

IN THE SEYCHELLES COURT OF APPEAL

[Coram: S. Domah (J.A) , M. Twomey (J.A) , J. Msoffe (J.A) **]**

Criminal Appeal SCA 01/2012
(Appeal from Supreme Court Decision CR 46(A)/2009)

Veronica Moustache

Appellant

Versus

The Republic

Respondent

Heard: 09 December 2015

Counsel: Mr. Nichol Gabriel for the Appellant

Ms. Brigitte Confait for the Respondent

Delivered: 17 December 2015

JUDGMENT

J. Msoffe (J.A)

[1] The Appellant and Michael Uranie (the second accused at the trial) were charged with the offence of aiding and abetting the importation of a controlled drug, namely 433.2 grams of heroin (diamorphine) contrary to Section 27(a) and Section 26(1)(a) of the Misuse of Drugs Act and punishable under Section 27 and Section 29, as read with the 2nd Schedule of the Act, and the offence of conspiracy to commit the offence of importation of a controlled drug, namely 433.2 grams of heroin (diamorphine) contrary to Section 28(a) and Section 26(1)(a) of the Misuse of Drugs Act punishable under Section 28 and Section 29 as read with the 2nd Schedule of the same Act.

- [2] The particulars of the offence alleged that on or about the 21st of September 2009, the Appellant aided and abetted persons unknown to the prosecution to import into Seychelles 433.2 grams of heroin (diamorphine), and that on or about the 21st of September 2009, the Appellant agreed with persons unknown to the prosecution that a course of conduct shall be pursued which will necessarily involve the commission of an offence under the Misuse of Drugs Act, namely the importation of 433.2 grams of heroin (diamorphine).
- [3] At the trial, the prosecution side summoned a total number of 16 witnesses. The Appellant made a dock statement while the second accused testified and called one witness. Both aspects of the case were fairly long. In order to appreciate the gist of the prosecution and the defence cases, the salient aspects of the respective cases are stated as under.
- [4] Dave Mathiot, who is a DHL courier, testified that on the 14th of September 2009, as per the instructions of the DHL country manager Mr. Percy Grandcourt attempted to deliver a DHL package addressed to RK Auto Spare Parts with the caption “Attention George Leon”, to RK Auto Shop at Petit Paris but failed to do so, having found the shop closed. On 15th September 2009, the Appellant went to the DHL office and collected the same package, and she was identified by Curtis Leopold who works as Operations supervisor at DHL, Trinity House.
- [5] On the 21st September 2009, Dave had a pending delivery with the same address as the document collected by the Appellant on the 15th September 2009. The owner of the addressed store Mr. Ralph Beaudoin and his wife Ketsia Beaudoin testified at the trial that they do not use DHL as couriers and that on 21st September 2009, Dave had paid them a visit showing them the pending for a delivery to their store, with the caption “Attention George Leon” and a telephone number which Ketsia then called and spoke to a lady. Later that day Dave called Ralph and Ketsia to inform them that a lady in a taxi driven by Michael Uranie (2nd accused at the trial)

had approached him near the Premier auto parts at Cascade, and signed the pending for RK Auto spare parts. In his testimony he further explained that the lady had signed as Bernadette Stravens and had shown him the airway bill number of the parcel. He went on to state that he was not mistaken as to her identity being the Appellant even though she used a different name then, and he recognized Michael as he had just seen him at the RK Auto shop.

[6] Mr. Ralph Beaudoin testified that he was well acquainted with the Appellant and Michael who live across the road from the shop and that on the 21st September 2009, Michael had visited the store four times inquiring about making purchases of spare parts for one of his vehicles, a white Toyota registration number S89 and that after Dave's visit, Ralph went with Michael for a test drive in an attempt to diagnose the problem with the vehicle where he asked Michael about the passenger who had signed the pending delivery. Michael explained that he had picked that lady at the cross near Chetty's place and dropped her after Premier auto parts at Cascade.

[7] Brian Nicette who is an NDEA agent testified that on 21st September 2009, upon receiving information that a suspect package had arrived on an Emirates flight from Dubai, proceeded to the airport and examined the parcel addressed to RK Auto Spare Parts, Cascade, captioned "Attention George Leon". Simon Hannaford, in assisting agent Nicette, also found that the invoice attached to the said parcel was not genuine and that the parcel had originally come from Bangladesh. One of the packages was opened and the "ring" was found to contain some substance wrapped in clear plastic suspected to be illicit drugs. Subsequently, Ralph – the owner of the Auto Spare Parts store the parcel was addressed to, was arrested by the NDEA and all packages were opened before him but he denied any knowledge of the items. He was detained for a few days before being released. Agent Nicette requested that the parcel remain in the custody of DHL to find out if there was any attempt to collect the same.

