

IN THE SUPREME COURT OF SEYCHELLES

CriminalSide: CO43/2016

[2017] SCSC 396

THE REPUBLIC

versus

DERRICK CLARISSE

Accused

Heard: 21, 23 & 24 March 2017
Counsel: Mr. D. Esparon, Principal State Counsel for the Republic
Mr. N. Gabriel for the accused
Delivered: 8 May 2017

JUDGMENT

Vidot J

[1] The accused stands charged as follows;

Count 1

Statement of Offence

Trafficking in a controlled drug contrary to Section 7(1) of the Misuse of Drugs Act 2016 read with Section 2 of the said Act and punishable under Section 7(1) read with the Second Schedule of the said Act

Particulars of Offence

Derrick Clarisse of La Gogue, Mahe, on 23rd July 2016 at La Gogue, Mahe was trafficking in a controlled drug namely Diamorphine (heroin), with a net weight of 29.99 grams of substance containing 17.06 grams of Diamorphine (heroin) by transporting the said controlled drug or to do or offering to do any act preparatory to or for the purpose of selling, supplying, transporting, delivering or distributing the said of the controlled drugs.

Count 2 (In the alternative to Count 1)

Statement of Offence

Trafficking in a controlled drug by means of being found in possession of the controlled drug with intent to traffic in a controlled drug, contrary to Section 9 of the Misuse of Drugs Act 2016 read with Section 19(1)(c) of the said Act and punishable under Section 7(1) and read with the Second Schedule of the said Act.

Particular of Offence

Derrick Clarisse of La Gogue, Mahe, on 23rd July 2016 at La Gogue, Mahe, was found in possession of a controlled drug, namely heroin with a net weight of 29.99 grams of substance containing 17.06 grams of Diamorphine (heroin) which gives rise to the rebuttable presumption to have the said controlled drug in his possession with the intent to traffic the said controlled drug.

Count 3

Statement of Offence

Trafficking in a controlled drug by means of being found in possession of a controlled drug with intent to traffic in the said controlled drug contrary to Section 9 of the Misuse

of Drugs Act 2016, read with Section 19 (1) (c) of the said Act and punishable under Section 7(1) and read with the Second Schedule of the same said Act.

Particulars of Offence

Derrick Clarisse of La Gogue, Mahe, on the 23rd July 2016, at La Gogue, Mahe, was found in possession of a controlled drug, namely heroin with a net weight of 396.50 grams of substance containing 204.59 grams of Diamorphine (heroin) which gives rise to the rebuttable presumption to have had the said controlled drug in his possession with the intent to traffic in the said controlled drug.

The Prosecution's Case

- [2] A synopsis of evidence can be found in the testimony of NDEA Agent Alexander Moumou. On 23rd July 2016, on instruction, he proceeded to the residence of one Ronny Kilindo (hereafter "Kilindo") to conduct a search on suspicion that the latter is involved in drug related activities. He was accompanied by NDEA Agent Valerie Auguste and police officers Samson and Berville. A search was conducted at Kilindo's house and in his vehicle but no drugs was found. Nonetheless, he was cautioned and arrested on a charge of conspiracy to traffic in a controlled drug and taken to NDEA headquarters. Kilindo decided to co-operate and informed the agents that an ex-NDEA agent, namely Derrick Clarisse, the accused, was supplying drugs.
- [3] Thereafter, Agent Siguy Marie instructed Kilindo to contact the accused and tell him that someone was looking for 30 grams of heroin and whether he could supply the same. Kilindo was made to use his own mobile phone to make the call. He already had the accused's phone number in his phone directory. The call was made and the person at the other end of the line agreed to supply the drugs at a chosen meeting point at La Gogue. Agent Moumou said he was convinced that it was the accused who had responded at the other end of the line as the latter was an ex-work colleague and he was therefore familiar with his voice. When the call was made the phone was placed on speaker phone so that those present which included Agents Siguy Marie, Ken Jean-Charles, Jacques Tirant and Moumou himself, could follow the conversation.

