

**DIRECTOR OF PUBLIC
PROSECUTIONS KWAZULU NATAL**



The National Prosecuting Authority of South Africa
Igungu Jikelele Labetshehshisi boMzantsi Afrika
Die Nasionale Vervolgingsgesag van Suid-Afrika

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**PROJECT BAD GUYS: S vs GAVIN VAREJES
TOWNHILL CAS 32/05/2002**

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1. The abovementioned matter was referred to this office on 17 January 2011 under cover of (unsigned) minute 6/1/3 Project BG drafted by Mr A.G. Leask of the Asset Forfeiture Unit: National Prosecuting Authority.
2. The affidavits in the case docket disclosed that on 27 March 2002 two police agents planted drugs in the home of Gary Porritt in Pietermaritzburg on the instruction of Gavin Varejes. A quantity of cocaine was recovered from the house of Porritt on 5 April 2002.
3. The circumstances of the information supplied to the police about the presence of drugs as well as the witnesses on the premises clearly showed that the drugs had been planted.

Justice in our society, so that people can live in freedom and security

4. Varejes and Porritt have an acrimonious relationship. It is characterised by civil litigation, registering of case dockets against each other and each one informing SARS of unlawful conduct by the other in respect of tax offences. Varejes, together with Tony Strike (a business associate) had reason to falsely implicate Porritt to embarrass and frustrate him.
5. The agents, Paul Stephanus Stemmet and Freddie Burger, admit their involvement in the planting of drugs. Note that Burger's affidavit has not been signed by him. These affidavits were deposed to in terms of section 204 of Act 51 of 1977.
6. Circumstantial evidence supports their version that they knew Varejes and Strike. Although they were police reservists and informers they also owned a private security company "Palto". They were very well "connected" and had contact with Glen Agliotti, Jackie Selebi (the former National Commissioner) and a variety of other senior police officers.
7. It appears that Stemmet and Burger have been involved in a large number and great variety of criminal enterprises. This circumstance was cause for concern. However, Adv. Gerrie C. Nel who had previously consulted with the witnesses was of the view that both will testify "frankly and honestly".
8. On 23 June 2011 I issued instruction that Varejes be prosecuted for the following crimes:
 - 8.1 Contravening section 4(b) of Act 140 of 1992 – unlawful possession of cocaine;
 - 8.2 Contravening section 13(a) of Act 140 of 1992 – placing of drugs on person's premises with the intention that the latter be charged; and
 - 8.3 Alternatively: attempting to defeat the ends of justice.

9. The case was never enrolled as Varejes' legal representatives requested an opportunity to make representations before it being placed on the roll. On 7 May 2012 we accordingly met with his legal team. The following persons were present:

- 9.1 Mike Hellens SC
- 9.2 Lawrence Hodes SC
- 9.3 Ian Smal-Smith (attorney)
- 9.4 Lt. Col. E. Cloete
- 9.5 W/O M. McLean
- 9.6 Andrew Leask (AFU)
- 9.7 George Hardaker (AFU)
- 9.8 Gert Nel (DPP)
- 9.9 Richard Xaba (DPP)

10. After receiving their verbal and written representations we agreed to hold the prosecution in abeyance pending consultation with at least Stemmet and Burger. It has not been possible to facilitate this because of *inter alia*, Burger's constant unavailability as he is working in Afghanistan.
11. I have now reconsidered my earlier decision to prosecute Varejes. I remain convinced that there is a *prima facie* case against him but I am no longer convinced that a prosecution is feasible or that the interests of justice will be served by it for the reasons set out below.

STEMMET: A SINGLE WITNESS AND ACCOMPLICE

12. Stemmet is the only witness who directly implicates Varejes. We were initially of the view that Burger would corroborate him in this regard. His draft affidavit does not do so.
13. The possibility of inferring from Burger's statement that Varejes requested the drug plant is not persuasive. Burger explains that he heard about a job

in Pietermaritzburg from Stemmet either before or after a meal at the home of Varejes.

14. During the discussions referred to above with Varejes' legal representatives they referred us to numerous instances of serious crimes committed by Stemmet. A number of Stemmet's affidavits were subsequently made available to support their averments. It further appears that a variety of senior police officers were aware of his conduct but simply ignored it.
15. Stemmet on his own version, inter alia, committed the following acts:
 - 15.1 Assisted in the theft of a consignment of counterfeit cigarettes on more than one occasion.
 - 15.2 Assisted in recovering contraband goods seized by SARS. He was paid R80 000.00 by Glen Agliotti for doing so. It appears that forged documents supplied by another police officer were used to facilitate the release of the goods.
 - 15.3 Received a stolen R5 rifle into his possession. In a subsequent affidavit he also mentions receiving at more or less the same time a hand grenade.
 - 15.4 He had his own munitions cache and caused a number of explosions in order to threaten individuals who were not exhibiting cooperative behaviour.
 - A hand grenade was thrown into a Koi fishpond because the owner was not paying money he owed.
 - A hand grenade (M26) was also thrown in amongst vehicles also because the owner was not paying monies owed.
 - When Microsoft officials showed reluctance to renew a protection contract with him (Palto), a bomb was detonated in the foyer of the Microsoft headquarters in Sunninghill.

