

IN THE SUPREME COURT OF SEYCHELLES

**THE REPUBLIC
VERSUS
ROBIN BARBE**

Criminal Side No. 38 of 2008

Mr. Durup standing in
For Mr Labonte for the Republic
Mr. Elizabeth for the Accused

JUDGMENT

Burhan, J

The accused in this case stands charged with trafficking in controlled drug contrary to section 5 of the Misuse of Drugs Act read with section 14 (d) and 26 (1) (a) of the same as amended by Act 14 of 1994 and punishable under the second schedule of the said Misuse of Drugs Act read with section 29.

The particulars of the offence are that the accused Robin Barbe of Majoie, Mahe had on the 26th of April 2008 been found in the possession of a controlled drug, namely 84 grams of Cannabis Resin, which gives rise to the rebuttable presumption of having possessed the said controlled drug for the purpose of trafficking.

The accused pleaded not guilty to the aforementioned charge and trial against the accused commenced on the 30th January 2009. The prosecution

in order to prove the charge against the accused beyond reasonable doubt called witnesses Dr A.K.Jakaria, Police Constable (PC) Samuel Camille, Lance Corporal (LC) Bernard Hoareau and closed their case. At the close of the prosecution case as court was satisfied that the prosecution had established a prima facie case a defence was called. The accused testified under oath and called several witnesses namely his foster daughter Annie Rosette, his brother in law Peter Joubert, his daughter Li-Anne Barbe and retired Lance Corporal Sonny Confiance and closed his case. Thereafter both counsel made oral submissions to court.

Prosecution witness Dr A K Jakaria a forensic chemist and the present Government Analyst in Seychelles, whose expertise was never contested by the defence, gave expert evidence testifying that he analysed the exhibit brought to him by PC Camille as requested by request form, bearing CB No 689/08 marked E1. He described in detail the test carried out by him and stated that his final conclusion was that he positively identified the presence of the three constituents of Cannabis in the said exhibit. He produced his report E2 which confirmed the fact that the exhibit was Cannabis Resin. Witness had after analysing the exhibit placed it in a white envelope and sealed and signed it. He identified the sealed white envelope in open court and produced it as E3a. The seals he observed were intact. On opening E3a witness identified the envelope the exhibit was brought in (evidence envelope) as E3b. He also identified the large piece of dark brown substance brought for analysis and analysed by him and identified as Cannabis Resin as E3c.

Under cross examination witness explained in detail the 3 tests done to determine whether Cannabis was present in a substance. He further explained that on conclusion of all three tests he could ascertain 100 % whether the substance analysed contained Cannabis. He further stated that the 'Mass Spectrometry test' required a very costly instrument which was not available in the Seychelles. The 'Mass Spectrometry test' was only a confirmatory examination as all other 3 tests i.e the 2 colour tests and the thin layer chromatography test in any event had to be done and these 3 tests were sufficient to affirm 100% whether the substance was Cannabis Resin.

The prosecution next called police officer Samuel Camille. He stated that on the 26th of April 2008 around 5.00pm on the instructions of Inspector Marie he had gone to the house of the accused at Majoie to conduct a search. On arriving at the house he was informed by LC Hoareau that the accused had run inside the house. He had proceeded to the house and knocked at the door. As no one had answered he had broken down the door and entered. The other officers who were with him at the time were LC Hoareau and PC Jean. As he had entered the house halfway down a corridor he had seen the accused. He had informed the accused he was going to conduct a search on him. The accused had resisted. After the ensuing struggle and after they had brought the accused under control he had noticed a "piece of substance" near the sofa. He had told the others that it must have come out of the pocket of the accused.

At this stage the prosecution counsel sought for an adjournment to consult the Attorney General as he was having difficulties in respect of the evidence given by the witness. After a short adjournment the prosecution counsel moved to adjourn the case to another day and as defence counsel did not object the case was adjourned.

On the next date of hearing, the prosecution continued with the evidence of PC Camille. Witness testifying further apologised to court and stated that as he had a lot of cases, he had got confused and made a mistake in his evidence concerning the drugs. He further stated that he had not read his statement very well on that date and had done so now. Continuing with his evidence in respect of the said detection, he stated after controlling the struggling accused he had searched him and found a black substance in the right pocket of the pair of shorts the accused was wearing. He stated that thereafter he had arrested the accused and taken him to Central police station. As he had arrested the accused on a Saturday, he had taken the dark substance taken into custody for analysis to the Government Analyst on Monday. He had kept the exhibit locked in his locker till then. After the dark substance taken into custody from the accused had been analysed, he had collected the exhibit which was sealed by the Government Analyst and the report and kept it in his locker. Witness identified the analyst report E2 and the dark substance marked in court as E3c as that taken into custody by him on the date of detection.