- [4] Therefore, Agents Moumou, Kurtis Matombe and Robert Payadachy were instructed to accompany Kilindo in a vehicle which was driven by the latter to proceed to La Gogue. The 3 agents were in the back passenger seat. Other officers, including dog handlers were also instructed to join the operation but they went in other vehicles. Arriving at a garage at La Gogue, another call, again on speaker phone, was placed to the accused who informed Kilindo that he was on his way and shortly thereafter he arrived in a red Kia Pikanto, registration number S20048 and his car was intercepted. The officers disembarked from the car whilst Kilindo was made to stay in the vehicle. Moumou approached the accused and asked him if he had anything illegal on him to which the accused did not respond. He was cautioned and a search was conducted on his body whereby a yellow plastic (Exhibit P3) containing what was then suspected and later confirmed to be heroin was seized by Agent Moumou.
- [5] Thereafter, the accused was informed that a search would be conducted in his vehicle and at his residence. The accused was directed back to his home. Arriving at the accused's home, Agent Kurtis Matombe conducted a search in the car of the accused after he had been asked if there was anything illegal in his vehicle. The accused mentioned that there was SR135,00/-. The same was seized. The accused was then allowed to unlock his house, whereby a search was conducted. At that time the dog handlers were instructed to carry out a search. The dog handlers were Agents Sandy Marie and Samad Zelia. The accused had at that time been cautioned and informed of his constitutional rights. After the dogs had sniffed around the house, Agent Marie identified 2 spots where the dogs had shown interest. This included a table whereon was a microwave. After the spots had been identified the dog handlers exited the house to allow the search to be conducted.
- [6] The search of the microwave was conducted by Agent Collin Samson. From the microwave a yellow plastic was found in which there was a red plastic bag and therein was a "Melody" milk tin (hereafter "the tin"), (exhibit P7). In the tin there were several other plastics and a white cloth with red and blue imprint (exhibit P11) and in there was a plastic bag that contained brownish substance, later confirmed to be heroin (exhibit P12) as per analyst report (exhibit P1) from analyst Mr. B. Singh. The appropriate caution was administered to the accused and he was reminded of his constitutional right. The drugs were handed over to Agent Moumou who kept the same as exhibit.

- [7] After the search, the accused was taken back to the NDEA headquarters where a further search was conducted on his body and from his wallet a sum of SR3,470/- was seized and he was charged with possession and trafficking in a controlled drug.
- [8] I note that the evidence of Agent Moumou is corroborated in very material particular by the other prosecution witnesses that included Agents Matombe, Samson, Zelia, Marie and Payadachy and any discrepancies were insignificant. In fact in his submission Learned Counsel for the accused did not challenge any discrepancies in the evidence as probable weaknesses in the prosecution's case.
- [9] Kilindo was also called as a prosecution witness. He corroborated the testimony of Agent Moumou to the point where at La Gogue the accused was intercepted. He confirmed that it was Agent Siguy Marie who had coerced him into making the phone call and to suggest to the accused to supply 30 grams of heroin. He testified that he felt pressured to cooperate with the NDEA as he was threatened that if he did not do so he would not see his family and children.

The Defence's case

- [10] The Defence decided not to call any witnesses and elected to exercise his right to remain silent. No adverse reference is made from the accused's decision to exercise that right. From submission of Counsel for the accused, the main contentions for the defence are twofold. Firstly, the accused challenges the chain of custody of the exhibits, suggesting that there was possibility of tempering as according to the accused, Agent Malvina could not state clearly if the exhibit was under his sole custody. Secondly, the accused invokes entrapment as a defence. Essentially, the defence argues that if it were not for the NDEA agents, namely Agent Siguy Marie insisting that Kilindo places a call to the accused and asking that he supplies 30 grams of heroin, the offences would not have been committed. The defence also argued that the prosecution failed to establish necessary elements for the offences the accused is charged with and that therefore the accused should be acquitted. I note however, that the defence did not identify which elements that were not proved.

