

IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CO 25/2011

[2013] SCSC 69

THE REPUBLIC

versus

GARRY MOUSTACHE
Accused

Heard: 14th & 28th August 2013
Counsel: V. Benjamin, State Counsel for the Republic
A. Juliette for the accused

Delivered: 18 October 2013

JUDGMENT

Dodin J

- [1] The accused, Garry Moustache stands charged with one count of possession of a controlled drug contrary to section 6 read with sections 15(1) and 26(1)(a) of the Misuse of Drugs Act as amended by Act 14 of 1994 and punishable under section 29 read with the Second Schedule of the Act.
- [2] The particulars of the offence are that the accused on the 6th day of May, 2011 at Gazza Estate was found in possession of the controlled drug cannabis herbal material, weighing 18.9 grams.

- [3] Jemmy Bouzin, a forensic analyst, testified that on the 4th June 2013, he received a sealed evidence envelope from agent Pierre Servina containing an opened brown envelope in which he found some dried herbal material and two letter of request requesting him to re-analyse the said herbal material which had been previously analyzed by Mr Purmanan who had subsequently left the country. After completing the formalities, he conducted the re-analysis of the material and made a report. The findings were that the herbal material was cannabis weighing 18.9 grams. The witness explained the difference in weight from the first analysis where the material weighed 31 grams as due to loss of moisture and the use of samples for analysis.
- [4] Agent Pierre Servina testified that on the 6th May, 2011, he was on patrol in a vehicle together with agent Prudence at Au Cap going towards Point au Sel when he received a call from the late Brian Nicette that there was a silver taxi Registration number S8893 heading towards Au Cap behind a blue pick-up and was carrying drugs. When he was driving back towards the Montagne Posee junction he was informed further that the taxi was heading to Gazza and was being followed by another NDEA vehicle from town. When he reached the Montagne Posee junction he saw the taxi ahead of him followed by the NDEA vehicle.
- [5] He testified that when they reached a spot along the Gazza road, the other NDEA vehicle overtook and blocked the taxi and he stopped his vehicle behind the taxi. He disembarked and informed the taxi driver whom he later identified as the accused, that he would be conducting a search of his vehicle. He conducted the search in the presence of agents Prudence and Naiken. He testified that at first the accused remained in the vehicle whilst he searched the passenger side but then he came round to observe him and left the driver's door open.
- [6] In the passenger door pocket he found an envelope containing 49 notes of Rs100 and 2 notes of Rs 500. There were also two black telephones. He then searched the driver's side and found another envelope containing 90 notes of Rs100 and 20 notes of Rs50 as well as a cling film containing some moist herbal material which he suspected to be drugs. He informed the accused that he was suspected to be in possession of drugs and the accused

was arrested after his rights were read to him. The accused was brought to the NDEA headquarters and the herbal material was taken to the forensic lab for analysis. He then collected the report of the analysis from Mr Purmanan and the exhibit was handed over to for safekeeping in the exhibit store.

[7] On the 4th June 2013 he was again handed over the exhibit for re-analysis by Mr Bouzin and he collected the exhibit with another report on the 11th June, 2013. He identified the exhibits in Court as the same he took for analysis and that it looked like the same he found in the car of the accused although he admitted that at the time the herbal material was moist but now it is dried.

[8] In cross-examination, the witness agreed that when he was searching the passenger side of the car and the accused had come round to watch leaving the driver's door open and that the two other agents were standing near the driver's door. He maintained however that he did not notice if agent Naiken placed anything in the car. He maintains that he does not recall if it was agent Naiken who said they had found drugs but he recalled opening the cling film to show it to the accused. He admitted that the place where the accused was stopped was deserted and there was no other persons around and stated that he did not know why agent Naiken chose that spot to stop the accused.

