

IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2020] SCSC 995
CR/2019

REPUBLIC
(rep. by David Esparon)

Prosecution

and

ROWLY LESPERANCE
(rep. by Alexia Amesbury)

1st Accused

COLLIN HENRI
(rep. by Nichol Gabriel)

2nd Accused

LANCE HENRI
(rep by Clifford Andre)

3rd Accused

Neutral Citation: *Republic v Rowly Lesperance & Ors* (CR 31/2019) [2020] SCSC 995 01st December 2020).

Before: Vidot J

Summary: Conspiracy to import of and traffic in controlled drugs; Submission of no case to answer

Heard: 08 October 2020

Delivered: 01 December 2020

ORDER

Submission of No Case to Answer Succeeds

RULING

VIDOT J

- [1] The accused, Rolly Lesperance, Collin Henri and Lance Henri have been indicted for drugs related offences. They are charged as follows;

Count 1

Statement of Offence

Agreeing with other persons that a course of conduct shall be pursued, and if pursued would necessarily amount to or involve the commission of an offence under the Misuse of Drugs Act, namely the importation of a controlled drug by one or more of the parties to the agreement but for the existence of facts which renders the commission of the offence impossible contrary to section 16(b) of the Misuse of Drugs Act and read with section 5 of the Misuse of Drugs Act and punishable under section 16 of the Misuse of Drugs Act read with the Second Schedule of the said Act.

Particulars of Offence

Rowly James Lesperance, Collin Daniel Henri and Lance Henri together with a person known to the Republic namely George Riase around the 11th March 2019 to 15th March 2019, at Cascade, Mahe agreed with one another that a course of conduct shall be pursued and if pursued would necessarily amount to or involve the commission of an offence under the Misuse of Drugs Act, namely the importation of a controlled drug namely heroin by one or more of the parties to the agreement, but for the existence of facts, which renders the commission of the offence impossible.

Count 2

Statement of Offence

Agreeing with other persons that a course of conduct shall be pursued, that if pursued, would necessarily amount to or involve the commission of an offence under the Misuse of Drugs Act, namely the offence of trafficking in a controlled drug by one or more of the parties to the agreement but for the existence of facts which renders the commission of the

offence impossible contrary to section 16(b) of the Misuse of Drugs Act and read with section 5 of the Misuse of Drugs Act and punishable under section 16 of the Misuse of Drugs Act read with the Second Schedule of the said Act.

Particulars of Offence

Rowly James Lesperance, Collin Daniel Henri and Lance Henri together with a person known to the Republic namely George Riase around the 11th March 2019 to 15th March 2019, at Cascade, Mahe agreed with one another that a course of conduct shall be pursued and if pursued would necessarily amount to or involve the commission of an offence under the Misuse of Drugs Act, namely the importation of a controlled drug namely heroin by one or more of the parties to the agreement, but for the existence of facts, which renders the commission of the offence impossible.

- [2] At the close of the prosecution case, counsels for the accused, moved the court on a submission of no case to answer. The argument of the defence is that the prosecution had not discharged the burden of proof, as required by law, to establish the elements of the offences in that the evidence adduced is so tenuous in character and that it has been discredited that a properly directed jury will not convict. The required standard to establish the elements of the offence is beyond reasonable doubt.
- [3] The principles for consideration on a submission of no case to answer are well settled in the case of **R v Gailbraith [1981] 73 Criminal Appeal Report**. In that case it was held that for such a submission to succeed the court should be satisfied that;
- i. There is no evidence that the crime was committed by the accused; or
 - ii. The evidence adduced is so inconsistent and tenuous in nature; or
 - iii. A jury properly directed could not properly convict on the evidence.
- [4] The principles laid down in **R V Galbraith (supra)** were adopted in several domestic cases. These include **R v Stiven (1971) SLR 137**, **Republic v Yannick Laira CR48/2017 [2019] SCSC1035** (25 November 2019), **R v Marengo (2004) SLR 166**, **R v Matombe (No.1)(2006) SLR 32** and more recently in **R v Gerard Hoareau CR79 of 2014**.

- [5] In **R v Galbraith** (supra), Lord Lane CJ had the following to say;

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 when 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 on it, it is his duty upon 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 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 the branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

- [6] Therefore at the stage of a submission of no case to answer, if the court was to rule that as a matter of law there is no evidence on which the accused could be convicted, the judge shall direct the jury to enter a verdict of not guilty. In the case of **R v Hoareau** (supra), Chief Justice Twomey makes reference to **Green v R (1972) SLR 55** in which Sauzier J had the following to say in respect of what constitutes "no evidence" as provided for under section 294(1) of the Criminal Procedure Code;

"The considerations which apply at that stage are purely objective and the trial court is not asked to weigh the evidence. At that stage it is only necessary for it to find that a reasonable tribunal might convict."

