

**DUGASSE v R**  
**(2013) SLR 67**

Domah, Fernando, Twomey JJA

3 May 2013

CR SCA 25, 26 and 30/2010

F Elizabeth for the first appellant

J Camille for the second appellant

N Gabriel for the third appellant

D Esparon for the respondent

**The judgment was delivered by FERNANDO JA**

[1] All three appellants, namely the first, second and third appellants, appeal against their conviction under count 2, for aiding and abetting in the trafficking of a controlled drug, namely 536.1 grams of powder containing mono-acetyl-morphine which is an ester of morphine and under count 4, for conspiracy to commit the offence of trafficking in the same drug. In the Notices of Appeal filed on behalf of the appellants by their counsel there is no appeal against the sentences imposed on them. Counts 2 and 4 were set out as alternative counts to counts 1 and 3.

[2] Counts 2 and 4 read as follows:

Count 2 in the alternative to count 1

**Statement of Offence**

Aiding and abetting the trafficking of a controlled drug contrary to section 27(a) as read with section 5, section 2 and 26(1)(a) of the Misuse of Drugs Act (Cap 133) and punishable under section 29 Misuse of Drugs Act and the Second Schedule referred therein as read with section 23 of the Penal Code.

**Particulars of Offence**

Nelson Payet, Dominique Dugasse and Christopher Dunienville on or about the 30<sup>th</sup> May 2009, with common intention aided and abetted Ernestine Isaacs to traffick in a controlled drug namely 536.1 grams of powder containing monoacetylmorphine which is an ester of morphine being a controlled drug by

selling, giving, transporting, sending, delivering or distributing, or offering to do any such acts.

Count 4 in the alternative to Count 3

#### Statement of Offence

Conspiracy to commit the offence of trafficking in a controlled drug contrary to section 28(b) as read with section 5, section 2 and 26(1)(a) of the Misuse of Drugs Act and punishable under section 28 and 29 of the Misuse of Drugs Act and the Second Schedule referred therein.

#### Particulars of Offence

Nelson Payet, Dominique Dugasse and Christopher Dunienville on or about the 30<sup>th</sup> May 2009, agreed with one another and with another person namely, Ernestine Isaac, that a course of conduct shall be pursued which, if pursued, will necessarily involve the commission of an offence by them under the Misuse of Drugs Act, namely the offence of trafficking of 536.1 grams of powder containing monoacetylmorphine which is an ester of morphine being a controlled drug by selling, giving, transporting, sending, delivering or distributing, or offering to do any such acts.

[3] At their trial before the Supreme Court the numbering of the accused were different. The first appellant stood charged as the second accused, the second appellant stood charged as the third accused and the third appellant stood charged as the first accused. The change in the numbering had been made by this Court in view of the order their appeals had been filed. In order to avoid any confusion the appellants would be referred to in this judgment by their surnames.

[4] The following grounds of appeal had been filed on behalf of the first and third appellants, namely, Dugasse and Payet:

1) The learned Judge erred when he concluded that the Respondent has proved its case beyond any reasonable doubt in that:

i) The Respondent failed to prove an essential element of the offence of aiding and abetting the trafficking of a controlled drug under count 1 namely that the 1<sup>st</sup> and 2<sup>nd</sup> Appellants “aided” and “abetted” Ernestine Isaac.

ii) The learned Judge erred when he concluded that the Respondent has proved the offence of conspiracy to commit the offence of importation of a controlled drug under count 3 in that the Respondent failed to prove a essential ingredient of the offence namely “conspiracy” beyond a reasonable doubt.

2) The learned Judge erred when he convicted the Appellants of count 1 and count 3 since the charges are defective in that it did not specify the

place where the offence are alleged to have been committed.

- 3) The learned Judge erred when he convicted the Appellants since no offence was committed by either by Ernestine Issac or the Appellants on the 30<sup>th</sup> May since the Police had substituted the illicit substance with a substance which was not illegal on the said date.

