IN THE SEYCHELLES COURT OF APPEAL

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

CriminalAppeal SCA2/2013 & 4/2013

(Appeal from Supreme Court Decision 4/2013)

Neressia Pool 1st Appellant

Dorian Hoareau 2nd Appellant

Versus

The Republic Respondent

Heard: 09 December 2015

Counsel: France Bonté for 1st Appellant and Lucie Pool for 2nd Appellant

Brigitte Confait for the Respondent

Delivered: 17 December 2015

JUDGMENT

M. Twomey (J.A)

[1] These appeals arise from the convictions of the Appellants on 30th January 2013 on a charge of aiding and abetting the trafficking of a controlled drug contrary to section 27 (a) of the Misuse of Drugs Act read with section 5 and 26 (1) (a) of the same Act and for which they were sentenced to undergo 10 years of imprisonment.

[2] The conviction arises out of incidents in March 2010 when one Natascha Bruelgemans arrived from Kenya with ingested heroin which she subsequently evacuated in cylindrical masses and passed on to one Kenneth Bibi. Both Natascha Breulgelmans and Kenneth Bibi pleaded guilty to the offence of trafficking in a controlled drug, namely 112.3 grams of heroin.

[3] The appeal concerns two of the original co-accused, a mother and son, whom the learned trial judge Burhan found had aided and abetted the trafficking of the said drug in that they had transported the same from the house at Anse Royale of one Helm Sounadin, a convicted drug trafficker when they were arrested by the police.

[4] After the close of the prosecution case on 4th August 2011, the two Appellants represented by Counsel, Nichol Gabriel elected to remain silent and not to call evidence. Subsequently they applied for new counsel. New Counsel, Ms. Lucie Pool applied for a trial *de novo* which was refused. The trial proceeded and the learned trial judge found the two Appellants guilty on the charge of aiding and abetting the trafficking of a controlled drug and sentenced them both to ten years imprisonment.

[5] The 1st Appellant has appealed on the following grounds, namely:

> The finding of the Honourable Judge is against the weight of the evidence in this case.

[6] The 2nd Appellant has appealed on several grounds which may conveniently be summarised as follows:

1. The learned judge was wrong not to hold that the charge was defective as the Appellant was not charged with the exact quantity of the controlled drug.

2. The learned judge did not address his mind to the discrepancy in the evidence especially in relation to the fact that the drug seized may not have been the drug produced at trial.

3. The learned judge was wrong to find that the Appellants aided and abetted the commission of the offence when the evidence only showed that the Appellant was the driver of the vehicle and there was no evidence to show that he had knowledge or intention to aid and abet the other accused persons.

4. The Appellant was denied a fair trial as the application for a trial *de novo* was refused.

5. The learned trial judge failed to take into consideration that the controlled drugs which were the subject matter of the whole case were lost and could not have been produced at the trial. This failure on the part of the trial judge was highly prejudicial to the Appellant.

6. The sentence imposed in unsafe and unsatisfactory in the circumstances of the case.

[7] As regards the first Appellant, the ground of appeal is vague, so vague as to being meaningless. The particular finding of the learned judge that is being appealed is not mentioned at all. What finding of the learned judge is being referred to? There were several made. We have said before that this type of ground offends Rule 18(7) of the Seychelles Court of Appeal Rules. We have also said before that a party who wishes to come to this court on an appeal must comply with its rules (see for example *Petit v Bonté* SCA Civil Appeal No. 11 of 2003). Had Counsel for the 1st Appellant not expounded on this ground in his skeleton heads of argument we would have been obliged to dismiss the appeal on the basis that the vague ground of appeal amounted to no ground at all.

[8] As the ground of appeal of the 1st Appellant is subsumed in the grounds of appeal of the 2nd Appellant we shall consider them together.

[9] The first ground of appeal as submitted by Ms. Lucie Pool, Counsel for the 2nd Appellant, is that it was imperative to state the amount and weight of the controlled drug, failing which the charge became defective and bad in law. This case was decided before the Misuse of Drugs (Amendment) Act of 2014 in which the law was amended to make it clear that a reference to a controlled drug in the Act meant any substance, preparation or product containing a drug as specified in the Schedule of the Act. The passing of the amendment to the law meant that it was no longer important to state what the actual amount of the particular controlled drug was in the mixture to obtain a conviction - instead of being charged with possession of the controlled drug, in effect one was charged with possession of the substance containing the controlled drug.

