

IN THE SUPREME COURT OF SEYCHELLES

THE REPUBLIC

versus

RAYMOND PATRICK FRANCIS

Case No: CR 11 of 2010.

Miss B. Confait for the Republic

Mr B. Hoareau for the Accused.

Accused Present.

JUDGMENT

Dodin. J

The Accused Raymond Patrick Francis stands charged with the offence of trafficking of a controlled drug contrary to section 5 as read with section 14(d) and section 26(1)(a) of the Misuse of Drugs Act as amended by Act 14 of 1994 and punishable under section 29 of the same Act.

The particulars of the offence state that the Accused Raymond Patrick Francis of English River, Mahe, on the 7th March, 2010 at Au Cap, Mahe, was trafficking in a controlled drug by virtue of having been found in possession of 100.8 grams of Cannabis, which gives rise to the rebuttable presumption of trafficking in a controlled drug.

The prosecution called three witnesses. The 1st prosecution witness was Jemmy Terrence Bouzin, a forensic chemist in charge of the Forensic Laboratory, situated at Mont Fleuri.

Mr Bouzin testified that on 8th March, 2010, at 11.35 am he received from Agent

Kenneth Joseph two large brown sealed envelopes together with a letter of request all with reference CB121/10 of Anse Aux Pins Police Station requesting him to analyse the herbal content of both envelopes which were suspected to be controlled drugs. One envelope contained one red plastic bag inside which were three kaki papers each wrapping some dried green herbal material. The other envelope contained one backpack inside which were some herbal material. After completing the formalities, Mr Bouzin conducted tests on samples taken from each wrapping and from the backpack and all the tests confirmed that the herbal material were cannabis. After concluding the tests, he prepared a report which was produced to Court as exhibit P1. The herbal material from the three wrappings had a net weight of 100 grams whilst those from the backpack had a net weight of 0.8 grams. After the tests the herbal materials were returned into their respective wrappings and placed back into the red plastic bag and those that were in the backpack were returned into the backpack and each were put in their respective envelopes. Then both were placed in a large transparent evidence bag and sealed. The report and the exhibits were handed to Agent Joseph on the 10th March, 2010. Mr Bouzin identified the evidence bag containing the exhibits and then opened the same. He then identified the contents of the brown envelopes as well as the herbal material in the brown wrappings and the backpack. All were admitted as exhibits.

In cross-examination Mr Bouzin stated that he was the only person having access to the forensic laboratory which he is in charge and that the evidence bag and the exhibits were in the same state they were when he had handed them to Agent Joseph.

The 2nd prosecution witness was agent Kenneth Joseph who testified that he has been an NDEA agent for 6 months. He was on duty on the 7th March, 2010 from 9 am to 11 pm. At about 11.30 am he was on patrol with three other agents, namely Lance Corporal Hoareau, Agents Marlbrook and Barbier in white terios jeep registration number S17153 at Anse Aux Pins. Arriving at the Montagne Posée junction, he saw two persons near the road on the seaside.

As the jeep approached their position, the two persons went into the bush near

the sea. He described the two persons as two men, one baldhead with a goatee beard and the other with braided hair. The man with the goatee beard had a backpack on his back and a red plastic bag in each hand. As the agents got out of the vehicle both men ran away. The baldhead one with the goatee beard jumped over a wall into the sea. He identified the baldhead man with a goatee beard as the Accused. Agent Joseph ran after him also jumping into the sea and as he was catching up with him, the Accused threw one of the red plastic bags towards the shore and it came to rest on the wall close to where L/Cpl Hoareau was standing. Agent Joseph caught him and took him to the place where L/Cpl Hoareau was standing and he was handcuffed and searched. The red plastic bag he had thrown was retrieved and opened in the presence of the Accused. Inside there were three small packages containing herbal material wrapped in brown paper which was suspected to be controlled drugs. The other red plastic bag contained mangoes. A body search was conducted on the Accused and nothing was found on his person. The backpack he was carrying was also searched and a few leaves of herbal material were found inside which was also suspected to be controlled drugs. The Accused and the other man who had by then been apprehended were taken to Anse Aux Pins Police Station where a case was registered against the Accused. Agent Joseph retained the red plastic bag and the backpack which were suspected to contain controlled drugs which were brought for analysis at the forensic laboratory. He collected the exhibits and the forensic report two days later and he identified the exhibits in court as the same that he had to the forensic laboratory and then collected and kept in his possession until the trial.