[9] The witness maintained that he received his instruction from the late Brian Nicette and did not receive any instructions from agent Naiken. He agreed that usually when they have information that drugs are being transported they follow the suspect so that the person who collects the drugs could also be apprehended but maintains that in this case he was not instructed to do so and he does not know what instructions agent Naiken had been given. He was only told to follow the vehicle and then he searched the same.

[10] Agent Marcel Naiken testified that on the 6th May 2011 he received a call from the late Brian Nicette who informed him that a person driving a taxi registration number S8893 was transporting drugs towards Roche Caiman. He then proceeded alone in a hired vehicle towards Roche Caiman and saw the suspect's vehicle behind a blue pick-up truck at Roche Caiman near the fitness trail. He then called agents Servina and Prudence for

assistance. He followed the taxi at moderate speed to Anse aux Pins then called agent Servina again to inform him that the taxi was going towards Gazza.

[11] He testified further that the suspected vehicle turned into the Gazza road and when the road was clear he overtook the suspected vehicle and blocked its way. Agent Servina then asked the driver to get out and proceeded to search the vehicle whilst agent Prudence and the witness only observed. Agent Servina found the sum of Rs5,500 on the passenger side and then searched the driver's side and found some more money in an envelope together with piece of cling film containing herbal material. He testified that agent Servina opened the cling film and showed it to the accused and then arrested the accused on suspicion that he was in possession of a controlled drugs. He identified the exhibit in Court as the same that was found in the accused's vehicle.

[12] In cross-examination the witness admitted that in his statement he did not state that he had received information and instructions from the late Brian Nicette. He maintained that he was not told and had no information that the taxi was going to Gazza but when shown his statement, he admitted that in his statement he had stated that "*later I got information that the vehicle was going to Gazza*" whilst he was still at Roche Caiman. He admitted that at the time he had been told and he knew that the suspected vehicle was going to Gazza. He agreed that in his statement he had stated: "*It was at Gazza that I first sighted the taxi S8893*". He also maintained that it was him who gave instructions to agent Servina on both occasions. He denied that he had placed the drugs in the accused's car.

[13] The witness agreed that the distance from Roche Caiman to Anse aux Pins is much greater than the distance from Pointe au Sel to Anse aux Pins but that he did not know why he arrived at Anse aux Pins before agent Servina and Prudence did. He denied that the spot where the accused was stopped was deserted and maintained that there were houses and there were people about at the time.

[14] Randolph Prudence testified that on the 6th May 2011 whilst he was on patrol at Au Cap district together with agent Pierre Servina, agent Servina received information that a silver coloured taxi was transporting drugs in the direction of Au Cap. Agent Servina drove fast towards Anse aux Pins but they did not see the taxi. Then they received

another call that the taxi was going to Gazza. They went to Gazza and that was the first time they saw the taxi which had already been stopped by agent Naiken in another NDEA vehicle. He testified that agent Servina stopped their vehicle behind the taxi and proceeded to search the taxi whilst he took the details of the vehicle.

[15] He testified that agent Servina found an envelope with some money in the passenger door and a telephone near the handbrake. Agent Servina then searched the driver's side and found another envelope containing money. Then agent Servina found a cling film containing herbal material in the driver's door. When shown the exhibit he maintained that it was not the same cling film or herbal material that he saw that day as what he saw that day was moist and much darker. He maintained that he could not remember some details about the incident as it was a long time ago.

[16] In cross-examination he admitted that his employment with the NDEA was terminated for disciplinary reason. He maintained that when they got to Gazza, agent Naiken had already stopped the taxi and was standing by the driver's door speaking to the driver who was also standing outside the vehicle. When they arrived the driver came to them leaving agent Naiken near the vehicle. He maintained that when agent Servina started to search the vehicle agent Naiken remained at the driver's door whilst the driver was arguing with them and had to be handcuffed and placed in the back of his vehicle.

[17] The witness maintained in re-examination that the cling film was not in the envelope but was found separate from the envelope and that they never saw the taxi until they reached Gazza where it had already been stopped by agent Naiken.