Under cross examination witness admitted that he had stated in evidence on the earlier date that he had seen the piece of substance two metres away from the sofa and that was a mistake on his part. He further admitted that there were two versions on the record as a result of the said mistake. He denied that since that date he had met the Prosecution counsel, Attorney General or the Commissioner of Police. He further denied that he was under pressure to tell the present version of the incident. Under further cross examination by counsel, witness denied seeing Counsel Mr Frank Elizabeth on the date of the incident, at the house of the accused in a red Terrios Jeep. He further stated under cross examination that one of the

other officers had to go to hospital for treatment, as he had been hit in the struggle to control the accused.

Witness categorically denied the fact that they had gone to the house of the accused with the drug to plant the drug on the accused. He denied that for every case the exhibits had to be handed over to the officer in charge of the exhibit store room LC Confiance, to be kept in the store room until required to be produced in court. He denied the suggestion that exhibits were kept in their personal lockers in order that it could be planted on someone later.

The other witness Lance Corporal Hoareau gave evidence corroborating the evidence of PC Camille in respect of the detection of the controlled drug, in the right hand side pocket of the shorts the accused was wearing. He further stated that while trying to control the accused, the accused had hit him on his lower lip and it had broken.

Under cross examination he admitted he was carrying a weapon on that date but however stated it was unloaded. He admitted that when the accused was shown the substance taken from his pocket he had said "it is not his". Witness testified to the procedure adopted when exhibits were taken into custody. He however referred to instances where exhibits taken into custody were not handed over to the exhibit room officer, as those taken into custody in the night could not be handed over to him, as he was not on duty at that time. In such instances the exhibit was kept locked in their personal lockers which were outside the exhibit storeroom. He admitted it was not normal for an exhibit to be kept in a personal locker until it was produced in court. Thereafter the prosecution closed its case.

The accused giving evidence under oath stated he was the father of two children and a Mechanic by profession. He admitted he lived at Majoie. He stated on the 26th of April 2008 he was fixing his vehicle at La Louisse when he received a telephone call from his daughter around 1.00pm, informing him that there were police officers at his residence. He had instructed his daughter to call his lawyer Mr Frank Elizabeth. He was advised by his lawyer not to go to his house as the police would plant drugs on him. As his daughter was alone at home and he had to pick up his concubine from the airport, he disregarded the advice and went to the house around 1700 hours.

When he arrived at his house he saw his mother in law, his brother in law Peter Joubert and his daughters Annie Rosette and Li-Anne Barbe. While he was on the road he saw two persons in civilian clothing. He had disembarked from his vehicle and entered his house. He further stated his house had a ground floor and an upper floor. He had gone in and as he felt thirsty he had gone to the kitchen to drink some water, when he heard three vehicles stop near the road. He heard someone knocking at the door. As he was going half way down a corridor the door was broken open and six men entered the house and jumped him. He said all of them were trying to put their hands into his pocket and he struggled to prevent them from doing it. He further stated that they had kicked him and stamped on him. After handcuffing him they had put their hands in his pocket and taken his money and with the money in one hand and the clenched fist in the other they had told him they have found what they came for. His brother in law had come in and asked them to stop beating him. The accused stated he had told them "Go you, God will punish you, you have planted drugs on me". His daughters too had entered and cried and taken photographs of what was happening.

The accused stated he was thereafter taken to the Central police station. He further mentioned that Rs 20,000/= was taken into custody at the time of his arrest by Officer Camille. He stated that the National Drug Enforcement Agency had searched his house on an earlier occasion and taken into custody Rs 20,000/= and \$150 but returned it subsequently. He was subsequently taken to English River clinic for treatment. The next morning he was taken to Victoria Hospital and thereafter charged in court. The medical certificate of the accused was marked DI and photographs of the house of the accused were produced and marked D2 to D7, while a complaint to the Commissioner of Police was marked as D8. He stated that witness Camille was crying while giving his evidence as he was lying.

