

IN THE SEYCHELLES COURT OF APPEAL

[Coram: A. Fernando (J.A), M. Twomey (J.A), J. Msoffe (J.A)]

Criminal Appeal SCA04/2014

(Appeal from Supreme Court Decision CR 90/2008)

Marc Woodcock

Appellant

Versus

The Republic

Respondent

Heard: 05 April 2017

Counsel: Mr. A. Juliette for the Appellant
Mr. H. Kumar for the Respondent

Delivered: 21 April 2017

JUDGMENT

A. Fernando (J.A)

1. The Appellant appeals against his conviction for conspiracy to commit the offence of trafficking by paying Mohammed Taufique 11,000 Euros to obtain heroin, stored in 27 bullets.
2. The charge on which the Appellant was convicted, namely count 3 of the Indictment, reads as follows:

Statement of Offence

Conspiracy to commit the offence of Trafficking in a controlled drug contrary to section 28(a) and punishable under section 28 of the Misuse of Drugs Act.

Particulars of Offence

Brigitte Mancienne and Marc Woodcock, on the 5th day of February 2008, at the Sunrise Hotel, Mont Fleuri agreed with one Mohammed Taufique to pursue a course of conduct which, if pursued, involved the commission of the offence of trafficking in

a controlled drug, by way of paying the said Mohammed Taufique 11,000 Euros to obtain heroin, stored in 27 bullets, from him. (emphasis added by us)

3. The Appellant was charged along with Brigitte Mancienne. The Indictment had altogether 4 counts. Counts 1 and 2 of the Indictment were only against Brigitte Mancienne. Brigitte Mancienne had died during the trial and thereafter the case had proceeded against the Appellant in respect of counts 3 and 4. The statement of offence in the said two counts were also for conspiracy to commit the offence of Trafficking in heroin and the particulars of offence in count 1 were identical to that of count 3 save that the offence in count 1 was alleged to have been committed in November 2007 and the number of bullets containing heroin was 22 and the price paid was 9000 Euros. Count two did not specify the number of heroin bullets to be obtained and the price to be paid. Count 4 was against both Brigitte Mancienne and the Appellant and here again the statement of offence was for conspiracy to commit the offence of Trafficking in heroin and the particulars of offence in count 4 were identical to that of count 3 save that the offence in count 4 was alleged to have been committed on the 18th of March 2008. The salient feature in all 4 counts was that the agreement was always with Mohammed Taufique. The learned Trial Judge had acquitted the Appellant on count 4 on the basis that that the evidence in respect of count 4 does not conform to the charge.
4. The **Misuse of Drugs Act of 1995 (Cap133)** which is applicable to this case, (now repealed by The Misuse of Drugs Act of 2016), defined conspiracy as follows in **section 28**:

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

- (a) will necessarily amount to or involve the commission of an offence under this Act by one or more of the parties to the agreement;
- (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 by us)

5. The Appellant had filed the following grounds of appeal against conviction:
 1. “The Learned Trial Judge erred in convicting the Appellant on Count 3 as the said conviction is not supported by evidence adduced at the trial.
 2. The Learned Trial Judge failed to properly consider the evidence of identification of the Appellant in the case, in that the evidence of identification adduced by the Prosecution do not support the finding of guilt against the Appellant.