- [7] If the prosecution's evidence fails to establish any particular element of the offence, then a submission of no case to answer will succeed and the charges against an accused will be dismissed.

- [8] Mrs. Amesbury, Counsel for the first Accused made submission which was adopted by Counsels for the second and third Accused. . She submitted that the essential elements of the offence had not been established. She particularly placed emphasis that the prosecution needed to establish the required mens rea necessary to make out the offence. She maintained that there was not an iota of evidence that showed that there was a meeting of the minds that 'a course of conduct should be pursued and if pursued would necessarily amount to or involve the commission of the offences with which the Accused are charged. That, according to Mrs. Amesbury is a prerequisite in establishing the offence.
- [9] Mrs. Amesbury's submission was focused on the offence of conspiracy. Halsbury' Laws (5th Edition) states that the offence of conspiracy is committed where two or more persons agree to pursue a course of conduct which if carried out in accordance with their intentions , will necessarily amount to or involve the commission of an offence by one or more of the conspirators, or would do so, but for existence of facts which render the commission of the offence impossible; see **John Sifflore v The Republic SCA 15/2011** (17th December 2015).
- [10] Section 16 of the Misuse of Drugs Act (MODA) deals with the offence of conspiracy (see marginal notes). The Accused must have agreed with one another to commit the offences. There is need to show a meeting of minds that would establish that a course of conduct was to be pursued and that if pursued will amount to the commission of the offences of importation and trafficking in a controlled drug which in this case the prosecution states was heroin. The prosecution must establish that there was an agreement to import or traffic in heroin and that all Accused participated in that agreement and that the agreement was clear to them and that they agreed to the same thing. It is not easy to know one's mind unless one is vocal about it. Therefore, the Court has to consider circumstantial evidence to decide whether there was a meeting of minds toward a common cause that is the commission of the offences.
- [11] Mr. Esparon, Learned Counsel for the prosecution argues that these elements were established. He argued that it was abundantly clear that the Accused came together to

commit the offences they are charged with. He relies heavily on the evidence of Deidre Valentin, Allain Raoudy and the confession of the 1st Accused.

- [12] Allain Raoudy testified to having overheard George Riazé, the day before leaving Mahe that he was going to pick up a package. He asserted nonetheless that there was no mention of drugs. Deidre Valentin confirmed that evidence. Deidre is Allain Raoudy's niece. She added that George Riazé, with whom she was having a relationship stated that he was going to pick up a package in South Africa for the 2nd and 3rd Accused. She had questioned him as to whether or not that he was going to South Africa to collect drugs but she did not get an answer but George merely said that he would be returning in 6 days.
- [13] Deidre recounted that in answer to Allain Raoudy's query as for whom was the package that he was going to collect, Georges Riazé had responded that it was for the 2nd and 3rd Accused and that 1st Accused had approached him to go with him. That conversation took place on the 13th March 2019. On that day, Deidre was with George Riazé at the Cascade market and the 2nd Accused came in a red vehicle and then left and 15 minutes later the 3rd Accused came with a bag in which she said there was SR200,000.00 but in US dollars but the currency were counterfeit. The bag was handed over to the 1st Accused. Rowly went into a store with George and they looked into the bag and found the cash. She also stated that Rowly was in possession of a gun. George asked that the bullets were given to him, but Rowly declined.
- [14] The prosecution also brought evidence that there were exchanges between the 1st Accused phone and the 2nd Accused phone whilst Pti Sirenn was out at sea. It also put forth evidence that the GPS on board the Pti Sirenn was at times switched off during the vessel's journey. It also indicated that due to engine capacity, Pti Sirenn could not at times have travelled the distance it did according to the GPS log.
- [15] The prosecution relied on the Confession of Rowly Lesperance. The admissibility of the confession was challenged by Counsel for the latter. However, after the holding of a voir dire this Court ruled that the confession was made voluntarily and therefore admissible. However, the confession can be used against the maker of that confession only and not against any other co-accused.