Under cross examination the accused admitted that he went to the house despite advice from his lawyer not to do so. The reason he gave for doing so was because his daughter was alone in the house. He admitted that his mother in law lives in the house next door. He further stated (vide pg 12 of the proceedings of 11th February 2009 -1.45 pm) that PC Camille put his hand in his pocket and took his money out. He categorically stated that the clenched fist was never put in his pocket. He denied that PC Camille placed the drug in his pocket (vide pg 13). He denied the suggestion that his relations had turned the furniture upside down in order that they could take pictures to show the court. He stated that he saw that PC Camille's hand was clenched but he did not see what was in it (vide pg30).

Annie Rosette the foster daughter of the accused testified next. She stated that on the 26th of April 2008 she was at home, with her grandmother, sister, uncle and foster father the accused. Witness further stated that around 12.30 or 1.00pm while on her way to the shop she had seen a police vehicle passing. When she contacted her sister she was informed that the police

officers were there. Her sister had informed her she had notified her father about it. She corroborated the fact that Mr Frank Elizabeth the accused's counsel thereafter came to the house and advised her father not to come as the police officers were planning to plant drugs on him. She had thereafter gone to sleep and was awakened by the sound of arguments. When she arrived on the scene the raid was in progress. The accused was on the ground face down and an officer was kneeling over him. The accused had been injured in the struggle. She had thereafter taken photographs of the scene after the police had left.

The other witness called by the defence was Peter Joubert the brother in law of the accused. He corroborated the fact that the police officers had arrived earlier on at the house, the fact the accused was being manhandled and sustained injuries and the fact that some of the police officers carried guns. He mentioned that the accused said they had planted drugs.

Another witness called by the defence Li Anne Barbe the daughter of the accused also corroborated the fact that the police officers had come in the morning. She had immediately called her father and warned him that the police had carried out a search of the place. On her father's instructions she had contacted Mr F Elizabeth their lawyer. She also gave a detail description of what the police did before they went inside the house. She also corroborated the evidence of the other defence witnesses that following the struggle with the police her father sustained injuries.

The final witness called by the defence was retired Lance Corporal Confiance. He stated whilst in service he was the exhibit store officer. He described in detail the usual procedure followed when an exhibit was handed over to him and the procedure adopted when it was taken for

analysis and to court. He stated that sometimes on holidays and after working hours the exhibit would be kept with the officers and handed over subsequently. Some officers had lockers inside the exhibit room so he would allow them to store it there after he made the necessary entries, if they did not have a locker, he would store the exhibit in the filing cabinet in the exhibit store room. Under cross examination he confirmed the fact that PC Camille had a locker inside the exhibit room (vide pg 35 of proceedings of 13th February 2009). Thereafter the defence closed its case.

Having thus carefully analysed the evidence, it is clear that the main contentions of the defence, are that the controlled drug was planted on the accused and that this is further supported by the fact that the main prosecution witness PC Camille, had given two different versions of the detection. No doubt prosecution witness PC Camille gave two different versions as to where the drug was found. As already mentioned he first stated the drug was found near the sofa after the struggle and later he stated that it was found in the right hand side pocket of the short the accused was wearing. His explanation was that he had not read his statement properly and he had made a genuine error, as he had confused his evidence as he done several drug detections. Although the witness admittedly did make such an error in his evidence, it is to be noted that having corrected himself there was not a single inconsistency the defence was able to show with his corrected evidence and the statement given by him soon after the incident. Usually it is the inconsistencies between the evidence and the witness's statement that establishes whether a witness is truthful or not. Hence it is clear that the witness did err which is human, but certainly was not telling any untruths or lying to court after correcting himself. Furthermore the defence itself does not seek to depend on the defence that the drug was found near the sofa. Although the defence suggested he had changed his

evidence due to pressure, it is apparent he had not changed any evidence in respect of the detection under pressure, as his corrected evidence had no inconsistencies with his statement given soon after the detection. For this reason court is satisfied that though PC Camille did err in giving evidence it was a genuine error and that he was not an untruthful witness.

Learned counsel for the defence in his submissions to court stated that witness PC Camille appeared to be a man with a tortured soul when he was giving evidence. The accused went to the extent of stating that the witness was crying in court. Firstly it should be categorically mentioned that witness did not cry in court though he did have a running nose. Nor has counsel for the defence requested court to make note of the fact he was crying. PC Camille is an experienced police officer very unlikely to start sobbing or crying in open court. The fact that one witness had a running nose or that the other witness refused to accept the challenge of counsel to look into his eyes by stating "I was asked to come and give evidence in relation to a drug case not to look at you" does not in anyway show the witnesses were untruthful or lying under oath. As such court will proceed to accept the evidence of these two witnesses.