The Analyst Report and Drugs

[11] It was not in dispute that the substance that was seized from the accused by Agent Moumou from his trouser pocket (P3) and that found in the microwave (P12) was diamorphine (heroin). The production of these items as exhibits was not challenged by the defence. The analyst report (P1) from Mr. Singh confirming the purity level of the heroin was not challenged either and the defence did not file with the court and served on the Attorney General a notice for attendance pursuant to Section 17(3) of MODA 2016 for the analyst to appear before Court for the purpose of being cross-examined. Therefore, in the absence of uncontroverted evidence, this Court is unequivocally satisfied that exhibits P3 and P12 is heroin, a controlled drug.

Chain of Custody of the exhibits

[12] As already mentioned, the exhibits, particularly the drugs were admitted without objection. The defence nonetheless did extensively cross-examined Agent Johnny Malvina as to possible tempering of the exhibits, particularly the drugs. Agent Moumou was very coherent that when he collected the exhibits from Agent Malvina they were sealed and in same state as when he had handed them over to him. There were no signs of tempering with the evidence bags which all remained sealed. The Court could examine the exhibit bags before they were cut opened and no signs of tempering were visible.

[13] Agent Malvina, the exhibit officer, as did Agents Moumou and Matombe identified the various signatures on the evidence bags in which the exhibits were kept that clearly showed the chain of custody. All the evidence bags in which the items were sealed were clear and would it have been easy to identify any signs of tempering and all bore CB No. 651/2016. Agent Malvina confirms “... *the evidence bag is clear evidence bag, so you can see from inside*”. When asked who had the key to the exhibit store room, he responded thus; “*I have*”. Under cross-examination about Agent Seeward having the keys, he stated that that Agent Seeward “*does not have a key , he does not have access to the store*” and “*what I can say, that I was the one who received the exhibit and placed it in the store because at that time I was also working in the store*”.

[14] This court is overwhelmingly satisfied that the exhibits were kept safe and that they were not in any way tempered with. The Court had the opportunity to examine each item of exhibit before they were produced. The defence was accorded the same opportunity and

they did not challenge then that there had been or that there was any apparent sign of tempering with the exhibit. As above noted the exhibits were admitted with no objection. I find the defence submission on this matter unsubstantiated and devoid and of any merit.

Count 1

[15] Under Count 1 the accused is charged with trafficking in a controlled drug, namely 29.99 grams of substance containing 17.06 grams of diamorphine (heroin). It is alleged that the offence committed by the accused was transporting the said controlled drug or doing or offering to do an act preparatory to or for the purpose of selling, supplying, transporting, delivering or distributing the sad controlled drug. The Prosecution submitted that it had discharged the burden of establishing the committal of the offence beyond reasonable doubt. The defence disagrees.

[16] Section 2 of MODA, the interpretation section defines traffic as follows;

- (a) to sell, broker, supply, transport, deliver or distribute;
- (b) To offer to do or do anything mentioned in paragraph (a); or
- (c) to do or offer or offer to do any act preparatory to or for the purposes mentioned in paragraph (a); and

“trafficking has a corresponding meaning.

In order to establish the charge of trafficking, it suffices for the prosecution to establish beyond reasonable doubt that one of the acts above mentioned had been carried out. While cross examining prosecution witnesses, Learned Counsel suggested that there was no supply, delivery or distribution. That is indeed correct but there are other acts that could have been performed in order to establish the offence.

[17] It is not disputed that when the accused was searched and arrested at La Gogue, drugs was found in his trouser pocket. The testimonies of Agents Moumou, Matombe and Payadachy corroborate one another in that respect. The drug seized from him as per evidence of Agent Moumou and Kilindo was the result of the call placed to the accused by the latter requesting for 30 grams of heroin. The drug was being transported and the

accused had done acts that satisfy (b) and (c) under paragraph 16 above. The accused had already done acts preparatory to sell, deliver and distribute. This Court finds that both the actus rea and mens rea are present necessary to establish that the offence has been committed.

