

**SUPREME COURT OF SEYCHELLES**

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**Reportable**  
[2019] SCSC 214  
CO3/2018

In the matter between

**THE REPUBLIC**  
*(rep. by Hermant Kumar)*

and

**JEAN ALBERT LOUISE**  
*(rep. by Nichol Gabriel)*

**Accused**

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**Neutral Citation:** Rep v Louise CO3/2018) [2019] SCSC214 (15 March 2019).

**Before:** Govinden J

**Summary:** Accused acquitted on two counts; namely the offence of possession with intent to traffic in the controlled drug cannabis herbal materials and possession with intent to traffic in the controlled drug cannabis resin, all contrary to section 9(1) of the Misuse of Drugs Act, punishable under Section 7(1) of the Misuse of Drugs Act 2016, respectively, as a result of failure by the Prosecution to establish physical possession of the controlled drugs on the part of the Accused person.

**Heard:** 24, 27 September 2018

**Delivered:** 15 March 2019

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**JUDGMENT**

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**GOVINDEN J**

[1] The Accused person stands charge as follows:

**Count 1**

### **Statement of offence**

*Possession with intent to traffic in a controlled drug , namely cannabis herbal materials contrary to section 9(1) of the Misuse of Drugs Act punishable under section 7 (1) of the Misuse of Drugs Act 2016.*

### **Particulars of offence**

*Jean Albert Louise of Tamatave Estate , Praslin on the 28<sup>th</sup> of December 20017, at Grand Anse, Praslin possessed the controlled drug having a net weight of 1243.0 grams of cannabis materials unlawfully with intent to traffic with in contravention of the said Act and committed the offence of trafficking.*

### **Count 2**

### **Statement of offence**

*Possession with intent to traffic in a controlled drug, namely cannabis resin contrary to section 9 (1) of the Misused of Drugs Act punishable under section 7 (1) of the Misuse of Drugs Act 2016.*

### **Particulars of offence**

*Jean Albert Louise of Tamatave Estate, Praslin on the 28<sup>th</sup> of December 2017, at Grand Anse, Praslin possessed the controlled drug having net weight of 184.3 grams of Cannabis Resin unlawfully with intent to traffic with in contravention of the said Act and committed the offence of Trafficking*

- [2] After being charged the Accused person was released on the bail of this court on the condition that he appears for his subsequent trials.
- [3] The Republic's case started off with the leading of the evidence of Egbert Payet, an officer of the Anti Narcotic Bureau (ANB). Officer Payet testified that he is attached to the investigation section of the ANB and that on the 28<sup>th</sup> of December 2017, whilst he was on duty at the Bois de Rose station, at 9am in the morning, he received from Sub Inspector Desire Boniface a sealed evidence bag marked and labelled as CB 241/ 12 / 2017 of Baie Ate Anne Praslin. On the same day in the afternoon he brought the sealed evidence bag along with a Letter of Request to the Scientific Support Bureau for the

purpose of analysis and there the said evidence bag was a handed over to Ms Julia Volcere, a government Analyst , for analysis .

- [4] According to the witness when Ms Volcere received the bag from him, both he and the latter signed on the Letter of Request and on the evidence bag. In so doing it is his testimony that Ms Volcere verified the CB number on the bag and the Letter of Request and the description on the evidence bag. In court the witness identified the Letter of Request that he had drafted and that he handed over to Ms Volcere, This letter was produced in evidence as exhibit P(1), with no objection from the Defence .
- [5] Officer Payet testified that he next went to Ms Volcere on the 19<sup>th</sup> of January 2018 at 2 o'clock in the afternoon, where he received the said bag along with a certificate of analysis. According to officer Payet, both he and Ms Volcere signed on the certificate of analysis and he verified the evidence bag and saw that it was resealed .Then Ms Volcere signed on the sealed evidence bag and on the chain of custody entry on the bag and he thereafter signed it and took custody of the bag. He kept the evidence bag and the certificate of analysis at the ANB headquarters in an exhibit store.
- [6] Witness Egbert Payet, thereafter, produced the evidence bag in court, in the process he indicated the various signatures on the bag that he and witness Volcere placed on the bag. He testified on the description of the content of the evidence bag, which he said contained a black plastic bag; enclosing a green disposable bag that further contained a blue disposable bag that in turn contained two dark substances each wrapped in cling film and a block of herbal material wrapped in cling film. Officer Payet thereafter opened a sealed evidence bag in court and removed its content.
- [7] The content proved to be the same as the ones indicated on the cover of the Exhibit Envelope. The witness confirmed that these were the exhibits that he handed over to Ms Volcere on the 28<sup>th</sup> of December 2017 for analysis. The content of the evidence Bag and the bag itself were then produced in evidence without any defence objections.
- [8] The evidence bag was marked as exhibit p (2); the black bin liner as exhibit p (3); the green disposable bag was marked as exhibit p (4); the blue disposable bag as p (5), the

two pieces of dark brown substances found in the blue disposable bag was collectively marked as p (6); a piece of compacted herbal material wrapped in cling film and foil paper were marked collectively as exhibit p (7).

