The Republic v Francois
(2000) SLR 103

Ronny Govinden for the republic
Antony Derjaques for the accused

Judgment delivered on 26 July 2000 by:

PERERA J: The accused stands charged with the offence of trafficking in a controlled drug, contrary to section 5, read with section 14, and 26 (1)(a) of the Misuse of Drugs Act 1990, as amended by Act no. 14 of 1999, and punishable under section 29 and the second schedule referred thereto. The particulars of the offence, as set out in charge, are that, the accused:

> on 25 July 1998, at L'ilot, Glacis, was trafficking in a controlled drug by virtue of having been found in the possession of 166.4 grams of cannabis resin, which gives rise to the presumption of having possessed the said controlled drug for the purpose of trafficking.

P.C. Mervin Dufrene (Pw2), testifying for the prosecution stated that on 23 and 24 of July 1998, he and P.C. Ange Michel were assigned to observe the house occupied by the accused from a distance. He stated that he saw "something was being sold, and this went on for two days". Then, on 25 July 1998 around 11 a.m, he went with a group of about seven other officers to the house of the accused. The police vehicle he travelled was parked on the access road near that house directly opposite his room. The distance between the parked vehicle and the road was about 2–2½ meters.
Another police vehicle was parked behind it. According to this witness, the officers then surrounded the house. He went near the kitchen door, while P.C Belle was near the main entrance door of the sitting room. P.C Dufrene further testified that when he went near the kitchen door, he saw the mother of the accused pouring "baka" into bottles. P.C. Mitchell was knocking on the bathroom door, and then from where he was, he saw the accused "coming from the direction where the noise was", towards the sitting room. He then moved towards the entrance to the sitting room. Then he saw the accused moving towards the window near the entrance door, which is fitted with louvre blades, and dropping something. He picked up a brown package wrapped in cling film. Counsel for the prosecution, then questioned the witness as follows:

> Q. What happened then?
> A. At that moment, P.C. Belle went in and caught him.
> Q. Did P.C Belle talk to you?
> A. He told me, Dufrene, there it is, he has dropped it there. I told him to go on holding him.

After that, the officers informed the accused that they had come to search the house. They told him that he will be arrested for being in possession of the substance which

they suspected to be a controlled drug. He appeared to be frightened. The accused was searched. He had R500 in cash, and a pair of scissors in his pocket. P.C. Dufrene further stated that the accused took out a small round piece and a rectangular piece of black substance from his pocket. However as they were supposed to have been given to P.C. Dufrene before the accused was cautioned, the prosecution excluded them from the quantity of drugs exhibited in the case. The room occupied by him was thereafter searched and the officers found R 1558 in cash, and a pocket penknife. P.C. Dufrene testified that there were traces of drugs on the penknife. Although the penknife is an exhibit in the case, it had not been sent to the analyst for examination and reports as regards any substance said to have been on its blade.

P.C. Dufrene further testified that the accused was arrested and taken to the Glacis Police Station. From there he was taken to the Drug Squad at New Port, and later locked in a cell at the Central Police station. All the exhibits were in the custody of P.C. Dufrene, no one had access to them. On 27 July 1998, he obtained a letter from ASP Quatre addressed to the analyst (exhibit PI) and he took with him 17 pieces of cannabis resin wrapped in Cling Film, and one small round and a rectangular piece of the same substance.

Dr. Gobine, the Analyst (Pw1) testified that he received the substance on 27 July 1998 at 8.40 a.m from P.C. Dufrene. After analysis, he reported that these items of dark substance were cannabis resin. He returned the items with his report on 28 July 1998 at 10 a.m to P.C Dufrene (exhibit P2). The weight of the substance upon analysis was 167 grams. However, on an application made by state counsel only the 17 pieces of cannabis resin were re- weighed in court by Dr. Gobine. As the two small pieces were excluded, it was found that the weight was 166.4 grams and not 167 grams as stated in the report. The charge was accordingly amended on a motion by the prosecution to read as 166 grams. The amended charge was again put to the accused, and he maintained his plea of not guilty.