[18] It was held in **R v Victor CO62/2010** (unreported) which referred to **DPP v Brooks [1974] AC 826**, that in order to establish trafficking, it is necessary that the accused had possession of the drugs and two key elements of possession are custody and knowledge, see **Ignace v Republic [2015] SCCA 4**. In this present case the drugs was found in the pocket of the accused and therefore in his actual possession and therefore under his control. The accused further had knowledge of the drugs because as per the evidence of Kilindo, Agents Matombe and Moumou, the accused had agreed to supply 30 grams of heroin following the request by Kilindo. Furthermore, the defence did not challenge the fact that the accused had in his possession the said drugs and neither did they adduce any evidence to suggest that the accused was deprived of any knowledge of what the substance that was in his pocket was. The only contention of the accused is that he did not distribute, sell or deliver the drugs as the accused was intercepted with the same at La Gogue as part of the operation that had induced the accused to commit the unlawful act, thus the reason for advancing and relying on the defence of entrapment

[19] Since the prosecution has proven beyond reasonable doubt that the accused was found in possession of controlled drug which he had transported with the intent to supply, deliver and/or distribute to Kilindo, I am satisfied that the offence of trafficking has been established beyond reasonable doubt.

Count 2

[20] Since I have already found that Count 1 has been established, consideration of Count 2 which is in the alternative to the previous count shall only be academic. This count shall just remain on file. I shall therefore deal with it very briefly.

[21] This count relates to the same substance which was found in the accused trouser pocket but the charge pertains to possession with a rebuttable presumption of trafficking. The matters relating to possession and the finding that the accused had control and knowledge

of the drugs discussed in count 1 has applicability to this count. The issue to be addressed is that of rebutting the presumption. I shall deal with that issue when assessing count 3, which too deals with possession with the rebuttable presumption to have the controlled drug with the intent to traffic in the same controlled drug. Therefore, all application and findings in that respect which is discussed under count 3 shall equally apply to this count.

- [22] The explanation provided by the accused was that the drug was in possession as a result of the inducement, amounts to entrapment, which caused him to be in possession of the drug. I shall deal with the defence of entrapment further herein below. This court finds that the accused has not met the required standard to rebut the aforementioned presumption. I find that that this offence too established beyond reasonable doubt.

Count 3

- [23] The third count one of trafficking in a controlled drug, namely 204.59 grams of diamorphine (heroin). Similar to count 2, this is a case of possession which gives rise to the rebuttable presumption of having had the said controlled drug in his possession with the intent to traffic the said controlled drug. The accused whilst not denying the nature and weight of the drug and the fact that it was found at the accused's home, in its submission suggests that the accused was not cautioned and he was not informed of constitutional rights and that he was not confronted with the drugs. The NDEA Agents disagree with such propositions. This court found the evidence of Agents Momou, Zelia and Matombe credible and accepts their testimonies that the search was conducted with full respect of the accused's rights and that he was shown the drugs and that he was within a proximity that allowed him to see of the content of the tin when it was removed from it. Agents Samad Zelia and Collin Samson corroborated one another that after the content was removed from the tin the accused was cautioned. Agent Zelia further testified that when the yellow plastic bag (P5) was removed from the microwave, Agent Moumou asked the accused what was inside the tin, to which he replied that it was drugs. That shows that he had complete knowledge of the drugs. Agent Zelia also testified that when he removed the items from the microwave, he described the contents of the tin to those present.

[24] As above stated it is necessary that in order to establish traffic that it must be proven beyond reasonable doubt that the accused was in possession of the said controlled drug and therefore had knowledge and control over the same; see **DPP v Brooks** (supra). I am satisfied that the accused was in control of the tin. Upon arriving at his house and his vehicle having been searched, the accused had the keys to open the door. Apart from the accused and his wife, it appears that there were no other adults residing in the house. Since this court already concluded that the accused had knowledge that the substance found on his body was controlled drug, there is no doubt in my mind that he had full knowledge the nature of the contents of the tin as they appear very similar. Kilindo also testified that he had had discussions with the accused who used to be a work colleague of his when they worked at SPTC, that he would find markets for the accused to sell drugs. The accused was also a former NDEA agent and therefore would have been fully conversant with different types of controlled drugs. I am therefore satisfied that the prosecution has satisfied at this stage that the prosecution has established the offence of trafficking beyond reasonable doubt.

