

SUPREME COURT OF SEYCHELLES

Reportable

[2019] SCSC 219

CO58/2017

In the matter between:

THE REPUBLIC Republic

(rep. by George Thachett)

and

JERRY LENCLUME Accused

(rep. by Nichol Gabriel)

Neutral Citation: *Republic v Lenclume* [CO58/2017] [2019] SCSC 219 [18 March 2019]

Before: Burhan J

Summary: Accused charged with importation of a controlled Drug Heroin. DNA profile on hair sample found on sticky tape on the covering of the controlled drug matched DNA profile of accused. Link between the controlled drug found in a bin in the toilet of the airplane and the accused who travelled in same plane established.

Heard: 21-3-2018, 29-3-2018, 24-5-2018, 1-6-2018, 17-7-2018, 17-8-2018, 17-9-2018

Delivered: 19 March 2019

ORDER

Accused convicted of the charge of importation of a controlled drug namely heroin and remanded pending sentence. Call for probation report prior to sentence.

JUDGMENT

BURHAN J

[1] The accused Jerry Lenclume stands charged as follows:

Count 1

Importation of a controlled drug in contravention of the Misuse of Drugs Act, 2016, contrary to and punishable under Section 5 read with Second Schedule of the Misuse of Drugs Act.

Particulars of offence are that, Jerry Lenclume, 50 year old Male casual labour, residing at Petite Paris, Mahe, on 25th of June 2017, imported into Seychelles, 280.7 grams of controlled drug namely, Heroin (Diamorphine) with a purity of 45% & having a heroin content of 126.3 grams, in contravention of the Misuse of Drugs Act, 2016, on board Air Seychelles flight HM 754 coming from Madagascar.

[2] The prosecution in order to establish the charge against the accused called as its first witness the forensic scientist from Mauritius Zeina Maharaullee. She stated she had worked as a forensic analyst for the past 7 years. She tendered her certificates to Court and stated her maiden name was Sidalli. Her expertise was not challenged. She stated she received two exhibits to be analysed. The exhibit given the marking YL 1 was a container containing hair samples. She selected hairs which had roots for the purpose of analysing for DNA. She also described the chain of custody and procedure adopted and stated that the samples were brought from Seychelles by Yves Leon and received by the laboratory in Mauritius on the 13th of July 2017. She had also received the request letter. She had opened YL 1 and inside there were 10 small hair fragments ranging from 1.5 cm to 3.6 cm and she had performed DNA examination on the hair roots and a DNA profile was obtained. From YL 2 there were also 10 hair fragments from 1.1 to 4 cm but no DNA profile was obtained from them. YL 3 was a reference sample and a profile was obtained from same. YL 4 was another reference sample from which a DNA profile was obtained. YL 5 was also a reference sample from which a DNA profile was obtained.

[3] The forensic analyst further stated that she conducted tests on the DNA profile from the hair fragments obtained from the exhibit YL 1 and the DNA profile obtained from the hair fragment Y L 1 was a match on the DNA profile obtained from the reference sample obtained from one Jerry Lenclume. After analyzing the exhibits she had sealed them back and placed them in the evidence bag sealed it and prepared her report. Her report was produced as P4. She explained in detail the process involved in extracting the DNA from the cells of the hair root, the process to quantify the DNA that is to see how much DNA was available and the process to amplify the DNA. She stated that no two persons have

the identical DNA other than identical twins. The exhibits were collected by Yves Lyon on the 5th of October 2017. She categorically stated there was no tampering with the exhibits while they were in her custody. After analysis she had placed the exhibits back in the exhibit bag and sealed it. The same exhibit bag sealed by her and handed back to officer Yves Leon was identified by her in open Court and the seals placed by her were also identified as being intact.