3. The Learned Trial Judge's finding against the Appellant is flawed as the evidence of the accomplice is not corroborated in any material particular.
 4. There was no evidence to prove any agreement to pursue any criminal act of drug trafficking between the Appellant, the 1st Accused and Mohammed Taufique and hence the Learned Judge erred in convicting the Appellant by inferring that he had played an apparent role in the agreement between the 1st Accused and Taufique.
 5. The Learned Trial Judge erred in convicting the Appellant of trafficking in 27 bullets of heroin when the same was never proved before the Court and the contents of the same were never proved.
 6. The conviction is against the weight of the evidence." (verbatim)
6. At paragraph 3 of the judgment it is stated that "The prosecution relied mainly on the evidence of accomplice Mohamed Taufique a Pakistani national who was made a witness for the prosecution under section 61 A (2) of the Criminal Procedure Code Cap 54 after he was made an offer under section 61 A (1) of the said Code". **Section 61(A) of the Criminal Procedure Code** under the heading 'Conditional offers by Attorney-General states:
- "61A.(1) The Attorney-General may, at any time with the view of obtaining the evidence of any person believed to have been directly or indirectly concerned in or privy to an offence, notify an offer to the person to the effect that the person-
- (a) would be tried for any other offence of which the person appears to have been guilty; or
 - (b) would not be tried in connection with the same matter,
- on condition of the person making a full and true disclosure of the whole of the circumstances within the person's knowledge relative to such offence and to every other person concerned whether as principal or abettor in the commission of the offence.
- (2) Every person accepting an offer notified under this section shall be examined as a witness in the case.
 - (3) Such person if not on bail may be detained in custody until the termination of the trial.

(4) Where an offer has been notified under this section and the person who has accepted the offer has, either by wilfully concealing anything material or by giving false evidence, not complied with the condition of the offer, the person may be tried for the offence in respect of which the offer was so notified or for any other offence of which the person appears to have been guilty in connection with the same matter.

(5) The statement under caution made by a person who has accepted an offer under this section may be given in evidence against the person when the person is tried as stated in subsection (4).”

7. Mohamed Taufique alias ‘Baba’, testifying before the court in October 2009, had stated that he was involved in trafficking in drugs with two others in Pakistan. They were to get involved in drug trafficking in the Seychelles and Taufique had come to the Seychelles for that purpose in November 2007. He was to act as a broker. Their Seychelles’ contact was Brigitte Mancienne. The arrangement was that Taufique would act as broker with locals and the drugs were to be sent through other persons from Pakistan.
8. His first visit was in November 2007 where he met Brigitte with Francis whom she introduced to him as her boyfriend. On conclusion of their first transaction with Brigitte he had gone back to Pakistan.
9. He had returned on the 5th of February 2008 and had stayed at Sunrise Hotel. The 3rd count on which the Appellant was convicted was in relation to what took place during this visit. His other counterpart in Pakistan had sent another Pakistani namely Jabe Baig with drugs and according to Taufique on this occasion “there were 27 bullets. Each bullet was 12 grams”(verbatim). On his arrival at Sunrise Hotel, he had contacted Brigitte and asked her to come to collect the “27 bullets”. He had also asked her to bring some Seychelles rupees to buy food before noon, as he did not have any Seychelles currency with him. He had also contacted a pirate taxi driver by the name of Tendo, whom he had met on his earlier trip to the Seychelles, namely in November 2007, to come and meet him so that he could give him money to buy food for him before noon. When Tendo came, Brigitte had not yet arrived and therefore they had sat in the room and started to talk. Later Brigitte had come into his room with the Appellant and introduced him as Marc Woodcock, her boyfriend. The latter part of the evidence, namely giving the name of the Appellant as Marc Woodcock, is hearsay and inadmissible. According to Taufique he had then requested Tendo to go outside as he wanted to deal with Brigitte and that he will call him when that was done. He had then discussed with Brigitte regarding the 27 bullets and taken “two of the bullets of heroin” and shown it to Brigitte. Brigitte had then given him Rs 6000/- for which he had given her in exchange 500 USD. They had agreed at a sum of 11,000 Euros for

the 27 bullets. She had then pulled out about 3000-4000 USD and placed it on the table and said that was an advance payment. He had refused to accept the dollars as it was difficult to exchange it in Pakistan and asked that he be paid in Euros. While they were discussing Tendo had come into the room. He had then given him some money to buy food for him at Beau Vallon. Thereafter Brigitte had put the dollars back into her purse and gone, promising to return at night to take the drugs. Brigitte had come back around 11 pm with the Appellant to the hotel. He had then given Brigitte the “27 bullets of heroin in a brown plastic”. She had then opened the packet and checked the drugs while the Appellant had given him a plastic bag which contained 11,000 Euros. Thereafter they had gone away. Taufique had left Seychelles three days later.