[25] Therefore, this court finds no merit in the defence's submission that there was "*forced knowledge of drugs inside the house as he was taken there under arrest and duress*". There is definitely no evidence adduced that the accused was forced to go to his house before the search. The evidence reveals that on being told his vehicle and home were to be searched he co-operated fully. The house in under his control, he had the keys. The accused did not object to the search.

[26] It was held in **Dorasamy v Republic [2013] SLR 57** that "*where a reasonable presumption of law applies, on the proof or admission of a fact, referred to as a primary fact, and in the absence of further, evidence, another fact referred to as a presumed fact, is presumed. Once the prosecution has adduced sufficient evidence on that fact, the defence bears the evidential burden to adduce some evidence to rebut the presumed fact.*"

[27] In the case of **Beehary v Republic [2012] SCCA 1**, this court held that –

“Nonetheless, once the prosecution has established a prima facie case, as has been done in the present case, the defence runs a serious tactical risk in not calling evidence to rebut it, not because the defendant is called upon to prove his innocence (which would be contrary to the rule in Woolmington’s case) but because the court may exercise its entitlement to accept the uncontroverted prosecution evidence. ... and although the prosecution must in all cases prove the guilt of the defendant, there is no rule that the defence cannot be required to bear the burden of proof on individual issues such as whether the drugs could have been planted by the police to foist a false case against the defendant, This does not require the appellant who stood charged with trafficking in drugs to prove his innocence.....”

[28] Whilst fully acknowledging that the accused has a right to silence guaranteed under Article 19(2) of the Constitution, on the charge under count 3 (as in Count 2), the accused is called upon to bear the evidential burden to adduce some evidence to rebut the presumed fact.

[29] In the present case the accused elected his right to remain silent and also failed to call witnesses. In cross-examination, the defence did not make any serious and credible attempt to rebut the presumption as set out in MODA 2016. The defence did not discharge the evidential burden of rebutting that presumption. In the accused’s vehicle the sum of SR150,000/- was discovered. Agent Payadachy testified that when asked if there was anything illegal in the vehicle, the accused had responded that there was SR135,000/-. In cross-examination Counsel had suggested that possession of such large amount of cash was not unlawful, but I find Agent Payadachy’s testimony credible. Since the defence failed to satisfy court that the accused did not have the said controlled drug with the intent to traffic in the same, I find that the offence has been proven beyond reasonable ground.

The Defence of Entrapment

[29] Learned Counsel for the accused, in his submission raised the defence of entrapment. His argument was that the entire operation to arrest the accused was, but a plan put together

by Agent Malvina and that had there not been an inducement through a phone call by Kilindo to the accused, the offences would not have been committed. He pointed out that for that defence to succeed as a defence to drug charges, three key elements have to be proved;

- i. the idea to buy and sell drugs was initially conceived by the police, not the accused;
- ii. the undercover officer(s) urged and induced the accused to buy or sell drugs;
- iii. the accused was not inclined or predisposed to buy and sell drugs before the police urged or induced the accused to do so.

Learned Counsel further submitted the defence would extend to Count 3 in that, had there not been an operation by the NDEA to entrap the accused there would not have been a further search of his house. He also argued that in the house the accused was not shown content of the tin.

[30] Entrapment happens when a law enforcer such as police causes a person to commit an offence with the intention of the prosecution of that offence. It happens when an agent would have induced a person to commit an offence that otherwise they would have had no intention to commit. As was pronounced in the case of **R v Loosely; Att. Gen. Ref (No.3 of 2000 [2002] 1 Cr. App. R 29**, the defence considers whether the police presented the accused with an exceptional opportunity to commit a crime and if the accused would have committed the crime but for the incitement of others.