- [4] Under cross examination, she stated that there was no match with the reference samples of Richard Andre Jules and David Serge Mondon. She stated the 10 hair samples in YL 1 were in one container and only one hair had a root which had a DNA profile. YL 2 had 4 hairs with roots but no DNA was extracted. She described the phases of the growth of hair and stated that when the hair gets degraded at the termination stage or telogen phase, it loses its nucleus and its DNA. She stated when she received the exhibits, it was sealed and there was no damage on the seals.
- [5] The next witness Ronny Joseph stated that he was a former NDEA (National Drug Enforcement Agency) agent and he was instructed to search a man by the name of Jerry Lenclume in regard to a case of drugs. He stated he had arrested Jerry Lenclume at Petit Paris on the 26th of June 2017. No drugs were found on the accused. He stated he was accompanied by agent Terryna Balthide, agent Cadeau and agent Madeline. After arrest, the accused was taken to the NDEA office at Bois De Rose. Witness Mike Monthly stated he had been working with the police for the past 23 years and on the 25th of June 2017, he was attached to the airport police as Deputy Commander. He received information that a flight HM 754 was arriving from Madagascar and there was information that drugs had been placed inside a toilet. He had passed on the information to the NDEA officer at the airport agent D' Acambra. He had gone on board when the flight arrived and left as the NDEA agents had taken over. The other witness Stephane Agathe stated she had taken a buccal swab from the accused with his consent which she had obtained in writing. His consent form was marked as P7.

- [6] Mr. Yves Leon attached to Anti-Narcotics Bureau stated he had worked 32 years in the police force. He had received a phone call from agent Legaie at the airport that his assistance was required at the NDEA investigation unit in regard to the case of importation of controlled drugs. He was referred to agent D'Acambra, the officer who found the exhibits and he had examined the exhibits and taken photographs of the two packets of substances. There were also some tape on the packets and on the sticky side, he observed some hair fragments. On both packets there was some hair on the sticky side of the tape on the packets. He produced photographs as P8. Thereafter on the 11th of July 2017, he received from Julia Volcere a brown exhibit envelope inside of which were two containers containing 10 fragments of hair each. She sealed the envelope in front of him and handed it over to him to be taken to the forensic laboratory in Mauritius. The purpose of taking the hair samples to Mauritius was to further examine it and for DNA analysis. Each container was placed in an exhibit envelope labelled and dated. YL stood for Yves Lyon as he was the one taking the exhibit to Mauritius. On the same day he received the buccal swab of Jerry Lenclume from Stephanie Agathe labelled it YL 3 and two more buccal swabs one from David Mondon YL 4 and another from Richard Jules YL 5.
- [7] He had taken the exhibits together with the request letter to Mauritius and handed it over and they had stamped and signed the exhibit chart. The exhibits and report were returned to him after analysis on the 5th of October 2017 as per collection form marked P9. He identified the request letter and exhibit chart P2 and P3 respectively and the analyst report received by him as P4. He confirmed that the hair fragments were from the sticky side of the tape affixed to the packets of the controlled drugs.
- [8] The next witness called by the prosecution was Julia Volcere the government analyst. Her expertise was not challenged. She stated she received two sealed envelopes from agent Magarete D' Acambra and the request was for the hair samples to be checked for DNA and the substance to be analysed for controlled drugs. She identified the request letter P11. There were two packets she opened them one by one. In packet 1, she did a physical check and recorded the weight and placed a bit of sample taken from it for analysis of controlled drug. She then removed a total of 10 hairs samples from the sticky area of the clear tape and placed it in a container and labelled it and placed it in an envelope. She

proceeded to test the substance and confirmed the substance in the 1st packet was heroin. She then proceeded to test the purity of the substance. She did the same procedure with the 2nd packet. She then prepared her report and produced her report as P12. She stated according to her finding the 1st packet contained clear tape wrapped in cling film enclosing aggregates of powder of brownish substance identified by her as heroin net weight 280.7 grams. The purity was 45% with a total heroin content of 126.3 grams. The 2nd packet also comprised of clear tape wrapping cling film enclosing aggregate of brownish substance identified by her as heroin. The net weight was 478.2 grams and had a purity of 43% with a total heroin content of 205.6 grams. There were also some hair fragments on the 2nd packet adhering to the sticky area of the clear tape. The hair fragments from packets 1 and 2 were put into two small plastic containers and labelled 1 and 2 respectively. All hair samples were adhered to the sticky side of the clear tape and she had used tweezers to remove them. The hair fragments were difficult to remove from the sticky tape as they were tightly bound to it. She stated the way the hair samples were stuck indicated it was not accidental but the sticky tape had been in close contact with the hair samples. She described in detail the test carried out by her to identify the substance as heroin. When she received the exhibits from agent D' Acambra it was in a sealed state.