10. Taufique had come back to the Seychelles on the 18th of March 2008 and had another transaction with Brigitte and the Appellant and left Seychelles again.
11. He had come back again for drug transaction to the Seychelles on the 18th of May 2008. On this occasion he speaks of having had a telephone conversation only with Brigitte but there had been no transaction as he had been arrested by the NDEA on the 27th of May. Thus the last time that Taufique had met the Appellant was on his visit to the Seychelles on the 18th of March 2008. The identification of the Appellant in court had taken place 1.7 years after that meeting.
12. Under cross-examination, Taufique had admitted that he had been charged for importation of drugs to Seychelles on the 27th of May 2008 and had been on remand since then. He had admitted entering into a deal with the prosecution to testify against Brigitte and the Appellant in this case and signing an agreement in this regard. Taufique had admitted that the understanding was that the case against him for importation would be dropped and he could go back to Pakistan if he implicates Brigitte and the Appellant. Taufique has however said that what he had told the police and in court about the Appellant’s involvement is true. In fact Counsel for Brigitte Mancienne had suggested to Taufique that the police had told him that if he were to tell the truth about everything he would be deported to Pakistan and that it was on that basis he gave a statement and that is what happened. This has been accepted by Taufique. The evidence on record does not indicate that at the time of giving the statement Taufique had pointed out to the Appellant as Brigitte’s associate. We do not find the statement of Taufique on record. The entirety of the cross-examination had centered on Taufique accepting a pardon to testify against Brigitte and the Appellant. The cross examination of Taufique clearly shows that the defence had accepted that Taufique was having dealings with persons in the Seychelles in dangerous drugs. The main challenge to Taufique’s evidence is on the basis that he is a self-confessed drug trafficker who should not be relied upon.

13. Daniella Adeline testifying before the Court had said that Mohamed Taufique was her boyfriend for about 9 months during the period November 2007- 2008, that Taufique was in the habit of travelling to Pakistan and he visited Seychelles every four weeks. During his visits he used to stay at Coral strand Hotel, Villa De Rose Guest house, a bungalow near Beau Vallon Hotel and Sunrise Guest House. Sometime in April (year not given, we have to assume it was in 2008 as her relationship with Taufique had started in November 2007), Taufique had called her to say that Brigitte Mancienne would bring some money for him and for her to collect it and keep it for him and as stated Brigitte had come with the money and had given it to her saying that the money was for Taufique. Taufique in his evidence before court had not confirmed this and instead had stated under cross examination that he had not given Daniella any money for safe keeping. Also since Taufique had not been questioned about this specifically, Daniella's evidence of the conversation with Taufique is hearsay. The next day itself Brigitte had called to say that the money was not for Taufique and that it was hers and said she would come to collect it. Thereafter the Appellant whom she had identified in Court had come to collect the money. Daniella's identification of the Appellant in court had been about five years thereafter.

14. After that visit by the Appellant, Taufique had visited Seychelles and she had met the Appellant and Brigitte on two occasions. According to Daniella the first occasion was: "One time I was at work and after work I saw them leaving the Sunrise Guest House". On the other occasion: "I was in the room and I saw them outside the Sunrise Guest House talking". It is clear from her evidence that she speaks of incidents after the 5th of February 2008, namely April 2008 and thereafter, and we cannot therefore see the relevance of her evidence to the charge on which the Appellant had been convicted in the absence of the prosecution failing to draw any connection between the two incidents. Under cross examination Daniella had said that she cannot recall being at Sunrise Guest House on the 5th of February 2008. She had also said that she had never heard Taufique talking to anyone and was unaware of any agreements Taufique had with others. Facts being such, her evidence in whole have no relevance to the charge on which the Appellant was convicted.

