

IN THE SUPREME COURT OF SEYCHELLES

REPUBLIC

VS

GARRY STEPHEN

Criminal side no: 55 of 2009

Ms. Madeleine for the Republic

Mrs. Amesbury for the Accused

JUDGMENT

Burhan J,

The accused in this case Garry Stephen has been charged for trafficking in a Controlled Drug, contrary to section 5 read with section 14 (c) and 2 (1) (a) of the Misuse of Drugs Act Cap 133 and punishable under section 29 read with the second schedule to the said Act.

The particulars of the offence are that Garry Stephen, on the 16th of December, 2009 at Roche Bois was found in possession of a Controlled Drug namely 37.5 grms of Heroin (Diamorphine) 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 9th of April 2010.

The main witness for the prosecution agent Kenneth Joseph testified to the fact that he worked for the NDEA (National Drug Enforcement Agency) and that on the 16th of December 2009, he together with another agent Ricky Charles had gone to Roche Bois and positioned themselves behind a boulder near the house of one George Hoareau and observed the persons who were going in and out of the said house. They had observed a person with a machette and a bottle of water in his hands come from one of the houses below and go into the house of Mr. George Hoareau. He had called for backup and when the backup had arrived he had heard some people shouting police and saw the person who had earlier gone into the house come running out in his direction. The person who the police officer identified as the accused had a jar with a red lid and carried a black bag in his left hand. When he arrived close to them they had emerged from behind the boulder and ordered him to stop but he had continued running. He had grabbed the accused by his shoulder. They had struggled and fallen on the ground and the accused had thrown the jar in his hand. Thereafter the other officer Ricky had hand cuffed the accused and he had gone over to where the jar had fallen and picked it up. He had opened the jar in the presence of the accused and Ricky Charles and shown the contents. It had contained 4 plastics which were transparent and inside these were some powder which was a "bit brown." He had thereafter informed the accused he was being arrested for being in possession of a suspected controlled drug.

Witness further stated that the accused was taken to hospital as he had hit his head on the ground during the struggle and was bleeding. He had kept the plastic containing the powder and the jar in his possession and placed it in a brown envelope which he had kept in his own locker. On the 17th of December 2009 he had taken the jar and its contents for analysis to the Government Analyst together with the letter of request. After handing over the brown envelope and its contents for analysis he had gone again to collect it on the 21st of December 2009. He had collected the exhibits which were in a sealed envelope which contained the CB number of the exhibit 1753 of 2009. He had thereafter handed it over to Sergeant Seeward the store exhibit officer.

On the 9th of April 2010 he had collected the envelope with its seals intact and brought it to court. He identified the glass jar and the 4 packets containing the powder and produced them as P4 and P5 a, b c and d respectively.

Under cross examination he stated he did not know on whose property the boulder behind which they were observing the house belonged to or whose property they traversed to reach the boulder. The boulder from which they were observing the house of Mr Hoareau was about 5 metres from the house. Witness stated he made a statement in respect of the detection. He stated he did not record what was happening in a note book but made a statement the very next day. He further stated that he explained his constitutional rights and cautioned the accused prior to arresting him but admitted it was not mentioned in his statement. The accused had at that stage stated the jar did not belong to him and he had nothing to do with the jar. He denied the defence suggestion that the accused was bleeding as he had been beaten by a police officer. He stated he could not say how many jeeps arrived when he called for backup. He further stated that Sergeant Dogley had not recorded in the statement that the accused had a bottle of water and a machette in his hand when he went to the house of Mr Hoareau.

The other officer who gave evidence in the case was agent Ricky Charles who had accompanied agent Joseph on the raid. His evidence corroborates that of agent Joseph in all material matters. He corroborates the evidence given by agent Joseph in respect of the date, time and place the detection occurred and the fact that they were observing the house from behind a boulder. He verified the fact that they had called for back up and thereafter someone had shouted police and the accused had come running out of the house. He too had seen the accused throw the jar when he was caught by agent Joseph. He stated he heard agent Joseph inform the accused of his constitutional rights. He denied hitting the accused and causing him an injury. He admitted that some things he mentioned had not been written in his statement. Chief officer David Sheedy deponed to the fact that the request letter marked through him as P6 was issued by him. He stated the number of vehicles that took part in the raid was one or two and there were about four to five agents at that time.