P.C. Joel Belle (PW3) corroborated P.C. Dufrene's evidence that he accompanied the officers in the raid of the accused's house on 28 July 1998 around 11 a.m. He staged that the front door was open. There was an iron gate on it, which was also open. He saw the accused coming from a corridor inside the house with a packet of "black substance in his hand". Then he get hold of him, but he resisted dragged him near the window, put his hand through an open window and "threw" it. Then he told P.C. Dufrene to pick it up. P.C. Belle also stated that when he searched the accused, he found a pair of scissors in his pocket. Inside the room they found R1558 and a penknife stained with some substance that smelt like 'hasish'. P.C. Belle however did not state that he found R500 inside the accused's pocket, as testified by P.C. Dufrene. However, when the envelope containing R1558 was shown to him, he stated for the first time that he took out R500 from the accused's pocket and that he saw only R1500 in the wardrobe in the accused's room. The prosecution exhibit P5 however contains R2058.

On being cross examined, P.C. Belle stated that he observed an open shed adjoining

the accused's house where there were people drinking "baka". He also stated that he saw a big drum of "baka" or toddy in the kitchen of the house occupied by the accused. He also saw several bottles filled with "baka". He however did not know whether the mother and father of the accused, who lived in that house, had a licence to sell "baka" to the public.

The prosecution sought to produce a statement which tantamounts to a confession made by the accused to the police on 25 July 1998 at 1.45 p.m at the Drug Squad Unit. The defence objected to its production on the basis that it was an involuntary statement made upon force being used on him. The Court held a voire dire hearing where the evidence of the officers who recorded the statement, the evidence of the accused, and medical evidence were adduced. Defence also produced two photographs (exhibit D4) which showed an injury in the waist area of the accused. On a consideration of the evidence at the voire dire hearing, the court rejected that statement, as one having been made involuntarily. I have, at the end of the defence case reviewed the evidence as regards the admission allegedly made by the accused in his statement. However, on a consideration of the totality of the evidence, I am fortified in my view that it was an involuntary statement. Hence no reliance is placed on any of the matters contained in it.

The accused, testifying on oath, stated that he lived with his mother, father and two sisters in that house. One of the sisters had a two year old child. He stated that there was a shed between the house and the shop near the road, where people gathered to play dominoes. They also consumed drinks bought from that shop. On 25 July 1998, he was watching television around 10 a.m. Close to the main entrance to the sitting room is a window fitted with louvre blades. It had curtains made of light, soft material of a kind that could be seen through. The curtains were drawn. Then he saw two police officers outside the house while being seated with his back to the main entrance. He denied that he ran into the sitting room, as P.C. Belle and P.C Dufrene had testified. The accused further testified that two officers came to the sitting room where he was seated and took him to inspect his bedroom. P.C. Dufrene came in later with his mother who was outside. The officers found R2000 in his wardrobe. They asked him where he got that money, and he replied that they were the proceeds of sale of bananas. The officers found a penknife on top of the fridge, and his mother told them that it belongs to his father. He further stated that a third officer whose name he did not know, brought slabs of a brownish substance and accused him of having thrown them outside. He denied that he did so. Although they searched him, there was nothing on him.

He explained that the pair of scissors that was seized by the officers, was the one he used to cut his finger nails. On being cross examined, the accused stated that although the material of the curtains was light and soft, one could not see through them. He further stated that he had sold bananas the previous day but did not deposit R2000 in his account at the savings bank as he had intended to purchase certain items and also to buy "football book" tickets. He denied having any drugs in his possession, and also denied the assertion of the prosecution that he pulled P.C. Belle towards the window to throw out any package. He said:

A. P.C. Belle is much larger and stronger than me; he was standing in front of me. How could I, small as I am, get beyond him, him having caught hold of my left hand, to pick up the package and throw it outside the window? He said that the package was in my left hand?

Q. Do you know the consequences of being found guilty for trafficking in cannabis resin?
A. Yes.

Q. That is why you were so desperate to get rid of that substance on that day?

A. It does not make any sense for me to go and throw it through the window, for him to pick it up and confront me with it again.

Q. On that day, nothing made sense to you. You were desperate and determined to get rid of that substance and on that day, the struggle ensued and you managed to arrive at the window, on the left of the sitting room, it was not very far from the main door to the sitting room. I am putting that to you?
A. Yes, but P.C.Belle was standing in front of an open door, why would I struggle and fight to go throw it out a window that was further away from me. If I wanted to throw something out, why didn't I just check it out through the open door.