In cross-examination, Agent Joseph stated that he was not good at reading and writing and that he was assisted throughout by L/Cpl Hoareau, Sergeant Seeward and Sergeant Dogley to complete the formalities necessary but that he signed the relevant documents where necessary. He denied that there were contradictions between his statement and his court testimony.

The 3rd prosecution witness was L/Cpl Berard Hoareau. Agent Hoareau testified that that on the 7th March, 2010, he was on patrol together with Agents Joseph, Marlbrook and Barbier in a white terios jeep. Arriving at Anse Aux Pins close to the Montagne Posee junction, he saw the Accused and another man about to

cross the road from the seaside. When the jeep approached the two men returned into the bush. The agents became suspicious and as they got out of the jeep he saw the Accused ran and jumped into the sea. Agent Joseph ran after him and jumped into the sea behind the Accused. The Accused had two red plastic bags with him and he threw one of the bags on the wall about 7 meters from him. Agent Joseph returned with the Accused and Agent Hoareau handcuffed him. Agent Joseph then went to collect the plastic bag which the Accused had thrown on the wall. There were three packets of herbal material wrapped in kaki paper. Agent Hoareau then told the Accused that he was being arrested and told him his rights. The Accused was body searched by Agent Joseph and nothing illegal was found. Agent Joseph then searched the backpack the Accused was carrying and found traces of herbal material in it. They went to the jeep where the other agents were detaining the other man known as Farabeau. Both persons were taken to Anse Aux Pins police station where a case was registered against the Accused and the Accused was placed in a cell. The agents returned to NDEA office where he assisted Agent Joseph with the formalities. PW3 indentified the exhibits in court as the same which were seized from the scene at Anse Aux Pins which he maintained were with the Accused.

In cross-examination, Agent Hoareau stated that the Accused jumped into the water, then threw the red plastic bag onto the wall before starting to run in the water. He said that he did not know the Accused before that incident. He admitted that he knew a person by the name of Joe Brian Savy whom they usually see at the Chetty Flats and that he had seen the said Joe Brian Savy on that day but he did not recall if they stopped or searched him on that day.

At the close of the Prosecution's case the Accused chose to make the following statement from the dock:

"I was drinking a beer, I saw a man running. A short later I saw a vehicle coming. I don't know whose vehicle it was. They removed a plastic from the vehicle and they said it was ours. Then they put us in the vehicle and brought us to Anse Aux Pins Police Station. When we got there they took us inside. There was another man with me. Then they took me outside and

took the other man inside. That is all.”

The Defence called one witness, namely Marcus Farabeau who testified that on the 7th March, 2010, he was at Au Cap, close to the Montagne Posee Junction with the Accused. They were drinking beer. He saw a young man who came running past them and told them NDEA just searched him at Anse Aux Pins. Then they saw the NDEA vehicle coming and stopped near them. The Agents came and searched them and did not find anything. Then they searched the surrounding and they picked up a red plastic bag and asked them to whom it belonged. Both himself and the Accused said they did not know. They were placed in the jeep and taken to Anse Aux Pins Police Station. There they searched his bag and found nothing. Then they took the Accused’s bag and went into the corridor. They called him into the corridor and Agent Hoareau told him to say that the drugs belong to the Accused which he refused. He was asked if he had a wife and children and if he wanted to go to prison for 4 years. He still refused to say the drugs were for the Accused.

In cross-examination, the Defence Witness stated that he had known the Accused for about 7 years and they worked together. He denied that the Accused ran away when the NDEA came and said he (Defence Witness) tried to run away when they were being put in the jeep. He denied that he was lying to cover the Accused.

Having considered and analysed the evidence and submissions of the prosecution and the defence the Court shall first consider whether the offence with which the Accused is charged has been prove by the Prosecution beyond a reasonable doubt.

The elements of the offence to be proved by the Prosecution are that; the herbal material before the court as exhibits is the controlled drug cannabis; that the net weight of the material is 100.8 grams; that the herbal material were in the possession of the Accused who had knowledge of the existence of the said material in his possession.

Mr Bouzin was admitted as a forensic expert and produced a certificate of analysis certifying that the herbal materials which were brought to him for

analysis were cannabis with the net weight of 100.8 grams. There was no contention by the Defence about the weight of the herbal material or that it was the same material that were analysed by Mr Bouzin. However Learned Counsel for the Accused took issue with the analytical processes employed by Mr Bouzin. Learned Counsel submitted that since Mr Bouzin did not produce a statement stating the process of examination in detail, the Defence was not able to test the evidence of Mr Bouzin in cross-examination.