[5] We are surprised at the carelessness displayed by counsel for appellants Dugasse and Payet in filing the grounds of appeal. The appellants were not convicted of counts 1 and 3 but of counts 2 and 4 which were in the alternative to counts 1 and 3 respectively. The appellants have not been convicted of conspiracy to import but of conspiracy to traffic under count 4. At the hearing of the appeal counsel for the appellants sought permission of the Court to correct these defects for which permission was granted. Grounds (i) and (ii) in ground 1 are vague and meaningless as it merely repeats the offence itself as an element of the offence. Ground 2 becomes a mere technicality since on a reading of ground 3 it is clear that the appellants were well aware of an incident that took place on 30 May 2009 and both appellants in their dock statements admit being at Gondwana, Providence around the time the offences were alleged to have been committed as per the prosecution case. Further the appellants had proceeded to trial on the basis of the charges and no objection had been raised to the alleged defect in the charge at any stage of the trial. At ground 3 the appellants have accepted that a substance which was not illegal had been substituted for the illicit substance on 30 May by the police. The question whether the conviction can be sustained in view of this substitution will be dealt with later.

[6] The following grounds of appeal had been filed on behalf of the second appellant, namely D'unienville:

- i) The learned trial judge erred in law, in holding, that the evidence of Ernestine Isaac, whose status was clearly one of an accomplice, to the effect that she delivered the boots to the Appellant and that the Appellant paid her a certain sum of money had been corroborated by the NDEA Agents who stopped the car.

- ii) The learned trial judge erred in law in convicting the Appellant on the uncorroborated evidence of Ernestine Isaac, whose statement was that of an accomplice, to the effect that the appellant was one of the persons present at the time the boots were delivered.

- iii) The learned trial judge erred in law and on the facts in not attaching sufficient weight to the fact that, Ernestine Isaac had testified that the Appellant was wearing a short sleeve t shirt and yet she failed to mention that the Appellant had a massive tattoo on each arm, which tattoos were shown to the learned trial judge, as real evidence.

- iv) The learned trial judge erred in law and on the facts in accepting the evidence of Ernestine Isaac, who had clearly been discredited under

cross-examination and shown to be a witness not worthy of belief.

v) The learned trial judge erred in law and on the facts in holding that the prosecution had proven all the elements of the offence of aiding and abetting the trafficking of a controlled drug, more specifically the actus reus of the said offence.

vi) The learned trial judge erred in law and on the facts in holding that the prosecution had proven all the elements of the offence of conspiracy to trafficking in a controlled drug, more specifically the existence of such conspiracy.

[7] The main witness for the prosecution was Ms Ernestine Isaacs, an accomplice in the case, who turned State Witness in terms of s 61A of the Criminal Procedure Code (Cap 54) as amended by Act No, 4 of 2007. According to her testimony before the Court, she had been procured by two persons in South Africa to be a carrier of the seized drugs; to the Seychelles, on a promise of payment. She had been handed a pair of boots in which the drugs were concealed and had been instructed to wear the boots at all times. One of the said persons had dropped her off at the Cape Town airport where she was to board a flight to Johannesburg and thereafter onwards to the Seychelles. She had arrived in the Seychelles on the morning of 30 May 2009. According to her she had never been to the Seychelles nor did she know anyone in the Seychelles. Her instructions were to contact one of her accomplices in South Africa after she had cleared through Immigration and Customs at the Seychelles International airport. The understanding was that she would then be given the number of a person to whom she had to deliver the drugs. She had arrived in Seychelles in the morning of 30 May 2009 on an Air Seychelles flight. On arrival at the Seychelles International Airport she had been questioned at Customs because she was not in possession of sufficient money to stay over in the Seychelles for the one week duration she claimed that she intended to stay and had not been in a position to give the name of any person whom she knew in the Seychelles. All that she had with her was USD 100, Euro 100 and R 300 and a hotel reservation at 'Le Surmer', all provided and arranged by her contacts in South Africa. This aroused the suspicion of the customs authorities in Seychelles who carried out a body search on her and her belongings. The sole of the boots that were given for her to wear were scanned and when cut open revealed that something was concealed therein. It was then that the authorities discovered three packets of a powder-like substance concealed inside each of the boots. This on examination later was found to be an ester of morphine. There is no challenge in this appeal to the expertise of the Analyst, his analysis of the drugs or the chain of evidence. There is no challenge to the evidence of Ernestine Isaacs that she came over to Seychelles with drugs concealed in her boots. In fact the defence position had been that she was a carrier and part of a drug ring.