Q. So where was P.C. Belle standing?
A. He was standing just beyond, in front of the sitting room door.

The admission that P.C Belle was standing near the front door was consistent with the evidence of P.C. Dufrene and P.C. Belle himself, but inconsistent with the evidence of the accused, who testified that he was watching television in the sitting room and two police officers came and arrested him while he was seated there. The accused realising this discrepancy stated that in fact P.C. Belle was not standing near the door, and that when he testified that he was there, he was only refuting P.C. Belle's evidence to show that if that had been so, he could have thrown the substance through the open door and not the window. The accused claimed that he had only a R10 note and some coins in his pocket, and not Rs500 as stated by P.C Dufrene.

In re-examination, he stated that there was a window in his bedroom which faces the side road where, according to the police officers, the vehicle they arrived there with several officers, was parked. The accused also stated that the flush toilet was close to his room, and that there is another window in the kitchen, which is situated before entering the sitting area from his bedroom.

The Court upon visiting the locus in quo, noted the doors, windows and the toilet which the accused mentioned in his testimony.

Lisette Francois (Dw2), the mother of the accused also stated that the house is occupied by five persons, herself, her husband, the accused, his two sisters, and a child of one of the sisters. Her husband is unemployed but receives rent from a rented shop premises. Only the daughters were employed. Between the house and the main road is a shop where people play dominos. They buy beer from the shop in front and drink there. Her husband buys a container of "baka" and gives it to the people who come to work in the house. The day the police raided the house she was pouring a bottle of "baka" in the kitchen for a man who had cut grass for her. P.C. Dufrene came in through the outside door of the kitchen, and pointing a pistol said "don't run". Robin was in the sitting room watching television. P.C. Dufrene asked her to accompany him to the sitting room. Both of them went through the kitchen to the sitting room. Inside the house, she saw the accused, her son, standing with his hands handcuffed behind his back. She did not see the accused throwing anything out of the window.

This witness maintained that she and P.C. Dufrene went into the house from inside the house and not outside and that in the sitting room, there were two officers with the accused, and another officer was just entering. If that be so, P.C Dufrene's evidence that after speaking to this witness, he moved towards the front window from outside the house, and that the package of drugs fell near his feet would be false.

The prosecution evidence regarding possession is based on the evidence of P.C Dufrene and P.C. Joel Belle. The raid on 25 July 1998 was, according to the evidence of P.C. Dufrene, preceeded by observation of the accused's house on the two previous days. He stated in evidence "I noticed something was being sold, and this went on for two days." Hence there was no evidence as to what was being sold, or who was selling. Admittedly, there were at least five members of the household, including the accused.

Hence in the absence of positive evidence as to the sale of a controlled drug, the observations made by the officers on 23rd and 24th July 1998 from a distance, may have been the sale of *"baka",* by one of the members of that household, and not necessarily sale of drugs by the accused.

However, did the accused have possession of the drugs exhibited in this case?

Section 15(2) of the Misuse of Drugs Act provides that "the fact that a person never had physical possession of a controlled drug shall not be sufficient to rebut a presumption under this section". According to the evidence of P.C. Belle, the accused ran from inside the house, towards him, as he stood by the front door. He had some package with him. As he got hold of him, he struggled and put that package out of the window. The defence sought to refute his evidence by relying on the use of the word "threw" in the statements of P.C. Dufrene and P.C. Belle (exhibit Dl and D2) and the use of the word "dropping", used by both of them in evidence. It was suggested that they stated that the package was "dropped" on later realisation that one could not "throw" through a window fitted with louvre blades. I do not consider that to be a material discrepancy as long as the prosecution establishes that the accused had the package in his possession before

throwing or dropping it through the window.

The accused's evidence that three officers entered the sitting room where he was seated watching television, was contradicted by his own evidence that P.C. Belle was standing in front of the sitting room door. Although he tried to explain that he said so as a supposition and not as a fact, that answer, in the context of the questioning by the state counsel, was an admission of the prosecution case, and more particularly the evidence of P.C. Belle, that he found P.C Belle obstructing his getaway through the front door while other officers were banging on the back door.