Mr Bouzin Government Analyst gave evidence stating that on the 17th of December 2009 at 11.00 hrs, he received a letter of request together with the exhibit from Agent Kenneth Joseph. The exhibit was sealed in a brown envelope and the CB No 1753/09 was written on the said envelope. He verified the contents of the envelope which contained a transparent jar with a red cap and 4 plastic packets of a light brown powder. He thereafter described in detail the physical examination and chemical tests carried out on the samples of brown powder taken by him for analysis and stated that the weight was 37.5, the percentage purity was 53% and that each sample on analysis was found to contain heroin (diamorphine) . He had thereafter drawn up a report of his findings. The report was marked as P1. He had after analysis placed the exhibit in a large white envelope sealed it and handed it back to Agent Joseph. He identified the envelope as P2 and verified the fact the seal was intact. The evidence envelope, the glass jar with lid and the 4 plastic packets and the contents were identified by him in open court as that which he received from agent Joseph and which was analysed by him. During cross examination there was no contest to his expertise or the chain of evidence in respect of the exhibits in this case. He further stated that the jar was not tested for fingerprints.

The accused in defence admitted that on the said day he was working for one Ernest William and had been instructed to do some cleaning work at the premises of George Hoareau sister's house. He admitted he had gone to George Hoareau's house which was situated close by for lunch. He stated he did not stay long as he had left a fire burning at the place he was clearing. He admitted several times and even to the questions put by his own counsel that he was running when he came out of Mr Hoareau's house (Vide page 4 of the proceedings of 9th June 2010) but subsequently stated he was not running but walked quite fast as the fire in the premises he was clearing was still burning. He admitted (Vide page 13 of the proceedings of 9th June 2010 1.45pm) that he heard someone shout police when he was at Mr Hoareau's house. He further stated that he was arrested by Ricky Charles and hit on the head with a stick by the officer. He admitted he saw the police pick up the glass jar with a red cap. He denied he threw the said jar or that he was in possession of same.

The other witness called by the defence was Sergeant Brian Dogley, the maker of the affidavit marked D1. It was suggested by learned counsel for the defence that this affidavit showed that the accused had no drugs as it had been given to him by Ernest William, which was denied by witness who further stated the affidavit sworn by him contained facts which were brought to his notice by officers who were involved in the detection. When one considers the evidence of defence witness Ernest William, he corroborates the fact that the accused worked on Mr. George Hoareau sister's land that day and that the accused went to Mr. George Hoareau's house for lunch that day. It is clear he was not present at the time the accused was detected running with the controlled drug and had been arrested. He further stated he did not know why the accused was arrested and that he did not see the arrest at all but had heard someone screaming that Gary is bleeding heavily and when he had gone there he had seen Garry handcuffed. (Vide page pg 14 of the proceedings of 22nd June 2010 1.45pm). He further stated that he had not seen agent Kenneth Joseph there at the time Gary had been arrested. It is clear this witness had not seen the incident regarding the arrest of the accused. He denies however that there was any drug transaction going on at that time in the house of George Hoareau. Having led the evidence of these witnesses the defence closed its case. Thereafter both counsel made oral submissions.

Having thus carefully analysed the evidence it is apparent the defence of the accused is that he denies the prosecution version that he was in possession of any glass jar with a redcap containing any controlled drug or that he had thrown such a jar when he was being apprehended by the agents of the NDEA.

Learned counsel in her submissions urged court not to rely solely on the evidence of the officers of the NDEA but for court to look for independent evidence to corroborate the facts mentioned by the police officers. This is not a legal requirement but however in order to satisfy learned counsel, this is one case where many aspects of the evidence given by the police officers is corroborated from no other source than the defence witnesses themselves. The evidence of agent Kenneth Joseph that the accused was seen around 11.a.m, going to the house of George Hoareau is admitted by the accused himself. In his evidence he admits he went to the said house for lunch that day. Both officers stated they took up positions behind a boulder to observe the

house the accused admits in evidence there was a boulder close to the house (Vide page 13 of the proceedings of 9th June 2010). As mentioned by the prosecution witnesses the accused admits (Vide page 3 of the proceedings of 9th June 2010 1.45pm) he had a black bag with him at the time containing his money. Both police officers state someone shouted “police.” The accused admits he heard the shout of “police.” Both police officers state the accused came running out of the house. The accused admitted several times that he ran out of the house of George Hoareau though he changed it later and denied running but stated he walked fast and skipped over some steps.