15. Jules Rosalie had been the other witness for the prosecution. He is the pirate taxi driver referred to by Taufique in his evidence as 'Tento'. He had said that he used to buy food for Taufique. According to Rosalie in the year 2008, the month of which he could not remember Taufique had been staying at Sunrise guesthouse. He had spoken of an incident in the year 2008, without specifying a day or month, when he went to Sunrise guesthouse after receiving a call from Taufique to get him some food. He had there seen "Brigitte and also a man they called him Woodcock or Solo". His evidence pertaining to the name of the Appellant is hearsay. He had stated on this visit "I do not know how they called it but I saw 2 cling film bullets on the table the contents of which he did not know, I went to buy the food and then when I came back I did not

see the 2 bullets on the table”. When he came back with the food for Taufique, Brigitte and Solo had not been there and the bullets he had seen earlier on the table were also not there. On being asked to describe the person introduced to him as Solo he had said: “He was a Rasta man and I don’t know him”. On being questioned whether Solo was in court his answer had been a categorical “No”. We therefore find that Jules Rosalie’s evidence does not corroborate the evidence of the accomplice nor does it support the prosecution case in anyway.

16. In our view the essential issue arising in this case is the evidence of identification of the Appellant, which is the second ground of appeal and which has been completely overlooked by the learned Trial Judge. In any indictment the sine qua non of a conviction is the identity of the person that is alleged to have committed the crime. Mohamed Taufique, who is a foreigner, had made a dock identification of the Appellant 1.7 years after he last met him. He had not been asked to give a description of the Appellant before he had pointed out the Appellant in the dock. When you compare his evidence with that of Jules Rosalie who had described the man who was introduced to him by Brigitte Mancienne as Woodcock or Solo as a Rasta man, and the learned Trial Judge’s comment at paragraph 18 of the judgment that: “Witness Jules even though he named the 2nd accused, it appears was unable to identify the 2nd accused as the 2nd accused the time he first met him 5 years ago had been a Rasta but now had short hair and was clean shaved”; a serious doubt arises in our minds as to whether the Appellant was pointed out by Taufique merely because he happened to be in the dock with Brigitte Mancienne, with whom he had several dealings. Witness Jules had given the name of the Appellant, based on hearsay evidence.
17. We cannot overlook Taufique’s admitted eagerness to get the pardon and get away from the country after implicating Brigitte and the Appellant which was the agreement he had with the prosecution. Had he failed to identify the Appellant the agreement would have fallen apart and section 61A (4) of the Criminal Procedure Code, referred to at paragraph 6 above, could have come into operation. The question of a possible mistaken identification by Taufique had never been considered by the Trial Judge. It is not Jules Rosalie who had given an explanation as to his inability to identify the Appellant but the learned Trial Judge himself. Also Taufique in his evidence had not mentioned about the 1st Appellant being a “Rasta man” and so is Daniella Adeline. Daniella too had made a dock identification of the Appellant five years after she had last seen him. Daniella, a Seychelloise had not been asked whether she had seen the Appellant during the past five years, after she had last seen him with Taufique. However Daniella’s evidence loses its significance as she speaks of seeing the Appellant in April 2008 and that is after the date set out in the charge, namely February 2008. We also note that both Taufique and Daniella according to the evidence as recorded, have had only two brief encounters with the Appellant. Had the learned Trial Judge dealt with the issue of identification and commented about the

discrepancy in the evidence between Taufique and Jules Rosalie rather than himself seeking to find an explanation as to the inability of Jules Rosalie to identify the Appellant in the dock and also adverted to the fact that Taufique's identification of the Appellant was 1.7 years after he had last seen him and Daniella's identification of the Appellant was five years after she had last seen him and that too, on a date after the date set out in count 3, we could have known the learned Trial Judge's views on this material issue. His failure to do so is fatal to the conviction of the Appellant.

