

IN THE SEYCHELLES COURT OF APPEAL

[Coram: A. Fernando (JA), M. Twomey (JA), B. Renaud (JA)]

Criminal Appeal SCA 04/2018

(Appeal from the Supreme Court Decision in CR 42/2015)

Alex Monthy

Appellant

Versus

The Republic

Respondent

Heard: 05 December 2018

Counsel: Mr. Basil Hoareau for the Appellant
Mr. Hernanth Kumar for the Respondent.

Delivered: 14 December 2018

JUDGMENT

M. Twomey (JA)

[1] The Appellant was charged with the offence of conspiracy to commit the offence of arson contrary to section 381 of the Penal Code punishable under section 318 of the Penal Code. As the particulars of the offence are relevant to the appeal, they are hereunder set out:

Alex Monthy on or around the 28 May 2015 conspired with another, namely Francisco Zialor to commit the offence of arson on a boat belongs to Daniel Monthy (sic).

[2] The Appellant was also charged with the offence of procurement of a person to commit arson. It is noted that the Appellant was tried together with Francisco Zialor (the Second Accused) for the offence of conspiracy to commit arson and the offence of arson.

[3] The salient facts of the present case are the following:

The Prosecution's case

[4] It was the case for the Prosecution that the Appellant arranged with the Second Accused to set his brother's boat, the *Madras*, on fire as it lay anchored in Anse Boileau bay on the night of 28 May 2015. The Second Accused had gone to the Appellant's house with one Ron Francourt to make the arrangements and had proceeded to Anse Royale together with Ron Francourt and Jean Paul Lozé to borrow a small vessel, (the *Kelly*) to commit the offence. They moored the *Kelly* at Grand Anse. The fuel was paid for by the Appellant and delivered by him in his white pick-up to the Second Accused at his home.

[5] Francourt had travelled with his sister Annie to Grand Anse in her car to buy the fuel so that they would not be recognised. As they took too long to return, the Second Accused had proceeded with Lozé from Grand Anse in the *Kelly* to where the *Madras* was moored at Anse Boileau. There they set it on fire. In the process, the Second Accused got burnt and jumped into the sea. Lozé corroborated some of this narrative but stated that he had himself jumped off the *Kelly* before it reached the *Madras*, had swum to the rocks in Barbarons and watched it burn from there. The Second Accused stated that he was promised SR75, 000 for the operation but was never paid. He went into hiding, first at Barbarons and later to an apartment at Au Cap paid for by the Appellant. He was arrested by the police at the apartment on 25 June 2015. Daniel Monthy, the Appellant's brother explained that the motive for the arson was the enmity between himself and his brother. His brother had threatened to burn his boat and they had had arguments and fights before. In a previous incident the Appellant's boat had also been set on fire and it was believed that Daniel Monthy was responsible for it.

The Appellant's case

[6] The Appellant gave an unsworn statement from the dock in which he stated that he had not done anything with regard to burning his brother's boat or sending anyone to do it. He knew the Second Accused through buying fishing bait from him. He stated that the

Madras was not his brother's boat but belonged to Errol Dias. He stated that he had five brothers and got on with all of them except for his brother Daniel.

[7] Roddy Allisop from the Seychelles Fishing Authority confirmed that Errol Dias was registered as owner of the boat *Madras* and Daniel Monthy as the skipper.

[8] Gerald Monthy, the Appellant's brother, also testified. He produced a video recording of Daniel Monthy, Mr. Patrick Pillay (then Member of the National Assembly for Anse Boileau and Speaker for the National Assembly), Mr. Clifford Andre (then Counsel for the Second Accused) and the Second Accused in conversation at the courthouse on 10th April 2017. It was the Appellant's case that this clearly showed some form of collusion between the Second Accused and his brother Daniel in terms of fitting up the Appellant for the arson.

Conviction and sentence

[9] The Appellant was found guilty on the charge of conspiracy and sentenced to 8 years' imprisonment and fined SR 300, 000, of which SR 250, 000 was to be paid as compensation to Daniel Monthy and Errol Dias and should they default in paying, a further consecutive term of 6 months' imprisonment was to be served. No finding was made with regard to the charge of procurement, which the trial judge found should have been an alternative to the charge of conspiracy. The Second Accused was found guilty of both charges, that is, conspiracy and arson. In sentencing him the learned trial judge found a strong mitigating factor in his favour in the fact that he had towards the end of the case "decided to tell the truth and seek forgiveness from the complainant". He was sentenced to 6 years' imprisonment for each offence, with such sentences to run concurrently. He was also ordered to pay a fine of SR 50, 000, and in default a further consecutive term of 6 months' imprisonment.