[8] Ms Isaacs on being detected with the drugs agreed to cooperate with the National Drug Enforcement Agency (NDEA) authorities to track down the counterparts in Seychelles who were involved in the drug transaction. Therefore on instructions by the NDEA authorities she called her contact in South Africa to say that she had arrived in the Seychelles and was okay. PW 9 Sgt Seeward corroborates Ms Isaacs evidence in

this regard. A few minutes after she had made the call to South Africa Ms Isaacs received a call on her mobile from a local cell phone bearing the number 517742. She had informed the caller that she was on her way to the hotel. The NDEA authorities had then informed her to act as per instructions she received from the caller in Seychelles and was handed back the boots to proceed to 'Le Surmer' hotel. The drugs that were found inside the boots were substituted with milk powder. On arrival at the hotel around 1 pm she had received another call from the same local number who had called her earlier and asked whether everything was okay with the boots and informed that they will call her back in two hours. Just before 3 pm she had received a call from the same local number which call she could not take as she was a bit away from her phone. On her calling the same number she had been told to wear the boots and take a taxi and come to meet the caller. But after 3 pm he had called again to say that a car was waiting outside the hotel for her. Going out of the hotel she had seen a blue coloured car parked outside and the person whom she identified in Court as the third appellant, namely, Payet, was on the driver's seat. She had sat on the passenger seat next to the driver. Prior to leaving the hotel she had kept the NDEA officers informed of her movements. As she got into the car Payet had driven off and got to a bushy area within a short while. PW 9 who was in surveillance in the area had recognized Payet as the driver of the car. On arriving at this place the person whom she identified in Court as the first appellant, namely Dugasse, had got into the car and sat behind the driver's seat. She had had a good view of him as he emerged out of the bushes and walked around the car before getting into it. Dugasse had asked her whether she was okay. Payet had then moved the car a bit forward when the person whom she identified in Court as the second appellant, namely D'unienville, had got into the car and sat behind her on the passenger's seat. He had then asked her how she was and requested her to give him, her boots. While she was in the process of giving him the boots Payet had removed some money from the cubby-hole on the dashboard and given it to one of the men at the back. D'unienvielle had then got out of the car, stood near the window of the front passenger seat and given Ms Isaacs Euro 700 to meet the hotel bills. Dugasse had also given her R 2000. D'unienvielle and Dugasse had then walked away. Thereafter Payet had taken a U-turn and started to proceed back along the road they had come. It is at this stage that the NDEA officers had stopped the car and arrested Payet.

[9] Ms Isaacs had identified all three appellants in Court. There had been no identification parade. In the dock statement of Payet, he states that on the day of the incident around noon, he was informed by one of his clients that there was a lady to be taken to Gondwana at Providence. He had then gone to '369' also known as 'Le Surmer' where a lady at the hotel had come and got into the car without saying anything to him. Prior to the lady getting into the car he had done several rounds around 'Le Surmer'. He had then taken the lady to Gondwana. On reaching Gondwana he had seen Dugasse, one of his clients, who walked up to the car and got into the back seat of his car. Thereafter another person, who he does not know, had approached the car and had started talking to the lady. The lady had handed over a handbag to that person. That person had then gone away after having told Payet to take the lady back to the hotel. Payet states that he had a conversation with Dugasse while inside the car about animal food. Dugasse had paid him R 200 for the trip. We are conscious that the

references to Dugasse and the other person cannot be taken as evidence against Dugasse or D'unienville, but certainly will be evidence in determining whether Payet had aided, abetted and conspired with Ms Isaacs to traffic in drugs. We have also not taken into consideration the rest of the contents of Payet's dock statement which makes reference to matters not admitted by Dugasse.

[10] Dugasse in his dock statement states that he took a boat at about 12.30 pm and came to Mahe with D'unienville at his instance. He admits calling Payet on 30 May again at the instance of D'unienville and requesting him to pick up a lady at AnseEtoile. He admits getting into Payet's car when he came along with a lady. He states that D'unienville spoke to the lady who was seated on the front seat. He admits having a conversation with Payet about animal food and giving Payet R 200 for the hire. He states thereafter that he took a boat and went back to Praslin with D'unienville. Here again we are conscious that the references to D'unienville and Payet cannot be taken as evidence against D'unienville or Payet but certainly will be evidence in determining whether Dugasse had aided, abetted and conspired with Ms Isaacs to traffic in drugs. We have taken into consideration only those portions of the statement in which Dugasse speaks about himself.

