

IN THE SUPREME COURT OF SEYCHELLES

**THE REPUBLIC
VERSUS
SALIM SERVINA**

Criminal Side No. 74 of 2008

Mr. Durup for the Republic
Mr. Elizabeth for the Accused

JUDGMENT

Burhan, J

The accused in this case stands charged with having committed the offence of trafficking in a controlled drug, contrary to section 5 read with section 14 (c) and section 26 (1) (a) of the Misuse of Drugs Act 1990, as amended by Act No 14 of 1994 and punishable under section 29 and the second schedule referred thereto in the Misuse of Drugs Act, as amended by Act 14 of 1994.

The particulars of the offence as stated are, that the accused Salim Servina, on 3rd September 2008, at Barbaron, was trafficking in controlled drug by virtue of having been found in the possession of 240.3 grams of Cannabis (herbal material), which gives rise to the rebuttable presumption of having possessed the said controlled drug for the purposes of trafficking. The accused pleaded not guilty to the aforementioned charge and the case proceeded to trial.

The prosecution in order to prove the charge against the accused beyond reasonable doubt called as witnesses, Police Constable Bernard Hoareau,

Government Analyst Dr Abdul Kadeer Jakaria and Lance Corporal Julien Sanders and closed their case. In defence the accused gave evidence under oath and called his mother Mrs Jeanette Loze to testify on his behalf. Thereafter both the prosecution counsel and defence counsel made oral submissions to court.

The prosecution's first witness Police Constable (PC) Bernard Hoareau testified to the fact that, on the 3rd day of September 2008, while he was on duty at Barbaron with several other named officers, he noticed the accused, who witness identified in open court, standing behind a car bearing registration number S9972, with a black plastic bag in his hand. He further stated that he walked up to the accused, took hold of the black plastic bag and on opening it noticed a certain amount of herbal material in the bag, which the witness suspected to be Cannabis. At this moment both Lance Corporal Sanders and Constable Jean were with him and after explaining to the accused his constitutional rights, he had arrested him and taken him to the Anse Boileau police station. Witness stated he had kept the black bag with its contents in his personal custody and on the same day, he had taken the contents for analysis to Dr Jakaria at Mont-Fleuri around 14.45 hours together with the request form. The next day, the 4th of September 2008, witness had collected the sealed envelope bearing CB number 88/08 together with the government analyst report. He had taken the items back with him and had given it to Corporal Confiance on the same day to be placed in the exhibit store. Thereafter for the purposes of producing the exhibits at the trial, he had personally collected the same envelope from the new exhibit store officer Lance Corporal Robinson and brought it to court. The envelope with its seals intact was produced in open court as exhibit E2a. The envelope was thereafter opened in court and the brown envelope (evidence envelope) in which the exhibits were handed over to the analyst

found inside was produced together with the black plastic bag and marked E2b and E2c respectively. The herbal material was marked as exhibit E2d. All exhibits were properly identified by witness.

Under cross examination, PC Hoareau admitted that he had acted on information received by him personally and that the Adams Unit was now disbanded. He denied that the entire operation was a set up and that the person who orchestrated the set up was one Jemmy Lebon. Witness admitted he was aware that he knew that one Jemmy Lebon had been charged with a drug related offence but he had nothing to do with that arrest. He also admitted that he did see Jemmy Lebon, Derreck Labrosse at the scene together with the accused on the date of this detection and said he was unaware as to whether Jemmy Lebon had been released on bail, as he had agreed to provide information about other drug dealers. He further stated under cross examination he was unaware whether Jemmy Lebon acted as an "*agent provocateur*" in relation to this case. He categorically denied the suggestion by defence counsel that the black plastic bag was in the hands of Jemmy Lebon and not the accused. Under cross examination witness stated that after the detection they conducted a search on the house of the accused but nothing was found. He stated further that in the cases of trafficking this was usually procedure. Witness also testified to the fact that it was normal procedure, to first register the case in the district the arrest took place and then bring the accused to the base. Witness denied the suggestion that he had kept the brown envelope with the contents in his locker without handing it over to Lance Corporal Confiance. He stated that he had received the exhibits from Lance Corporal Robinson to be brought to court and not from Inspector Dogley.

The other witness called by the prosecution Dr A.K.Jakaria the government analyst, a forensic chemist, gave expert evidence in respect of the identification of the herbal material taken into custody as being Cannabis. He further identified his report as E3 affirming same. He also identified the brown envelope (evidence envelope) E2b and the black plastic bag E2c and the herbal material E2d taken into custody, as the exhibits brought to him by PC Hoareau for analysis. He categorically stated that after analysing herbal material E2d he came to the conclusion it was cannabis. Under cross examination witness stated that he had entered the net weight of the substance analysed, which was the total weight of the herbal material including stem, twigs and leaves. He stated further that as far as Cannabis was concerned, only a qualitative analysis was sufficient to determine the three main constituents of Cannabis. He stated that Cannabis Resin contained more of the active ingredients than herbal Cannabis. He further stated under cross examination that the active three ingredients of Cannabis were usually concentrated in the leaves. He also stated that the estimated percentage of each constituent would be in the region of two to ten percent in herbal material but would be more in Cannabis resin.

