

IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CO22/2016

[2017] SCSC 1080

THE REPUBLIC

versus

FRANCIS ERNESTA

BRIAN MOTHE

KEVIN QUATRE

DANNY SULTAN

Accused

Heard: 25th October 2017 and 27th October 2017
Counsel: Mr. Chinasammy Jayaraj, Principal State Counsel for the Republic
Mr. Clifford Andre Attorney at Law for all four accused
Delivered: 16 November 2017

RULING

Burhan J

[1] I have considered the submissions made by learned Counsel for all the aforementioned accused, in support of his contention that the accused have no case to answer. I have also considered the learned prosecution Counsel's reply in respect of same.

- [2] All four accused in this case have been charged with the following offences:
- 1) Trafficking in a controlled drug contrary to section 5 read with section 2 and section 26(1) of the Misuse of Drugs Act Cap. 133 read with section 22(a) of the Penal Code and punishable under section 29(1) read with the 2nd Schedule of the Misuse of Drugs Act.
 - 2) Conspiracy to commit the offence of trafficking in a controlled drug contrary to section 28 (a) read with 5 and 26(1) of the Misuse of Drugs Act and punishable under section 28 read with section 29 read with the 2nd Schedule of the Misuse of Drugs Act.
 - 3) Importation of a controlled Drug contrary to section 3 of the Misuse of Drugs Act read with 26(1) and 22(a) of the Penal Code and punishable under section 29 (1) read with the 2nd Schedule of the Misuse of Drugs Act.
 - 4) Conspiracy to import a controlled drug contrary to section 28(1) (a) of the Misuse of Drugs Act (Cao 133) read with section 3 of the Misuse of drugs Act and punishable under section 29 (1) read with 2nd Schedule of the Misuse of Drugs Act.
- [3] The main grounds relied on by learned Counsel for the accused in his no case to answer application, could be summarized as follows;
- a) Nothing illegal was found on the vessel Canapone in which the 1st and 2nd accused were travelling in, when the officers of the NDEA (National Drug Enforcement Agency) boarded and searched the vessel.
 - b) Although the particulars of the offence indicate that the offences were committed on the 26th of March 2016 the accused were in custody by then.
 - c) The prosecution has failed to prove conspiracy as no controlled drugs were recovered and there was no evidence of any agreement between the parties.
 - d) The main prosecution witness Michael Hissen has failed to identify anyone.
 - e) The evidence of witness Xavier Pool cannot be accepted as witness Ryan Accouche was not called by the prosecution to corroborate his evidence.

[4] In the case of *R vs. Stiven 1971 SLR No 9 at pg 137*, it was held what Court has to consider at this stage is whether;

- a) there is no evidence to prove the essential elements of the offence charged.
- b) the evidence for the prosecution has been so discredited or is so manifestly unreliable that no reasonable tribunal could safely convict.

[5] Archbold in Criminal Pleadings Evidence and Practice 2008 edition at page 492 sets out the principle in a no case to answer application.

“A submission of no case should be allowed where there is no evidence upon which, if the evidence adduced were accepted, a reasonable jury, if properly directed, could convict.”

[6] In *David Sopha & Anor v Republic SCA 2/1991* the Seychelles Court of Appeal held:

“In considering a submission of no case to answer, the judge must decide whether the evidence, taken at its highest, could lead to a properly directed jury convicting the accused. If so, the case should be allowed to go to the jury.”

[7] I have considered the evidence for the prosecution. According to the evidence of NDEA agent Sammy Ghislain, they had received information that controlled drugs were being brought to the Seychelles on board a vessel Canapone for one Francis Ernesta, the 1st accused. Accordingly a joint air and sea operation was launched by the NDEA involving planes and air force personnel, coast guard vessels namely PB (Patrol Boat) Hermes and PS (Patrol Ship) Constance. The services of officers of the air force, coast guard and officers of the NDEA were utilised in tracking the movements of the suspect vessel identified as Canapone which was detected from the air on the 24th of March 2016 coming towards Seychelles. This was done with the aid of sophisticated equipment namely a search radar system and electro- optical camera system with very good zoom capability and thermal imagery, all of which was part of the equipment on the plane.