[11] D'unienville in his dock statement admits that he came back to the Seychelles on 30 May from a flight from Johannesburg. This is the same flight Ms Isaacs arrived in Seychelles. He denies any involvement with Payet and Dugasse. Ms Isaacs while testifying before the Court had gone on to describe D'unienville as a tall, light complexioned and broad shouldered person with brownish hair and was wearing glasses, a sleeveless yellow vest and grey shorts when she saw him at Gondwana. Ms Isaacs' identification of D'unienville in Court was about 2 <sup>3</sup>/<sub>4</sub> months after the incident at Gondwana, Providence. Defence challenges the correctness of the identification made by Ms Isaacs of D'unienville on the basis that she failed to mention that he had tattoos on both arms. The defence in cross-examining Ms Isaacs had not specifically questioned her about the tattoos on the arms of D'unienville other than asking her whether there was anything peculiar about his body to which she had answered that he had broad shoulders. Ms Isaacs' evidence is to the effect that she had seen D'unienville on the evening of 29 May 2009, that is the day before she saw him at Gondwana, Providence when she went to a smoking lounge at the Etwatwa restaurant at the Johannesburg airport about half an hour prior to boarding the flight to the Seychelles. She had been cross-examined at length by the defence as to the circumstances under which she had seen D'unienville at the restaurant at the Johannesburg airport. According to Ms Isaacs, D'unienville had been seated on the fourth table on her right, speaking to an old man and had been smoking a cigarette as well. He had been wearing white shirt. At a certain stage D'unienville had walked past her. She had been at the restaurant for about five minutes. D'unienville in his dock statement had not denied that he was at the smoking lounge at the Etwatwa restaurant at the Johannesburg airport prior to boarding the flight to the Seychelles or that he was wearing a white shirt on his flight back to the Seychelles. The trial Judge in dealing with the identification of D'unienville by Ms Isaacs, which is the third ground of appeal had this to say:



With regard to the identity of the 3<sup>rd</sup> accused at the scene of delivery witness Isaac positively identifies him as after he had got down from the car, he had stood near the window of the front passenger seat where she was seated and had spoken to her ... It is apparent that by wearing glasses at the scene of delivery he was attempting to look different as such he would have also taken steps to conceal the obvious tattoo marks on his arms.

[12] In commenting about Ms Isaac's evidence the trial Judge states "That the evidence of Isaacs was fully tested by intense cross-examination and firmly withstood all the rigours of cross-examination as well." Taking into consideration the circumstances under which Ms Isaacs came to identify D'unienville at Gondwana and in Court as the person whom she had seen at the Etwata restaurant at the Johannesburg airport, we do not want to disturb this finding of fact by the trial Judge as to the identification of D'unienville, not having had the advantage of seeing her demeanour as a witness before the Court. It is a fundamental rule that factual findings of the trial courts involving credibility are accorded respect when no glaring errors, gross misapprehension of facts, and speculative, arbitrary, and unsupported conclusions can be gathered from such findings. The reason for this is that the trial court is in a better position to decide the credibility of witnesses having heard their testimonies and observed their deportment and manner of testifying during the trial. We are also of the view that the identification of D'unienville satisfies the test propounded in the Turnbull Guidelines, namely the circumstances under which the identification came to be made, the length of time Isaacs had D'unienville under observation, the distance between the two, that there was nothing to impede the observation in any way, as for example, by passing traffic or a press of people, that Isaacs had seen D'unienville less than 24 hours before she saw him again at Gondwana, that only a period of 2 ¾ months had elapsed between the original observation at the Johannesburg and Gondwana and the subsequent identification in Court.

[13] The trial Judge having stated that Isaacs' evidence has to be considered as that of an accomplice had warned himself that it is an established rule of law that it is dangerous to convict on the evidence of an accomplice unless it is corroborated. He then had gone on to itemize the evidence that corroborated the testimony of Isaacs. It has therefore become necessary to examine the necessity for a corroboration warning, which was a requirement under the common law of England where the witness is an accomplice, that has been followed by our courts for a long period of time and even after, the promulgation of our 1993 Constitution which provides for equal protection of the law; and the enactment of the Criminal Justice and Public Order Act of 1994 in England, which came into force on 3 February 1995 and which abrogated the requirement for the corroboration warning.