Another witness called by the prosecution namely Lance Corporal (LC) Julien Sanders gave evidence in respect of the detection and subsequent arrest of the accused. He too identified in open court the accused, the herbal material taken into custody from the accused and the black plastic bag in which it was contained. Under cross examination this witness stated, he had a personal locker which had nothing to do with the exhibit room locker and that he was unaware whether P C Hoareau had a personal locker of his own. He admitted that although he had been 22 years in the police force he was still a Lance Corporal and also stated this was the first time he was giving evidence in court. He further stated that he was aware that Lance Corporal

Confiance had handed over the exhibits to Mr Dogley. He denied that Jemmy Lebon had been released on bail as he was acting as a police informant and stated further that this was an untruth. This witness too denied the suggestion by the defence counsel that the herbal material in the black plastic bag were in the hands of Jemmy Lebon and not the accused. He also denied the fact that the controlled drug found in the hands of Jemmy Lebon, was subsequently introduced on the accused as a search of the house of the accused was unsuccessful. Having led the evidence of these three witnesses the prosecution closed its case.

The accused in defence gave evidence and stated that he was a farmer who also ran a private taxi. He stated that on the 3rd of September around half past eleven he received a phone call from Jemmy Lebon. He stated that around six or seven times before he had transported him in his taxi. He said he was unaware whether Jemmy Lebon had been released on bail. Jemmy Lebon had called him for a hire that day and around 11.50 am accompanied with Derreck Labrosse, a man who was working at his place, he had gone to the arranged rendezvous at 'Ter rouze' Barboron. He had parked his vehicle facing Port Launay next to the main road. A few minutes, after he had alighted from the car, he saw Jemmy Lebon coming from Port Launay direction through the bush, from the direction of a house situated close by with a black plastic bag in his hand. He stated that he was not surprised Jemmy Lebon came from the bush, as he knew that Jemmy Lebon was selling drugs and that the people in the house from where he came also sold drugs. Jemmy Lebon had asked him to hold the bag but he refused as he suspected it contained drugs. At that moment three vehicles arrived quickly, and as the police vehicles arrived he was standing at the back of his car. The police had thereafter grabbed the bag from Jemmy Lebon and despite his protest of his innocence he, Derreck Labrosse and Jemmy Lebon were

arrested. Thereafter a search on his house was conducted, nothing was found and he was subsequently taken to Anse Boileau police station. Thereafter he was taken to Adams Unit at New Port. Whilst in police custody, the accused admitted he gave a statement which he described as “full with lies nothing is true in there”. Although he had been promised he would be released after giving his statement he was remanded but Derreck Labrosse and Jemmy Lebon were released.

While he was in remand he was visited by Irish persons from the NDEA (National Drug Enforcement Agency) who offered him bail if he came to work with them. He had agreed and signed the forms given by them as “their conditions were good”. They had wanted him to gather as much information that he could from big dealers and give it to them. He stated further that “according to his information” all had agreed to release him except for Mr Ronnie Govinden the Attorney General. He stated further he was an athlete who had represented his country for 15 years and that he was a Pineapple farmer with an extent of 10 Hectors of land and at the time of his arrest he had Pineapples on his farm worth Rs 25,000/= and that up to this incident he had had a clean record. The accused mother also testified on his behalf mentioning that police officers came and conducted a search in the house of the accused. Thereafter the defence closed its case.

Having considered the evidence of both the prosecution and the defence and the oral submissions made, it is clear that one of the main contentions of the defence is that the police used Jemmy Lebon a police informant as an ‘*agent provocateur*’ and that at the time of detection the drugs were not in the hands of the accused but had been brought to the scene by the *agent provocateur* and was in his hands at the time of detection. ***Archbold, Criminal Pleadings, Evidence and Practice 2008 edition pg 1710***

contains the definition of an *agent provocateur* as “ a person who entices another to commit an express breach of the law which he would not have otherwise committed and then proceeds to inform against him in respect of such an offence”. In the case of *R v Mealey and Sheridan 60 Cr.App.R.59.CA* it was held that the defence of entrapment is not known to English law. A defendant cannot entitle himself to an acquittal by showing that he acted in concert with or as a result of the conduct of an agent provocateur, though the matter may be highly relevant on the question of sentence”. In a more recent case *R v Looseley [2002] 2 Cr.App.R.29* it was shown that, although it is not a substantive defence, English law had now developed remedies in respect of entrapment and went on to specify the said remedies.

However when one considers the evidence led in this instant case, the prosecution strongly denies the fact that Jemmy Lebon, though present at the scene, was acting as an informant or an *agent provocateur*. Both prosecution witnesses strongly denied the fact that, Jemmy Lebon was given bail after being arrested for being in possession of controlled drug, as he had agreed to be an informant to the police. Even though this was a suggestion by defence counsel the accused himself seems unaware of this fact as in his evidence he stated, that he himself was not aware about Jemmy Lebon being released on bail (vide page 4 of proceedings of 12-2-2008).The prosecution in this case has not sought to lead evidence of an undercover operation conducted to entrap the accused, nor has the accused stated he was entrapped into committing the said offence. In fact it is the accused position he did not commit any offence. For the aforementioned reasons this court cannot see any merit in the defence brought by counsel in this respect.