[10] As we have stated the present case concerned a conviction pre the amendment of the Misuse of Drugs Act. In cases concerning trafficking of drugs where the offence of trafficking was

triggered by the presumption of the amount of the controlled drug pursuant to section 14 of the Misuse of Drugs Act, it was imperative to know the exact amount of drugs as possession of more than 2 grammes of heroin was enough to raise a presumption of trafficking. In *Aaron Simeon v R* SCA 23/2009, where the accused had been found in possession of 2.44 grammes of powder, the Court of Appeal held that since the qualitative analysis of the powder revealed that there was only 4% heroin therein, the Appellant could not have been held to be in possession of more than 0.00976 grammes of heroin. In the circumstances, the court rightly held that the correct interpretation of section 14 of the Act entailed finding that there was at least 2 grammes of heroin in the mixture in order to trigger a presumption of trafficking.

[11] The present case involved the offence of aiding and abetting the trafficking of drugs where the mixture weighed 112.3 grammes of heroin with 40% purity. If the case had involved the triggering of the presumption of trafficking under section 14 of the Act, the content of heroin in the mixture would in any case have been 44.92 grammes well over the 2 grammes necessary to trigger the presumption. This, however, was a case where the amount of drugs found in the possession of the accused persons was not the determinant factor in the charge of aiding and abetting the trafficking of the controlled drugs.

[12] As was submitted by Ms. Confait, Counsel for the Respondent, the determinant factors were the facts surrounding the seizure of the drugs. An operation had been mounted by the National Drugs Enforcement Agency as a result of which it was discovered that the house was closely guarded by a dog and the occupants of the house. Large amounts of cash (SR100, 460, US$ 3,500 and Euro 2,960) had been found in the house occupied by the two accused persons. One of the original co-accused, Kenneth Bibi, who had pleaded guilty at the trial to the offence of trafficking in a controlled drug had been observed digging the ground behind the house occupied by the Appellants. The Appellants and the co-accused Bibi had sped away from the house in a car that had been rented the day before and when intercepted had thrown a packet containing the drug out of the car window.

[13] The charge of aiding and abetting the trafficking of a controlled drug against the two Appellants in this case involved trafficking with the definition ascribed to it in section 2 of the Act namely:

"(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 purposes mentioned in paragraph (a); or

(d) to possess, whether lawfully or not, with intent to supply to another person contrary to this Act."

[14] In the circumstances, failure to state the exact amount of the controlled drug in the substance seized was of no consequence to the charge, did not prejudice the Appellants in any way and was in no way fatal to the charge. This ground of appeal has no substance and is dismissed.

[15] As concerns grounds 2 and 5 of the appeal, it was the submission of Counsel for the 2nd Appellant that the exhibited drugs in the case may not have been the drugs seized from the Appellants. She based her submission on the fact that the drugs in question was sometimes referred to by the analyst as either being powdery or solid rock. She further submitted the exhibit was now not available for scrutiny by the Appellants. The discrepancy in the description of the controlled drug is explained by Counsel for the Respondent in her submission that the powdery substance was wrapped tightly in cylindrical compressed masses as is confirmed by the evidence of the analyst Jemmy Bouzin.

[16] In any case, the chain of custody as regards the exhibit was not contested by the Appellants. The fact that the exhibit could not be retrieved at the stage where a new trial was sought by the Appellants at the close of the prosecution case when they obtained new counsel is also of no significance and has no bearing on the conviction of the two Appellants. The production of the controlled drug as an exhibit had not been challenged by the Appellants' first Counsel and was admitted as evidence. Neither the method of analysis nor the result of the analysis of the drug substance were challenged. Counsel has submitted that the cases of *R v Amedée and anor* SCA 22/2001, *R v Bacco* CrS 56/2000, *R v Gabriel* CrS 6/2000 and *R v Marie* CrS 34/2000 also involved circumstances where the exhibits were lost or stolen during break-ins of the Court Registry and that the court had dismissed the charges against the Accused in those cases.

[17] *Amedée, Bacco* and *Marie* were all overruled by the Court of Appeal in a referral made by the Attorney General under Section 342 A of the Criminal Procedure Code in the case of *Bacco*, (S.C.A. no. 18 of 2003). As was pointed out by Sauzier J in the editorial note of the case, there is no principle of law that the material found in the possession of the accused person which is subsequently analysed must be produced in Court at the trial as an exhibit. It is sufficient for the Prosecution to prove that material was so found, that it was analysed and that was a controlled drug. In the constitutional case of *R v Marie* CC 2/2007, involving the issue of whether the inability of the Counsel for the Accused to cross examine Prosecution witnesses due to the loss of exhibits in a case of trafficking in dangerous drugs would constitute a violation of his right under Article 19(2) of the Constitution (the right to a fair hearing) Perera J stated:

> "That right involves the principle of equality of arms. Literally, the Prosecution and the defence should have equal opportunities to present their respective cases. This principle was considered by the Court of Appeal of New Zealand in the case of *R v Harmer* (2004) 4. CHRLD 384, in respect of Article 24(d) of the Constitution of that Country, which provides that "everyone charged with an offence shall have the right to adequate time and facilities to prepare a defence". That Court held inter alia that –
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> "It is not correct to maintain that a criminal trial cannot proceed and there is a breach of Art: 24(d) merely because certain material or testimony which might possibly have contradicted the Prosecution case is unobtainable or has been contaminated. Rather there are two relevant considerations, first, whether the evidence has been lost because of acts or omissions by the Police involving bad faith, and secondly, whether it is probable that the lost evidence would have been of real assistance to the defence in creating or contributing to a reasonable doubt as to guilt. In the absence of the former, as here the particular significance of the missing evidence will need to be considered in light of all available evidence".