[14] In the case of *Lucas v R* SCA 17/09 decided on 2 September 2011 this Court held that it is not obligatory for the courts to give a corroboration warning in cases involving sexual offences and we left it to the discretion of judges to look for corroboration when there is an evidential basis for it, after having given due consideration to the provisions of the 1993 Constitution, the Evidence Act (Cap 74), the Courts Act (Cap 43), reviewing the

cases of *Kim Koon & Co v R* (1969) SCAR and *Finesse v Banane* (1981) SLR 108, and the provisions of the Criminal Justice and Public Order Act of 1994 in England which came into force on 3 February 1995 and which abrogated the requirement for the corroboration warning in sexual offence cases and cases involving accomplice evidence.

[15] We stated in that case that:

... to think that we are bogged down with and have to blindly follow the English law of evidence as it stood on the 15th October, 1962, that is almost 50 years ago is an affront to our sovereignty as a Nation and retards our jurisprudential development. We have in adopting the 1993 Constitution solemnly declared our unswaying commitment to maintain Seychelles as an independent State politically and to safeguard its sovereignty. We have vested our legislative power which springs from the will of the people in our National Assembly. Therefore the principle enunciated in the Kim Koon judgment as regards the applicability of the English law of evidence in the Seychelles should be only if it is not otherwise inconsistent with the 1993 Constitution which provides for equal protection of the law and if considered relevant and keeping in line with the modern notions of the law of evidence acceptable in other democratic countries. Paragraph 2(1) of Schedule 7 of the 1993 Constitution should be given a fair and liberal meaning and the continuation in force of existing law should not be understood as making applicable to the Seychelles the English law of evidence which has now been abrogated. The requirement for the court to give the jury a warning about convicting an accused on the uncorroborated evidence of a victim in sexual offence cases was abrogated in England by section 32 of the Criminal Justice and Public Order Act of 1994, which came into force on February 3 1995.

[16] For a detailed discussion please see the case of *Lucas v R* SCA 17/09.

[17] In *R v Makanjuola* [1995] 1 WLR 1348 and *R v Easton* (1995) 2 Cr App R 469 it was argued on behalf of the appellants that the Judge should in his discretion have given the full corroboration warning notwithstanding the abolition of the requirement on the basis that the underlying rationale of the common law rules could not disappear overnight. That argument was roundly dismissed by the Court on the basis that any attempt to re-impose the “straightjacket” of the old common law rules was to be deprecated. It was held, however, that the judge does have a discretion to warn the jury if he thinks it necessary. Lord Taylor CJ giving the judgment of the Court, said that they had been invited to give guidance as to the circumstances in which, as a matter of discretion, a judge, in summing up, ought to urge caution in regard to particular witness and the terms in which that should be done. His Lordship said:

The circumstances and evidence in criminal cases are infinitely variable and it is impossible to categorise how a judge should deal with them. But it is clear that to carry on giving ‘discretionary’ warnings generally and in the



same terms as were previously obligatory would be contrary to the policy and purpose of the 1994 Act. Whether as a matter of discretion, a judge should give any warning and if so its strength and terms must depend upon the content and manner of the witness's evidence, the circumstances of the case and the issues raised. The judge will often consider that no special warning is required at all. Where, however, the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence. We stress that these observations are merely illustrative of some, not all, of the factors which judges may take into account in measuring where a witness stands in the scale of reliability and what response they should make at the level in their directions to the jury. We also stress that judges are not required to conform to any formula and this court will also be slow to interfere with the exercise of discretion by a trial judge who has the advantage of assessing the manner of a witness's evidence as well as its content.

[18] Thus it is clear that as per the English law of evidence presently, it is a matter for the judge's discretion whether any corroboration warning is appropriate in respect of a complainant of a sexual offence case, a case involving accomplice evidence or in respect of any other witness in whatever type of case. In the case of *Singh v State of Punjab* Crim App no 523–528/2009 (SC India) the Supreme Court of India stated:

The law on the issue can be summarized to the effect that the deposition of an accomplice in a crime who has not been made an accused/put on trial, can be relied upon, however, the evidence is required to be considered with care and caution. An accomplice who has not been put on trial is a competent witness as he depones in the court after taking oath and there is no prohibition in any law not to act upon his deposition without corroboration.

