

IN THE SUPREME COURT OF SEYCHELLES

**THE REPUBLIC
VS
CHE DORAISAMY**

Criminal Side No. 35 of 2009

JUDGMENT

Burhan J

1. The accused in this case Che Doraisamy has been charged for 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 14 of 1994 and punishable under section 29 and the second schedule referred thereto in the Misuse of Drugs Act 1990 as amended by Act 14 of 1994.
2. The particulars of the offence are that the accused Che Doraisamy on the 26th of August at Plaisance/Roche Caiman Mahe was Trafficking in a controlled drug by virtue of having been found in possession of 2.45 grams of Heroin which gives rise to the rebuttable presumption of having possessed the said controlled drug for the purposes of trafficking.
3. The accused denied the charge and trial against the accused commenced on the 14th of December 2009.
4. Mr. Bouzin Government Analyst called by prosecution testified that he

received the exhibit in relation to this case bearing CB No 168/09 from agent Mickey Barbier around 14.55 hrs on the 26th of August 2009, together with a letter of request. He explained the tests carried out by him and stated he had identified the light brown powder as Heroin. He stated the weight of the powder was 2.45 grams and the purity 16%. His report was marked as P1. He identified the sealed envelope in which he had placed the exhibits in, P2 and stated the seal was intact. He identified in open court the exhibits and the powder P5d brought to him by agent Mickey Barbier for analysis, analysed by him and identified as Heroin.

5. The prosecution called agent Mickey Barbier of the NDEA (National Drug Enforcement Agency) who stated that on the 26th of August 2009 he together with agent Siguy Marie and agent Aglae went on patrol first to the North of Mahe and then to Plaisance. They had stopped a black motorbike bearing registration number S11685 being driven by the accused Che Doraisamy near Fresh Cut. They had come up from behind him used the hazard and horn and signaled him to stop. They had identified themselves and done a body search on him. Thereafter he was invited to the NDEA office as they wanted to search his bike and he had cooperated and ridden his bike in front while they followed till they reached the NDEA office. They had proceeded to search the motorbike with his consent and in his presence. On removal of the seat at the back of the motor cycle a tissue had fallen down. Inside the white tissue were a yellow foil and a plastic which contained a light brown powder. He had then informed the accused he was arresting him on suspicion that the powder was a controlled drug. He had thereafter put the tissue and contents into a brown envelope P5, sealed it and kept it in his possession till he handed it to Mr. Bouzin for analysis. He had after analysis

collected the exhibit from Mr. Bouzin which was sealed and kept it with Sergeant Seeward and then collected it from him to bring it to court where it was handed over to witness Mr. Bouzin. At the time he collected the exhibit from Sergeant Seeward the seals were intact, a fact confirmed by the Government Analyst Mr. Bouzin as well in open court. He identified the brown powder P5d as that taken into custody by him.

6. Under cross examination he explained that from 8.00am to 12.00pm they were in the north and described in detail what they had done. They had stopped vehicles and searched and conducted body searches as well. He further stated agent Siguy Marie had been in charge that day as the team leader. He stated it was agent Siguy Marie who had instructed him to stop the motorcycle driven by the accused. He further stated that agent Siguy Marie knew the accused. He stated the accused had been calm and not aggressive at the time of the search.
7. Witness Agent Siguy Marie corroborated the evidence given by witness Mickey Barbier. He too stated that on searching the motor bicycle driven by the accused at the NDEA office, the tissue containing the powder had fallen on the ground from under the seat of the motorcycle when the seat was unscrewed. He further stated the accused was cooperative when they had stopped him and that he knew the accused as he had searched him on earlier occasion but found nothing.
8. At the request of the defence the prosecution witness agent Barbier and Siguy Marie were recalled for further cross examination as the prosecution had no objections in respect of the application to recall the said witnesses.

Under further cross examination agent Barbier stated, he did not receive any call regarding the accused but possibly had received calls from his wife and from his office. He denied receiving a call on his mobile 30 minutes prior to the arrest of the accused informing him that the accused was on a motor cycle going towards Mont Fleuri. He stated the mobile phone number he was using on that day was 522629. He further stated his private mobile phone number was 588750. As to whether he had received any call at the said time witness replied he could not recall. He denied they had parked their vehicle near the Mont Fleuri cemetery and had received a call regarding the accused and had then followed him. He denied Siguy Marie had gone to purchase 3 bottles of Guinness from the shop of GS Pillay while they were waiting for the accused. He denied that any specific call came on his mobile informing him that Che Doraisamy was carrying drugs. He further denied he was involved in “setting the accused up” in the detection.