[9] She further stated that while the exhibits were in her custody there was no interference or tampering by others as the exhibits were kept in a locker in her safe and the keys were in her custody. She produced the exhibits in open court as P14 to P18. The hair samples in containers were produced as P5b (taken from 1st packet) and P6b (taken from the 2 packet). She stated as a forensic analyst she was unable to say from which part of the body the hair had come from. Mr. Ted Barbe stated that he requested for the travel details of the accused by letter P19 and received the information which was produced as P 20. Travel History of the accused from immigration was produced as P21 (a) and Richard Jules as P21 (b).

[10] Agent Margaret D' Acambra stated that she had been working as an ANB (Anti-Narcotics Bureau) officer for a period of 2 years and she would usually perform her duties at the airport. On the 25th of June 2017, she was at the airport and at that time she was working with the National Drug Enforcement Agency and the airbus from

Madagascar arrived at 7.02 p.m. and she was informed by Inspector Monthy that there were drugs aboard the said flight. She had informed her colleague and they had boarded the plane together after the passengers had disembarked. The sky chef cleaners were cleaning the plane. After they finished the duties they left the plane. They had entered the toilet situated at the right side at the tail of the plane. They had noticed a silver metallic cabinet in the toilet and she and her colleague agent S. Laflute opened the door of the cabinet and removed a bin that was located inside the cabinet and inside there was a clear plastic with controlled drug suspected to be heroin. In the bin there was nothing else. She stated when the bin was inside the cabinet you could access the bin from an opening on the top. She had removed the plastic and put the packages in a blue bin and left the plane about 8.15 p.m. She had done so by using gloves and noticed hairs stuck on the sticky side of the plastic. She identified from P8 photograph the two packages she had found in the bin. She had taken the packets into custody and taken them to the ANB office. She stated the hair was on the sticky part of the tape which was compressed on a part of the body. The bin was inside a metallic cabinet so it was not possible for the hairs to have accidentally have fallen on it, as it was not an open bin but had to be removed from the metallic cabinet to be accessed.

[11] She stated under cross examination that the D' Acambra mentioned in her statement was her and not another agent Vicky D' Acambra. She stated that agent Vicky D' Acambra did not work at the airport. There after the prosecution marked the statement of the accused under caution as P 22. Mr. Egbert Payet the exhibit store keeper was called to further establish that the chain of custody of the exhibits from the time the exhibit officer had taken charge of the exhibits. He stated when they were in his custody they were not tampered with. Mr. Sam Laflute the other agent who was present at the time the packets containing the controlled drugs were retrieved from the bin in the toilet of the airplane, corroborated the evidence of agent Margaret D' Acambra.

[12] Thereafter the prosecution closed its case and the accused chose his right to remain silent and did not call witnesses. In terms of article 19 (1) (h) of the Constitution no adverse inference should be drawn from the fact that the accused remained silent during his defence.

- [13] The main contention of the defence is that the hairs on the sticky tape on the cling film covering the controlled drug has not been proved by the prosecution to be that of the accused as only one hair matched that of the accused. It is the defence contention that there is a strong possibility that the accused and even other passengers used the toilet resulting in several hairs been found on the said sticky tape. His next contention is that the failure of the prosecution to carry out a fingerprint analysis on the exhibits and their failure to find the finger prints of the accused on the parcel is fatal for the prosecution case.
- [14] Firstly, it is to be observed that the prosecution seeks to establish the case not on finger print evidence but on DNA evidence from a hair sample found on the sticky tape of the cling film wrapping the controlled drug. The report P 12 states that the packaging 1 and 2 were referred to PC Bethew for finger print examination. Witness Julia Volcere herself admits no finger print report was communicated to her. It could be presumed that the prosecution does not wish to rely on a finger print as the finger prints of the accused could not be found on the packaging sent for finger print analysis. This does not necessarily mean that there is no case against the accused. The prosecution has next attempted to prove that the hair sample found on the sticky tape belonged to the accused. In doing so several hair samples found on the sticky tapes of the packets 1 and 2 which both contained a brown substance identified as heroin recovered from the bin of a toilet in the plane, were sent for DNA analysis to Mauritius. Samples of DNA from the saliva taken from the buccal cavity of the accused were also sent. The forensic analyst reported that the hair sample taken from the sticky tape on packet 1, contained a DNA profile that matched the DNA profile of sample given by the accused from his buccal cavity. This clearly establishes the connection between the accused and the controlled drug found in the bin of the toilet in the plane in which the accused admittedly travelled that day.
- [15] The evidence of the government analyst in the Seychelles M/s Volcere is that she extracted the hair samples which were firmly stuck to the sticky tape in both packages which she states indicates that the sticky tape had been in contact with the body of the individual concerned. The fact that the hair samples were firmly stuck to the sticky tape is further established by the evidence of the detecting officer D'Acambra and Sam Laflute

