

IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CO 35/2011

[2016] SCSC 583

THE REPUBLIC

versus

NICOL PADAYACHY

Accused

Heard: 25, 28 May, 22 Aug 2012, 13, 27 Feb, 2013, 24th Oct, 2014, 22 May, 2015

Counsel: V. Benjamin, Attorney General for the Republic
A, Amesbury for the accused

Delivered: 12 February 2016

JUDGMENT

Dodin J

[1] The accused Nicol Padayachy, stands charged with one count of trafficking in controlled drug 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 section 29 read with the 2nd Schedule of the same Act.

- [2] The particulars of the offence are that on the 15th day of July, 2011 at Belonie, Mahe, the accused was found in possession of 281.383 grams of cannabis resin which gives rise to the presumption that he had the drug in his possession for the purpose of trafficking.
- [3] The prosecution witness T. Purmanan, a forensic analyst testified that on the 18th June, 2011, Agents Sigguy Marie and Terrence Florentine brought an exhibit and a letter of request exhibit each requesting him to analyse the substance found in their respective exhibit envelopes. Agent Marie's exhibit consisted of 4 blocks of dark brown substance with a total weight of 248.4 grams and agent Florentine's exhibit consisted of 3 blocks of dark substance with a total weight of 33.283 grams. The analysis confirmed that all the blocks of dark substances were cannabis resin. He drew up reports for each exhibit and sealed the exhibits in forensic evidence bags which he kept in the laboratory until they were collected by agents Marie and Florentine on the 20th July, 2011.
- [4] Agent Sigguy Marie testified that on the 15th July 2011, at about 2 pm he was on patrol at Belonie in the company of agents Joseph, Florentine, William, Moumou and Trejoe when they received information that a drug transaction was being undertaken at one Evelina Padayachy's house at Roche Bois. They returned to NDEA headquarters, put on their uniforms and planned how to carry out the operation. They also added another vehicle to the operation.
- [5] Upon arriving at the house of Evelina Padayachy, agents Florentine and Joseph went to the house first. At the same time they saw a boy who was sweeping the yard ran towards the house shouting NDEA. Agent Florentine apprehended the boy and handed him over to agent Joseph. The witness followed agent Florentine to the house where they saw the accused run into the house and closed the door behind him. When they reached the door, the door was locked. They immediately kicked the door open and ran inside and saw the accused going further inside the house and entered a room which they found to be the bathroom. Agent Florentine caught up with the accused as the accused tried to close the door. He noticed a clear plastic bag in the accused's left hand and some money in his right hand.
- [6] The accused struggled with them and the witness managed to hold the accused by locking his arm and the accused dropped the plastic and the money. Agent Florentine

picked up the plastic and at this time they had been joined by agent Joseph who picked up the money. The accused started to struggle again and they fell into the bath tub. He then managed to handcuff the accused.

- [7] Agent Florentine then opened the plastic in the presence of the accused and in it there were 3 pieces of dark substances, two of which were wrapped in cling film. A body search was then conducted on the accused and a big piece of dark substance was removed from his right front pocket together with a smaller rectangular piece. There were two other smaller pieces that were not wrapped. All the pieces of substances were taken to the forensic lab for analysis by Mr Purmanan who issued a report confirming all the pieces of substances to be cannabis resin.
- [8] The money that had been dropped by the accused were also counted in his presence and it amounted to about RS 6,000/-. They also called for assistance from the dog unit and the house was searched but nothing more that was illegal was found.
- [9] The accused was informed that he was been arrested for the offence of possession of controlled drugs and was taken to NDEA Office for formalities.
- [10] Agent Terry Florentine also testified that on the 15th July, 2011 he was on patrol when they received information that a drug transaction was being undertaken at the house of Evelina Padayachy. They went back the NDEA office where they changed into uniforms and then proceeded to Roche Bois. Arriving at the house he heard a boy called out “NDEA” and saw him ran towards the house. He also saw the accused who was sitting under a shed closer to the house, got up and ran into the house with a plastic in each hand. As the accused refused to open the door, agent Marie forced it open and they chased the accused into the bathroom where the accused dropped the bags that were with him and a struggle ensued mainly between agent Marie and the accused until the accused was subdued.
- [11] From the two plastics that were dropped by the accused, one contained a certain sum of money whilst the other contained pieces of dark substances suspected to be drugs. All were opened in the presence of the accused. A search of the accused also revealed more pieces of dark substances concealed in his right pocket. A search of the house with the

assistance of sniffer dog did not find anything else that was illegal. The accused was arrested and brought to the NDEA office. On the 18th July he took the substances that were in the plastic bag that the accused had dropped to the forensic lab for analysis and the same were retrieved from Mr Purmanan on the 21st July, 2011 together with a certificate of analysis which confirmed the substances to be cannabis resin.