9. Agent Siguy Marie too was recalled and he too denied the suggestion that he had a bottle of Guinness while they were parked waiting for the accused Che Doraisamy. He denied the suggestion that they had not gone to the North of Mahe but had come directly to the entrance to the cemetery at Mont Fleuri that day. He too denied that any one had informed them Che Doraisamy was carrying drugs that day.
10. Witness Alexandro Mazorrchi testified to the fact that he was the owner of motor cycle bearing registration number S11865 which he had sold to the accused Che Doraisamy in April 2009 for Rs 60,000/-.
11. The accused in defence made a statement from the dock. He admitted that he

had been riding the said motorcycle and on reaching Roche Caiman he had noticed a vehicle following him. When they stopped him, he had realized they were police officers. He had cooperated with them and they had searched him and had found nothing illegal on him. Then at their request he had driven his motor cycle to the NDEA office. They had searched his motorcycle and had asked that the front seat be removed as they could not remove it. He had cooperated with them and told them how the seat of the motor cycle could be removed. He had told them to remove the front seat, the seat from behind had to be removed. When they had removed the seat from behind something had fallen from the ground. One agent had asked him what it was and he had said he did not know and for the agent to see for himself. They had opened it and told him they suspected it was heroin. He told them it was a set up and if he had something illegal he would not have cooperated with them.

12. The defence then called Robin Aglae who had been formerly an officer attached to the NDEA but was now serving a term of imprisonment for having sold drugs which were in the custody of the NDEA. He stated he had participated in the detection in this case but denied that the officers had gone to Anse Etoile, Glacis and St Louise that day and said they had gone to the alley leading to Mont Fleuri cemetery. He stated that they had bought three Guinness while they were on duty from a shop. He spoke of phone calls received by Mickey Barbier and that Mickey Barbier had said the suspect could be sleeping, as the night before there had been a football match. That call had come around 11.30 am. Afterwards a motorcycle had passed and his phone rang and he had answered it quickly and begun to follow the motorcycle. At Plaisance near Fresh Cut they had horned and stopped the

motorcycle and its rider Che Doraisamy. He corroborated the fact that throughout the search at Plaisance and at the NDEA office the accused remained calm and did not try to escape but cooperated with the police in their endeavour to remove the motorcycle seat. Under cross examination he admitted he was serving a term of imprisonment for stealing drugs. He admitted stealing the drugs and stated he did so to use the drug to train his dogs. He stated that he was the one who removed the seat of the motor cycle and whilst doing so the tissue which contained the drug fell off. He stated the other NDEA officers were behind him at that time.

13. Witness Doffay called by the defence testified to the fact telephone number 588750 had received many calls that day i.e the 26th of August 2009 and proceeded to mention the numbers called and marked the list as D1. He stated at 12.05 hrs a call had come which had lasted 30 seconds. Thereafter the defence closed its case.

14. When one considers the defence of the accused it is apparent the accused contention is that he was unaware that there were drugs under the seat as it was a set up as somebody had placed it there and set him up. It is to be noted neither he nor his witness former agent Aglae who participated in the search, specifically state it was the NDEA officers who planted it at the time of the search but the suggestion of the defence appears that they had set it up with another person to have the drugs placed under his seat prior to him being searched. However other than a mere suggestion by the defence of a “set up”, no evidence exists to establish same. It is to be noted that at the inspection carried out on the motor bicycle by court, it was observed that there was a possibility of putting ones palm between the seat and the

motorcycle, however considering the accused statement from the dock, it is not possible to come to a conclusion that someone other than the accused, would have had access to his motorcycle to set him up in such a manner. The evidence of witness Aglae in regard to the phone calls received just prior to the arrest of the accused by agent Mickey Barbier or that they drank beer, is specifically denied by the prosecution witnesses. His evidence must be considered in the light that he was a former agent of the NDEA who had been found guilty of stealing drugs in the custody of the NDEA and fallen out of grace with the NDEA. He states that Agent Mickey Barbier received at least two calls from the same source, apparently one informing him that the person was sleeping as there had been a football match and the other that he had left. Witness Aglae sets out the time of a call received by Mickey Barbier as 11.30 am but subsequently the defence sought only to rely on a short call made at another time 12.05 pm.

15. If one is to check the telephone records D1 marked by the defence no calls were made to him at 11.30am. Only two calls were received by Mickey Barbier on the said day prior to 12.05 pm and not from the same number that dialed at 12.05 pm but different numbers. The evidence of witness Aglae is not corroborated by the phone records produced. Therefore on his evidence one could not come to a conclusion that Mickey Barbe was lying ,as telephone records show he had not received a call at 11.30 am the time given by defence witness Aglae. Considering the above mentioned facts this court holds that the evidence of witness Aglae cannot be relied on. For the aforementioned reasons the defence that the prosecution witnesses set up the accused, bears no merit.

