

SUPREME COURT OF SEYCHELLES

Reportable

[2019] SCSC 784

CO15/2017

In the matter between:

THE REPUBLIC

(rep. by Mr Jayaraj Chinasamy)

and

FRANCIS BARREAU

(rep. by Mr Nichol Gabriel)

Accused

Neutral Citation: The Republic v Francis Barreau [2019] SCSC 784

Before: Govinden J

Summary: **No case to answer – Section 183 of the Criminal Procedure Code.**

Heard: 1st and 4th of October 2018

Delivered: 17th September 2019

ORDER

On a submission being made, the court ruled that no case has been made out against the Accused person sufficient to require him to make a defence, as the prosecution had failed to establish the element of possession of the Controlled Drugs. The case was dismissed for reasons given in the Ruling and the Accused person acquitted.

RULING

GOVINDEN J

The charges

The Accused person stands charge with the following offences;

Count 1

Statement of Offence

Trafficking in a controlled drug, by virtue of being found in unlawful possession of a controlled drug namely Heroin (Diamorphine), with intent to traffic, contrary to section 9(1) read with section 19 (1) (C) of the Misuse of Drugs Act 2016 and read with section 22 (a) of the Penal Code and punishable under section 7(1) and the second schedule of the said Misuse of drugs Act.

Particulars of offence

Francis Barreau of Cote D'or, at La Louise, Mahe, on 12 November 2017 was trafficking in a controlled drug, by virtue of having been found in unlawful possession of a substance having a total net weight of 61.52 grams of light brownish substance which containing a controlled drug namely Heroin with a purity of 55 percent (Heroin;33.83 grams), giving rise to the rebuttable presumption of having possessed the said controlled drug with intent to traffic.

Count 2

Statement of Offence

Trafficking, in a controlled drug, by virtue of being found in unlawful possession of a controlled drug namely cannabis herbal materials with intent to traffic, contrary to section 9 (1) read with section 19 (1) (d) of the Misuse of Drugs Act, 2016 and punishable under Section 7 (1) and the Second Schedule of the said Act.

Particulars of offence

Francis Barreau of Cote d'or at La Louise, Mahe, on the 12th November 2017 was trafficking in a controlled drug by virtue of having been found in unlawful possession of a substance having a total net weight of 351.9 grams of cannabis herbal material giving rise to the rebuttable presumption of having possessed the said controlled drug with the intent to traffic

No case to answer submission

[1] At the close of the prosecution case the defence chose to make a no case to answer submission in pursuant to s 183 of the Criminal Procedure Code.

- [2] In effect the learned defence Counsel, Mr Nichol Gabriel, contended that the evidence adduced by the prosecution has failed to established essential an element of the offences. In both counts, the defence had argued that the Republic has failed to show that the Accused person, Mr Francis Barreau, had the possession of the controlled drugs charged. As a result, Learned defence counsel submitted that the prosecution has failed to establish a prima facie case against the Accused person and that the case should be dismissed and that he should be acquitted.
- [3] Mr Chinnasamy, Learned Counsel representing the Republic, in his reply to the no case to answer submission, submitted that the prosecution has charged the accused with trafficking in a controlled drug, heroin by virtue of being found in unlawful possession of two different Controlled Drug, contrary to section 9 (1) read with section 19(1) (c) and 19 (1) (d) of the Misuse of Drugs Act 2016. And that the evidence adduced by the prosecution so far has proved all the essential elements of the offences charged, including the element of possession, and that as a result he has proved his case on a prima facie basis.
- [4] The learned counsel quoted the case of *Republic vs Marengo and ors* , SC 11/03in which the court defined “ *possession*” for the purpose of trafficking as follows, “*In the ordinary use of the word possession one has in possession whatever is to their own knowledge physically in their custody or under their physical control. That is what is intended to be prohibited in the case of dangerous drug*”. The learned counsel also made reference to the case of *Republic vs Albert* SC 45/97, in which the court held further that, “*the court must be satisfied that the accused possessed the controlled drug and had knowledge of that possession. Possession of a controlled drug may be established through continuous act that involves either physical custody or of control*”. Finally, he cited the case of *Republic vs Victor* CR 62/10, in which the Supreme Court ruled that, “*The concept of possession consist of two elements; custody and knowledge, as was well established in the case of DPP vs Brooks [1974] AC 862. A person has possession of drugs if he or she has actual control of drugs such as having the drugs in his or her hand or if the drugs are*

on that person. A person has also possession of drugs if he or she has the power and intent to control and use the drugs”