Regarding the drugs, the accused answered his sounsel in examination-in-chief thus:

> Q. When did you first see the drugs brought to court?
>
> A. I saw those drugs shown in court in their hands at my house.
>
> Q. What did they show - what did you see?
>
> A. What did you mean?
>
> Q. You said you saw in their hands what did you see in their hands?
>
> A. I saw the drugs in the hands of the two police officers who came in. Not the first two who came in, but the third officer who came in after them. He came in with those drugs in his hands and he said that I was in possession of drugs and he put handcuffs on me.

He further stated that he did not know the name of this third officer who brought the drugs, but it was not P.C. Dufrene. It was therefore his defence that the drugs were "introduced" to implicate him. However, on a consideration of the totality of evidence I am satisfied beyond a reasonable doubt that the accused had in his possession the 17 slices of cannabis resin wrapped in "cling film" exhibited in the case.

As regards knowledge, the behavior of the accused in running towards the front door, with the package in hand, and attempting to get rid of it by putting it out of the window, is indicative of the animus possi dendi. He had knowledge that what he possessed was a controlled drug, and knowing the implications of being in possession thereof, in desperation he threw it away before P.C. Belle could arrest him with physical custody of it. Accordingly, the prosecution has proved the elements of possession and knowledge beyond a reasonable doubt.

Counsel for the accused submitted that there was a "break in the chain of evidence" as regards the drugs produced in the case. ASP Quatre (Pw6), in his testimony stated that P.C Dufrene came to him for a letter to take the drugs for analysis on 27 July 1998 around 8-8.15 a.m. The drugs were allegedly seized on 25 July 1998. ASP Quatre stated that he was not aware where P.C. Dufrene had kept the exhibits for two days.

P.C. Dufrene testified that the drugs were opened and counted before the accused at the Glacis Police station before proceeding to the Drug Squad Unit. Questioned by counsel for the accused in examination-in-chief, the accused stated:

> Q. Belle says that at the Glacis Police Station, he opened a package and counted 17 pieces of drugs.
>
> A. Yes, they did open the package and counted it at Glacis.
>
> Q. What colour is the package?
>
> A. As I said, it was brown going to black,
>
> Q. You saw the brown paper package that was brought to Court?
>
> A. Yes.
>
> Q. Was that the package?
>
> A. Yes.

Hence the accused himself has identified the drugs exhibited in court as those that he was shown at the Glacis Police Station soon after arrest, and on the way to the Drug Squad Unit at New Port. There can therefore be no doubt that there was any interference with that substance while they were in the locker of P.C. Dufrene. Thereafter they were taken to the analyst, who returned them to P.C Dufrene with a report. The drugs were inserted in a white envelope and duly initialed by Dr. Gobine at the four corners. In Court, the envelope and the initials were identified by Dr. Gobine. The envelope was then shown to counsel for the accused, who had no objections, and then opened thereafter. The analyst then identified the 17 slices and two small pieces therein as the substance he analyzed as "cannabis resin". In these circumstances, I am satisfied beyond a reasonable doubt that the chain of evidence has been maintained and that there has been no "mix up" or introduction of a substitute substance.

The accused is charged under section 5 read with section 14 and section 26(1) of the Misuse of Drugs Act.

Section 5 of the Misuse of Drugs Act, is as follows:

> Subject to this Act, a person shall not, whether on his own behalf or on behalf of another person whether the other person is in Seychelles or not, traffic in a controlled drug.

Section 26(1) contains the provision which makes trafficking an offence under the Act.

Section 14(d) provides that:

> A person who is proved or presumed to have had in his possession more than .... 25 grammes of cannabis or cannabis resin shall, until he proves the contrary, be presumed to have had the controlled drug in his possession for the purpose of trafficking in the controlled drug, contrary to Section 5.

Before the offence of trafficking is established, the prosecution has to prove the elements of possession and knowledge beyond a reasonable doubt. As regards section 14, the Court of Appeal, in the case of *Raymond Tarnecki v R* (unreported) S.C.A. No. 4 of 96 stated that:

> ... The presumption of trafficking raised by section 14 of the Act is but a rebuttable presumption. The effect of section 14 is to shift on the accused, upon proof that he was in possession of the prescribed quantity of controlled drug, the legal burden of proving that he was not in possession thereof for the purpose of trafficking. But, even then, when such legal burden lies on the defence, the standard of proof is not one of proof beyond a reasonable doubt, but on a balance of probabilities.