16. Section 18 of the Misuse of Drugs Act reads as follows:-

Where a controlled drug is found in a vehicle vessel or aircraft other than a vessel or aircraft referred in section 17, it shall be presumed until the contrary is proved, that the drug is in the possession of the owner of the vehicle, vessel or aircraft and of the person in charge of the vehicle, vessel or aircraft or the time being.

17. The evidence of witness Marzorchi establishes the fact that he had sold the vehicle to the accused Che Doraisamy a fact not contested by the defence. The evidence shows that at the time of detection the accused Che Doraisamy was driving the said vehicle and was in charge of it at the time the detection was made. The accused in his evidence accepts the fact that he was the rider of the motorcycle at the time the detection was made. On consideration of the evidence of the prosecution witnesses and even the witness called by the defence former agent Aglae, all accept the fact that a tissue containing the light brown powder fell from the seat of the motorcycle at the time the seat was unscrewed. On consideration of the evidence of Mr. Bouzin, the prosecution has established beyond reasonable doubt the fact that the light brown powder inside the tissue was identified to contain heroin. Therefore this court is satisfied beyond reasonable doubt that the said controlled drug was found in the vehicle owned by the accused and driven by him at the time of detection.

18. Thus applying the presumption contained in section 18 of the Misuse of drugs Act, this court is satisfied beyond reasonable doubt that the accused was in possession of the said controlled drug. The fact that it was concealed below the seat he was seated, one could infer the fact that the accused had

the necessary knowledge that it was a controlled drug and decided to conceal it.

19. In the case of *Republic v Barnsely Lebon SCA 2 of 2009* paragraph 14 Domah JA held that section 18 laid upon the driver the onus of proving that the drugs did not belong to him.

20. When one considers the evidence in this case, the mere fact that the accused remained calm or cooperated with the NDEA officers by telling them how the seat should be removed or the denial by the accused that the drugs were his and him alleging that it was a setup, does not in the view of this court discharge this onus. Therefore this court holds the accused has failed to rebut the presumption contained in section 18 of the said Act.

21. Learned counsel for the defence also submitted that a motor cycle or motor bicycle could not be considered as a vehicle and thus section 18 did not apply to this instant case.

22. "Motor vehicle" as defined in section 2 the Road Transport Act Cap 206 and means a vehicle propelled by any form of mechanical power and includes a motor bicycle, with or without a side car or trailer, a motor tricycle assisted by a motor, but not a vehicle drawn by another motor vehicle.

23. "Vehicle" means any kind of wheeled transport propelled or drawn by mechanical power, animals or persons and used or intended to be used for the conveyance of goods or persons on any road, and includes a rickshaw, a bicycle and a tricycle.

24. Thus it is apparent that vehicle has a wider meaning than motor vehicle and includes a motor cycle as well. Therefore learned counsel's contention that a motor cycle or motor bicycle cannot be considered a vehicle in the context of section 18 is unacceptable.

25. When one considers the chain of evidence led by the prosecution in this case in respect of the exhibits there is no contest in respect of same. Agent Barbier has identified the exhibit P5d as that found under the seat of the motorcycle driven by the accused and given for analysis to Mr. Bouzin. Mr. Bouzin has identified the said exhibit as that received from agent Barbier and identified as Heroin of 16% purity and that handed back to agent Barbier after sealing same. He has identified the seals were intact at the time the exhibit was produced in court. Therefore this court is satisfied that the said exhibit has not been tampered with and the chain of evidence in respect of the exhibits from the time of detection, analysis and production in court has been established beyond reasonable doubt by the prosecution.

26. For the aforementioned reasons this court proceeds to accept the uncontradicted and corroborated evidence of the prosecution..

27. The quantity of controlled drug for which the accused has been charged is 2.45 grams. The purity as stated by the Government Analyst is 16%. In the case of *Aaron Simeon v The Republic SCA 23 Of 2009* it was held that the accused could be convicted only on the pure quantity of Heroin found in his possession. Therefore based on the percentage, the pure quantity of controlled drug in this instant case is 0.392 grams. The quantity concerned

does not attract the presumption of trafficking and thus the accused could only be convicted of being in possession of the said controlled drug.

28. Therefore for the aforementioned reasons, as this court is satisfied that the prosecution has proved all the necessary elements of a charge of possession of a controlled drug namely Heroin against the accused, beyond reasonable doubt, this court proceeds to find the accused guilty of being in possession of 0.392 grams of Heroin and proceeds to convict him of same.

M. BURHAN

JUDGE

Dated this 09th day of February 2011