The Appeal

[10] The Second Accused did not appeal against his conviction and sentence, however the Appellant has appealed against both his conviction and sentence on the following 25 grounds:

Against conviction

1. The learned trial judge erred in law and on the evidence in dismissing the Appellant's submission of no case to answer.
2. The decision of the learned trial judge to convict the Appellant is unreasonable and cannot be supported by the evidence.
3. The learned trial judge erred in law and on the evidence in failing to properly analyse and evaluate the evidence.
4. The learned trial judge erred in law and on the evidence to take into account, and attach sufficient weight to, material inconsistencies in the prosecution witness's testimony and material inconsistencies between the testimony of prosecution witnesses.
5. The learned trial judge erred in law in failing to take into account, and attach sufficient weight to, material inconsistencies in the testimony of the 2nd Accused Person and material inconsistencies between the testimony of prosecution witnesses and the 2nd Accused Person.
6. The learned trial judge erred in law in failing to warn himself in terms of the Turnbull guidelines in respect of the identification of the Appellant's voice by Jean-Paul Lozé.
7. The learned trial judge erred in law and on the evidence in holding that Jean-Paul Lozé had identified the voice of the Appellant.

8. The learned trial judge erred in law and acted contrary to Article 19 of the Constitution in allowing Jeffrey Winsley Antoine to testify before the Court in respect of material matters which had not been disclosed to the Appellant in accordance with Article 19 (1) (c) of the constitution.
9. The learned trial judge erred in law and on the evidence in failing to attach sufficient weight to the video evidence produced as part of the Appellant's defence.
10. The learned trial judge erred in law and on the evidence in failing to properly analyse, and attach sufficient weight to, the fact that both the 2nd Accused Person and Jean-Paul Lozé had been influenced by Daniel Monthy to falsely implicate the Appellant, in their testimony.
11. The learned trial judge erred in law and on the evidence in failing to hold that the case was one, whereby it was proper and necessary to give a corroboration warning in respect of the testimony of the 2nd Accused Person, Jean-Paul Lozé and Daniel Monthy.
12. The learned trial judge erred in law and on the evidence in failing to hold that the case was one, whereby it was unsafe and dangerous to act on the uncorroborated evidence of the 2nd Accused person, Jean-Paul Lozé and Daniel Monthy.
13. The learned trial judge erred in law and on the evidence in failing to properly consider what evidence is capable of amounting to corroboration.
14. The learned trial judge when analysing and weighing the testimony of the 2nd Accused Person, erred in law and on the evidence in failing to address his mind to the fact that the 2nd Accused Person had the opportunity to hear the testimony of all the witnesses, prior to him testifying.

15. The learned trial judge erred in law and on the evidence in failing to hold that the vessel was owned solely by Errol Dias.
16. The learned trial judge erred in law and on the evidence in failing to hold that there was variance between the evidence and the charge.
17. The learned trial judge erred in law and on the evidence in failing to hold that the prosecution had not discharged the burden of proving the charge which it had elected to particularise in the charge.
18. The learned trial judge erred in law and on the evidence in treating the words “belongs to Daniel Monthy” – in the charge – as mere surplusage.
19. The learned trial judge erred in law in failing to hold that the words “belongs to Daniel Monthy” – in the charge – informed the Appellant of the charge he had to meet, as required by Article 19 of the Constitution.
20. The learned trial judge erred in law in failing to hold that the charge had not been framed in accordance with Section 114 (c) (ii) of the Criminal Procedure Code.
21. In respect of the telephone records, the learned trial judge erred in law and on the evidence in failing to hold that there were valid and legitimate reasons for the Appellant to contact the 2nd Accused Person.
22. The learned trial judge erred in law in relying on the previous inconsistent statements of Daniel Monthy – produced to establish his previous inconsistent statements – for the truth of their contents.

Against sentence

23. The learned trial judge erred in law in imposing an 8 years sentence of imprisonment on the Appellant, in excess of the maximum sentence of seven years provided by law.
24. The sentence imposed on the Appellant is manifestly harsh and excessive in all the circumstances of the case.
25. The learned trial judge erred in law and on the evidence in imposing a fine of Seychelles Rupees Three Hundred Thousand (SR300, 000) on the Appellant and from which Errol Dias and Daniel Monthy is each to receive the sum of SR125, 000.