The law

- [5] The law governing this submission can be summarized as follows;
- [6] When it comes to the submissions of no case to answer, the prosecution at this stage of the trial, needs to show that it has made a prima facie case against the Accused person and this is decided on a balance of probabilities.
- [7] There is no case to answer where there is no evidence to prove an essential element in the alleged offence; or the prosecution case is so manifestly unreliable that no reasonable tribunal could safely convict upon it.
- [8] If a submission is made that there is no case to answer, the court should make a decision based on whether the evidence is such that a reasonable court might convict the accused and not whether the court, if compelled to do so, would at that stage convict or acquit the accused person.
- [9] Where a court comes to the conclusion that the prosecution evidence, taken as at its highest, is such that a jury properly directed could not properly convict upon it, it is the duty of the court, upon a submission being made, to stop the case.
- [10] Where the prosecution evidence is such that its strength or weakness depends on the view to be taken on the reliability of a witness or other matters within the preserve 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.
- [11] Before making a decision on a submission of no case to answer, the judge must wait until the conclusion of the prosecution’s case. *R vs Lepere(1971) SLR 112; R vs Stiven*

(1971) SLR 137;R vs Olsen (1973) SLR 188; R vs Marengo (2004) SLR 116; R vs Matombe (2006) SLR 32.

Statement of issues and analysis

- [12] In this case the defence is not questioning the credibility of the witnesses, it is only submitting on the lack of proof of one essential elements of the offences in both counts. It is there submission that there is no evidence to prove both the physical and mental elements of possession. It is the case of the defence that the Accused person was not present in the premises where the controlled drugs were seized; that he has no legal right to these properties, that controlled drugs belonged to a former co-accused in this case; that no forensic evidence, including finger print evidence was produced to show a link between the controlled drugs and the Accused person. It is their submission that the only evidence of the Accused person possession of the Controlled Drugs only came from the verbal testimonies of Laure Dick and that of the latter's daughter, the former being already being formerly implicated in this case as a co-accused
- [13] The submissions of the Republic regarding the applicable law in respect of the possession of a controlled drug is accepted by the defence. It is the defence contention, however, that even if it is to accept these submissions as true, the Republic have not managed to adduce enough evidence prove the element of possession of the controlled drugs.
- [14] Bearing the above legal principles and the law in mind, I have carefully examined the entire evidence led so far by the 8 prosecution witnesses. In doing so I have given special and careful consideration to the submissions of both the learned Principal state counsel and that of the learned Defence Counsel when it comes to the facts regarding the Accused person being in possession of the controlled drugs charged in the two counts before this court.
- [15] The prosecution has to prove that the accused was in possession of the controlled drugs on a prima facie basis. It is by virtue of this possession that the presumption of trafficking are triggered in this case. The amounts of the Controlled Drug possessed are such that, if

proven, will trigger the presumption that the Accused person was in possession of the drugs with the intent to traffic. Under count 1 the Accused person is said to have possessed 61.52 grams of heroin. Whilst under count 2 he is said to have possessed 351.2 grams of cannabis resin. For the purpose of possession of a controlled drug.

[16] In the case of *Republic v Marengo SSC 11/2003*, the Supreme Court held, “*In the ordinary use of the word possession; one has in possession whatever is to their knowledge physically in their custody or under their physical control. This is what was intended to be prohibited in the case of dangerous drugs*”.

[17] In the case of *Noel v Republic 1992 SLR 152*. The court when addressing a case where drugs is shared or found in a home held, “*Unless there is conclusive evidence that a person is in possession of, or actually using drugs on his premises, he cannot be responsible for possession of the same. Where drugs are found in a house where there are several occupants, it has to be proved beyond doubt that the person charged was in exclusive possession of them or that the drugs formed a common pool from which occupiers could partake at will*”.