[31] Entrapment has developed as a vibrant doctrine in the United States. However, in England the position remains that while offering significant mitigation, there is no defence of entrapment in English law. The courts nonetheless have expressed a certain level of disdain to such practice. As you held in **R v Loosely** (supra) and **R v Latif and Shahzad [1996] 2 Cr. App. R 92 HL**; *“the end does not always justify the means”*. In Australia, where like in England there is no defence of entrapment, similar sentiment is echoed in the case of **Ridgeway v The Queen**, where McHugh J expressed the following;

“In a society predicated on respect for dignity and rights of individuals, noble ends cannot justify ignoble means..... No government in a democratic state has an unlimited right to test the virtue of its citizens. Testing the integrity of citizens can quickly become a tool of political oppression for creating a police state mentality”

This shows an expression of discomfort by court of such practices.

- [32] At the root of this disdain for the use of entrapment is that it is felt that it is unacceptable for a state through its agents to lure citizens to commit unlawful acts and then seek to prosecute them for doing so. Entrapment is viewed as a misuse of state power and an abuse of process of the courts; see **European Court of Human Rights in Teixeira de Castro v Portugal 28 E.H.R.R.101**. In that case, the court described entrapment as a misuse of state power and an abuse of the courts.
- [33] I have found hardly any established jurisprudence on the defence under our law. My research has not revealed the defence to have been canvassed successfully before the courts. Such a defence has not found its way in any statutory instrument. Learned Counsel for the accused in advancing this defence had relied on a submission of no case to answer in **Republic v Janice Beverly Dupres CR49 of 2009** (unreported). This was a case controlled delivery of drugs. With respect to learned counsel the defence of entrapment was not argued on that submission.
- [34] In **Republic v Melitine Ladouceur C.S No. 37/2010** (unreported), a case of controlled delivery, Dodin J, addressed the defence of entrapment and referred to the Canadian case of **R V Mack [1998] 2 S.C.R 903**. In that case, the Court laid down the test where there can be unlawful entrapment when;
- (i) “the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bona fide inquiry”; and
 - (ii) although having such a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity an induce the commission of the offence”.

In **Republic v Melanie** (supra) the defence of entrapment failed.

- [35] In the present case, I find that the NDEA agents were acting on reasonable suspicion that the accused was engaged in criminal activity particularly dealing with drugs. This is confirmed by the testimony of Kilindo who stated that the accused had, at a time when they had met, discussed the possibility of Kilindo finding making finding him a market for the “deal” (drugs). I find that the accused would have agreed to deal in drugs, particularly for purpose of trafficking at any time that Kilindo would have asked for the same, irrespective if request for sale of delivery is initiated other persons, and as in this case the NDEA.
- [36] I disagree with Counsel for the accused that the accused had no intention of deliver 30 grams of drugs to any person let alone Kilindo, if it wasn't but for the inducement and suggesting that that Kilindo was induced and forced into entrapment of the accused for him to be released “*from his own predicament that is the drug dealing with one Fracois Lime*”. The defence failed to adduce any evidence in support of such proposition. Kilindo had not been arrested in relation to drug offences with Francois Lime. Kilindo had disagreed with such proposition.
- [37] Whilst, this Court holds that entrapment is not a substantive defence under our law, if such a defence were to succeed, which is not the case here, it would have been applicable to counts 1 and 2 only. I also disagree with Counsel for the accused that if the NDEA had not through Kilindo entrapped the accused to deliver the 30 grams of heroin, the house would not have been searched. The NDEA definitely did not suggest to Kilindo that he should suggest to the accused to keep such a huge amount of controlled drug at his home. There was no influence exerted on the accused for the same and in any case, the NDEA could always have conducted a search on his residence. If entrapment was a valid defence, it would not provide a defence for count 3.
- [38] In holding that entrapment is not a substantive defence, I also find that at the end of the day entrapment does not take away the intent to commit a guilty act by the accused. I further find that the defence of entrapment is not available to the accused and since this court has already found the elements of the offences levelled against the accused established beyond reasonable doubt, therefore finds the accused guilty of the charges but

since count 2 is in the alternative to count 1 proceeds to pronounce the accused guilty of count 1 and 3 and accordingly convict him of those 2 counts.

Signed, dated and delivered at Ile du Port on 8 May 2017

M Vidot
Judge of the Supreme Court