[11] We note that ground 8 was not pursued at the hearing of the appeal and we do not intend therefore to consider that ground of appeal. With respect to the other grounds of appeal, we do not intend to treat them separately but will consider them as raising the following issues:

1. The dismissal of the submission of no case to answer.
2. The errors in the learned trial judge's assessment of the evidence.
3. The identification of the Appellant's voice.
4. The weight of the video evidence.
5. The inconsistencies in the evidence of the Second Accused and Mr. Lozé.
6. The ownership of the boat.
7. The variance between the charge and the evidence adduced.
8. The error in sentencing in excess of the maximum prescribed sentence.
9. The sentence being "manifestly harsh and excessive".
10. The illegality of the imposition of the fine.

(1.) The dismissal of the submission of no case to answer

[12] Counsel for the Appellant has averred that the submission of no case to answer at the close of the prosecution case should have been upheld. He relied on the authority of *R v Stiven* (1971) SLR 137 for the proposition that a submission of no case to answer should be

upheld where there has been no evidence to prove an essential element of the alleged offence and where the evidence adduced by the prosecutor has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it. He has stated that in the present case, the evidence of the prosecution was so discredited by the inconsistencies in its witnesses' evidence, namely that of Messrs Lozé, Appasamy and Daniel Monthy, that there was no prima facie case to put before the accused for a defence.

[13] In particular, he directed the court's attention to the fact that Mr. Lozé in trying to inculcate the Appellant had either fabricated evidence or tailored his evidence. He submitted that in so doing Mr. Lozé had contradicted himself on many occasions and his testimony was full of material inconsistencies so as to discredit his evidence entirely. In particular, his identification of the pick-up as one belonging to the Appellant but which matter he failed to mention in his statement to the police or in his evidence-in-chief meant that it was not evidence that could be relied on.

[14] Similarly, the incredibility of his identification of the Appellant's voice on the phone over the noise of the boat would mean that the evidence would have to be excluded.

[15] It was also impossible for him to have seen the boat engulfed in fire and to have seen the Second Accused also on fire from the distance he claimed he was from the boat when it erupted in flames. He would have to have been on the boat. His evidence to this effect could therefore also not be relied upon.

[16] Further, he submitted, there were several discrepancies between the statement Lozé gave to the police and the evidence he gave in court.

[17] With regard to Daniel Monthy's evidence, discrepancies were evident with regard to the different expressions or statements he had uttered regarding the threats made by the Appellant to him. Further, in stating that his lawyer had written to the Appellant warning

him about the threats of setting fire to his boat when the letter only mentioned general threats. It was submitted that these are material inconsistencies.

[18] He further submitted that the evidence of Ron Francourt was not truthful as he was an employee and close friend of Daniel Monthy.

[19] Counsel for the Respondent, Mr. Kumar, has submitted that a prima facie case had been made out at the close of the prosecution case, and after the examination of the evidence by the trial judge the submission of “no-case to answer” was dismissed.

[20] We note that the learned trial judge, after examining the evidence, found that apart from the evidence of the three witnesses abovementioned, there was also phone evidence indicating communication between the Appellant and the Second Accused. He also stated that in terms of *Stiven*, the evidence of the three witnesses on material aspects of the offence could not be totally discredited or be ruled manifestly unreliable. He held that although the evidence of the witnesses had been vigorously challenged, it could not be said that there was no evidence to prove the essential elements of the offence.

[21] We are of the view that the learned trial judge’s ruling was correct in the circumstances of the present case. In *Green v R* (1972) SLR 55 it was held that the considerations which apply at that stage of the trial are purely objective and the trial court is not asked to weigh the evidence. In *R v Gerard Hoareau* [2015] SCSC 567 (18 November 2015) the Supreme Court found that at the close of the prosecution case, only some minimal evaluation of evidence is required to determine whether the prosecution has established a prima facie case.

[22] In *R v Galbraith* [1981] 73 Cr. App. R. 124, the following principles were enunciated:

“(1) *If there is no evidence that the crime alleged has been committed by the accused person there is no difficulty. The judge will of course stop the case.*

- (2) *The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence.*
- (3) *Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case.*
- (4) *Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness' reliability or, other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the accused person is guilty, then the judge should allow the matter to be tried by the jury.... There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge.”(at 127)*

[23] The courts in Seychelles have consistently followed the above principles (See *R v Marengo and ors* (2004) SLR 116 and *R v Matombe (No. 1)* (2006) SLR 32).