[18] As regards the evidence to prove “*intent to traffic*”, it was held in the case of *R vs Louise SCR 3/18* , that, “*it is essentially a mental element, the Republic can produced the evidence of a confession; evidence from informants; telephone information or the presence of paraphenalias such as scales. 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 provision of the Misused of Drugs Act*”.

In this, case therefore, first and foremost, the Prosecution has to prove possession. It is only if it can satisfied this court that the Accused person was in possession that it will then proceed to prove that the possession done was with the intent to traffic.

The facts of the case reveals the following;

Andy Servina, an Anti Narcotic Bureau (ANB) police officer testified that he received credible information that the Accused person was leaving drugs at the house of Claudette Dick at La Louise. He informed his colleague Terry Florentine and he and Terry, in the company of other ANB officers went to the house of Claudette Dick at around 7.30 am on the 12th of November 2017. There they met an elderly lady and a boy name Savio Joubert. Present on the scene was also a police dog handler. A search was conducted with the assistance of the dogs which gave three indications in the house. In searching the indicated areas, in the living room, Officer Servina saw a white plastic with imprints. Inside the plastic was a clear plastic which contained herbal materials. Claudette Dick was arrested for the offence of possession of a Controlled Drug when she came back to the house. In the living room a white box written " bicarbonate " was found. It was opened in the presence of Claudette Dick and some clear plastics were found inside containing drugs suspected to be heroin. A machete with traces of substance was also found and seized from the bedroom. A sum of SR10,000 in cash was also seized. All the exhibits were handed over to Officer Egbert Payet. On cross examination, the officer confirmed that the accused was not present at the house on the day and time in question.

Witness Aubrey Valentin testified that on the 12th November 2017 he received a call from agent Servina to inform him that there was a job to be done at La Louise. He proceeded to the place accompanied by Agents Lisa Valentin, Servina and Mellie. They checked through the windows and saw a lady with a boy. They knocked on the door and told the lady that a search would be conducted in the house. She allowed them to conduct the search. The dogs indicated some locations one of which was a drawer. They found a white plastic bag with blue imprints on it. Inside they found cannabis herbal materials. The lady who turned out to be Claudette Dick was cautioned. Later they found a machete in the bedroom and then a white container in which heroin was found. Cash in the sum of SR10,000 was also found and seized. On cross examination, the witness stated that the accused was not present on the date and time of the search in the house.

Witness Dave Mellie corroborated the evidence of the previous two witnesses. He was the dog handler. However, he could not recall what was inside the white plastic bag. He also confirmed that the accused was not present at the date and time at the location.

Witness Lisa Valentin further corroborated the evidence of the other officers.

Witness Laure Dick. She was initially charged but was made a state witness at a later stage of the proceedings. She testified that she knew the accused as being in a relationship with her daughter Kerine. However, she resides at Les Mamelles and would come to take care of her mother Claudette Dick at La Louise. On the 12th November 2017 she went to her mother's place and saw the ANB Officers there. She was questioned and then taken to the ANB Office at 11am where she was arrested. She recounted that the accused would come to her mother's house about 3-4 times to bring heroin. She knows heroin because her brother and son are users of the substance. She said the accused would place the substances in the kitchen or on the cabinet. He would also place it in a medicine box belonging to her mother. He would collect these later to sell. Her role was to give the heroin and the guys would pay the money. The money collected is given to the Accused, sometimes between SR25,000-28,000. She was also shown the medicine box and after some difficulties she identified it. The last time she saw the accused was on the Friday morning. That was before the search was done at the house which was on a Sunday. She also confirmed that the money seized belonged to her and she normally keeps her cash at her mother's place to avoid thieves. She would even keep as much as SR40,000 in the room.

Witness Savio Joubert was at the house when the officers searched on that day. He is a student at the Maritime School. He is 16 years old. He said the accused would come to the house of his grandmother Claudette almost every day to remove 'his stuff' and weigh it. He would keep it outside and inside. Some people would come to collect it. On the 12th November 2017 he was at the house when the officers of ANB came. The accused was not present on that day in question.