[19] There would need to be an evidential basis for suggesting that the evidence of the witness might be unreliable. Where some warning is required, it is for the judge to decide the strength and terms of the warning. An appellate court should be disinclined to interfere with the judge's exercise of his discretion save in a case where the exercise of discretion had been wholly unreasonable.

[20] We therefore hold that it is not obligatory on the courts to give a corroboration warning in cases involving accomplice evidence and we leave it at the discretion of judges to look for corroboration when there is an evidential basis for it as stated earlier. We are satisfied with the approach adopted by the trial Judge in dealing with the evidence of Isaacs.

[21] It has been the defence position that Ms Isaacs is "part of a drug trafficking ring, that goes to different countries and sell drugs for a living" and that it was her boyfriend

who organized for her to come to the Seychelles to bring drugs into the country. The defence had also questioned her in the following terms:

Now, I put it to you that during your interview it was agreed between you and the police officers that the exhibits which are in court will be removed from the boots and another substance will be based in the boots for you to continue with the transaction.

[22] Thus the fact Ms Isaacs came to the Seychelles as a courier as part of a drug trafficking ring, to deliver dangerous drugs to a person or persons in the Seychelles and that the drugs were substituted with another substance is accepted by the defence.

[23] Ms Isaacs' evidence that she had not been to Seychelles before, did not know anyone here, had been asked to call a number in South Africa, and that she did receive calls from a local number, and had been instructed to get into a car that was waiting outside 'Le Surmer' hotel has not been challenged. Her evidence that Payet drove her to a place in Providence where Dugasse and D'unienville (D'unienville's identification is challenged, but not Isaacs' evidence of another person getting into the car) got into the car, has been accepted by Dugasse and Payet. The defence does not allege that there was a reason for Ms Isaacs to falsely implicate the three appellants as the other members of the drug ring or that she bears a grudge against them, save the fact that she decided to testify for the prosecution to save her skin and return to South Africa. We are of the view the content and manner of Ms Isaacs' evidence, the circumstances of the case and the issues raised in this case did not require the trial Judge to exercise extreme caution in acting on her evidence against Payet and Dugasse.

[24] The dock statements of Payet and Dugasse have to be examined in the light of the defence position in regard to Ms Isaacs and her evidence. The defence suggestion that Ms Isaacs was part of a drug ring fits in ideally with her evidence and the dock statements of Payet and Dugasse. It is difficult to conceive that Payet was an innocent taxi driver who took Ms Isaacs on a hire to Gondwana, Providence, on the afternoon of 30 May in view of his dock statement as set out in paragraph 8 above. Hovering around 'Le Surmer', picking up Ms Isaacs and proceeding straight to a bushy area in Gondwana, stopping for two other persons to get into his vehicle at two different places, shows his complicity in the crime. Again the dock statement of Dugasse as set out in paragraph 9 coming to Gondwana on a boat from Praslin to meet Nelson who was in a taxi with a lady, shows his complicity in the crime. Their statements corroborate the evidence of Ms Isaacs who undoubtedly is an accomplice. The fact that the police did not find the boots that were with Ms Isaacs when they stopped Nelson's car when he was returning after the incident and the presence of Euro 700 and R 2000 also corroborates Ms Isaacs' testimony. We are of the view that this is a reasonable inference to be drawn in view of the above facts and the circumstances of the case. The absence of the boots and the presence of the money with Ms Isaacs, which was not with her before, fits in ideally with the defence suggestion that Ms Isaacs is part of a drug ring who came over to the Seychelles to sell drugs. We therefore dismiss ground (i) of the appeal by D'unienville.