Although the Misuse of Drugs Act was enacted by Act no. 11 of 1990, it was brought into operation on 1 July 1995, by S.I. 52 of 1995. Hence the provisions of that Act should be consistent with the provisions of the present Constitution which came into force on 21 June 1993. Article 19(1) of the Constitution contains the fundamental right of every person to a fair hearing. Sub-article (2)(a), provides that every person who is charged with an offence:

> (2)(a) is innocent until the person is proved or has pleaded guilty

Sub-article (10) thereof provides that:

> Anything contained in or done under the authority of any law necessary in a democratic society shall not be held to be inconsistent with or in contravention of:
>
> > (b) Clause (2)(a), to the extent that the law in question imposes upon any person charged with an offence the burden of proving particular facts or declare that the proof of certain facts shall be prima facie proof of the offence or of any element thereof.

Section 14 of the Misuse of Drugs Act falls under the second limb, in that it declares that upon proof of possession of more than 25 grams of cannabis resin, the presumption of trafficking applies until the accused proves the contrary.

In the case of *R v Oakes* (1983) D.L.R. 123, a decision of the Court of Appeal of Ontario, Canada, section 8 of the Narcotic Control Act came up for interpretation in relation to section 11 (d) of the Canadian Charter of Rights and Freedoms which

guaranteed the presumption of innocence. Martin JA stated thus:

> I have reached the conclusion that section 8 of the Narcotic Control Act is constitutionally invalid because of the lack of a rational connection between the proved fact (possession) and the presumed fact (an intention to traffic)...mere possession of a small quantity of a narcotic drug does not support an inference of possession for the purpose of trafficking or even tend to prove an intent to traffic. Moreover, upon proof of possession, section 8 casts upon the accused the burden of disproving not some formal element of the offence but the burden of disproving the very essence of the offence.

Section 14(d) of the Misuse of Drugs Act appears to be similar in scope. Although the evidentiary presumptions in sections 15 to 19 of that Act may be consistent with the recognized derogation in article 19(10) of the Constitution, the presumption of trafficking contained in section 14 may, in an appropriate case before the Constitutional Court, be declared to be inconsistent with article 19 of the Constitution. A person's fundamental rights may be restricted, but they cannot be denied to him either expressly or impliedly.

Section 14(d) is structured under the heading *of* "Evidence" in part III of the Act. Hence the burden on the accused is an evidentiary burden which has to be discharged on a balance of probabilities. Cross on "evidence" states that:

> when the accused bears the evidential burden, it is only necessary for there to be such evidence as would, if believed and un-contradicted, induce a reasonable doubt in the mind of a reasonable jury as to whether his version might not be true.

Before the prosecution establishes the offence of trafficking under the presumption in section 14(d), it has necessarily to establish that the accused was in possession with knowledge of the controlled drug. If the quantity of drugs as analysed is 25 grams or less, then a conviction on possession would be recorded. In the case of cannabis or cannabis resin, the possession of more than 25 grams attracts the presumption, not of trafficking as a matter of fact, but "for the purpose of trafficking in a controlled drug contrary to section 5." This is the subtle difference in terminology. Section 5 contains the prohibition to trafficking, within the meaning ascribed to it in section 2 of the Act.

The term "traffic" is defined as:

(a) To sell, give, administer, transport, send, deliver or distribute; or

(b) To offer to do anything mentioned in paragraph (a) or;
(c) To do or offer to do any act preparatory to or for the purpose mentioned in paragraph (a);

But the particulars of the charge does not specify any of those different modes of "trafficking". In the charge, the prosecution relies on the mere possession of 166.4 grams of cannabis resin as constituting "trafficking" in the sense of that definition.

According to the prosecution case, which this court has accepted, the accused was in possession of 166.4 grams of cannabis resin, which he dropped out of the window in an attempt to dispossess himself of that substance. Hence did he do any act preparatory to or for the purpose of selling, giving, administering, transporting, sending, delivering or distributing, to be guilty of the offence of trafficking?

Article 19(2)(c) of the Constitution provides that every person charged with an offence "shall be given adequate time and facilities to prepare a defence to the charge". He may therefore present any defence. In the present case he relied on the defence of "introduction", or "planting" by the Police Officers. The punishment prescribed for trafficking is more severe than for possession. Hence if mere possession of more than 25 grams of cannabis resin amounts to "doing of an act preparatory" to trafficking, section 14(d) would not have given the accused an opportunity to prove that he was not possessing for the purpose of trafficking, as mere possession alone of that quantity would have constituted the offence, and there would not have been any issue of rebutting the presumption.