indicating that the hairs had not fallen accidentally onto the sticky tapes. Further the accused denies going to the toilet whilst on the plane in his statement under caution P 22, even though Learned Counsel for the accused attempts to place him there in his submissions to show it could have happened accidentally. The other hairs on the sticky tape did not have DNA to obtain DNA profiles, therefore it cannot be said that other hairs found on packet 1 belonged to the accused or persons other than the accused. The necessity for the prosecution to call the other suspects from whom buccal cavity swabs were obtained is therefore not necessary. Further the bin was inside a silver metallic cabinet and thus it was not possible for hairs to have accidentally fallen on it as borne out by the evidence of the detecting officers. Therefore the defence contention that there is a strong possibility that the accused and even other passengers used the toilet resulting in several hairs been found on the said sticky tape is not acceptable or bears merit. This Court is satisfied that the evidence set out above clearly establishes beyond reasonable doubt the connection between the accused and the controlled drug heroin contained in packet 1. This evidence further confirms, beyond reasonable doubt that at some stage during the importation, the said packet 1 containing the controlled drug was in the possession and control of the accused Jerry Lenclume **R v Marengo [2004] SLR 116**.

- [16] The accused admits in his statement under caution that he did come on the said flight HM 754 and his Learned Counsel admits same in his submissions to Court. The evidence of Mr. Ted Barbe and documents P 19 and 20 corroborate this fact. I am therefore satisfied that this admission as contained in is retracted statement can be accepted as it stands corroborated from an independent source. Further the flight as borne out by the evidence both oral and documentary was coming in from Madagascar to the Seychelles therefore this establishes that the controlled drug was being brought into the Seychelles on the said flight. In the case of **R v Dubignon [1998] SLR 52** “ In Seychelles in the absence of any definition, the word “import” must be taken in the broader sense of “to bring” or “ cause to be brought” by air or sea. “ In the Interpretation and General Provisions Act CAP 103 it defines “Import” means to bring, or cause to be brought, into Seychelles. Therefore when one considers the aforementioned evidence, the act of importation has too been established by the prosecution beyond reasonable doubt.

[17] When one considers the evidence of the witnesses for the prosecution namely Mr. Yves Leon, detecting officer D'Acambra, exhibit officer Egbert Payet, forensic analyst Seychelles Julia Volcere and Mauritius analyst Zeina Maharaullee, I am satisfied beyond reasonable doubt about the chain of custody of the exhibits from the time of detection till the time the exhibits were produced in Court. The evidence clearly indicates the exhibits were always kept in safe custody and there was no possibility at any stage of the exhibits being tampered with. I am also satisfied on the evidence of government analyst Julia Volcere supported by her report P12 that the suspect substance found in packet 1 was a controlled drug namely Heroin having a net weight of 280.7 grams with a purity of 45% and having a heroin content of 126.3 grams.

[18] For all the aforementioned reasons, I proceed to accept the evidence of the prosecution and reject the defence. I am satisfied the prosecution has proved all the essential elements of the charge beyond reasonable doubt. I proceed to find the accused Jerry Lenclume guilty of the charge and convict him of same.

Signed, dated and delivered at Ile du Port on 19 March 2019

Burhan J