18. We are of the view that although dock identification remains legally admissible, it should be relied upon with extreme caution, especially in cases like this, where there has been no identification parade before and a long time had elapsed between the incident and when the dock identification took place. We have to bear in mind that there is always the tendency for a witness to merely point out the persons arraigned in the dock and in the case of Taufique because he saw the Appellant in the dock with Brigitte Mancienne whom he knew well and also because of his desire to have the case against him for importation withdrawn by implicating the Appellant as per his agreement and getting back to Pakistan. Taufique had much to gain and a motive to identify the Appellant as Brigitte's companion whom he met 1.7 years ago.

19. In **Blackstone's Criminal Practice at D21.29** it is stated that: "*when the witness is asked to identify the accused in the dock at his trial the accused is at a great disadvantage – the eyes of the witness are bound to go to the person sitting in the dock*". In **Cross & Tapper on Evidence 12th edition, p 709** it is stated: "*The least satisfactory method of all is to ask the witness to identify the man in the dock as the criminal*". In **R V Tricoglus (1976) 65 Cr App Rep 16** it was held: "*It has all the disadvantages of a confrontation, and compounds them by being still more suggestive*". In the **South African case of Maradu 1994 (2) SACR 410 (W)** the court held that the danger of a dock identification is the same as that created by a leading question in examination-in-chief, which is normally inadmissible: it suggests the answer desired. Commenting on the disadvantages of dock identification it was said in the **Zimbabwean case of Mutsiziri 1997 (1) ZLR 6** "*Everything about the atmosphere of the court proceedings points to the accused and to him alone, as the person who is to be identified by the witness*".

20. We therefore allow the appeal on ground 2. In view of our allowing the appeal on ground 2, namely on the issue of identification, the need to consider grounds 1, 3, 4, and 6 does not arise for determination.

21. However we wish to express our views on the 5th ground of appeal as it is of interest and for future guidance, namely that "the Learned Trial Judge erred in convicting the Appellant of trafficking in 27 bullets of heroin when the same was never proved (*sic* –

should be produced) before the Court and the contents of the same were never proved.”. It is to be noted that the essential element in the conspiracy to traffic in drugs as laid down in count 3 was to pursue a course of conduct by paying the said Mohammed Taufique 11,000 Euros to obtain heroin, stored in 27 bullets, from him; and not trafficking in 27 bullets of heroin. It is to be noted that ‘trafficking’ as per its definition in the Misuse of Drugs Act also involves “to do or offer to do any act preparatory to or for the purposes” of selling or distributing controlled drugs. Thus in view of the way the charge had been particularized there was no need to produce the 27 bullets and or to prove that the contents were heroin. We would go on to say that even if the contents of the 27 bullets did not turn out to be heroin the accused could have been found guilty of conspiracy in view of the provisions of section 28(b) set out in paragraph 4 above which states that even if “the existence of facts rendered the commission of the offence impossible”. The essence of the offence of conspiracy under section 28 of the Misuse of Drugs Act, is the agreement. When two or more persons agree to carry their criminal scheme into effect, the very plot is the criminal act itself. This is made clear by the words “A person who agrees with another person or persons that a course of conduct shall be pursued”. Nothing need be done in pursuit of the agreement. This is made clear by the words “which if pursued will necessarily amount to or involve the commission of an offence”. Repentance, lack of opportunity, failure or impossibility are all immaterial. An agreement may amount to a conspiracy even if it contains some reservation, express or implied. If for instance, it is no more than that a pre-arranged crime will not be attempted if a policeman is at the scene, there is an agreement amounting to conspiracy to commit the crime. We therefore dismiss ground 5 of appeal.

22. In view of our allowing the appeal on ground 2 we quash the conviction and acquit the Appellant forthwith.

A. Fernando (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 21 April 2017