- [16] In the confession, the 1st Accused relates about incidents that happened prior to leaving Mahe to go out at sea. He explained how on the 11th March 2019, George Riaz had borrowed from Lance Henri cash amounting to 120,000/- in three instalments. It is not evident as for what purpose such cash was borrowed. He even collected money from Mr. Lindsey Henri to purchase fuel for the trip. On the 13th March 2019, Lindsey gave additional cash for the purchase of provisions for the trip. That sum of SR5000.00 he handed over to Marcus Antat, who was to be the cook for the trip. On the 15th March 2019, the 1st Accused had seen George Riaz going fishing in another boat and he had informed him that later that evening they would leave for their fishing trip.
- [17] Up to 15th March 2019, following from Deidre Valentin's evidence, the events that were happening raised suspicion that some form of illegal activity was about to take place. These include testimony that the George had mentioned that he was going to collect a package in South Africa. Counsel for the prosecution referred to **Republic v Dodin & Ors (47 of 2008) [2009] SCSC 130 (29th July 2009)** in which the trial Judge stated that "*in crimes or any criminal activity the perpetrators rarely refer to the illegal act, substance or contraband, or object by its true name but normally assign a code name to avoid detection by the authorities.*" This is indeed correct. However, in that case, it was concluded that the drugs were heroin, which was the drugs were seized. In this case however, no drugs were seized.
- [18] In the present case, the drugs to be imported into and trafficked in Seychelles was said to have been heroin. This is because traces of heroin were found on a small piece of mirror that was seized and produced as exhibit. However, it is this Court's position that this evidence is not conclusive as to the nature of drugs, if drugs were indeed to be imported or trafficked. Apart from that trace of heroin no drugs were found. Counsel attempted to establish that the contraband to be imported was indeed drugs, let alone heroin.
- [19] It is held in **Hussain (1969) 53 Cr. App. R. 448**, that it was essential that an accused should know that the goods which were being imported were subject prohibition but that it is not necessary that he should know the precise category of goods, the importation of which is necessary. The same position was echoed in **R v Shivpuri [1986] UK HL2 [1987] AC 1**.

Be that as it may, it is imperative that prosecution establishes that the intention of the Accused, if they had indeed conspired, was to import drugs. The conspiracy remains one vital ingredient of the offences.

- [20] Counsel for the Prosecution also relied on the evidence of Mr. D'Offay from Cable and Wireless in respect of certain phone calls that were made from the 1st Accused phone to that of the 2nd Defendant when the Accused were out at sea. He also relies on the GPS coordinates. The making of phone calls does not necessarily add much to the charges. However, the giving of coordinates could be suspicious.
- [21] However, it is necessary to establish that through these pockets of evidence that the Accused had the necessary mens rea to commit the offences they are charged with. It is imperative that the Prosecution shows that there was a meeting of the minds of the accused to import into and traffic drugs in the Seychelles.
- [22] The mere association of two persons or more will not constitute a criminal conspiracy. The essential elements of a conspiracy are a specific intent, an agreement with another person to engage in a crime to be performed, and the commission of an overt act by one of the conspirators in furtherance of the conspiracy. The conspiracy will arise and the offence committed as soon as the agreement is made. Therefore the essential feature of a conspiracy is that the parties agree on a course of conduct that will necessarily amount or involve the commission of an offence by one or more of the conspirators.
- [23] The Prosecution relies on the confession of 1st Accused, to establish that there was an agreement to import and traffic in drug in Seychelles but that the existence of facts which renders the commission of the offence impossible. When evaluating the confession, I need to consider it in its entirety. The Court cannot pick and choose which part of the confession it wishes to consider and reject other parts. Furthermore, it cannot use any part of the confession which is incriminating to the other co-accused. It is clear that no drugs was either imported or trafficked in Seychelles. What one has to consider is whether there were preparatory acts to commits that offence. Traffic is defined under Section 2 of MODA which is the definition section of the Act. Section 2 of MODA provides that 'traffic' means;

(a) To sell, broker, supply, transport, send , deliver or distribute;

(b) To offer to do anything mentioned in paragraph (a); or

(c) To do or offer to do any act preparatory to the purposes mentioned in paragraph (a)

[24] It is clear from Rowly Lesperance's confession that he was told that they were going fishing. Before they left Mahe, there is no mention of drugs, save for the mention of collection of a package from South Africa which George mentioned to Deidre and Allan Rouady. No such mention was made to Rowly. George did not inform Rowly where they were going fishing. At the time he left Cascade jetty he assumed that they were going to the Constant Bank, but it was George who was steering the vessel. He did not verify the equipment aboard to see if they were in working order. However, the GPS and VMS aboard were switched on and working. He offered the GPS he had come with on board but George Riaze has told him to it was not needed and he left it switched off in his bag.

