

IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CO 46/2011

[2018] SCSC 291

THE REPUBLIC

versus

DAVID BAKER
First Accused

DOMINICO BANANE

Second Accused

Heard: 26, 27 Sept, 28 Oct 2013, 19 Jan, 10 July, 6 Oct 2017, 5, 12 Feb 2018.
Counsel: V Benjamin, A Subramanian, Principal State Counsel for the Republic
N Gabriel for the first accused
B Hoareau for the second accused
Delivered: 16 March 2018

RULING

Dodin J

[1] Learned counsel for both accused moved the Court to rule that both accused persons have no case to answer on the charges levelled against them. Learned counsel for the first accused submitted that the prosecution has failed to establish a prima facie case against the first accused. He submitted that this is a case of entrapment whereby the 1st accused informed on by the 2nd accused but none of the accused could be said to have had

possession of the drugs in question as the house where the drugs were found belonged to his mother who was never questioned by the NDEA. The first accused was first taken to a bin site where no drugs were found. He was later taken to his mother's house where a block of drugs was found under some wood and iron sheets. The second accused had not been arrested and was being used as an informer. Learned counsel submitted that the only evidence of note before the Court is that of the forensic analyst and agent Sigguy Marie. However agent Marie's evidence stands uncorroborated. The other evidence brought by the prosecution were discredited and unreliable and no Court should convict on such evidence.

- [2] Learned counsel for the 2nd accused submitted that on the 1st count the prosecution failed to prove that the 2nd accused was in possession of the drugs in question and had the intention to possess the same. Learned counsel submitted that there is no evidence was brought to show that the second accused ever had physical possession or had intention to possess the drugs. Therefore an essential element of the offence has not been proved by the prosecution. In addition there was no evidence showing common intention.
- [3] Learned counsel submitted that the same principle applied to the 2nd Count in that the prosecution has failed to prove the essential element that the 2nd accused intended to help the 1st accused to do the acts stated in the charge.
- [4] Learned counsel further submitted that on the 3rd count, there is no evidence of agreement between the 1st and second accused to do the act stated in the charge. There was not even any intention to form an agreement.
- [5] Learned counsel submitted that the case was based on the confession statements of the accused persons but when the statements were not produced or admitted, there was no other evidence to go on and the Court should dismiss the case against the accused persons.
- [6] Learned counsel for the prosecution submitted that the Prosecution has established a prima facie case against both accused persons and has proved the necessary elements of all the offences charged. Learned counsel made a thorough review of the witnesses' testimony concluded that even if a single witness testimony is credible and reliable and

incontrovertible the court can rely on that evidence to convict, hence it is the quality of evidence, not the quantity that is necessary to establish a prima facie case against the accused persons.

- [7] Learned counsel submitted that the concept of possession connotes two elements which are custody and knowledge. The act of possession or custody means that the accused has physical control and has knowledge which is that the accused must know or should reasonably have known of the existence of the drug. Learned counsel submitted that in this case the evidence established that the drug was recovered from a hidden place at the house of the mother of the 1st accused which was pointed out by the 1st accused. The 2nd accused was the one who gave information to the agents which allowed them to recover the drug which shows that he also had knowledge and also that the two accused persons had an agreement and common intention.
- [8] Learned counsel moved the Court to dismiss the submission of no case to answer and to rule that both accused persons have a case to answer on all count levelled against them.
- [9] Both accused persons are charged with one count of trafficking in 532.1 grams of cannabis resin contrary to section 5 read with section 14(d) and 26(1) (a) of the Misuse of Drugs Act and read with section 29 and the second schedule of the same Act and section 23, (common intention) of the Penal Code and one count of conspiracy to commit the offence of trafficking in the said amount of controlled drugs, 532.1 grams of cannabis resin. The second accused is further charged with one count of aiding and abetting the first accused to commit the offence of trafficking the said drugs.
- [10] The evidence of the Jemmy Bouzin, the forensic analyst was not challenged by the defence. Agent Sigguy Marie testified that he was the team leader in the operation. On the 1st October, he learned that the 2nd accused had in his possession a large quantity of drugs. They proceeded to his house at Camp Frichot but they only came across him on the way back and he agreed to accompany them to the station. Later a team was sent to bring the 1st accused to the station. They also conducted searches at the two accused persons houses but nothing was found. After the 2nd accused had left, they further questioned the 1st accused who took them to a bin site but nothing was found there. After further questioning the 1st accused took them to his mother's place and inside a corrugated iron