[18] The grounds raised in respect of the lost exhibit in the present appeal is on all fours with the principle enunciated by Perera J as this is not a case where the exhibit is necessary for their examination by the Appellant so as to challenge the expert evidence of the analyst. In the

present appeal, as we have pointed out no challenge was ever made by the Appellants to the admission of the controlled drug as an exhibit. They elected for their defence not to call any evidence and to remain silent. In the circumstances, these grounds of appeal have no merit therefore and are dismissed.

[19] The third ground of appeal is in relation to the lack of evidence of knowledge of the drugs or intention to traffic by the Appellants in this case which the Appellants submit do not amount to the offence of aiding and abetting the trafficking of drugs. It was also submitted that the 1st Appellant was only a passenger in the car and the 2nd Appellant a driver of the car from which the drugs were thrown. It was submitted that the offence of aiding and abetting necessitates evidence of participation by the Accused.

[20] Section 27 of the Misuse of Drugs Act provides that

> "A person who –
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> (a) aids, abets, counsels, incites or procures another person to commit an offence under this Act;
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> (b) does or omits to do any act for the purpose of enabling another person to commit an offence under this Act;
>
> (c) attempts to commit or does any act preparatory to or in furtherance of the commission of 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."

It is clear that that it is not necessary to have an additional mental element beyond what is required for a principal to find an accomplice guilty of aiding and abetting a crime. Nor is it correct to state that the mental element required of an aider and abetter may be a lesser one than that necessary for a principal.

[21] As was pointed out by Msoffe JA in *Khudabin v R* SCA15/2012, there are three elements necessary to prove a charge of aiding and abetting: firstly that another person (the principal),

committed the underlying crime, secondly that the aider and abetter had knowledge of the crime or the principal's intent and thirdly that the aider and abetter intentionally provided some form of assistance to the principal offender.

[22] The principal in this case was one Kenneth Bibi who pleaded guilty to the charge of trafficking of a controlled drug. The fact that the Appellants had been together with him in the house where the money was found and that they had driven away together, after the principal had been seen digging in the garden and the fact that the 2nd Appellant had driven the car and the 1st Appellant had been a passenger in the car from which window the principal had thrown the drugs is sufficient to draw an inference that they had knowledge of the crime.

[23] As concerns the third element of the offence of aiding and abetting a crime, participation in the crime itself need not have been through an overt act. As was pointed out by Sauzier J in *R v Vel* (1978) SLR 29, even countenancing an offence may amount to aiding and abetting. We have already recounted the facts surrounding this case. It is obvious that the two Appellants in their acts participated fully in the commission of the offence by Kenneth Bibi. Hence this ground of appeal is also dismissed.

[24] The fourth ground of appeal raises the issue of whether the refusal to grant a trial *de novo* after the appointment of a new Counsel by the Appellants breached their constitutional right to a fair trial. There is no real reason given as to why the trial judge should have acceded to the request of the Appellants to order a new trial, nor how the refusal to grant their request breached their constitutional right to a fair hearing. The change of Counsel came at the stage where the prosecution had closed their case and the Appellants had to elect their defence. The transcript of proceedings of the trial was made available to Counsel for the Appellants but she applied for a new trial which was refused. Section 133 (3) (b) of the Criminal Procedure Code provides for trials *de novo* where trials are held and concluded in the absence of the Accused and he subsequently appears and satisfactorily explains his absence. *Venire de novo* are also granted by appellate courts in circumstances where the first trial is declared a mistrial due to a fundamental error or gross irregularity. It is an exceptional order made in

exceptional circumstances. We see no reasons why it should have been so ordered in the present appeal. This ground of appeal is therefore dismissed.

[25] For the reasons we have given we maintain the finding of the learned trial judge that the appellants were guilty of the charge of aiding and abetting the trafficking of drugs and find that there are no grounds to hold that the sentences passed on the appellants were unsafe and unsatisfactory. The appeal is dismissed.

M. Twomey (J.A)

I concur:. **…….** S. Domah (J.A)

I concur:. **…….** J. Msoffe (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on17 December 2015