Kerine Etheve is the former girlfriend of the Accused. She testified that she did not know the profession of the Accused but knew that he was a drug user, by fixing cannabis with heroin. She would go with him to collect money at Corgat Estate and Plaisance. On 12th November 2017 she was at Les Mamelles. The accused was not present.

I have examined these facts in the light of the No case to Answer submission and I find that there is no evidence presented by the prosecution that the Accused had physical possession of the drugs charged. The house where the drugs were found belonged to Claudette Dick, the mother of

her estranged mother in law, Laure Dick. The Accused person live on Praslin and was not at this house on the 12th of November 2017. There is moreover, no forensic evidence, in the form of finger prints or otherwise, that shows that the Accused person was physically connected with the said drugs. There being no exclusive physical possession, the prosecution could have been able to prove “*constructive possession*”, by showing that the illicit substances found was part of a common pool that in which the Accused person could partake at will. The prosecution attempted to prove this through the evidence of Kerine Etheve; Savio Joubert and Claudette Dick. However I find that their evidence in that regards to be lacking both in term of their credibility and substance.

Laure Dick, testified that she live at Les Mamelles and now and then she comes to her mother’s house. She said that is the “pusher” or sellor of the Accused person’s drug, she says that the Accused person would come to the house 3 to 4 times a week in order to bring drug for her to sell. She would sell them and then gave the Accused person the proceeds of the sale. According to her he last came to the house on the 8th of November 2017. I find, therefore, based on her own evidence, that the Accused person is not an inmate in the house, he would have no control to, at will, decide on who takes and when one takes a share in the drugs. Laure Dick, based on her own testimony, had complete control on who accessed the drug and under what circumstances. She even claimed that the money retrieved from the sofa that was suspected to be the proceeds of drug trafficking belonged to her and not the Accused person. Further, Laure does not live at La Louise where the drugs were seized she would not know what happen at the premises when she is away at her home and who would have access to the exhibits during her absence. Accordingly, I find that the evidence of a joint enterprise or a common pool to be absent. Moreover. Claudette Dick was a co-accused in this case, the charges were withdrawn against her as a result for her to give evidence in favour of the Republic, I accordingly treat her as an accomplice. An accomplice evidence is always suspect, this court has over the years treat accomplice evidence with great caution and this for good reasons as they have the propensity to belittle their involvements in an offence and amplified that of their co-accomplice. I therefore warn myself of the need to act with extreme care and that it is dangerous to convict on accomplice’s evidence in the absence of some independence evidence that not that not only connect the material particulars of the accomplice’s evidence but that also connect the Accused

person to the offences. Having done so, I find that in many instances the witness was found not to be telling the truth in her testimony, she was in many instances attempting to diminish her involvement and amplifying that of the Accused person. The only persons that could have corroborated her evidence is Kerine Etheve. However, Kerine appears to be not on good terms with her ex boyfriend, the Accused person and she is moreover, the daughter of Laure Dick. As a result she appear and gave impression that she is as a witness that has come to support the evidence of former accused against a co-accused . As far as Savio Paul is concerned, he is the grandchild of Laure Dick and his evidence contradicts that of her grandmother in many respect, this applies to the places where the Accused Person allegedly hide his drugs and who sells the drug. He makes no reference to the fact that it was Laure, who sold the Controlled Drugs I therefore chose not to believe his evidence also.

Determination

- [19] For these reasons I am of the opinion that the evidence adduced by the Prosecution has failed to established the essential element of possession of the Controlled Drugs in the two charges levelled against the Accused person and therefore there is no prima facie case against the Accused person and he has no case to answer.
- [20] I accordingly dismiss the case and acquit the Accused person forthwith as a case is not made out against him to sufficiently require him to make a defence.
- [21] As a result of this acquittal, any passport or travelling documents; unless ordered to be surrendered by another court, shall be returned to the Accused person.

Signed, dated and delivered at Ile du Port on 17 of September 2019

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Govinden J