sheet shed he removed a black plastic in which the drugs were wrapped clear plastic. The same was showed to the 1st accused and he was arrested and read his constitutional right when they reached the NDEA office. The next day they searched for and arrested the 2nd accused who was also brought to the office, shown the drugs and then arrested and read his constitutional rights. The witness was rigorously cross-examined by both counsel for the two accused but maintained his consistency throughout.

[11] Agent Jimmy Louise testified that he went to bring the 2nd accused to the NDEA station on the instructions of agent Sigguy Marie. He did not arrest the 2nd accused, he just told him that his presence was required at the NDEA station and the 2nd accused obliged. At the station he witness agent Marie showing the drug to the 2nd accused and then cautioned the 2nd accused and read him his rights.

[12] Agent Trejo Rosalie testified that he accompanied agent Sigguy Marie, the team leader, to Camp Frichot where on the way back they saw the 2nd accused and after enquiring of his identity, he was asked to accompany them to the NDEA station. At the station he was interviewed and based on the information he gave they went to Copolia where they found the 1st accused who was asked to accompany them to the station. At the station he was cautioned and interviewed, then he took them to a bin site at Mont Fleuri but nothing was found. After further questioning, the 1st accused took them to his mother's house at Copolia where the 1st accused removed a black plastic from a shelter. From the plastic there was cannabis resin wrapped in more plastics which was showed to the 1st accused.

[13] In cross-examination the statements written by the witness was put to him highlighting several statements made which contradicted his testimony as well as each other. The most prominent was the fact that in one statement was written that they went twice to Copolia. Another is that at the station agent Marie cautioned and wrote the statement as he interviewed the 1st accused, which agent Marie had stated that he did not write anything nor cautioned him until after he had been arrested.

[14] Agent Evans Seeward assisted in the investigations by being asked to interview and take statements from the accused persons. However upon conducting a *voire dire*, the statement of the 2nd accused was ruled not admissible. The prosecution then closed the case without calling other witnesses.

[15] In determining whether the accused persons have a case to answer the Court must make an assessment of all the evidence adduced by the prosecution and make a determination on two critical issues.

- i. Whether all the elements of the offences have been established by the prosecution and therefore established a prima facie case against both accused persons.
- ii. Whether the available evidence has been so compromised by the defence or by serious inconsistencies in the prosecution's testimonies that such evidence taken as its highest would not properly secure a conviction.

[16] As stated in the case of Republic v Ralph Sonny Samedi CR13/2015 by this very Court:

“Where the prosecution’s evidence fails to address any particular element of the offence at all, 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.

Where the available evidence has been so compromised by the defence or by serious inconsistencies in the prosecution’s testimonies, the Court must determine 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 to answer would also succeed.”

[17] In the case of R v Galbraith [1981] 1 WLR 1039 Lord Lane C.J. also stated this on the issue:

“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*.

[18] At this stage, the Court must only be satisfied that a prima facie case on each charge has been made by the prosecution in order to find that the accused has a case to answer. The elements of the offences are that:

[19] In criminal cases of this nature a person has to have knowledge sometimes referred to as a "guilty mind" if he is to be convicted of the offence charged. Hence a person must have knowledge of the fact that the thing in his possession or on his property is illicit drug. Knowledge includes deliberately or recklessly disregarding the obvious fact that the item in one's possession is illicit substance and there is no requirement to know exactly what type of illegal drug is involved.