The accused in defence stated that, the controlled drug was not taken from him but from Jemmy Lebon, who had brought it with him. However the accused even though represented by counsel has not sought to complain to any higher authority against the police officers concerned in the raid, that they had 'framed' him. He has not given any reasons as to why the officers who had no personal contact with him, as he himself states he had a clean record, would want to 'frame' him. The evidence given by PC Hoareau though subject to lengthy cross examination, was not materially contradicted in any way. In fact all material details in respect of the arrest of the accused with the controlled drug in his possession, was corroborated by Lance Corporal Sanders. The fact that the black plastic bag containing herbal material in the hands of the accused, could not have been seen by the police officers in the jeep as suggested by the defence, cannot be accepted as the police officers were constantly on the move up to the time they walked up to the accused and took the plastic bag into custody. Furthermore the accused giving evidence admitted that Jemmy Lebon and Derreck Labrosse were both arrested with him and both were released at the base. In the light of these facts, this court is unable to accept the accused defence that the controlled drug was not in his possession at the time of detection.

Another defence taken by the accused counsel was that the chain of evidence linking the detection of the controlled drug to its production in open court, was not established by the prosecution. However on considering the evidence led at the trial PC Hoareau categorically stated that after taking the herbal material from the accused, he put it in an envelope he got from the Anse Boileau police station and it remained in his custody till he took it to the government analyst the same day. After the government analyst had analysed the exhibits, it was placed in a sealed envelope which he took back to the exhibit room and handed over to L.C Confiance who was

the officer in charge of the exhibit room at that time. Thereafter he had collected the exhibits from the new officer handling exhibits Lance Corporal Robinson and brought it to court. On examination in open court by all parties, the seals of the government analyst had not been tampered with and Dr Jakaria identified the herbal material in open court as that brought by PC Hoareau for analysis. Both PC Hoareau and LC Sanders identified in open court, the herbal material analysed by the government analyst, as that taken into custody from the accused. It is clear that L.C Robinson had replaced L.C Confiance in the exhibit room and it was he who had handed the exhibit to be brought to court. It is to be noted that LC Confiance and Robinson had handled the exhibit after it had been sealed by the government analyst. As the seals of the government analyst had not been tampered with and the government analyst himself had in open court, identified the herbal material as that analysed by him, even though the prosecution did not call Lance Corporals Confiance, Robinson or Inspector Dogley this court is satisfied beyond reasonable doubt that the exhibit had not been tampered with whilst being in the exhibit room and that the herbal material taken into custody and analysed was the exhibit E2d produced in court. Thus this court is satisfied beyond reasonable doubt that the chain of evidence mentioned above has been established by the prosecution.

Another matter raised by the defence was the fact that, even though the total weight of the substance was 240.3 g only between 2 to 10 percent of the constituent substance was the active ingredient. However this question has been clearly dealt with by the Seychelles Court of Appeal in the case of *Terrence Alphonse v Republic SCA Cr.6 of 2008*, where Bwana JA held that in the case of heroin “The entire powder is taken and weighed together. It cannot be separated by weighing the different chemical components..... The law and the courts should not be moved to assume or adopt some

arithmetical-cum-scholastic exercise divorced from the realities of the underworld drug business”. This court is satisfied that this finding applies even more to Cannabis, as in Cannabis the chemicals are contained within the plant material itself.

With regard to the subsequent attempt to make this accused an informant, it has no bearing on his innocence with regard to the offence with which he is charged. For the aforementioned reasons this court proceeds to reject the defence of the accused.

When one considers the evidence of the prosecution, PC Hoareau’s evidence clearly shows that the herbal material in the black plastic bag was taken into custody at Barboron on the 3rd of September 2008 whilst being in the hands of the accused. The material facts regarding the detection are corroborated by the evidence of Lance Corporal Sanders. Both prosecution witnesses have identified the accused as the person having the controlled drug in his possession. No material contradictions or major inconsistencies in respect of the detection arose, even though both police officers were subject to intense cross examination.

Dr Jakaria evidence clearly establishes the fact that the herbal material taken into custody from the accused was Cannabis, a controlled drug. His report marked E 3 affirms this fact and also specifies that the quantity taken into custody as 240.3 grams. The quantity detected in the possession of the accused attracts the rebuttable presumption that the accused was trafficking in the controlled drug. The accused has failed to rebut the said presumption. The prosecution has also successfully established the required chain of evidence in respect of the exhibit E2d.

For the aforementioned reasons it is clear that the prosecution has proved all the elements of the charge against the accused, beyond reasonable doubt. Therefore this court will proceed to find the accused guilty and convict him of the offence as charged.

M.N BURHAN

JUDGE

Dated 31st day of March 2009