- [9] The witness testified that on the 19<sup>th</sup> of January 2018 he also received an Analyst Report from Ms Julia Volcere. The witness identified the Report in court and indicated the entries of his signatures and the signatures of Ms Volcere on the Report. The Analyst Report of Ms Volcere was produced in evidence as exhibit p (7).
- [10] During the course of his cross examination officer Payet testified on the physical state of the disposable bags. He said that the blue bag had a hole in it, whilst the green bag had a torn handle.
- [11] The next witness for the Republic was police officer Jean Philip Lucas. The witness is a forensic Officer attached to the scientific Support Unit and Crime Record Bureau of the Seychelles police. He testified that he photographed a motor cycle, bearing registration number S 25883, belonging to the Accused person, at the Grand Anse Praslin police station. He did this at the request of agent Lagrenade of the police Anti Narcotic Bureau. Those photographs were collectively marked as exhibit p (8), without objections.
- [12] Police Officer Desire Boniface was the third witness for the Republic. His evidence is that on the 27<sup>th</sup> and the 28<sup>th</sup> of December 2017 he performed mobile patrol duties as part of a special task force with two other law enforcement officers on Praslin. He was the most senior of the three officers. In his company there were army private Bibi and police officer Nerry Luc, the latter came from the Seychelles police dog unit.
- [13] The witness testified that on the 28<sup>th</sup> of December he was patrolling in the vicinity of Grand Anse and that about 3.30 am to 4 am in the morning whilst they were patrolling on Grand Anse Praslin road they saw the Accused person on a motor cycle approaching them opposite the Barclays Bank. As his vehicle approached the motorcycle, the latter turned towards the right handside towards the Grand Anse cemetery and it increased its speed. As a result he suspected the Accused person of committing an offence as it seemed that he was trying to flee from them. They immediately gave chase to him and arriving at

the cemetery he saw the Accused person who had fallen on the ground and whilst on the ground he saw him throw something in the bush not far from where he was. Then he and all the other officers disembarked from their vehicle. He left the two other patrolling officers with the Accused person in order for them to attend to his needs whilst he took a torch and searched at the place where he saw the Accused person threw the item. According to him there he saw a black plastic bag.

[14] Officer Boniface testified further that after finding the black plastic bag, he opened it in the presence of the Accused person and inside the black plastic there were two other plastics bags. Inside the third plastic he saw two pieces of black substances that he suspected to be controlled drug individually wrapped in cling film and beneath was a block of herbal material wrapped in cling film and aluminium foil. He testified that they then brought the Accused person to the Baie Ste Anne police station where formalities were carried out, including making entries in the Occurrence book of that station and registering a case against the Accused person. On the same day at 7.30 am he took the exhibit and the Accused person to Mahe and there he handed him over to officer Egbert Payet. Officer Boniface identified the Accused person from the dock in a dock identification, he also identified the latter's motorcycle from exhibit p (8). The officer also identified exhibit p (3) to p (7) and he testified that they were the items that he seized from the accused on the 28<sup>th</sup> of December and that he handed over to officer Payet.

[15] Under cross examination officer Boniface testified that it was when the headlight of his car was shining that he saw the Accused person throw a black plastic bag away. According to him the Accused person at the time was stuck under his motor cycle. Thereafter, he informed him of his constitutional rights, which were of the suspected offence of possession of a controlled drug and his right to remain silent and his right to counsel.

[16] Police Officer, constable Nerry Luc was called to corroborate the evidence of officer Boniface. He testified that on the 27<sup>th</sup> of December 2017 he was instructed to carry out a mobile patrol together with officer Boniface and Bibi on Praslin and that he recalled seeing the Accused person on a motorcycle near the Grand Anse police station and that

the Accused person went towards the Grand Anse cemetery when he was spotted by the patrol and that this occurred at 4 am in the morning. They followed the vehicle of the Accused person as he was acting suspiciously. According to him the Accused person then fell down on the road, with the motorcycle partly lying on his leg and the he saw him throw something away.

