

**IN THE SUPREME COURT OF SEYCHELLES**

**Criminal Side: CO22/2016**

**[2017] SCSC**

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**THE REPUBLIC**

versus

**FRANCIS ERNESTA**

First Accused

**BRIAN MOTHE**

Second Accused

**KEVIN QUATRE**

Third Accused

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Heard: 25<sup>th</sup> November 2016, 2<sup>nd</sup> Decmber and 09<sup>th</sup> December 2016  
Counsel: Mr. Chinnasamy Jayaraj, Assistant Principal State Counsel for the Republic  
Mr. Clifford Andre Attorney at Law for the accused  
Delivered: 19 January 2017

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**RULING**

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Burhan J

[1] This is a ruling in respect of a *voire dire* held regarding the admissibility of the statement of the 2<sup>nd</sup> accused Brian Mothe recorded by the officers of the NDEA (National Drug Enforcement Agency). Learned counsel for the accused objected to the production of the said statement as an exhibit, on the grounds that the statement was not admissible as it

was not a voluntary statement given by the accused. The main grounds urged by learned counsel were:

- a) The accused had been beaten up by the officers of the NDEA prior to the statement being recorded.
  - b) He was made to sign numerous times on a blank piece of paper but had never signed any statement and had not given a statement.
  - c) He was not informed of his right to a lawyer.
- [2] It is trite law that the burden is on the prosecution to prove beyond reasonable doubt that the said statement had been given voluntarily.
- [3] NDEA agent Mr. Samir Ghislain giving evidence on behalf of the prosecution at the *voire dire* stated that the said statement was recorded by him on the 26<sup>th</sup> of March 2016 at 07.12 hrs. Prior to recording the statement, the accused had been cautioned and his constitutional rights explained to him. Mr. Ghislain further stated the statement was witnessed by agent Marcus Payet. Mr. Ghislain in his evidence mentioned the details of the caution and constitutional rights read over to the accused. He stated the accused elected to give a statement voluntarily in Creole. After recording the statement, it was read over to the accused and the accused was invited to make any corrections, additions and alterations in the statement. He had not done so but signed the statement. Agent Ghislain categorically stated that no threat, promise or inducement was made to the accused during the recording of the statement and the accused was okay and his state of mind fine, at the time the statement was recorded. The accused was informed of his constitutional rights, his right to a lawyer and his right to remain silent but the accused had not wanted a lawyer but volunteered to give the statement.
- [4] Witness denied allegations he had beaten the accused or asked the accused to sign on a blank piece of paper to see how he signs. He denied beating the accused while he was aboard the vessel Canapone in the presence of Marcus Payet. He further stated that the accused had wanted to give a statement when he was on the vessel Canapone when they arrived and he had asked him to wait.

- [5] Agent Marcus Payet corroborated the evidence given by agent Ghislain and stated he witnessed the taking of the said statement under caution. He too stated at the time the statement was being taken the accused was okay and had volunteered to give a statement and wanted agent Ghislain to write it. It is apparent while identifying the signatures, he had identified erroneously signature on page 3 as that of agent Ghislain. He further corroborated the fact that no threat, force was used on the accused to obtain his statement.
- [6] Under cross examination, he stated that he was with agent Ghislain at the time the statement was recorded and gave a description of the office where it was recorded. He stated he boarded the vessel Canapone with Mr. Ghislain but thereafter he was more in the wheel house with Mr. Ernesta while agent Ghislain was at the back of the ship with the accused Mothe. He reiterated the fact that Mr. Mothe had signed the statement in their presence. Thereafter the prosecution closed its case.
- [7] The accused Mr. Mothe gave evidence that Mr. Ghislain had boarded the vessel Canapone and taken him to the back and begun assaulting him all over his belly. He had shouted “stop beating me”. Agent Ghislain had asked him what he was doing at sea and he had replied that they had just repaired the boat and taken it to sea for testing. He had then been taken to the front and handcuffed. After the vessel had docked he had been taken to an office in the Coast Guard and asked to sign on a piece of paper six times. Agent Ghislain and Marcus Payet had then told him that they were going to take his statement down and when he replied he wanted his lawyer, they had started beating him up and told him “you will do it”. He stated he had not given a statement to agent Ghislain but admitted he had later given a statement to agent Egbert Payet.
- [8] Under cross examination he denied he was telling lies. He stated he was beaten all over his body and on his ears and he could not hear for one week. He had complained to the Mr. Scully the Head of the NDEA but he had replied that the NDEA does not beat anybody. When questioned as to why he had not complained to court immediately, he said “It is now that I am coming to court and telling it,” and stated further “It is now that I have been given a chance to tell it to the Court”. He stated he had been taken to hospital by the officers of the NDEA but thereafter the papers and the pills were kept by them. He denied he had signed a statement.