- [12] Evans Seeward testified that on the 18th July 2011, he signed letters of request which he gave to agents Marie and Florentine to take to the forensic lab requesting analysis of some pieces of dark substances. On the 21st July the agents returned with the substances in sealed evidence envelopes and the same were given to him which he placed in the exhibit room for safekeeping until they were handed over to the agents to take to Court for trial.
- [13] Agent Kenneth Joseph testified that on the 15th July 2011, he was on duty with 3 other agents when they received that a drug transaction was taking place at a house at Belonie owned by one Evelina Padayachy. They went to NDEA head quarters, changed in to uniform, got an additional vehicle and drove to the house at Belonie. As they approached the house he noticed a young male person sweeping the yard who ran towards the house shouting “police” and at the same time they saw the accused run from a shed into the house carrying a plastic bag in each hand.
- [14] They gave chase but when they reached the door it was closed and their call to open it went unheeded. Agent Marie broke down the door and he followed agents Marie and Florentine into the house. He saw the accused dropped the 2 bags as agent Marie caught up with him near the bathroom. Agent Florentine picked up one bag and he picked up another. The one with agent Florentine contained some pieces of dark substance whilst the one with him contained notes in Seychelles rupees, The accused was struggling against agent Marie and they both fell in a bathtub and agent Florentine assisted to handcuffed the accused.
- [15] The two bags were opened in the presence of the accused and their respective contents were shown to the accused. Agent Marie searched the accused and more pieces of substance were removed from his front right pockets. All were shown to the accused and the accused was arrested as a suspect for possession of controlled drugs. The witness

counted the money retrieved from the bag in his possession which were 3 notes of Rs500; 41 notes of Rs100; 5 notes of Rs50; 5 notes of Rs25; 11 notes of Rs10; 1 coin of Rs5; and 2 coins of R1, totalling Rs5842.

- [16] They sought assistance from the dog unit and searched the house but nothing else illegal was found. They then took the accused to NDEA headquarters.
- [17] The accused opted to testify on oath maintaining that he lived with his mother Evelina Padayachy at Belonie/Roche Bois together with his little brother. On the 15th July, 2011 whilst he was taking a bath, he heard vehicle braking noise. He wrapped himself in a towel and when he opened the bathroom door, he saw agents Sigguy Marie and Andy Arrisol in the house coming towards him. Agent Arrisol had a red plastic bag in his hand and asked him whose it was to which he replied that he did not know. He was then asked who was the person who had ran away and he replied that he did not know. Agent Arrisol then told him that if he did not know he will take his colleagues burden. (“Si ou pa konnen ou a anmass grenn ou kanmarad”).
- [18] He was asked to get dressed and he was then handcuffed. Other agents came with dogs and searched the house but nothing illegal was found. He was then taken to the NDEA headquarters where he was beaten by means of fist blows to this belly and mouth breaking a tooth. He was later taken to English River health centre and then detained at Anse aux Pin Police station.
- [19] In cross-examination, he denied that he was seen sitting under a shed or that agents Joseph and Florentine were present at his house. He admitted that the agents broke down the kitchen door but denied that any drug or money was recovered from his person or was with him when he saw the agent in the house.
- [20] Sergeant Brian Dogley testified that he remembered a search they conducted at the house of the accused after a first search had already been conducted and he had been made aware that agents Florentine, Marie and Joseph had conducted an operation at the house and the accused had been arrested. He saw the family of the accused at the house and saw the accused at the NDEA headquarters but he did not interact with him.

- [21] A locus in quo was conducted where the prosecution witnesses and the accused showed the Court the place where the events allegedly according to their respective testimonies. The Court observed however that since the date of the incident, there had been extensive restructuring of the premises and reconstruction of the house which was prejudicial to both sides version of events.
- [22] Learned counsel for the Prosecution submitted that the Prosecution has prove its case against the accused beyond reasonable doubt and all the elements of the offence charged have been proved to the satisfaction of the Court. Learned counsel submitted that the concept of possession requires that the drugs were in the physical custody of the accused and that the accused had knowledge that the thing in his possession was drug. Learned counsel submitted that in this case the prosecution has proved that the accused had the drugs in a plastic bag in his hand and others in his right front pocket and that when the NDEA agents arrived, the accused immediately ran into the house and locked the door which had to be broken down to prevent his arrest.
- [23] Learned counsel submitted that the acts of the accused showed that the accused had the requisite knowledge and the Court can infer from the circumstances that the accused had knowledge that the items in his custody where drugs, which were seized by the agents and the forensic analysis confirmed the same to be cannabis resin. Learned counsel submitted that the evidence of the witnesses for the prosecution were consistent and were not contradicted at all by cross-examination whilst the evidence of the accused was a story made up to support the accused's defence.
- [24] Learned counsel referred the Court to Archbold, Criminal Pleading, Evidence and Practice, 2002, paragraphs 26-54 and the case of DPP v Brooks [1974] A.C. 862 in support of his submission.
- [25] Learned counsel for the accused made a lengthy submission referring extensively to the records of proceedings but it is seems that learned counsel missed the amendment made to the charges against the accused dated the 8th August, 2011 at the direction of the Court which reduced the two counts of trafficking to one single count of trafficking in 281.383 grams of cannabis resin.

