP v Brooks [1974]A.C.826, Lewis [1988] Crim App. R 270, R v Steven [1971] SLR N0 9 and David Sopha & Anr v Rep SCA No 2 of 1991.

[10] Learned counsel hence moved the Court to find that the prosecution has proved all the elements of the offence as charged and that a prima facie case has been established against the accused, hence the submission of no case on the grounds advanced cannot succeed and should be dismissed.

[11] This submission of no case to answer is grounded on only one issue arising out of the testimonies of agents Larue and Tirant. In his testimony, agent Larue stated:

*“When we reached Anse Royale next to Kaz Kreol we saw a few men standing when we looked at the direction. We approached them and saw a man that took his right hand and threw away an object. We stopped. Agent Tirant got out of the car and agent Tirant went to look at what that man has thrown away and he saw three pieces of red plastic. We found out that it was a substance that we suspected it was heroin and That man was arrested...”*

[12] Agent Tirant stated this in his testimony:

*“While we were on patrol near where they sell fish, the fish market near Shell at Anse Royale at 1510 hours, we were on mobile patrol. We were entering on the beach I saw a group of people near a coconut trunk....While I was approaching them I saw one of the guys putting a red plastic using his right hand behind the coconut trunk. I went straight to him and I identified myself as an NDEA agent and I picked up the red plastic where he had put behind.”*

[13] However further in examination in chief he was asked the following leading questions:

*“Q- So you saw him dropping three plastics?”*

*A- Yes*

*Q- Whether you picked all the three?*

*A- I picked up three plastic.*

*Intervention by the learned counsel for the accused; My Lord my friend stands to be corrected. He never said three plastics.*

*Q- (Pros) Can we clarify how many plastic?*

*A- There were three. “*

**[14]** It would be enlightening also at this stage to look at the statement under caution made by the accused:

*“Today Tuesday 15<sup>th</sup> July 2014, it was in the afternoon. I do not recall the time, we were drinking at Anse Royale near Kaz Kreol at the beach. There were 5 of us. NDEA came all of a sudden one amongst them by the name of Mervin Larue saw a small red plastic near where we were standing. They searched everywhere in the sand and they told us to get in the jeep after that we were brought to the NDEA station.”*

**[15]** In cross-examination, the witness confirmed that he had seen the accused drop three pieces of red plastic and that he stated the same in his statement. The question at this stage is whether this discrepancy in evidence is fatal to the charge in itself or whether it simply goes to the credibility and the weight the Court would give to the evidence of a particular witness.

**[16]** In determining whether the accused has a case to answer the Court has to determine the following issues so as to determine whether the accused has a case to answer;

- 1** Whether all the elements of the offence have been proved to the extent that a prima facie case has been established against the accused; and if so,
- 2** when considering the evidence as a whole would it be sufficiently strong that a reasonable Court would convict on the same evidence.

**[17]** In order to do so the Court must make an assessment of the evidence as a whole and not just focus on the credibility of individual witnesses or on evidential inconsistencies between the witnesses.

- [18] Where the Prosecution's evidence fails to address a particular element of the offence at all, then no conviction could possibly be reached and the Court should allow the application of no case to succeed. Where there is some evidence to show that the accused committed or must have committed the offence but for some reason such evidence seems unconvincing, the matter is better left for the end of the trial where the evidence would be weighed and the Court would reach a verdict after assessing the witnesses' credibility together with all available evidence.
- [19] In addition to the above, where the evidence available to be considered has been so compromised by the defence or by serious inconsistencies in the prosecution's testimonies, the Court is entitled to consider whether the evidence adduced taken as its highest would not properly secure a conviction. If the Court determines that in such a circumstance a conviction could not be secured, the submission of no case must also succeed.
- [20] In the case of R v Galbraith [1981] 1 WLR 1039 Lord Lane C.J. stated:

*“How then should a judge approach a submission of 'no case'? If there has been no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence. Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness' reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury ... There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge.”*

See also the cases of Green v. R [1972] No 6, R v. Stiven [1971] No 9 and R v. Olsen [1973] No 5.

[21] It is obvious that this submission is based on the credibility of two witnesses who differed on the number of pieces of red plastic that was placed in the tree trunk and on the fact that one witness at first said one piece and then admitted that he had initially recorded 3 pieces in his statement. The other issue of the accused not having been read his rights before he was arrested would certainly not give rise to a finding of no case to answer unless the consequences of him not having been read his rights led to a confession upon which the prosecution is relying upon to secure a conviction and without which a conviction cannot possibly be arrived at. This is clearly not the case here as there was no admission by the accused and he was properly cautioned and read his right by agent Lisa Larue.

[22] Consequently, the accused is asking the court to make a finding based on the credibility of two of the prosecution's witnesses, agents Tirant and Larue to determine whether the accused has a case to answer. As stated above, it is trite law that where there is some evidence to show that the accused committed or must have committed the offence but for some reason such evidence seems unconvincing, the matter is better left for the end of the trial where the evidence would be weighed and the Court would reach a verdict after assessing the witnesses' credibility together with all available evidence.

[23] This submission of no case to answer is therefore not properly grounded on sound principles of law. Consequently, it cannot succeed for the very reasons that it does not meet the criteria established for a submission of no case to succeed. This submission is therefore dismissed accordingly and the accused is called upon to make his defence.

Signed, dated and delivered at Ile du Port on 1 July 2016

G Dodin  
**Judge of the Supreme Court**