[25] In regard to ground 3 raised by the appellants Payet and Dugasse, the challenge is that the police had substituted the illicit substance with a substance which was not illegal. It is clear that as accepted by the defence, this was a case of controlled delivery. Controlled delivery is an investigative tool in order to expose the organized gangs behind the intercepted consignment. Controlled delivery has been defined in the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances as “the technique of allowing illicit or suspect consignments of drugs *or substances substituted for them*, to pass out of, through or into the territory of one or more countries, with the knowledge and under the supervision of their competent authorities, with a view to identifying persons involved in the commission of offences ...” [emphasis added]. Identical provisions are found in the 2000 UN Convention against Transnational Organized Crime and the 2003 UN Convention against Corruption. Seychelles is a party to all three treaties by accession or ratification and thus we see no legal impediment to the NDEA authorities adopting such procedure in the investigation of crimes of this nature in the Seychelles. There is a need for a concerted and co-ordinated enforcement method to identify all the people involved in the trafficking. Appellants Payet and Dugasse have not argued that the substitution is contrary to law or has in any way caused prejudice to their defence save for the lame argument that they could not be said to have committed the offence due to the substitution. The defence had accepted the fact that what was contained in the boots of Ms Isaacs was in fact drugs and that another substance was substituted for it as referred to at paragraph 18 above. The behaviour of all three appellants on the afternoon of 30 May 2009 clearly shows that they all acted under the belief that the boots contained controlled drugs. We therefore see no merit in ground 3 of appellants Payet and Dugasse. Further we are of the view that s 28(b) of the Misuse of Drugs Act under which the appellants stood charged under count 4 and referred to at paragraph 24 below caters for such an eventuality. A similar provision is found in our Penal Code. Section 147 of the Penal Code deals with a situation where an offence can be committed in view of one’s criminal intention although the outcome desired is a physical impossibility when it states:

Any person who, with intent to procure a miscarriage of a woman, *whether she is or is not with child*, unlawfully administers to her or causes her to take any poison or other noxious thing or uses any force of any kind, or uses any other means whatever, is guilty of a felony, and is liable to imprisonment for fourteen years. [Emphasis added]

[26] In *Harris* (1979) 69 Cr App R 122, H and other persons attempted to make amphetamine. They had the correct formula but incompetently obtained the wrong ingredients and did not fully understand the process of production. They were convicted of conspiring to produce a controlled drug contrary to s 4(1) of the MDA. It was held the offence was capable of performance but merely ineptly carried out. We therefore dismiss ground 3 of appellants Payet and Dugasse.

[27] At ground (v), appellant D’unienville has taken up the position that the prosecution had failed to prove all the elements of the offence of aiding and abetting the trafficking of a controlled drug, more specifically the actus reus of the said offence. We have decided to examine this ground in relation to all three appellants despite our comments

at paragraph 5 above in respect of a similar ground badly drafted by counsel for appellants Payet and Dugasse.

[28] The offence of aiding and abetting referred to in count 2 is set out in s 27(a) of the Misuse of Drugs Act as follows:

A person who aids, abets, counsels, incites or procures another person to commit an offence under this Act ... is guilty of an offence and liable to the punishment provided for the offence and he may be charged with committing the offence.

[29] One becomes liable on the basis of aiding and abetting in the commission of a crime when the offence is established and where there is a principal offender. The actus reus of the offence of aiding the commission of an offence involves any type of assistance given prior to or at the time of the commission of the offence. The assistance rendered need not be the sine qua non or the sole cause for the offence. The fact that the principal could have carried out the offence without the assistance is not an issue. It is also not necessary to prove that the assistance was sought or the principal offender was aware of the assistance. The important element being that there must be a connection between the assistance and the commission of the offence and should have helped the principal to carry out the offence. However the principal offender may be free from criminal liability or the prosecution may not be able to prosecute him/her as his/her identity is not known or the prosecution may decide not to prosecute him/her and call him/her as a witness for the prosecution. Often the distinction between the principal offender and secondary offender/s is so misty that the law treats all the persons as having individually committed the offence and provides for charging them with committing the offence. Abetting involves inciting, instigating or encouraging the commission of an offence. Any form of encouragement suffices and it does not matter if the principal had already decided to commit the offence or that the encouragement was ignored by the principal. There is an essential difference between aiding and abetting, namely encouragement unlike aiding must have come to the attention of the principal, although it may have been ignored. The mens rea for both aiding and abetting is that the secondary party should have intended to do the act of assistance or encouragement or could have foreseen the commission of the offence as a real possibility, and should have intended or believed that such act will assist or encourage. The secondary party thus should have had knowledge as to the essential elements of the type of offence committed although knowledge of the precise crime intended to be committed by the principal is not necessary. When one examines the evidence in this case, namely that of Isaacs, Payet and Dugasse as set out in paragraphs 6 – 9 above, it is clear that a case of aiding in the trafficking of a controlled drug is clearly made out. The references to both aiding and abetting in count 2 of the indictment is permissible under s 114(b)(i) of the Criminal Procedure Code. We therefore dismiss ground (v) of appellant D'unienville's appeal and ground 1 (i) of the appeal by Payet and Dugasse. However we take the view that the inclusion of common intention in count 2 as set out at paragraph 2 above was misconceived, but had not caused any prejudice to the appellants.