- [8] Sergeant Evans Seeward as the exhibit officer had custody of the DHL parcel and its content until 29th September 2009 when he handed the same to agent Nicette who took it to Jemmy Bouzin, a forensic chemist for chemical analysis and report. Mr. Bouzin testified that he received a DHL envelope from agent Nicette containing a package in which there were 6 boxes. Each box contained a ring concealing 7 cylindrical masses making a total of 42 masses. Samples from the 42 masses were examined and analysed and found to contain in total 433.2 grams of heroin (diamorphine) with a purity of 27%. The report was drawn up and all were returned to agent Nicette on 2nd October 2009. These were handed back to Sergeant Seeward who kept them until they were eventually produced and admitted in evidence in court.
- [9] To further build the prosecution case, video footages were produced in court. Andy Moncherry who operated the CCTV camera system at the DHL office at Trinity House said that the camera system was operating properly on the 15th September 2009.
- [10] Steve Vidot testified that he operated the CCTV camera system at RK Auto Shop at Petit Paris and he too, was certain that the system was working properly on the 21st of September 2009. Both witnesses produced copies of the video footages of the respective dates in court and these were viewed by Dave who confirmed that the footages showed what he had observed on the respective dates and places. Ralph also confirmed that the footage he viewed was indeed in line with the activities that went on inside and outside RK Auto shop on 21st September 2009. Both videos were produced in court and admitted as exhibits.
- [11] Mr. Vivian Labiche, the principal civil status officer, produced the death certificate of Georges Davis Leon showing that he passed away on the 22nd of May 2003 at Baie Ste Anne, Praslin. He stated that he was not certain whether there

was any other person by the name of Georges Leon who was still alive or had died in Seychelles.

[12] In defence, the Appellant made a dock statement in which she denied involvement in any transaction to import drugs into Seychelles, and that at all times the parcels she collected from DHL were addressed to Nora Mederick who received them from her sister Florence Mederick residing in Canada, containing materials used by the Appellant in her cottage industry. The Appellant further denied to have been with Michael on 21st September 2009 as at that material time she was at her home and thus Dave must have made a mistaken identity.

[13] Michael testified that on 21st September 2009, he visited the RK Auto Shop to purchase a pair of links for his Toyota, and Lafortune shop at Cascade where he picked up a white lady who requested him to bring her to the airport. The lady told Michael that she had been waiting for someone since 11 am. On approaching the Cascade bridge, she stopped him, pointing to a person and told Michael that this was the person who had made her wait. She then disembarked from the taxi and walked towards that person. After a few minutes, she returned to the taxi, asking for the fare and paid Rs.100 which was twice the fare amount that Michael had requested, and then she left on foot walking towards the secondary road leading to the Cascade church. Michael denied that the lady passenger he had picked up was the Appellant.

[14] Astrid Nicette, a database administrator at the National Identity Cards office also testified. She stated that since her appointment 9 months previously, no ID card had been falsified and the system was not tampered with, but admitted to not knowing whether any such problem could have arisen prior to her appointment.

[15] The trial Judge analyzed both the prosecution and the defence cases. In the end, he was satisfied that the prosecution case in the first count was not proved beyond reasonable doubt. He accordingly acquitted the Appellant and Michael Uranie of

the offence of aiding and abetting. As for the second count, he convicted the Appellant of the same and sentenced her to ten years imprisonment. He acquitted Michael Uranie.

[16] Aggrieved, the Appellant is appealing against conviction only. She has raised the following grounds:-

- (i) The learned trial judge erred in law and on the facts, in concluding his findings, as regards to the discrepancies in the identification evidence of prosecution witness, Dave Mathiot, as to the person he identified on the 21st September 2009, on the second accused, Michael Uranie, in the conviction of the Appellant.
- (ii) The learned trial judge erred in law and on the facts, in holding that the discrepancies in the evidence of Dave Mathiot, as regards to the identification evidence of the Appellant, were minor discrepancies given the inconsistencies raised in the same witness's evidence, during cross examination.
- (iii) The learned trial judge erred in law in failing to satisfy himself that the Prosecution has proved beyond a reasonable doubt, the essential element of the offence of conspiracy, namely that of proof of an agreement between the Appellant and persons unknown as alleged by the prosecution.
- (iv) The learned trial judge erred in law in misdirecting himself as regards to the essential element of the offence of conspiracy.
- (v) The learned trial judge erred in law in not attaching sufficient weight on the fact that the second accused Michael Uranie, has testified that the Appellant was not there at the material time, in corroborating the evidence of the Appellant that she was not the person identified by the witness Dave Mathiot on the 21st September 2009.