In the case of R v *Philip Leon* (unreported) Criminal case No. 93 of 1983), the accused was found in the possession of 24 grams 260 mg of cannabis. When the legal limit for presumption of trafficking was 15 grams. Seaton CJ, finding the accused guilty of possession, but not of trafficking despite the quantity stated:

> Under section 4A(2) of the Dangerous Drugs Act, as amended by amendment no 2 of 1982, a person who is in possession of more than 15 grams of cannabis is presumed, unless the accused proves the contrary to be trafficking in the drug. The accused has denied any possession of the drugs but as I have stated that I found that he was in possession, and since it was more than 15 grams, the presumption holds that he was trafficking in it. This does not by itself, however constitute "trafficking" as that is defined in section 2 of the Dangerous Drugs Act. I therefore find the accused not guilty of trafficking, but guilty of possession under section 4 of the Act."

However in a later case the words "does or offers to do any act preparatory to, or for the purpose of, trafficking in a drug ..." in section 4A(l)-(c) of the previous Dangerous Drugs Act, was considered by Seaton CJ in *Joseph Lame v R* (unreported) Criminal appeal no. 6 of 1988 he stated that in that sub-section:

> *T*he Legislature has extended the range of culpability beyond those who sell, give, administer, transport, send, distribute or transfer the drug. Its net of prohibition has been widened to include even those who merely prepare

> to do such things. The question which the court had to ask in this case therefore was, on the evidence produced, could it be said that the appellant did an act that was preparatory to trafficking?

The learned Chief Justice then cited the case of *Gardner v Ackroyd* (1952) 2. Q.B.D. 743 in which Goddard CJ sought to define the phrase "act preparatory to" the commission of an offence. In that case, the price of meat had been controlled by "the Meat (prices) (no. 2) Order". A butcher had prepared parcels of meat bearing labels showing the names of the purchasers and the price which exceeded the maximum prices. It was held that "it was sometimes difficult to determine whether an act is immediately or remotely connected with the crime"...and therefore it may be that it was intended to meet this difficulty that the words ‘an Act preparatory to the commission of an offence’ were used to embrace acts which are only remotely connected with the commission of the offence. Goddard CJ further stated "one thing must, I think, be certain, and that is that those words are intended to apply to what the law would regard as something less than an attempt.” Hence in that case the labeling of the price in excess of the controlled price, was considered as an act preparatory to the selling of meat contrary to the price order.

However, the Court of Appeal, in the case of *Philip Cedras v R* (unreported) Criminal appeal no. 11 of 1988*,* interpreting the same section stated:

> Possession of a dangerous drug is an act - Albeit a continuous act, involving the physical custody or control of the drugs. If a person is in possession of a dangerous drug for the purpose of trafficking, he is evidently doing an act for the purpose of trafficking and such act is clearly caught by section 4A (1)(c).

That judgment may have no application to the presumption in section 14 (d) of the Misuse of Drugs Act (Cap 133), as the presumption now is that possession was for the purpose of trafficking contrary to section 5. As I stated before, section 5 contains the prohibition against trafficking, and the term trafficking there has to be considered within the meaning of the definition of trafficking. To do any act ‘preparatory to trafficking’, should necessarily be, for the purpose mentioned in sub paragraph (a) thereof, that is, to sell, give, administer, transport, send, deliver or distribute.

In the present case, the direct evidence is that the accused had the drugs in his possession. The prosecution also relied on circumstantial evidence to establish trafficking. First, observation of the premises of the accused from a vantage point for two days, prior to the raid. Admittedly, the house was occupied by the parents and two sisters of the accused.

The evidence of P.C Dufrene that he observed "something being sold" from a distance, alone is not indicative of trafficking of drugs by the accused. This was different to the situation in the case of R *v Ricky Chang Ty Sing* Criminal case no. 2 of 1997, where four Police Officers watched from a vantage point, the accused receiving money from

two men and handing over a black substance, which upon immediate arrest was seized and analysed as cannabis resin. There was evidence of selling in that case.