In attempting to show court the drugs were planted on the accused, defence counsel's main contention as borne out by the proceedings, was PC Camille put his clenched fist containing the controlled drug into the pocket of the accused and removed it and attempted to show the drug was detected in the pocket of the accused. However the accused himself does not support this fact in his evidence. He categorically states the clenched fist was never placed in his pocket. The hand which was not clenched was put in his pocket and money removed. His version does not clarify the suggestion made by defence counsel that the police attempted to show the drug was

taken from the pocket of the shorts the accused wore. Although such a glaring discrepancy exists in the attempt of the defence to show that the drug was planted on the accused, the corrected evidence of PC Camille is corroborated by LC Hoareau in respect of the drugs being found in the pocket of the short the accused was wearing. No major contradictory evidence between the evidence of these two witnesses was observed in this aspect. In view of these circumstances the defence of the accused that the controlled drug was planted on him is rejected.

Furthermore the mere fact the accused shouted for his family members to hear, that the drug was planted on him, does not in itself prove that fact. Although the accused stated that one of the reasons for him to go home against his lawyers advice, was because his 16 year old daughter was alone at home, the defence itself establishes the fact that, her 23 year old elder sister was at home and had not gone to work that day, and that his mother in law's house was situated close by, close enough for the arguments to be heard when the raid took place. Document D1 only confirms the fact that there was a struggle between the police and the accused when he resisted, while photographs D2 to D7 do not in anyway establish the defence contention that the drugs were planted on the accused. D8 is a document subsequently prepared to fall in line with the rejected defence of the accused.

The fact that PC Camille had a locker within the exhibit room is confirmed by the defence witness Lance Corporal Confiance himself.

In such instances LC Confiance stated, the officers could keep the exhibit in their lockers after the necessary entries had been made in the books by LC Confiance. As such PC Camille cannot be faulted for keeping the exhibits in

his locker, as his locker was within the exhibit room and not outside, as confirmed by the defence witness himself. Furthermore the seals placed by the Government Analyst had not been tampered with at the time the exhibit was produced in court and on identifying and opening the seals, the Government Analyst identified the exhibit brought for analysis and analysed by him. PC Camille identified the exhibit as that detected on the accused and handed over to the Government Analyst for analysis. He stated that after the analysis the exhibits were kept in the locker and produced at the trial by him. It is therefore clear that the chain of evidence has been established by the prosecution beyond reasonable doubt.

When one considers the evidence of the prosecution, PC Camille's evidence clearly shows that the Cannabis Resin was detected in the right side pocket of the short the accused was wearing. The material facts regarding the detection are corroborated by the evidence of Lance Corporal Hoareau. Both prosecution witnesses have identified the accused as the person having the controlled drug in his possession. No material contradictions or major inconsistencies arose in respect of the prosecution's evidence in regard to the detection, even though both police officers were subject to rigorous cross examination. Court is therefore satisfied that the prosecution has proved beyond reasonable doubt that the controlled drug was in the possession of the accused.

The concept of possession connotes two elements, the element of custody or mere possession and the element of knowledge as held in the case of *DPP. v Brooks (1974) A.C. 862*

With regard to the element of knowledge the accused himself admits in his evidence that he struggled with the police officers and at page 13 of the proceedings of 11th February 9.00 am states;

“They had grabbed me everywhere trying to put their hands in my pocket and I was struggling trying to prevent them from doing it”.

Having rejected the defence contention of a ‘plant’ it is clear that such a violent reaction and the attempt by the accused to prevent the police officers from putting their hands into his pockets was due to his knowledge that he had the controlled drug in the pocket of his shorts. For the aforementioned reasons court is satisfied that the prosecution has established the elements of possession and knowledge beyond reasonable doubt.

Dr Jakaria’s evidence clearly establishes the fact that the dark substance taken into custody from the accused was Cannabis Resin, a controlled drug. His report marked E2 confirms this fact and also specifies that the quantity taken into custody as 84 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.

For the aforementioned reasons this court is satisfied that the prosecution has proved all the ingredients of the charge against the accused beyond reasonable doubt. The accused is found guilty as charged and convicted of same.

M.N BURHAN

JUDGE

Dated 20th day of April 2009