(vi) The learned trial judge erred on the facts and in law in holding that the Appellant was the same person identified by the witness Dave Mathiot, on the 21st September 2009.

[17] There was no dispute at the trial that a package arrived in Seychelles on an Emirates flight on 20th September 2009. The parcel was addressed to RK Auto Spare Parts “Attention George Leon” and a telephone number 00248594563 was written on the said parcel. The parcel originated from Bangladesh. On being opened it was found to contain 433.2 gms of heroin. It was also not disputed that on 15th September 2009 the Appellant collected a parcel from DHL office. It was also not contested that the second accused was, and presumably still is, a taxi driver and that on 21st September 2009 he conveyed a lady to Cascade where the lady disembarked from the taxi to make an enquiry from a person (who happened to be Dave Mathiot) regarding the delivery of a parcel.

[18] At the trial, there was very strong contention regarding the identity of the above mentioned lady. Indeed, this is also a point of contention in this appeal.

[19] As this Court has always stated, the essence of conspiracy is the agreement. In other words when two or more persons agree to carry their criminal scheme into effect, **the very plot is the criminal act itself** — **Mullahy v R** (1868) LR 3 H.L. 306 at page 317.

[Emphasis added.]

[20] It is also settled law as per **Archbold** Chapter 33, notes 33—14 that the agreement may be proved in either of two ways; in the usual way or by proving circumstances from which it may be inferred or presumed that there was an agreement.

[21] In this case there was no direct evidence to establish the agreement between the Appellant and the undisclosed person in Bangladesh. So, the question is whether

it can be inferred from the circumstances of the case that the Appellant conspired with the said person to bring drugs to Seychelles. This brings us to the grounds of appeal which we will address as under.

GROUND 1, 2 And 6

[22] The strong point raised in these grounds of appeal centres on the evidence of Dave Mathiot. It is the Appellant's contention that this prosecution witness did not identify her.

[23] In order to answer the above point the starting point will be the events of 21st September 2009. In the evidence of Dave Mathiot, on that day when he was in the RK Auto Shop sorting out with the owner of the shop about the DHL parcel he saw a man standing for about 3 to 5 minutes who eventually came into the shop. The said man happened to be the second accused who had come in a taxi. He went on to state that in the taxi he noticed a lady seated at the rear seat signalling him to stop for purposes of collecting the parcel addressed to RK Auto Spare Parts. When cross-examined Dave Mathiot had the following to say:-

Q: On the 21st September, 2009 when you went to the RK Motor Shop at Petit Paris at Cascade you said you saw person standing on the other side of the shop next to a car, can you tell the court if this is the same car whom you saw that person standing next to on that day?

A: Yes, it was the same car.

Q: You also said that the woman who came to collect the pending from you on that date came in a taxi car?

A: Yes.

Q: Can you confirm to the court if this is the same car in which that woman came in?

A: Yes, it was the same vehicle that was parked at the road and it was the same one that came to the shop.

[24] Besides the incident at the RK Auto Spare Parts shop, there was also the other incident at Premiere Auto Parts where again Dave Mathiot saw the second accused with the Appellant in the taxi. He identified the Appellant as the same person he had earlier seen at the RK Auto Spare Parts shop.

[25] Further to the incidents of 21st September there was the incident of 15th September 2009. This incident was not relevant to the charge against the Appellant but for purposes of identification this was a material incident. In the evidence of Dave Mathiot, on this day he saw the Appellant coming to the DHL office to collect a parcel. In his evidence, this was the same person he identified in the video footage (exhibit P16).

[26] Dave Mathiot was subjected to thorough cross-examination regarding the lady who had come to the DHL office to collect the parcel. Despite the rigorous cross-examination he was unshaken. He continued to maintain all along that the lady he saw on 15th September 2009, 21st September 2009 and in the video footage was the same person, that is the Appellant in this case.

[27] Like the court below, we too are satisfied that on the basis of the evidence on record, the incidents of 15th September, 21st September 2009 and the video footage were clear testimony that the Appellant's identification by Dave Mathiot was not mistaken.