[30] D'unienville in ground (vi) of his appeal states that the prosecution had failed to

prove the existence of a conspiracy and thus the offence of conspiracy to trafficking in a controlled drug had not been established. We have decided to examine this ground in relation to all three appellants despite our comments at paragraph 5 above in respect of a similar ground badly drafted by counsel for appellants Payet and Dugasse.

[31] The offence of conspiracy referred to in count 4 is set out in s 28(b) of the Misuse of Drugs Act as follows:

A person who agrees with another person or persons that a course of conduct shall be pursued which, if pursued-

(b) would necessarily amount to or involve the commission of an offence under this Act by one or more of the parties to the agreement *but for the existence of facts which renders the commission of the offence impossible*, is guilty of the offence and liable to the punishment provided for the offence. [Emphasis added]

[32] The essence of conspiracy is the agreement. When two or more agree to carry their criminal scheme into effect, the very plot is the criminal act itself. Nothing need be done in pursuit of the agreement; repentance, lack of opportunity and failure are all immaterial. Proof of the existence of a conspiracy is generally:

a matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.....Overt acts which are proved against some defendants may be looked at as against all of them.

Vide *Archbold* (2012) 33-14.

[33] To be guilty of conspiracy, it is not necessary that the accused was a party to the original scheme. It is not necessary to prove that the defendants met to concoct or originate the scheme. A conspiracy may exist between persons who have neither seen nor corresponded with each other. If a conspiracy is already formed, and a person joins it afterwards, he is equally guilty with the original conspirators. Vide *Archbold* (2012) 33-25. So far as mens rea of the offence is concerned it needs be established that the accused, when he entered into the agreement intended to play some part in the agreed course of conduct in furtherance of the criminal purpose which the agreed course of conduct was intended to achieve. Vide Lord Bridge in *R v Anderson* [1986] AC 27. Lord Griffiths in *Yip Chiu-Cheung v R* (1994) 99 Cr App R 406 said:

The crime of conspiracy requires an agreement between two or more persons to commit an unlawful act with the intention of carrying it out. It is the intention to carry out the crime that constitutes the necessary mens rea.

[34] In *R v Anderson* [1986] AC 27, it was held that there was no requirement that the prosecution should prove against any particular alleged conspirator that he intended that the offence the subject of the conspiracy should be committed. Thus it would be sufficient for an alleged conspirator who had full knowledge of the plan to have agreed

to play a minor role by way of assistance. There can be 'chain' and 'wheel' conspiracies. In a chain conspiracy, A agrees with B, B agrees with C, C agrees with D, etc. In a wheel conspiracy, A at the hub, recruits B, C and D to his scheme. The facts of this case are suggestive of a wheel conspiracy. In either case, the alleged conspirators must each be shown to be party to a common design, and they must be aware that there is a larger scheme to which they are attaching themselves. Vide *Davenport* [2009] All ER (D) 30 (Mar). The engaging of Ms Isaacs as a courier who had never been to the Seychelles before and who did not know anyone in the Seychelles; her arrival in the Seychelles with hardly any money to support her stay here; her bringing in the drugs concealed inside the boots; her instructions to call and her calling a number in South Africa once she got out of the airport; Ms Isaacs being called from a number in Seychelles on four occasions when she was at 'Le Surmer' hotel; the caller inquiring whether the boots were okay; Ms Isaacs being informed that transport had arrived; the vehicle driven by Payet appearing outside 'Le Surmer' and speeding away to Gondwana once she had got into the vehicle; Payet stopping at two different places to pick up Dugasse and D'unienville who arrived that afternoon from Praslin on a boat to Gondwana; the handing over of the boots containing the substance substituted for drugs to D'unienville; the payment to Ms Isaacs; clearly establish that the three appellants along with Ms Isaacs and some others in South Africa were party to a conspiracy for trafficking in drugs. We see no substance in ground (vi) of appeal by D'unienville.

[35] We therefore dismiss the appeals of all three appellants.