

IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CO 49/2011

[2013] SCSC

THE REPUBLIC

versus

GULLY KHANNY
Accused

Heard: 27 April 2012, 6 June 2012, 25 July 2012, 7 September 2012
Counsel: Mr. Vipin Benjamin, Assistant Principal State Counsel for the Republic
Mr. Nichol Gabriel Attorney at Law for the accused
Delivered: 12 November 2013

JUDGMENT

Burhan J

[1] The accused in this case has been charged as follows;

Statement of offence

Trafficking in a controlled Drug contrary to Section 5 read with Sections 14 (d) and 26 (1) (a) of the Misuse of Drugs Act and read with Section 23 of the Penal Code and punishable under Section 29 read with Second Schedule of the said Act.

The particulars of the offence are that Guilly Khanny of Beau Vallon, Mahe on 22nd day of October 2011, was trafficking in a Controlled Drug at Castor Road, Mahe, by virtue of having been found in possession of 32.5 grams of Cannabis Herbal materials which gives rise to the rebuttable presumption of having possessed the said controlled drug for the purpose of trafficking.

- [2] The accused denied the charge and the prosecution's main witness agent Kenneth Joseph of the NDEA (National Drug Enforcement Agency) stated that on the 22nd day of October 2011, they had received information while he was patrolling with agents Siguy Marie, Moumou and Benoiton that a man at English river in jeans, a green T shirt and in yellow shoes was selling drugs near some steps at Castor road. At that time they had been going to the NDEA base and at the base they had agreed that two of them namely agent Kenneth Joseph and agent Siguy Marie would use the Mont Buxton road to go down to English River, while agents Moumou and Benoiton would take another transport and go to English River Castor Road.
- [3] Witness further stated that he and agent Siguy Marie had gone by another vehicle to Mont Buxton and down a secondary road and then disembarked and proceeded down on to a small footpath to Castor Road. They had come to the steps and seen 2 men one known as Garry Bonne and the other Guilly Khanny. He had known Garry Bonne earlier as both of them had graduated as soldiers together. While they were coming down towards them they had seen Garry Bonne take money from his pocket and give the accused Guilly Khanny a note.
- [4] Guilly Khanny had placed the money in his pocket and had gone into a bush close by and bent and removed something and witness had seen him come out with a clear plastic in his hand. Both of them had been facing downwards with their backs to the approaching agents when Garry Bonne had turned round and seen them and then said something to Guilly Khanny. He had turned around and when he saw them he had thrown the plastic and taken to his heels. They had observed that Guilly Khanny was wearing blue jeans, yellow shoes and had a green T shirt on his left shoulder which tallied with the information they had received.

- [5] Witness had picked up the clear plastic thrown by Guilly Khanny and given chase to him. He had caught up with the accused who had struggled and both had fallen down. Agent Siguy Marie who had handcuffed Garry Bonne had come to his assistance and they had handcuffed Guilly Khanny. As a result of the struggle and fall Guilly Khanny had injured his leg. They had thereafter opened the clear plastic in his presence and observed it contained herbal material wrapped in cling film which was rolled. They noted that there were 89 such packets. They had searched the accused and found SR 1065 in different notes. There were 5 notes of 100, 9 notes of SR 50, 3 notes of SR 25, 3 notes of SR 10 and a SR 5 coin. They had arrested Guilly Khanny the accused at around 2.00 p.m after informing him of his constitutional rights and cautioning him.
- [6] The accused was taken to the English River hospital and treated for his injury and witness had kept the exhibit in his custody in his locker, after placing it in a brown envelope and making the necessary entries. Thereafter he had taken the exhibit for analysis to Mr. Bouzin on the 25th of October 2011 who had checked it with the request letter and accepted it for analysis. Thereafter he had gone again to collect the exhibit and the report from the Analyst on the 26th of October 2011. The exhibits were in a clear sealed evidence bag and the report was also handed over to him. He had taken it back and handed it over to Sergeant Seward who was the exhibit store officer. He had thereafter received the exhibits from agent Seeward with its seals intact to bring it to court. He identified the small packets containing Cannabis herbal material taken into custody by him. He stated at present there were now 85 packets as some had opened up. He also produced the money taken into custody.
- [7] Under cross examination witness stated that Garry Bonne was released. He further stated the release had nothing to do with his earlier acquaintance with him. He admitted both of them were born on the same day but insisted that it was the investigation officer who had ordered Garry Bonne to be released. He denied he had beaten the accused.
- [8] Agent Siguy Marie the other detecting officer who accompanied agent Kenneth Joseph corroborated the evidence of agent Kenneth Joseph in regard to the information, detection and that he too had seen Garry Bonne giving money to the accused who had gone into a

bush and come out with a clear plastic bag in his hand. He too stated the accused was wearing yellow shoes at the time. He had arrested Garry Bonne while agent Joseph had arrested Guilly Khanny. He identified the rolled packets of Cannabis herbal material in open court. He too had seen the accused drop the plastic bag and denied the accused had been assaulted. Witness Sergeant Seward stated the exhibits were kept with him under lock and key and during that period no one had tampered with it. Thereafter the prosecution closed its case.

[9] The accused in defence gave evidence under oath.

[10] He stated that on the 22nd of October 2011, he was to visit his daughter at La Misere and had gone to English River near the bus stand. He had bought a beer and as he could not consume alcohol near the shop he had gone up the steps and sat on them and was drinking his beer. He admitted he had met Garry Bonne when he was walking past. He further stated he had removed his T shirt as it was hot and admitted he was wearing yellow shoes at the time. He stated that Garry Bonne had a back pack which he removed and placed it near him and there was a plastic bag with shoes which Garry had just bought.