- [28] It is on record that Dave Mathiot also identified the Appellant in court at the time of trial. This has drawn criticism from the Appellant's Counsel that the dock identification was unsafe and prejudicial to the Appellant's right to a fair hearing.
- [29] It is settled law that dock (also known as "in court") identification is where a witness identifies the defendant in a court room or in the dock as being the perpetrator they saw at the scene of crime. It is generally regarded as the most problematic of all forms of visual identification. It is also of little probative value when made by a person who has no prior knowledge of the defendant because at the trial circumstances may compel the witness to identify the defendant at the dock.
- [30] At common law dock identification is usually permitted once evidence of a prior out of court identification (usually by way of an identification parade) has been admitted. The identification is used to reinforce the prior identification, which serves as the primary means of identification.
- [31] In the case of **Terrell Nailly v The Queen** [2012] UK PC 12, the Privy Council stated, *inter alia*, as follows regarding dock identification:-

When considering the admissibility, and the strength, of identification evidence, it is often necessary to consider separately the circumstances in which the witness saw the accused and the circumstances in which he later identified him The decision whether to admit dock identification evidence is one for the trial judge, to be exercised in the light of all the circumstances. Ultimately the question is one of fairness

- [32] In this case the dock identification subject of criticism in this appeal arises from pages 290 to 291 of the record thus:-

Q: *Can you tell the court what happened after this taxi car had stopped?*

A: *The taxi stopped and in the back seat there was a lady who was sitting, she made a sign with her hand with me. I waited and she disembarked from the car and she came towards me. She showed me a tracking number which was written in the palm of her hand.*

Q: *You said the taxi stopped you and signalled you to stop. Who in the taxi stopped you, the driver or the passenger?*

A: *The passenger who was sitting at the back.*

Q: *She is the one who stopped the car?*

A: *Yes.*

Q: *The person who disembarked from the car, do you know her?*

A: ***Yes. She was the person who had come two weeks before to get the document.***

Q: *Which document had she come to collect two weeks before?*

A: *The box that was at the office which was for RK Auto spare parts.*

Q: ***This woman can you see her in court today?***

A: ***Yes.***

Q: ***Can you show to the court where is this woman?***

A: ***The lady who is sitting over there.***

[Emphasis added.]

[33] From the above record of proceedings it seems that the dock identification of the Appellant by Dave Mathiot was done merely to reinforce his prior identification of the said Appellant. Nonetheless, with or without the dock identification Dave Mathiot still identified the Appellant through the incidents mentioned above. We are satisfied that the events of the three incidents were enough for Dave Mathiot to identify the Appellant. The events took place in broad daylight with fairly long durations of time. Therefore, there was no question of possible mistaken identity.

GROUND 3 And 4

[34] The main complaint canvassed in these grounds is that the Judge misdirected himself on the essential elements of conspiracy and that he erred in holding that there was proof of an agreement between the Appellant and the unknown person.

[35] Needless to repeat, the law on conspiracy has already been stated above. Further to the above authorities, the cases of **Dominique Dugasse and Others v Republic** (2013) SLR 67, **Roger John Alexander Bolton** (1992) 94 Cr. App. R.74 underscore the same point.

[36] Further, as stated in **Dugasse** [supra], to be guilty of conspiracy, it is not necessary that the accused was a party to the original scheme. Also, 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.

[37] In this case, there was no direct evidence of an agreement between the Appellant and the unknown person in Bangladesh. However, in the circumstances of the case it can safely be inferred there was an agreement between her and the unknown person in Bangladesh to import drugs into Seychelles.

[38] Further to the incidents of 15th September 2009, 21st September 2009 and the video footage there were other incidents which helped in lending credence to the fact that the Appellant had knowledge of the drugs in issue and that she was in agreement with the unknown/undisclosed person. For example, when she was asked to show her ID she said she had none. However, when she was told that she could not collect the parcel without an ID she immediately took an ID from her pocket and signed on the delivery sheet as Bernadette Stravens which was not her true name. The act of signing the delivery sheet while presenting herself as Bernadette Stravens was a clear indication that she had knowledge of the parcel and its contents. Furthermore, it is in evidence that she had the tracking number of the parcel in issue. This, as already stated, was another clear testimony that she had knowledge of the parcel and its contents.

GROUND 5

[39] The complaint in this ground is a brief one. It is contended that the Judge erred in not attaching weight to the evidence of the second accused that the Appellant was not the person seen in the car at Cascade on 21st September 2009.

[40] With respect, as correctly pointed out by the State Counsel in her Heads of Argument, once the identity of the Appellant had been established by Dave Mathiot, exhibit P16, etc., the Judge did not err in not attaching weight to the evidence of the second accused. At any rate, as pointed out by the Judge at page 613 of the record, the second accused had all the reasons to conceal the true identify of the person he conveyed on 21st September as a self-serving measure and also given that he was in a relationship with the Appellant.

[41] In the result, for reasons stated, like the court below, we too are satisfied that an appreciation of the evidence in its totality will show that it can reasonably be inferred that the Appellant was in an agreement with the unknown person in Bangladesh to import drugs to Seychelles. To this end, there is no basis for

faulting the court below in its findings and conclusions regarding the prosecution case against the Appellant.

[42] The appeal is dismissed.

J. Msoffe (J.A)

I concur:.

S. Domah (J.A)

I concur:.

M. Twomey (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 17 December 2015