**[9]** The accused next called agent Egbert Payet the main investigating officer in the case as a witness. He admitted that the investigating diary entry of 09.42 indicated that a case had been filed against two persons namely Francis Phillip Ernesta and Brian Antoine Mothe for the offence of trafficking in a controlled drug suspected to be Cannabis and at 1940 hrs there was an entry that Mr. Mothe had been taken to the hospital and thereafter at 21.00 hrs an entry that he had been brought back. All these entries had been made on the 26<sup>th</sup> of March 2016. Witness stated he too had taken a statement from the accused at 17.35 hrs and ended at 18.15 hrs. He had met agent Ghislain who had briefed him about the operation done. After interviewing the accused he had prepared an affidavit dated 28<sup>th</sup> March 2016 for purposes of court procedure. He admitted that in the entry dated 11 April 2016, he had not mentioned the accused had remained silent and this was an error. He further stated the accused had remained silent at the time of arrest. He also admitted that the entries showed there was an error in the controlled drug mentioned and admitted that as this was the 1<sup>st</sup> time they were handling such a case and there were many “ups and downs” in their entries. The other witness Mr. Francis Ernesta the 1<sup>st</sup> accused, stated he was on a boat when it was boarded by officers of the NDEA and agent Ghislain had informed he was in charge of the group. Mr. Brian Mothe was with him at the time. He had heard Brian Mothe shout “stop beating me, stop beating me” several times but as he was at the wheelhouse and had no light he could not see anything.

**[10]** Having considered the entirety of the evidence led at the voire dire, it must first be noted that the voire dire is being held to determine whether the statement of the accused had been given voluntarily as the accused has retracted the statement on the grounds that it was not given voluntarily. Therefore shortcomings and discrepancies in the entries in the investigating diary as shown in this case are more related to the repudiation of a statement rather than the voluntariness of a given statement. The only material points relating to the voluntariness of the statement raised by the accused were that he was severely beaten up by Mr. Ghislain and his constitutional rights were not read to him.

**[11]** It is surprising considering the description of the assault that there is no medical certificate to show any form of injury, even a bruise. He himself admits in his evidence “Now only is he telling to court he was beaten”. Learned counsel states that he had brought it to the notice of court but such a serious beating, warrants an application to the

court and an order from court that the specific accused be examined by a doctor and medical report called for specially when Mr. Scully the Head of NDEA had refused to entertain the complaint. It is apparent that the 1<sup>st</sup> accused admits that the 2<sup>nd</sup> accused has been working with him for a long time and in actual fact both were arrested together and are facing serious charges. Further their own witness called by the defence, Mr Egbert Payet states that the accused was produced before a doctor not for any injuries sustained but as he complained of a headache. For all the aforementioned reasons I am inclined to disbelieve the accused when he states he was thoroughly beaten prior to his statement being recorded and the supportive evidence of the 1<sup>st</sup> accused.

**[12]** It appears learned counsel also wishes to repudiate certain parts of the statement. All these matter will be dealt with as and when they arise as the trial progresses. On consideration of the evidence of the prosecution, I find that the evidence of officer Ghislain in regard to the accused being informed of his constitutional rights and the caution being given to him prior to his statement being recorded, stands corroborated by the evidence of agent Marcus Payet. Though subject to lengthy cross examination, no material contradictions were observed in their evidence. I will therefore proceed to accept the evidence of the prosecution.

**[13]** For the aforementioned reasons and as no material contradictions are observed in the evidence of the prosecution witnesses which has been tested by cross examination, I proceed to accept the evidence of the prosecution and am satisfied on the evidence before court that the prosecution has proved beyond reasonable doubt that the statement of the accused had been given voluntarily.

**[14]** I therefore hold that the statement is admissible as evidence in the case.

Signed, dated and delivered at Ile du Port on 19 January 2017

M Burhan  
**Judge of the Supreme Court**