[25] On the 17th March 2019, whilst having breakfast, the engine of Pti Serenn broke down. Rowly tried to repair it but noticed that the clutch had burnt out. They were in the middle of nowhere. They drifted. He saw George on a satellite phone and he told them that they would get assistance in a few hours. Then George mentioned that he was going to do a cross over, meaning that they were going to leave Seychelles waters. The 1st Accused understood that what George meant was that he was going to get drugs. Rowly was surprised. It was the first time that there is any inference to drugs to which it appears Rowly said nothing. George continued communicating on the satellite phone and he was giving their location. Then at some point a dhow with what seemed to be Arabs approached them. Rowly thought the dhow had come to assist them. George boarded the dhow and spoke to a man he was calling captain as if he knew the person. George instructed Marcus to get the merchandise and the latter went to the engine room, retrieved 2 backpacks, threw them over to a man on board the dhow and climbed on board. Rowly was left alone and George said that he had already talked to Mahe. Rowly drifted until 30th March when he reached Grande Soeur Island. On the 03rd June 2019 he saw a boat that assisted him.

- [26] It is correct that George Riazee referred to a package, but that is not an indication that it was solely a reference to drug. In **Republic v Dodin & Ors (supra)** the court had noted that criminals use different names for illegal contrabands. Be that as it may, no contraband was discovered. It is the Prosecution position that there were facts that existed that made the offences impossible of being committed. The prosecution has not establish to this Court what these facts were. The trace of heroin on a piece of mirror can easily be dismissed as being drugs for personal consumption. Since no drugs in any significant quantity was discovered, presents certain difficulty in concluding that the Accused were dealing with drugs. It could have been a different form of contraband, albeit that there is a likelihood that it was drugs. But that in itself does not establish proof beyond reasonable doubt.
- [27] This court also takes notice that Deidre was not consistent as to the money that was allegedly delivered to Rowly by Lance on the 15th March 2019. When cross-examined she said she did not see inside the bag. She only saw one counterfeit dollar note. George is the one who allegedly told her how much cash was in the bag. Yet, in examination in chief her version was different. She mentioned the amount and she said she saw the money. This discrepancy in her evidence makes it unreliable. Statements which allegedly was made by George about a trip to collect a package and about the contents of the bag being cash is first hand hearsay. It is admissible since the maker of that statement cannot be found, but the court needs to be very cautious when dealing with such evidence.
- [28] The actus reus in conspiracy is therefore agreement for execution of the unlawful conduct, not the execution of it. It suffices that two persons pursued the same unlawful object at the same time and at the same place, it is necessary to show the meeting of the minds and consensus to effect the unlawful purpose. The prosecution had a difficulty to show that there was a meeting of minds. Rowly clearly stated that he thought they were going fishing and that on the 17th March 2019, which according to the charge sheet was after the alleged agreement was made, that he learnt that it came clear to him that George was to carry out a drug related activity.
- [29] The conduct of George and Marcus in boarding the dhow and leaving Rowly to fend for himself casts doubt as to whether there was to be a drug transaction that was to take place,

certainly not evidence of intention to import and traffic in drugs. According to Deidre and Allain Rouady the transaction was to involve collecting a package from South Africa. The evidence of these two witnesses is not consistent with that as appeared in the confession of 1st Accused. When there is discrepancy of that nature that creates doubt, that doubt should be resolved in favour of the Accused. The prosecution has tried to establish that on the 17th March 2019, in response to George having told him he will get a share of the money and that he had stated that he does not want any drugs but the money, as evidence that there was a conspiracy. Firstly, one will note that that incident happened after the period within which the conspiracy is averred to have happened. I have found that there is no sufficient evidence that there was an agreement between 11th and 15th March 2019. Furthermore, the fact that 1st Accused refused to partake in receiving any drugs but would not mind some cash, is not necessarily indicative that he had any intention to traffic and import drugs. It could be that that person did not wish to be involved in drugs related offences.

[30] This Court finds that based on the evidence placed before Court it will be unsafe to conclude that there was an agreement by the Accused to conspire to commit the offences levelled against them. There is obviously some evidence that could be interpreted that that could have been the case, but it leaves room for reasonable doubt, and being faced with such doubts, it would be unsafe for Court to allow this case to move forth.

[31] I therefore find that the Prosecution has not adduced sufficient cogent evidence to establish the charges the Accused stand charged with. The evidence adduce is tenuous. It has been discredited.. Therefore, I find that the Accused have no case to answer.

[32] The case against the Accused is hereby dismissed.

Signed, dated and delivered at Ile on 01st December 2020


Vidot J