[20] The concept of possession is well established in the case of *DPP. V Brooks [1974] A.C. 862*. The prosecution must establish the elements of physical possession, that is, custody and knowledge of the substance that turns out to be the controlled drug. See also the case of *Republic vs. Serge Esparon Criminal Side No. 75 of 2008* where the drugs were found in the vehicle of the accused who attempted to evade the police. The Court could therefore infer from the circumstances that the accused had physical custody of the drugs in his car to which he had exclusive control and also showed knowledge of having illegal substance in his vehicle by attempting to run away to evade the police who were trying to arrest him.

[21] Other relevant cases are *Republic vs. Sanders Vital Criminal Side No. 63 of 2008* and *Republic vs. Raymond Patrick Francis case no: Cr 11 of 2010* where the accused persons were seen throwing away the plastic bags which had been seen in their hands prior to being apprehended. Also the case of *R. v. Marshall, [1969] 3 C.C.C. (3d) 149* where the

accused was acquitted of drug possession as he had no control over drugs in the vehicle he was in.

[22] In this case where the drug was found in a shed or a shelter, depending on the testimonies of agents Sigguy Marie or Trejo Rosalie, on the land outside of house of the 1st accused's mother, the prosecution must also establish that the 1st and 2nd accused persons had exclusive access to the premises and had knowledge that the drug were on the premises. Mere presence on the land and knowledge of the presence of drug at or near the residence is not sufficient to establish possession. Furthermore even if one accused knew or had reason to believe that the other accused had placed the drug on the premises and decided not to do anything about it, that accused has not necessarily committed any offence. The prosecution must bring evidence to show control. In R. v. Colvin and Gladue [1942], 78 C.C.C. 282 (B.C.C.A.) two accused persons were found visiting a premise where narcotics were present. Both were found not to be in possession of the drugs on the premises.

[23] Having considered the evidence above, there is evidence that the 1st accused eventually led the agents to a shed/ shelter on his mother's land where the drug was recovered. It is possible that the 1st accused had knowledge of the whereabouts of the drug although the evidence showed that he led the agents to other places where searches were conducted. The evidence also showed that the 1st accused had access to his mother's premises without having to secure the permission of his mother. Consequently, I find that the prosecution has established a prima facie case against the 1st accused on the 1st count of trafficking by having in his possession the drug in question.

[24] However the same cannot be said of the 2nd accused. I find no evidence linking the 2nd accused to the drugs at the 1st accused's mother's place. I therefore rule that the prosecution has not established a prima facie case against the 2nd accused on the 1st count and I acquit him accordingly of the 1st count.

[25] In respect of the 2nd count of aiding and abetting, I find that the prosecution did not bring any evidence to establish how or when the 2nd accused committed the offence of aiding and abetting the 1st accused. In fact the only reference to the two accused persons being together was in the testimony of Sigguy Marie who testified that he received information

that the 2nd accused was in the company of the 1st accused the previous day and that they had drugs in their possession. Without proof that the information was correct no Court can convict an accused on that assertion only. Consequently I find that the prosecution has not established a prima facie case against the 2nd accused on the 2nd count. I acquit the 2nd accused of that count accordingly.

[26] On the 3rd count of conspiracy, the prosecution did not bring any evidence to establish that there was an agreement between the 1st and 2nd accused persons to commit the offence. Again, the only assertion that the 1st and 2nd accused persons were together which was made by agent Sigguy Marie as per paragraph 25 (above). Even if the Court were to accept that the two accused persons were together a day before there is no evidence to establish that they must have been agreeing to traffic in drugs.. Consequently I find that the prosecution has not established a prima facie case against either accused persons on the 3rd count and I acquit both accused persons of count 3 accordingly.

[27] I therefore acquit the 2nd accused of all counts against him. I acquit the 1st accused of count 2 and count 3. I find that the 1st accused has a case to answer on the 1st count and I call on the 1st accused to make his defence to count 1 accordingly.

Signed, dated and delivered at Ile du Port on 16 March 2018

G Dodin
Judge of the Supreme Court