[18] Evans Seeward testified that he was the exhibit officer in the case and he also signed the letters of request for analysis of the herbal material. He testified that all the items taken from the accused were later handed over to his lawyer to be returned to the accused.

[19] Learned counsel for the Republic submitted that the accused was initially charged with the offence of trafficking but upon reanalysis the drugs weighed only 18.9 grams hence the amended charge to possession. He submitted that there was no dispute with regards to the chain of custody of the drug and that the reason for the difference in weight had been

explained by the forensic analyst. Learned counsel admitted that there were discrepancies in the testimonies of agents Naiken and Prudence in that agent Naiken's testimony had some difference to what he had put in his written statement and the contradictions in agent Prudence's testimony reflected the fact that he is no longer with the NDEA.

[20] Learned counsel submitted that nevertheless the testimonies of all the witnesses established that it was agent Servina who conducted the search and found the drugs on the driver's side of the vehicle wrapped in cling film and that it was the same drugs produced as exhibit in the case. He submitted that the evidence did not show that the drug was planted and the fact that it was found in the vehicle with only the accused is proof that it was in the accused's possession. He submitted that the prosecution has established its case against the accused and therefore moved the Court to find the accused guilty and convict him accordingly.

[21] Learned counsel for the accused submitted that the prosecution has admitted that there are discrepancies in the testimonies of its witnesses. He submitted that the discrepancies are serious and raise serious doubts which must be interpreted in favour of the accused. Learned counsel submitted that with regards to the drugs at first there was 31 grams but now there is only 18.9 grams which is a serious difference of 12 grams. Agent Servina said the drug was in a brown envelope but agent Prudence insisted the drug was not in any envelope.

[22] Learned counsel submitted that with regards to the apprehension of the accused, agent Servina testified that he received instructions from the late Brian Nicette but agent Naiken testified that he was the one who communicated with agent Servina. Agent Servina testified that they first sighted the accused's taxi when they were driving towards Gazza whilst agent Prudence insisted that they first saw the taxi at Gazza after it had already been stopped by agent Naiken. Agent Servina testified that the taxi was stopped in a deserted stretch of road whilst agent Naiken maintained that it was stopped in an area where there were houses and people about.

[23] Learned counsel submitted that there were also serious discrepancies in the witnesses own testimonies. Agent Naiken never mentioned that he received instruction from the

late Brian Nicette in his statement but testified to having so received in Court. The agent also stated in his statement that he first sighted the taxi at Gazza but testified in Court that he first sighted the taxi at Roche Caiman, close to the fitness trail. He also stated in his statement that he had information that the taxi was going to Gazza but at first denied in his testimony that he knew the taxi was going to Gazza and only conceded after his statement was put to him. He also could not give any reason as to why he followed the taxi all the way from Roche Caiman to a deserted place at Gazza when he had no instruction to perform a controlled delivery or to find out who was the person the accused was supposedly transporting the drugs to.

[24] Learned counsel submitted that Randolph Prudence could not recall most of what happened but what he did remember did not match with the evidence of either agent Servina or agent Naiken. He submitted that the prosecution cannot now ask the Court to disregard the evidence of Randolph Prudence who was their own witness.

[25] Learned counsel hence concluded that with so many inconsistencies in the accounts of the witnesses, the prosecution has failed to establish a clear case against the accused and hence failed to prove the charge against the accused beyond reasonable doubt, therefore the Court should acquit the accused accordingly.

[26] The principle of 'beyond reasonable doubt' as is applicable in our law is the same in most Commonwealth jurisdiction and well expressed in the case of Woolmington v DPP [1935] UKHL 1 by Viscount Sankey in his "Golden thread" statement:

"Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

[27] The standard that must be met by the prosecution's evidence in a criminal prosecution is that no other logical explanation can be derived from the facts except that the accused committed the crime, thereby overcoming the presumption that a person is innocent until proven guilty.