The police officers stated the jar was picked up, the accused admits that he saw the jar being picked up. Therefore it is seen that several details of the evidence of the police officers is supported by the evidence of the defence. All these details admitted by the accused were borne out by the evidence of prosecution witness agent Kenneth Joseph and considering the detailed evidence given by witness Joseph which was not contradicted in any way but in fact corroborated by officer Ricky Charles, it is not possible to accept the defence contention that agent Joseph was not present during the detection. Further the only other witness Ernest William (for the defence) who testifies that agent Kenneth Joseph was not there, was not present at the time the accused was arrested but had subsequently been brought to the scene of arrest.

The officers deny the fact that they had assaulted the accused with a stick. They stated that the injury was due to a fall sustained at the time of arrest. The evidence of the prosecution that the accused continued to run when being ordered to stop and there had been a struggle and the accused had fallen to the ground and injured himself (vide page 7 of the proceedings of 12th April 2010) is plausible in the absence of any immediate complaint by the accused to the higher authorities regarding such assault. Learned counsel also contended that the police had not maintained contemporaneous notes and therefore their evidence was fabricated. However both officers have given statements soon thereafter by an oversight it is apparent the date was not recorded in the statement of agent Ricky Charles but the accused himself admits this officer was on the scene at the time and the evidence of this agent corroborates that of agent Joseph who had given a statement the very next day.

Learned counsel for the defence also highlighted to court, the fact that the constitutional rights of the accused had been explained to the accused, had not been mentioned in the officer's statement. However the officer stated under oath he had done so and his evidence is corroborated by that of Ricky Charles and the accused in his evidence does not seek to complain of such an omission. Learned counsel in cross examination pointed out that the statement of agent Joseph does not mention that the accused at the time he was going for lunch to Mr. George Hoareau's house had a machete in his hand. However this omission in his statement is not a material omission as he describes in detail what the accused had in his hands when he ran out of the house just before his arrest. Further a reading of the affidavit D1 does not indicate at all that the accused was not in possession of the said drug. Further when there are eyewitness accounts of an incident such as this, it is not essential that it be supported by finger print evidence as well to be accepted by court, neither is it necessary for the prosecution to prove or to disprove who the owner of the property on which the drug was thrown into was, when there is the evidence of eyewitnesses to say that the accused was seen throwing the controlled drug. Further the accused had not sought to complain to any higher authority that he had been "framed" by the 2 officers concerned.

For the aforementioned reasons this court sees no merit in the evidence and defence of the accused and proceeds to reject same.

There has been no contest to the chain of evidence led by the prosecution in regard to the exhibits detected at the scene, analysed by the Government Analyst and produced in court. The Government analyst has identified his seal being intact in open court showing clearly there has been no tampering with the exhibit after it had been handed back to agent Joseph after analysis. His evidence and report identify the powder taken into custody as a controlled drug Heroin.

When one considers the evidence before court, led by the prosecution, it is clear that the evidence of the detecting officer agent Kenneth Joseph can be believed and

accepted by court as even though he was subject to lengthy cross examination, no material contradictions in his evidence have emerged for him to be disbelieved. In fact several material aspects of his evidence have been corroborated by the other prosecution witness agent Ricky Charles and even admitted by the accused himself. The court is therefore satisfied that the prosecution has proved beyond reasonable doubt that the controlled drug was in the possession of the accused prior to him throwing it away.

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 of the accused, it is in evidence that the accused attempted to run away when asked to stop and had thrown the exhibit when he was detected by the police officers. It could be inferred from these acts and the relevant circumstances of this case that the accused had the necessary knowledge that he was in fact in possession of a controlled drug. For the aforementioned reasons court is satisfied that the prosecution has established or proved the elements of possession and knowledge beyond reasonable doubt.

The quantity of controlled drug for which the accused has been charged is 37.5. The purity as stated by the Government Analyst is 53%. In the case of *Aaron Simeon v The Republic SCA 23 Of 2009* A.F.T Fernando JA held that the accused could be convicted only on the pure quantity of heroin found in his possession. Therefore the pure quantity of controlled drug in this instant case is 19.875 grams. The quantity concerned attracts the presumption of trafficking which the accused has failed to rebut. Therefore as this court is satisfied that the prosecution has proved all the necessary elements of the charge beyond reasonable doubt, this court proceeds to find

the accused guilty of trafficking in a controlled drug namely heroin weighing 19.875 grams. Accordingly the accused is found guilty and convicted of same.

M.N. BURHAN

JUDGE

Dated this 30th day of September 2010