[17] The witness carried out a dock identification of the Accused person similar to the other Republic's witnesses. He supported the evidence of Officer Boniface that it was from the light of their patrol vehicle that they managed to see the Accused threw away something.

[18] The witness recount that he then restrained the Accused person and he pointed to Sub Inspector Boniface where he saw the former threw something and Boniface searched the area and picked up a black plastic bag. After that, Sub Inspector Boniface opened the bag in front of the Accused Person and the rest of the officers. Inside the black plastic according to witness Luc was a wrapped green bag and inside the wrapped up green bag was a blue bag, which in turn was found a block of substance and two pieces of dark substance. According to him, upon being shown those items the Accused person denied that the plastic and its content were his.

[19] The witness identified the motorcycle of the Accused person. As far as exhibit p (3)top (7) are concerned the witness testified that these were the items that he saw the Accused person threw away on the 27<sup>th</sup> of December 2017.

[20] Under cross examination the police officer testified that after cautioning and informing the Accused person of his rights, the latter informed them that he was trying to get away from them because he suspected them to be law enforcement officers and that did not have a license to ride a motor cycle.

[21] Ms Julia Volcere testified next. She is a forensic analyst working with the Police Scientific Support and Crime Records Bureau of the Seychelles Police Force. On the 28<sup>th</sup> of December 2017 she received the exhibits involved in this case from officer Egbert Payet, following her analysis she issued the Analyst Report to the latter on the 19<sup>th</sup> of

January 2018. The witness identified her report that she issued to the said officer and she physically described the controlled drugs exhibits brought to her for analysis.

[22] Under cross examination she testified on the procedure that she used in her analysis. She removed representative samples for analysis on different locations of the different controlled drug exhibits. She claimed that this would not have affected the general weight of the substances as the samples retrieved were very small. Ms Volcere's evidence is that the exhibits subject matter of the charges in this case are cannabis and cannabis resin, respectively.

[23] The Prosecution closed its case following the evidence of Ms Volcere and upon being informed of his rights under section 183 of the Criminal Procedure Code the Accused person decided to exercise his right to give an unsworn statement from the dock.

[24] In his unsworn statement the Accused person said that on the 28<sup>th</sup> of December 2017 he was coming from his mother in law's place and was going to his house. Whilst doing so he saw a vehicle coming, he did not know that it was the police, he went towards the "shell" and as he did not have a scooter licence. That was when he slipped and fall. The police removed the scooter that was on top of him. He fractured his rib and the police asked him whether he threw anything and he answered in the negative .The Accused person testified that he recalled that a police officer walked away and picked up a plastic in the bush and told him that he was the one that had thrown it away and he answered that he could not have thrown that object away as the scooter was on top of him. According to his dock statement he was later taken to the Grand Anse police station and his request to be taken to the doctor was not acceded to by the police. He then went on to state that when they picked up plastic the police called out "jackpot". Thereafter, he was brought by boat to Mahe and there the Anti Narcotic Officers took him to see a doctor. The accused person stated that thereafter he was remanded by the court .

### **Proof of the Controlled Drug.**

[25] Upon scrutinizing the evidence led by the prosecution in this case, this court finds that the 1243.0 grams of substances charged in count 1 to be the controlled drug cannabis and that the substance weighing 184.3 grams charged in count 2 to be cannabis resin . Both being

controlled drugs by virtue of being listed as such in the 1<sup>st</sup> schedule of the Misused of Dugs Act 2016. I find the evidence of the government analyst Julia Volcere to be credible and uncontroverted in that respect. The defence did not raise any issue regarding the nature of the substances charged, neither during the course of her testimony nor in its final submissions. The sampling techniques used and subject matter of cross examination did not go to the elicited nature of the substances charged.

### **Chain of custody**

[26] The ANB Officer, Egbert Payet, testified that he received the exhibits in this case, including the controlled drugs, from SI Desire Boniface on the 28<sup>th</sup> of December 2017. The evidence bag in which they were contained was intact and sealed. On the same day he brought the exhibits for analysis to Ms Julia Volcere. The handing over procedure took place with verifications of the evidence bag. The officer testified that he received back the bag and its content from the Analyst on the 19<sup>th</sup> of January 2019 and all the handing over protocols were observed.