[11] The accused Guilly Khanny stated he had seen the La Misere bus at the bus station and had got up to go when someone had kicked his knee. He had fallen into the gutter and the person had punched him and kicked him again. When the person stamped on his foot he had received a cut on his ankle. He was handcuffed and he noticed there was another person with the one who had handcuffed him and later two more had come from a jeep and stopped close by.

[12] He thereafter gave detailed evidence of how the NDEA officers had searched the bushes for two hours and not found anything even after sniffer dogs were called in. Thereafter he had noticed suspicious behavior from agent Kenneth Joseph who had put his hand into his own pocket and pulled out a plastic and shouted “there it is” and then Siguy Marie had gone over to him. He further described in detail how he was kept in the NDEA office and taken to casualty only at 6.00 p.m. He also described in detail how he had kept saying the plastic which was in Kenneth Joseph’s pocket was not his.

- [13] Under cross examination it was shown that the doctor at Victoria hospital had entered the time as 3.15 p m as the time he was examined. He admitted the time was entered as 3.15 p.m but stated the doctor must have made a mistake. He also admitted money was recovered from him. Thereafter the defence closed its case and both parties made written submissions.
- [14] I have considered the defence of the accused. The accused in defence stated that he had nothing in his possession at the time he was arrested. He admitted he was on the steps near English River and was with Garry Bonne. He however states at the time he was arrested by the officers of the NDEA he was on the steps and had not run anywhere and did not have any clear packet containing controlled drug in his possession. He further stated he was put down, trampled and beaten by the officers of the NDEA. The NDEA officers had searched the area for two hours but not found anything. Then he had seen agent Kenneth Joseph pull out something from his pocket and pretend he had found the controlled drug. He also stated he was taken to the hospital only at 6.00 p.m.
- [15] However under cross examination the accused admitted the doctor had written the time he was taken to the Victoria Hospital as 3.15 p.m. He admitted he was arrested around 2.30 p.m. Therefore this completely cuts across the defence of the accused and further corroborates the evidence of the prosecution. It is apparent therefore that the accused cannot be believed when he says that he was kept under guard for over two hours as they had been searching for the controlled drug and that he was taken to the hospital only at 6.00 p.m. The detailed description given by the accused about what had happened after the arrest is unbelievable. It is an obvious fabrication on his part. I cannot accept his explanation that the doctor must have made a mistake about the time. I am satisfied therefore for the aforementioned reasons that his evidence that Kenneth Joseph had assaulted him, is another fabrication and that the injury sustained by him was a result of a fall when he was struggling with agent Kenneth Joseph. I therefore proceed to reject the defence of the accused.
- [16] It is apparent that the prosecution has included section 23 of the Penal Code in the charge. However the particulars of the offence clearly indicate that only the accused is

being charged with possession of 32.5 grams of Cannabis herbal material and the evidence led clearly establishes same. Further the cross examination conducted and the submissions filed clearly indicate that this has not caused any prejudice or failure of justice to the accused. This court is satisfied that even though the evidence may not prove common intention, court is not precluded from coming to a finding on evidence which clearly and beyond reasonable doubt establishes the fact that an accused alone was solely responsible for committing the said offence, in this instant case trafficking in a controlled drug.

[17] I have considered the evidence of the prosecution. It is apparent that the evidence of agent Kenneth Joseph in regard to the detection and arrest as described earlier is corroborated by the evidence of agent Siguy Marie. The accused himself states he was present at the time and place where he was arrested and admits he had met and was speaking to one Garry Bonne at the time he was arrested. The fact that the accused was wearing unusual yellow shoes is confirmed by the accused himself.

[18] On consideration of the evidence of the Government Analyst this court is satisfied that Government Analyst has identified in open court the exhibits brought to him by agent Kenneth Joseph for analysis and analysed by him and identified as Cannabis. He stated after identifying the controlled drug Cannabis he had placed the exhibits in an evidence bag and sealed it. He identified the seal placed by him as being the same in open court, indicating that no tampering had been done to the exhibit after it was handed over back again to agent Joseph. Further agent Joseph identified the exhibit in open court as that taken into custody by him. Whilst in the custody of court a few cling film packets had opened and the herbal material contained within come out. Further it appears that a piece of cling film had torn during the handling of the exhibits. The findings of the Government Analyst are corroborated by the report prepared by him. I am satisfied therefore beyond reasonable doubt that the chain of evidence has been established by the prosecution beyond reasonable doubt.

[19] For the aforementioned reasons I will proceed to accept the corroborated evidence of the prosecution against the accused and am satisfied that the prosecution has proved beyond

reasonable doubt that the 89 small packets of cling film containing a herbal material identified as Cannabis weighing 32.5 grams was in the exclusive possession of the accused prior to him throwing it away and running.

[20] 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 had on seeing the agents approaching thrown away the clear plastic in his possession. This clearly establishes the fact that the accused had knowledge of the fact he was in possession of a controlled drug.

[21] I am satisfied on considering the evidence in this case that the prosecution has proved the elements of possession and knowledge against the accused beyond reasonable doubt. The quantity of Cannabis herbal material detected in the possession of the accused is 32.5 grams which attracts the rebuttable presumption that the accused was trafficking in the controlled drug. The accused has failed to rebut the said presumption.

[22] For the aforementioned reasons this court is satisfied that the prosecution has proved all the necessary elements of the charge against the accused beyond reasonable doubt and proceeds to find the accused guilty of the charge of trafficking in a controlled drug and convict him of same.

Signed, dated and delivered at Ile du Port on 12 November 2013

M Burhan
Judge of the Supreme Court