Secondly, the prosecution relied on the sum of R2058 seized as proceeds from drug trafficking. P.C. Dufrene and P.C. Belle testified that R500 was found in the accused's pocket and R1558 in his wardrobe. The accused claimed he had only R10 and a few coins in his pocket and that the monies in the wardrobe were the proceeds from selling bananas which he had planted. He also stated that he did painting and other odd jobs. In the case of *R v Morris* (1995) 2 Cr App R 69 at 75, Morland J observed that:

> …evidence of large amounts of money in the possession of a defendant or an extravagant lifestyle on his part, prima facie explicable only if derived from drug dealings, is admissible in cases of possession of drugs with intent to supply if it is of probative significance to an issue in the case.

In the case of *R v Garry Albert* (unreported) Criminal case no 45/97) a sum of R4,141.05 was found in the possession of the accused together with a quantity of cannabis resin around 1.30p.m in the night when he returned to his house where Police Officers ambushed him. That was considered by me "as being probative to the issue of trafficking".

In the instant case however, as there was evidence of a possible sale of "baka", not necessarily by the accused, the sum of R2058 cannot be considered as being probative to the issue of trafficking in cannabis resin to the exclusion of any other possibility.

Thirdly, the prosecution case was that, the penknife produced in the case, according to P.C. Dufrene, contained traces of cannabis resin, which was indicative of cutting the slices of cannabis resin, for sale. However, the penknife had not been analysed for evidence of any substance, and hence it has no evidentiary value as regards the issue of trafficking.

However the accused identified the 17 slices of cannabis resin exhibited in the case, as those that were shown to him at the Glacis Police Station, although his defence was that they were introduced at his residence by a Police Officer whose name he did not know. I have rejected that defence and found that the accused was in possession of the drugs which he dropped through the window. P.C. Dufrene and Dr. Gobine, the analyst testified that the 17 slices were individually wrapped in cling film, and the whole was again wrapped together. In the analyst's report (exhibit P2), it is stated that the lengths of those 17 slices ranged from 6 cms to 8.7 cms. In the case of *Gardner* (supra), the individual wrapping of parcels of meat, with labels containing the names of customers, and the prices which were above the controlled price, were considered as "acts preparatory to the commission of the offence" of selling above controlled price. As Goddard CJ stated, those words are used to cover acts which are remotely connected with the commission of the offence, and acts that fall short of an attempt to commit an offence.

Hence the individual wrapping of the slices in different lengths of marketable quantities, is probative of the issue of trafficking under section 5, read with the definition in section 2 of the Act.

The only matter for concern is that although section 14 provides a rebuttable presumption, it gives the accused no opportunity to do so unless he admits the offence of possession. This may be considered as a violation of the right to a presumption of innocence until proven guilty, which, under the present Constitution is a fundamental right. In Canada, section 8 of the Narcotic Drugs Act, which contains a similar provision as section 14 of our Act, the trial is divided into two phases. In the first phase, the sole issue to be determined is whether or not the accused is guilty of possession, upon evidence relevant to that issue only. In the second phase, the question to be resolved is whether or not the possession charged is for the purpose of trafficking. The procedure specified is that the second phase commences with a finding of the court that the accused is guilty of possession. Thereupon he is given an opportunity to establish that he was not trafficking. The prosecutor then adduces evidence of trafficking, and the accused would then adduce evidence to the contrary. The court would decide on a balance of probabilities.

Without statutory provisions, the courts in Seychelles are unable to follow such a procedure which would safeguard the fundamental rights of accused persons, as provided in the Constitution. Section 4(a) of the previous Dangerous Drugs Act was enacted to curb the incidence of trafficking. It is justifiable in a democratic society to restrict fundamental rights of individuals in the interest of the society. Whether section 14 as presently constituted is inconsistent with article 19(2)(a) may remain to be considered in an appropriate case before the Constitutional Court. The time for referring this issue in the present case to the Constitutional Court under article 46(7) has passed, as it should have been done "in the course of proceedings."

Hence on the basis of section 5 of the Misuse of Drugs Act, read with section 2, and section 14 and 26(1)(a) thereof, I am satisfied beyond a reasonable doubt that the prosecution has establish the offence of trafficking.

I therefore find the accused guilty of the offence of trafficking, as charged, and accordingly convict him.

Record: Criminal side No 34 of 1998