Section 12 of the Misuse of Drugs Act, CAP 113, states;

“A certificate purporting to be signed by a Government pharmacist, or such other person appointed by the Minister for the purposes of issuing a certificate under this section, and purporting to relate to a controlled drug shall be admitted in evidence in any proceedings for an offence under this Act, on its production without proof of signature and, until the contrary is proved, the certificate shall be prima facie evidence of all matters contained therein.”

Mr Bouzin gave evidence that he drew up the report after concluding the examination of the herbal material which were brought to him by Agent Kenneth Joseph. In the process of conducting the examination he also made notes as to the processes he employed and from which the report was drawn up. Indeed Learned Counsel for the Accused did not object to the admission of the report which was admitted as exhibit P1. Pursuant to Section 12 of the Misuse of Drugs Act, the report is prima facie evidence of the facts contained therein. The law does not require the analyst to make any additional records for the use of the Defence. Learned Counsel for the Accused requested to verify the notes which Mr Bouzin was referring to in court and was allowed to do so during cross-examination. The contention of the Learned Counsel for the Accused that there has been no disclosure of the details of the analytic process is therefore misguided and is rejected accordingly.

The Court is satisfied with the evidence of Mr Bouzin as supported by the report admitted as exhibit P1, that the herbal material analysed and produced in court was cannabis, a controlled drug proscribed by Part II of the First Schedule of the Misuse of Drugs Act.

The Court shall now consider whether it has been proved as required by law that the controlled drug cannabis were in the possession of the Accused and whether the Accused had knowledge of the existence of the said controlled drug in his possession.

The Prosecution relied on the evidence of two NDEA agents Kenneth Joseph and Berard Hoareau to prove possession of the controlled drugs by the Accused. Agent Joseph testified that when he disembarked from the vehicle close to the Accused, the Accused who was returning into the bush at the side of the road started to run and he decided to give chase. The witness testified that he had noticed two plastic bags in the hands of the Accused and a backpack on his back. Whilst chasing the Accused, the Accused jumped into the sea and threw the red plastic bag which was in his left hand towards the shore. The bag landed on the wall but the agent continued to chase after the Accused, caught up with him and arrested him. He brought the Accused to the shore where he was hand-cuffed by Agent Hoareau. He then went to collect the plastic bag which was opened in the presence of the Accused. In it there were three brown wrappings containing the drugs. The Accused handcuffs were removed to allow the removal and search of the back pack which was found to contain a very small amount of the same drugs.

Agent Hoareau also testified to the above version of events. Both witnesses were rigorously cross-examined but maintained their versions of events and remained consistent throughout. The evidence of both witnesses corroborate each other on all material facts, being that the Accused was with another person at the side of the road at Anse Aux Pins; that the Accused ran away and jumped into the sea when the Agents stopped next to him; that the Accused had a backpack on his back and had a plastic bag in each hand; and that the Accused threw away one plastic bag which was recovered by Agent Joseph and found to contained the controlled drug cannabis, and that the backpack attached to the Accused back was searched and found to contained the same drug.

There are only two points on which the evidence of the two material witnesses differed which were raised by the Learned Counsel for the Accused in his address to the Court. These are that Agent Joseph maintained that he did know and did

not recall having stopped or search a person by the name of Joe Brian Savy that day whilst Agent Hoareau stated that he knew Joe Brian Savy and saw him on that day in the vicinity of where the Accused was arrested. Agent Hoareau however maintained that he did not remember if the said Joe Brian Savy was stopped or searched that day. He further maintained however that if he did, it was not during the time that the Accused was arrested.

The second point raised was the manner in which the red plastic bag was thrown. Agent Joseph testified that it was thrown towards the shoreline in the direction of Anse Aux Pins whilst Agent Hoareau testified that it was thrown towards the shoreline in the direction of Anse Royale.