- [8] Several senior officers of the air force Chief pilot Don Zaaiman Dupres, Lieutenant (Lt) Commander Amil Kumar and Lt Terrence Tamboo testified how the vessel Canapone was kept under observation since the 24th of March 2016 and was observed by them both visually and from their cameras and equipment. On the 25th of October 2016 around late afternoon, they had observed a fast moving scarab speed boat moving in its direction from Mahe and rendezvousing with the suspicious vessel identified later as the Canapone and after being close together for about 5 minutes, the speed boat had left the Canapone and headed towards Praslin and La Digue. They had passed the information and the officers on PS Constance were ordered to 'home in' on the Canapone. The PB Hermes was ordered to intercept the speed boat which they observed pass La Digue and go towards Praslin. At Anse Boudin in Praslin, they had observed a person get off and go towards the land. PB Hermes was unable to intercept the speed boat as it developed engine problems. This all occurred in the late afternoon of the 25th of March 2016. The evidence of these witnesses were subject to cross examination. It cannot be said that the evidence of these witnesses have been so discredited or is so manifestly unreliable that no reasonable tribunal could safely convict on their evidence.
- [9] Major Estico Commander of the vessel PS Constance gave evidence that he had ordered the PS Constance to intercept the Canapone which they had done and coast guards and NDEA agents had boarded it and identified the 1st accused Francis Ernesta and the 2nd accused being on the vessel. They had searched the vessel but found no controlled drugs on it. It is apparent that Commander Estico was following orders received from Lt Colonel Leslie Benoiton. They had intercepted the Canapone about 24 nautical miles from Fregate. The coast guard and NDEA officers had boarded it by use of a zodiac boat. He identified the Canapone boat from the photographs. Ronny Rigdon from the coast guard who was in charge of the boarding party, described details of the boarding and the fact that the 1st accused Ernesta and the 2nd accused Brian Mothe were aboard the vessel. They had searched and taken into custody a portable GPS, a Chart and a VBSS radio for investigation. They had taken the phones of Francis Ernesta and Brian Mothe into custody. The NDEA agents on board Hermes, had boarded PS Constance and then come aboard the Canapone.

- [10] Captain Hans Radegonde who was commanding the PB Hermes gave evidence of how they had attempted to intercept the fast moving speed boat or scarab which was moving in the direction of La Digue and Praslin. However due to engine failure the PB Hermes was unable to intercept the speed boat. The scarab or speed boat was subsequently taken into custody. He had then gone and linked up with the PS Constance and the NDEA agents with him had boarded PS Constance to do an investigation on the vessel Canapone. Lt Colonel Leslie Benoiton gave evidence that he was co-ordinating the operation which commenced on the 24th of March 2016 and on receiving information from the air force he would pass it on and make the necessary orders to the coast guard vessels. He too testified in detail of the operation carried out by the air force and coastguard that day.
- [11] All these witnesses were subject to cross examination by learned Counsel for the defence but once again it cannot be said that the evidence of these witnesses have been so discredited or is so manifestly unreliable that no reasonable tribunal could safely convict on their evidence.
- [12] Mr. Michael Hissen called by the prosecution stated that he had taken his father's boat with the 3rd accused Kevin Quatre who used to do maintenance work for the boat, for a test run on the afternoon of the 25th of March 2016, to check out repairs already done by him. Whilst they were going in the boat towards Fregate Island, the error in the boat occurred again indicating the engine was heating up. When they had stopped, Kevin received a telephone call and he had told him that some other friends of his were having engine problems and if witness did not mind they could go and help them out. They had found the vessel and gone near about a metre to it and as they got close, a rope was thrown and a Rasta man jumped into their boat. The persons inside the bigger boat which Hissan identified as the Canapone from the photographs had said they will throw the bags and Kevin had told witness not to be scared. Some gunny bags were thrown into the scarab or speed boat. It was around 5 in the afternoon and he navigated towards La Digue. Then Kevin got a call and he had told him to go to Praslin. They had gone to a beach in Praslin which he did not know. Kevin and the Rasta had thrown the gunny bags into the water and jumped off and left. From the beach he could see the Raffles hotel. The

time they jumped off his boat was around 6.30 p.m. It was a bit dark. He identified the Canapone from the photographs as the boat he had approached and he identified the scarab or speed boat in photo 7 as his boat. He admitted certain gunny bags were loaded onto his scarab or speed boat and he had taken it to Praslin and unloaded the gunny bags and the Rasta man too had got off the boat near the beach where they could see the Raffles hotel.