[28] In the case of *R v Starr* [2000] 2 SCR 144 [Canada] the trial judge gave the following instructions with respect to the standard of proof and how to resolve doubts which in fact has been trite law in our jurisdiction:

“It is rarely possible to prove anything with absolute certainty and so the burden of proof on the Crown is only to prove the guilt of the accused beyond reasonable doubt. What, then, is proof beyond a reasonable doubt?”

The words "reasonable doubt" are used in their everyday, ordinary sense and not as a legal term having some special connotation. The words have no magic meaning that is peculiar to the law. A reasonable doubt is an honest, fair doubt, based upon reason and common sense. It is a real doubt, not an imaginary or frivolous one resting on speculation or guess rather than upon the evidence you heard in this courtroom.

So you can see, the words "reasonable doubt" are ordinary words we use in our everyday language. So if you can say, I am satisfied beyond a reasonable doubt, the Crown has met the onus upon it. If you cannot say those words -- if you cannot say, I am satisfied beyond a reasonable doubt, the Crown has not met the onus on it, and the accused is entitled to have your doubt resolved in his favor.”

[29] The contradictions in this case are serious not only because they put the credibility of the witnesses in question but raise serious doubts as to their veracity. It is of course almost unheard of for witnesses to give exactly the same testimonies even when they observe the same events. Each may understand or interpret the even from their own perspectives and understandably there would be minor inconsistencies which can be explained away and which would not give rise to reasonable doubt.

[30] In this case as stated by learned counsel for the accused and indeed admitted to a lesser extent by learned counsel for the Republic with regard to the evidence of Randolph Prudence, there were several inconsistencies and discrepancies in the testimonies of the

prosecution witnesses, particularly the testimonies of agent Naiken and Randolph Prudence. Randolph Prudence in fact was a very unfavourable witness for the prosecution which led the learned counsel for the Republic to remark in his final submission that this was probably due to the fact that he is no longer with the NDEA. However the witness was not hostile and since he was not declared hostile, his testimony cannot be disregarded.

- [31] In this case it is not clear how the accused came to be apprehended at Gazza Estate. Agent Naiken testified that he received and followed instructions given to him by Brian Nicette and that he passed on the information to agent Servina. However his testimony contradicts his previous written statement in which he never mentioned that fact. He testified that he followed the suspect vehicle from Roche Caiman to Gazza but then admitted that in his statement he stated that he first had sight of the vehicle at Gazza and that he knew well before that the vehicle was going to Gazza. Agent Servina on the other hand maintained that he received his instructions from Brian Nicette again contradicting the testimony of agent Naiken.
- [32] What happened at the scene has also not been satisfactorily explained. Was the accused aggressive and went to confront the agents as they arrived and had to be restrained as Randolph Prudence testified? Or did he calmly remained in his vehicle and then voluntarily came out and around to observe the search as testified to by agent Servina? Or was he ordered out of the vehicle by agent Servina as testified to by agent Naiken? Where was the drug found? Was it in an envelope containing money as testified to by agent Servina or separately in cling film as Randolph Prudence testified?
- [33] Since in proving possession the prosecution must prove actual possession and knowledge of the accused, the above contradictions leaves the Court with reasonable doubt as to whether the accused had knowledge of the drug in the vehicle as the manner in which the vehicle was followed and stopped and the drug found has not been consistently and successfully established. The law requires that when such doubts remain, those doubts must be interpreted in favour of the accused.

[34] Consequently, considering the serious nature of the contradictions in this case, I must find that the case against the accused has not been proved to the satisfaction of the Court and hence not proved beyond reasonable doubt by the prosecution. I therefore find the accused not guilty of the charge of possession of a controlled drug and the accused is acquitted accordingly.

Signed, dated and delivered at Ile du Port on 18 October 2013

G Dodin
Judge of the Supreme Court