[27] It is the testimony of officer Payet that he then placed the evidence bag in the exhibit store at the ANB headquarters. The Officer produced the bag to the court with the seal intact and he opened the bag in court and revealed its content. The content of the bag proved to be the same one as testified by Officer Desire Boniface and Officer Luc. The latter eventually identified those exhibits in court. The productions of the exhibits were made without objections from the defence. During the course of the cross examinations of those witnesses no issues were raised by the Learned Defence Counsel regarding the chain of custody of the exhibits from the time of their seizure to the time of their production in court.

[28] Accordingly, I am of the view that the chain of custody to be proven by the prosecution beyond a reasonable doubt.

### **Essential elements of the offence**

[29] The Offences charged in the two counts before the court contain the following essential elements;



- (1) That the accused was in possession of the controlled drug that are presently exhibited as p (6) and p (7).
- (2) That the possession of the said controlled drug was with the intention to traffic.

[30] In order to prove the second element of “*intent to traffic*”, which is essentially a mental element, the Republic can produce the evidence of a confession; evidence from informants; telephone information; circumstantial evidence such as the value or quantity of the drugs found in possession of the Accused person or the presence of paraphernalias, such as scales etc. All this in an attempt to show that the controlled drug in the possession of the Accused person was destined and intended for trafficking in terms of the above referred provisions of the Misused of Drugs Act.

[31] On the other hand “*traffic*” will have the same meaning as found in s 2 of the Misused of Drugs Act. Which are acts of selling; brokering; supplying; transporting; sending; delivering or; distributing or offering to sell; broker; supply; transport; send; deliver or distribute or to offer to do any acts preparatory to or for the purpose of selling , brokering; supplying; transporting; sending; delivering or; distributing .

[32] The proving of the “*intent to traffic*” and the act of trafficking being disjunctive and independent from one another.

[33] As to the element of possession in order for an Accused person to be found guilty of possession for the purpose of the offence of possession with intent to traffic the, Republic must prove beyond a reasonable doubt that the Accused person was in physical possession of the controlled drug that he or she is charged with and he or she knew that the substance was an illicit substance under the Act the Misused of Drugs Act. *R vs Albert (1997) SLR 27; R vs Shah ( 1979) SLR I; Dunienville vs R (1982) SLR 48; DPP vs Brooks [1974] A.C 862*

[34] As far as evidence with respect to physical possession of the controlled drug is concerned, the following evidence is present on record, Sub Inspector Boniface testified, “ *Upon arriving there at the cemetery I saw the accused if I can say he had*

*fallen down and as I was getting out of the vehicle I saw him throw something in the bush not far from where he was that was about 3.30 am*". According to him he took his torch and he searched the bushes which was not far and saw a plastic bag. He went on to show the Accused person a black plastic bag that he had collected and it is his evidence that he (the Accused person), *"looked at me confused"* and then the Accused person said *"this is not his"*.

[35] Under cross examination Officer Boniface, stated that he saw the Accused throw *"something"* and the light of his vehicle was not on full light and it was *"a bit dark"* and the Accused person was lying pinned down by his motor cycle some metres ahead. Upon being further questioned he said that he saw a black plastic bag being thrown by the Accused

[36] As far as Officer Nerry Luc is concerned his testimony, on this aspect of the evidence is as follows, he testified that the Accused person fell from the scooter at about 10 to 7 meters from their pursuing vehicle and there and then he saw *"something"* in his hand and the he threw it away and according to him *"it was something black"*.

[37] According to Officer Luc , it was Sub Inspector Boniface that retrieved the black object from the bush , which was found to be a black plastic bag and that when Mr Louise was shown the bag he said , *" it does not belong to him, it was already there before he got there. "*.

[38] Although the defence did not in its submission fully raised the issue of exclusive possession or lack of possession in its closing submission, it is the duty of this court to ensure that the Republic proves beyond a reasonable doubts all the essential elements of the case, including that of possession. Especially given that the Accused person did denied the possession of the exhibits both upon being confronted with them at the scene of alleged possession and in his Dock Statement.

[39] As I have found the concept of possession is well settled in law. The prosecution must above all established the elements of physical possession by the Accused person that is, the custody of the drug.

[40] Having scrutinized the evidence in that regards I found that the following facts as proven: The exhibits were retrieved from some bushes not very far from where the Accused person laid pinned down under his motorcycle. This fact is not denied. The exhibits were picked up by Sub Inspector Boniface at around four am in the morning, there was no light in the area and it was pitch black. He had to use a torchlight to search and locate them. They were found in a bushy, public area, near or in a cemetery where there were lots of leaves on the ground. His search was quick and he came out with the exhibits whilst the Accused person was being attended to. The Officer Boniface initially testified upon *something* being seen thrown by the Accused person, this he saw when the dimed headlights of his vehicle was shining on the latter, he thereafter took his torch and searched the area and he saw a plastic bag. He then show it to the Accused person as he believed it to be the thing thrown by the Accused person. The latter categorically denied that it was his .It was only under cross examination that the witness talked about a black plastic bag being thrown. Officer Luc on his part testified that he saw *something black* being thrown and that it was only when Sub inspector Boniface came from the bush that he found that the black object was a plastic bag.