[13] It appears from the evidence of Xavier Pool who had been in the vicinity with his sister and mother that when the boat had come in to Anse Boudin on the said date around 25th March 2016, he had seen the Rasta man alight from the speed boat and unload gunny bags. He identified the Rasta man as Danny Sultan the 4th accused who he knew for some time and also identified the scarab or speed boat from the photographs. He had seen the gunny bags which had been taken from the boat being carried by Danny to the higher ground where the Takamaka trees were near the seaside. This had taken about 15 minutes. Witness Xavier had left the area after the boat had left and he had gone to meet a friend of his and whilst he was there he had seen Danny Sultan the 4th accused pass by.

[14] Witness had gone back with his friend Ryan Accouche down to the seaside and told him what he had seen and stated he had thought the gunny bags contained coco de mer. They had come across the gunny bags. There were 10 of them, one was open and there were packets in the open bag. He had taken one packet and his friend Ryan had taken another. He had taken the packet to his grandmother's house and opened it and found it to contain heroin which he was aware of as he was a user. Thereafter he had sold the packet. The next day he had gone to the beach he had seen Danny Sultan and one Chang Leng take the gunny bags put them in a vehicle and drive towards Baie Ste Anne. Thereafter he had been arrested by the NDEA and subsequently agreed to be a State witness for the prosecution. He identified the packet recovered by the officers of the NDEA which he had taken from the gunny bag and the contents of the packet which were in turn identified by the Government analyst as heroin.

- [15] It appears the prosecution also relies on the statements under caution recorded from the 1st and 2nd accused by the officers of the NDEA, to prove their complicity in the charges. Though challenged on the grounds of voluntariness, the statements were admitted as evidence after a *voire dire*. The statements under caution have been strongly repudiated as well which is a matter to be decided at the end of the case.
- [16] It is in the light of this evidence before Court that learned Counsel states there is no case for the accused to answer. His main ground is that nothing illegal was found on the vessel Canapone in which the 1st and 2nd accused were travelling in, when the officers of the NDEA (National Drug Enforcement Agency) boarded and searched the vessel. No doubt this is true but the prosecution is attempting to prove trafficking and importation as borne out by the particulars of the offence by the acts committed and the part played by each of the accused in transporting the said controlled drug into the Seychelles in the vessel Canapone and the scarab or speed boat. The prosecution also seeks to prove that a part of this controlled drug which was imported was eventually taken into custody in Praslin by the officers of the NDEA and the said quantity recovered was produced in Court and identified as heroin. The prosecution also relies on the statements given by the 1st and 2nd accused and their admissions made therein relevant to the charges which statements have already been admitted as evidence.
- [17] It appears that the relevant date is the 25th of March 2016 but the controlled drug was eventually found by the officers on a later date. The error in the date in the indictment is not a ground to totally disbelieve the witnesses and acquit the accused. The contention that the prosecution has failed to prove conspiracy on the basis that no controlled drugs were recovered is not acceptable as prior agreement to commit the offence is all the prosecution has to establish. Even though witness Hissen has failed to identify anyone on the Canapone, he identifies the Canapone as the vessel from which the gunny bags were unloaded and identifies the scarab or speedboat driven by him as the speed boat which transported the gunny bags and contents to Praslin from the Canapone.
- [18] The other contention of learned Counsel for the defence is that the evidence of Xavier Pool who identified the contents of a gunny bag and the Rasta man cannot be accepted as

witness Ryan Accouche was not called by the prosecution to corroborate his evidence. It is apparent that witness Xavier was not an accomplice to the charges faced by the accused in this case. Therefore the necessity to look for corroboration does not exist but it is pertinent to mention that a part of his evidence is corroborated by the evidence of Delores Mounac.

[19] Having considered the aforementioned evidence it cannot be said that the evidence given by the witnesses have been so discredited or is so manifestly unreliable that no reasonable tribunal could safely convict on their evidence. It also cannot be said at this stage that the prosecution has failed to prove an essential element of the offences. For all the aforementioned reasons, I hold that the prosecution has proved or established a prima facie case against all the accused.

[20] No doubt certain discrepancies, contradictions and omissions exist in the evidence of the prosecution but as to whether they are material contradictions and omissions or material discrepancies is best decided at the close of the entire case. Further the statements under caution have been admitted by Court on the ground that they were obtained voluntarily but learned Counsel further repudiates the said statement strongly which is also a matter to be decided at the conclusion of the case.

[21] For the aforementioned reasons, I am satisfied the prosecution has established a prima facie case against all the accused. I hold that all four accused have a case to answer in respect of the charges framed against them and I proceed to call for a defence from all the accused.

Signed, dated and delivered at Ile du Port on 16 November 2017



M Burhan
Judge of the Supreme Court