16. It is significant that when Stemmet made these abovementioned disclosures on 28 August 2006 he omitted to mention this matter. He only did so in an affidavit on 2 November 2009.
17. On 7 September 2007 he again deposed to an affidavit wherein he admitted to committing other crimes but again omitted to mention this matter. In this affidavit he mentions, *inter alia*, the following incidents:
 - 17.1 Planted mandrax tablets in a Bantry Bay home during 2000 upon the request of Ysef Surtees.
 - 17.2 During 2000-2001 Varejes requested Stemmet and others to assault a Nigerian and his friends in Point Road, Durban. They did so.
18. Stemmet and Burger's respective versions of the planting of the drugs are characterised by contradictions and a lack of detail. They exhibit a cavalier disregard for the rights of others and no appreciation for the enormity of their own criminal conduct. Their statements contain no expressions of remorse.
19. Deficiencies in the evidence of witnesses of this type are to be expected. However, some unsatisfactory aspects of their evidence impact adversely on the prospects for a successful prosecution.
 - 19.1 Stemmet explains that on the day in question he acquired less than 40g of cocaine in the "vicinity" apparently of Porritt's home. The actual quantity of cocaine was 33.4g. In 2002 it would have been worth about R30 000.
 - 19.2 He claims that he could not remember from who and where he obtained the cocaine. This explanation is clearly not credible. It is further complicated by the fact that it is simply not possible to purchase such a large quantity of cocaine without prior contact with the dealer, an introduction, prior purchases to build trust, etc.

- 19.3 He does not claim that Varejes provided him with the funds to purchase the cocaine. Stemmet can also not remember whether Varejes paid them for the job, he assumes that he did. This version, considering the cost of the cocaine is inherently improbable.
- 19.4 Burger states that he only acted upon the instructions of Stemmet. He received no instructions from Varejes and was not paid by Varejes.
- 19.5 Burger contradicts Stemmet in respect of the appearance of the drugs and whether he knew that what he was planting was indeed drugs.
- Stemmet says that the cocaine was in a plastic transparent bag. Burger says that he could not see what was in the bag because it was not transparent.
 - Burger did not know what was in the bag and only heard later that it contained drugs. Stemmet says that Burger reported that he planted the drugs in the toilet.
- 19.6 Burger claims that he hid the bag somewhere in the toilet but can't remember where. Warrant Officer D.R Osborne (A.1) explains that two parcels of cocaine were found hidden in separate places (toilet roll holder and where the drain pipe goes into the wall). Stemmet refers only to "a" transparent plastic bag.
- 19.7 Burger says that he flushed the toilet and washed his hands after hiding the bag. Busisiwe Biyase (A.6) who is Porritt's domestic servant says that she heard no sound emanating from the toilet.

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20. During the meeting referred to above in paragraph 9 Messrs Leask and Hardaker conceded that the defence team are aware of other crimes committed by Stemmet and Burger not mentioned here. There is also a real probability that additional matters which even they are not aware of will be raised during a trial.

PROSPECTS FOR A SUCCESSFUL PROSECUTION

21. The abovementioned observations are not intended to be a comprehensive list of all deficiencies in the evidence of these two crucial witnesses. However, these problems go beyond what is ordinarily expected of witnesses of this type. The extent of these shortcomings will materially weaken the prosecutions case.
22. These two witnesses are self confessed criminals who have exhibited contempt for the administration of justice. This disposition will not endear them to the court. The court will instinctively ask why they are not in the dock as accused.
23. When representations were made to us it was clear that the defence had, had many dealings with these witnesses and have more negative information about them than what we have. This will be exploited and I do not foresee that cross-examination will be curtailed on the basis that these are collateral matters. Some of the aspects are already contained in their affidavits.
24. Although Varejes has allegedly committed a serious crime I am no longer convinced that there are reasonable prospects for a conviction. A trial of this nature will also be a costly and protracted affair.

DELAY IN INSTITUTING THE PROSECUTION

25. Varejes has a constitutional right to have his trial begin and concluded "without unreasonable delay". It is clear that he has played no role in the delay of some 11 years since the commission of the crime. The delay has been occasioned by the State.
26. The delay since May 2012, alone, is significant and has been caused by the inability to obtain an affidavit from Burger. Messrs Leask and Hardaker repeatedly implored this office to be patient in this regard. Only an unsigned draft affidavit was produced during this period.
27. The crime was committed some 11 years ago on 27 March 2002. Stemmet disclosed his own involvement and implicated Varejes only on 2 November 2009. The case docket was submitted to this office only on 17 January 2011. Our decision was issued on 23 June 2011.
28. These delays have now reached the stage where it is difficult to unequivocally state that Varejes will have a fair trial. It also appears that justice will not be seen to be done in these circumstances.
29. An application for a permanent stay of the prosecution should be anticipated if the matter is prosecuted.

PUBLIC INTEREST

30. The complainant, Porritt, suffered very little prejudice in the matter. His home was searched by police officers who upon discovering the drugs took no steps against him as it was apparent that it was planted. Osborne (A.1 Paragraph 10) came to that conclusion there on the scene.
31. Porritt only complained about the matter in September 2008, some 6 years later. On his version he already suspected Varejes on 5 April 2002 but did nothing about it.

32. This offence is not prevalent and it had no discernable impact on the security of the public. Even a successful prosecution will have little deterrent value due to the long time lapse since the commission of the crime.
33. It appears that a prosecution can also not be justified upon a consideration of the likely length and expense of the trial. As the trial progresses more and more witnesses will inevitably be drawn into it. Many of these are senior executives and public officials. Securing their presence will be time consuming and costly.
34. The objectives of criminal justice will not be served by engaging in a protracted trial with poor prospects of success. The main reason for such a trial, at this stage, appears to be to allow Porritt to teach Varejes a lesson. This is not a valid consideration in the decision making process.

CONCLUSION

35. I withdraw my earlier decision to prosecute Gavin Varejes for, *inter alia*, the reasons set out above.
36. I now regard the matter as finalised.



For **ACTING DIRECTOR OF PUBLIC PROSECUTIONS**
KWAZULU-NATAL