On the evidence regarding the person by the name of Joe Brian Savy, the Court finds that both Prosecution Witnesses were consistent on the fact that the said person was not at the scene where the Accused was arrested. Furthermore the Defence Witness, Marcus Farabeau who was initially arrested together with the Accused testified that a man, whose name he did not know ran past him and the Accused and told them that NDEA had just searched him and then the man ran away. Even if the Court was to consider this man to be the said Joe Brian Savy, it is clear that the said Joe Brian Savy was not present when the Agents apprehended the Accused. Secondly if that same person had just been stopped and searched by the NDEA agents it is reasonable to conclude that he could not at the time he spoke to the Accused and Marcus Farabeau have in his possession a bag containing drugs which he would deposit near the Accused before running away. The Court therefore concludes that the question of whether Joe Brian Savy was stopped or searched prior to the Accused being apprehended has no material effect on the evidence against the Accused.

As regards the manner of throwing the red plastic bag, both witnesses were consistent on the fact that the bag was thrown towards the shoreline and landed on the wall near the seaside. Agent Joseph testified that he saw the Accused throw the bag when both had jumped into the sea which means he was looking towards the shore, whilst Agent Hoareau testified that he saw the same thing but from the shore looking towards the sea. It is therefore explicable why their

demonstration of how the bag was thrown could be slightly different. However they were not inconsistent on the material aspect relevant to the case.

The concept of possession consists of two elements as was established in the case of DPP. V Brooks [1974] A.C. 862. These are custody and knowledge. The fact that the Accused was observed with two plastic bags in his hands, that he ran away and out of the two bags he threw one which turned out to contain the prohibited material is a clear indication that he must have known what was in that particular bag and the consequence of being caught with the same. Hence the element of knowledge has been proved to the satisfaction of the Court.

As a consequence of the above findings, the Court is satisfied that the prosecution has discharged the burden of proof as required by law in this case.

The Court now considers the evidence brought by the defence and whether the same give rise to a reasonable doubt in the prosecution's evidence.

The Accused after having been explained his rights chose to make an unsworn statement from the dock. The said statement is reproduced above. The Court takes note that the fact that the Accused chose not to give evidence under oath is a fundamental right which the Accused has and which cannot be interpreted to his detriment.

The value of a dock statement was considered in the case of R. v. Campbell 69 Cr. App. R. 221 which states:

"A statement from the dock is not, of course, evidence. It is, as many think – the fact that a defendant is still at liberty to make a statement of fact from the dock, invite a jury to consider his version of the facts without taking the oath and without subjecting himself to cross-examination – an anomalous historical survival from the days before the Criminal Evidence Act 1898 when a person could not give evidence on his own behalf. There it is anomaly or not; the courts have to grapple with it and a statement from the dock unsworn now seems to have taken on in current practice a somewhat shadowy character half-way in value and weight between unsworn evidence and mere hearsay. A jury cannot be told to disregard it altogether. They must be told to give it such weight as they think fit, but it can be properly pointed out to them that it cannot have the same value as

sworn evidence which has been tested by cross-examination.”

The Accused maintained that he was by the roadside drinking beer with Marcus Farabeau when the agents' vehicle came, the agents removed a bag and said it was for them and they were arrested and brought to Anse Aux Pins Police Station. The Defence witness Marcus Farabeau stated that they were by the road drinking beer when the NDEA agents came searched them, then searched around in the area and picked up a plastic bag and asked them to whom it belonged. The plastic bag was picked up somewhere in the bush. The only part of Marcus Farabeau's testimony which corroborated the Accused account is that they were by the roadside drinking beer and a young man went by then the NDEA agents came. According to the Accused, the bag was taken from the vehicle whilst the witness maintained that it was picked up from the bush after they had been arrested and searched. In fact, the Defence witness' account is closer to the accounts of the prosecution witnesses than to the Accused account.

In cross-examination the defence witness changed the sequence of events to state that it was after an agent had come with the red plastic bag from the bush that they were handcuffed. After carefully considering the evidence of Marcus Farabeau the court finds that it is far less consistent than the evidence of the prosecution witnesses. For these reasons the court finds the evidence of Marcus Farabeau to be unreliable and therefore rejects the same. No reasonable doubt has been cast on the evidence brought by the prosecution.

The offence of trafficking in the controlled drug cannabis is committed if the Accused was in possession of more than 25 grams of cannabis as the rebuttable presumption created by section 14(d) of the Misuse of Drugs Act. The Accused has failed to rebut the presumption of trafficking. The Court therefore finds the Accused Raymond Patrick Francis guilty of the offence of trafficking in the controlled drug cannabis as charged and convicts the Accused accordingly.

C.G. DODIN

JUDGE

Dated this 20th day of August, 2010.