[41] This set of evidence lives me in doubt as to what was seen being thrown by the Accused person by the two witnesses in the darkness of that public place. To my mind the Accused person could, in the dark, have thrown away any dark object that was in his hand and not necessarily the black plastic bag. Officer Boniface having gone and seen a black plastic bag made an assumption that it should have been the black object being thrown by the Accused person. But this decision based on that assumption is not enough to establish beyond a reasonable doubt that the black plastic bag was in the possession of the accused. For me to have been convinced that the black plastic bag was the object thrown by the Accused person there should be strong cogent and consistent evidence coming from the exhibit officer and officer Luc that the Accused person was seen throwing a black plastic bag, in which were contained the controlled drugs, and that the same bag was picked up by Officer Boniface. I do not see that in evidence. As far as the evidence can be argued to consist of enough circumstantial evidence of possession I am of the view that this cannot be so as there is more than one inference that can be drawn from the facts consisting of the Accused person being seen to be throwing a black object

and a black plastic bag being recovered. From these facts there can be a strong inference that another object or another plastic bag other than the plastic bag was thrown but officer Boniface only chose to pick up only the plastic bag and the other black object or other plastic were ignored.

[42] Moreover, there is no evidence from Officer Boniface that he painstakingly and thoroughly searched the relevant area to see to it that there were no other black plastic bags other than the one that he picked up or that no other black objects were seen other than the black plastic bag in the place where the object was seen to have been thrown.

[43] Officer Boniface went in the bush with a torch light and almost immediately came out with a black plastic bag. Neither he nor any other officers present on the scene talked about an exhaustive searched for any additional or similar items. The location of the alleged discarding of the exhibits by the accused person is a public place which may have contained other similar items to the one retrieved, it has not been prove to the satisfaction of this court that no similar items were seen or found at that place or that the exhibits were the only items of the kind seen thrown away by Mr Louise, that were found lying there.

- [44] This court cannot but emphasise that in cases where an Accused person is seen discarding an object or objects suspected to be a controlled drug in circumstances where the discarding identification is weak the police has a duty to ensure that they collect the right evidence in order to link the possession of the controlled drug to the Accused person.
- [45] The evidence of discard will be weak, for example, where such identifications were done in poor lighting conditions; where the distance between the Accused person and identifying police officers or witnesses were far apart or was otherwise obstructed or that the discard was quick or unexpected.
- [46] In such instances the controlled dug will not be found physically on the Accused person but at a place where he had allegedly thrown away an object or objects, with the evidence of the discard being weak.
- [47] It is the duty of the police in these instances to carry out a thorough search of the area where the discard had allegedly taken place. The result of the search should reveal that only the objects or object seen being thrown by the Accused person were or was up by the police. Or that other items were seen together with the discarded object or objects but none of them match the physical description of the object or objects that was or were seen being discarded by the Accused person. In these instances the court would be able to draw the necessary inferences that the discarded objects or object were the ones or the one that were or was seen being thrown away by the Accused person.
- [48] Where the evidence points to the contrary, the Republic would be in a difficult position to establish beyond a reasonable doubt that the objects or object retrieved were the ones or the one seen being thrown by the accused person.
- [49] As a result the court find that the prosecution have not managed to prove beyond a reasonable doubt that the exhibits produced to court as exhibits p3 to p7 were found in the physical possession of the Accused person on the 28<sup>th</sup> of December and that the controlled drugs charged in counts 1 and 2 in this case were in the physical possession of the Accused person. Accordingly, I find that the prosecution has not proven this case

beyond a reasonable doubt and I acquit the Accused person of both charges levelled against him.

[50] Having satisfied myself that the prosecution has not managed to prove the physical element of this offence beyond a reasonable doubt, it would serve no purpose for this court to look for proof in regards to the other elements of the offence.

[51] As a result of this acquittal the bail conditions imposed on the Accused person at the start of these proceedings would lapse and I accordingly rescind and cancel it. Any passport or travelling document surrendered by the Accused person to the Registrar of the Supreme Court shall be returned to him.

Signed, dated and delivered at Ile du Porton 15 March 2019

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Govinden J