- [26] The main thrusts of the accused defence are that the prosecution has not prove the case against the accused beyond reasonable doubt as the evidence of the prosecution witnesses lacked credibility and the events testified to in Court could not have happened the way the prosecution witnesses maintained due to the layout of the premises which would not have allowed all the prosecution witnesses to see all that they testified happened and further, no fingerprint from the plastic bag was lifted or tested to show conclusively that the accused had the bag in his hand.
- [27] Secondly if it is found that the drugs were in the custody of the accused, the prosecution has not prove beyond reasonable doubt that the accused had them for trafficking as the accused had no burden of proving anything but it is for the prosecution to prove everything and the accused only had to raised a prima facie defence that the drugs were for his own use.
- [28] Thirdly that the accused gave consistent testimony which was not contradicted by the prosecution whilst the testimonies of the prosecution witnesses were found wanting in credibility and consistency.
- [29] Learned counsel hence moved the Court to find that the case against the accused has not been proved to the satisfaction of the Court and to acquit the accused accordingly of the offence charged.
- [30] Learned counsel referred the Court to the case of R v Oakes [1986] 1S.C.R. 103 (Canada) in support of her submission.
- [31] It is not in dispute that the accused was apprehended on the 15th July, 2011 at his home at Belonie/Roche Bois. The prosecution maintains that he was apprehended in possession of cannabis resin which were found in a plastic bag in his hand as well as in his pocket. The Defence contends that not drug were found on the accused as he was taking a bath at the time the agents came to the house and was only wearing a boxer and a towel when he was apprehended.
- [32] 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 disposition and use of the drugs. See the case of R v Warner (1969) 2 AC 256.

- [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.
- [34] In the actual case, the accused maintains that he was never in possession of any drug but that an NDEA agent, Andy Arrissol, had a bag in his hand and asked him for whom the bag was and when he insisted he did not know he was told that he will take the burden of that person. The said Andy Arrisol was called by the defence but it was immediately apparent that he was unfavourable to the defence and his examination was discontinued by the defence. I warn myself that the accused has nothing to prove in any case and that the burden of proof is always on the prosecution to prove the elements of the charge beyond reasonable doubt.
- [35] In considering the evidence brought by the prosecution, all three agents who testified were consistent that when they arrived at the house of the accused, the accused was sitting on a chair under a shed close to the house and that a young boy who was in the yard shouted "NDEA" or "Police". All three were consistent that they observed the accused run into the house with a clear plastic in each hand and that they ran to the door the accused had entered and they could not open it but it was immediately broken down by agent Marie. They all testified that they further observed the accused going further into the house and that that he dropped the plastics that were in his hand.
- [36] The evidence of the prosecution is consistent also in establishing that one plastic picked up by agent Florentine contained 3 pieces of dark substances, two of which were wrapped in cling film. From the right front pocket of the accused agent Marie removed a big piece of dark substance together with a smaller rectangular piece wrapped in cling film and two other smaller pieces that were not wrapped. The testimony of the forensic expert corroborated the evidence of both agents and established that all the pieces of dark

substance were cannabis resin. There is no evidence that there was any interference with the exhibits from the time they were recovered until they were produced in Court.

[37] I am therefore satisfied that the prosecution has discharged its burden of proof beyond reasonable doubt by establishing a strong case against the accused.

[38] I must therefore now consider whether the accused's defence raises and doubt in the prosecution's case. Of the 3 witnesses called by the defence, only the accused testified on the incident which occurred at the house of his mother on the 15th July 2011. The other 2 witnesses did not assist the accused's defence at all and the evidence of Sergeant Dogley was more consistent with the prosecution witness than the accused testimony. The accused maintained that he only came out of the bathroom because he heard screeching of brakes but the locus in quo showed that the house of the accused's mother is close to the road and there is always the likelihood than vehicles going down the road would use brakes which may screech. There is no reason why would he get out of the bathroom to investigate that particular screech.

[39] Secondly, the accused in his testimony never agreed that he had or might have had the drug in his possession for his own use or for reasons other than trafficking. This type of defence therefore does not rebut the presumption of trafficking.

[40] Considering the totality of evidence adduced, I find the witnesses for the prosecution to be credible, consistent and their evidence was not at all contradicted. I believe and accept their evidence in its entirety. On the other hand I find the testimony of the accused to be lacking in consistency and credibility and I reject the evidence of the accused in its entirety.

[41] Consequently I find that the offence of trafficking in 281.383 grams of cannabis resin has been proved by the prosecution beyond reasonable doubt. I therefore find the accused guilty as charged and I convict him of the offence accordingly.

Signed, dated and delivered at Ile du Port on 12 February 2016

G Dodin
Judge of the Supreme Court