[24] Viewed through the prism of *Galbraith*, it cannot be said that in the present case, with the prosecution's evidence taken at its highest, a jury properly directed could not properly convict on the evidence at the close of the prosecution case. We therefore see no merit in this ground of appeal.

(2. – 5) The errors in the learned trial judge's assessment of the evidence; the identification of the Appellant's voice; the weight of the video evidence; the weight of the evidence of the Second Accused and Mr. Lozé given the inherent inconsistencies

[25] We have already discussed some of the discrepancies in the evidence of the main prosecution witnesses above. Mr. Hoareau, Counsel for the Appellant has submitted that

apart from assessing the inconsistencies in this evidence, the learned trial judge also failed to attach sufficient weight to the weakness in the evidence adduced.

[26] It is trite that at common law a previous inconsistent statement is only admissible to discredit a witness. In this regard, we do find several inconsistencies with prior statements in the statements of Mr. Lozé, as highlighted by Mr. Hoareau. With regard to his recognition of the Appellant's voice, he gave several versions as to how and why he came to this conclusion. We do not find it credible that the Second Accused had accidentally put his phone on speaker; nor that the boat was going slow, first, because it had engine failure; then, because there was a change in who was steering; and finally, because there were some rocks nearby. These explanations appear contrived. The claim of recognition of the Appellant's voice is embellished and exaggerated. Similarly to the trial judge, we are of the view that Lozé did participate in setting the *Madras* alight. Hence, his account of jumping off the *Kelly* at Barbarons is not credible. He was obviously trying to exculpate himself.

[27] However, in keeping with the principle of divisibility of credibility, although that part of Lozé's evidence is not reliable, it does not necessarily mean that his evidence should be rejected as a whole. A compartmentalised and fragmented approach to the assessment of the evidence in any particular case is not advisable. The evidence of a witness must always be assessed in light of the totality of the evidence adduced in the proceedings.

[28] In the Sri Lankan case of *Vithanalage Anura Thushara De Mel & Ors v AG Case no. SC/TAB/2A – D/2017* discussing *R v Julis* 65 NLR 505, it was held that where untainted evidence could be safely separated from inaccurate evidence due to faulty observation, exaggerations and embellishments, the court was entitled to act on such untainted evidence and discard and sever inaccurate and false evidence.

[29] In the Canadian case of *R v Cameron* 2017 ABQB 217 (CanLII) it was stated that the exercise of assessing evidence involves considering the "whole tapestry" (or the "whole scope and nature") of the evidence. In *JMH*, 2009 ONCA 834 (CanLII) the court stated

that it was an error of law to evaluate reliability and credibility on the basis of individual pieces of evidence without looking at the totality of the evidence.

[30] In the South African case of *S v Trainor 2003(1) SACR 35(SCA)* the court stated:

“A conspectus of all evidence is required. Evidence that is reliable should be weighed alongside such as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of the evidence must of necessity be evaluated as must corroborative evidence, if any.”(at 41b-c)

[31] We have adopted the same approach in Seychelles. In *Volcere v R [2014] SCCA 41* (12 December 2014), Domah J held that

“Judicial appreciation of evidence is a scientific rationalization of facts in their coherent whole not a forensic dissection of every detail removed from its coherent whole.”

[32] Hence, although there are parts Lozé’s narrative that are not reliable, we do not find that his testimony as a whole should not be discarded. We believe that he has exaggerated and embellished slightly to try to distance himself from guilt. Even if we exclude his inconsistent evidence (specifically relating to the fact that he recognised the Appellant’s voice), much of what he testifies to is corroborated by other evidence rendering him credible on other matters. In particular, the fact that the Appellant communicated with the Second Accused is supported by phone records. On the 28th May 2015 calls and text messages were exchanged between phones used by the Appellant and the Second Accused. That the two persons communicated on several occasions on the day of the incident is corroborated by Ron Francourt. This communication has not been satisfactorily explained by the Appellant.

[33] We also do not find the inconsistencies in relation to Lozé’s identification of the Appellant’s pick-up sufficiently material to exclude it. He identified a white Mitsubishi pick-up with which he was familiar and which he observed from where he was sitting.

The fact that Ron Francourt did not mention the white pick-up is neither here nor there. What a particular witness observes and hears may not be the same experience for another witness. An inference of unreliability by one of the witnesses on this basis is illogical. In the same vein, the inconsistency of the Second Accused's version of whether the plan was hatched one week or two days before it was put into action is not a material inconsistency.

[34] We fail to see why Counsel has made such an issue of the video evidence. That evidence, as we have said, shows Mr. Daniel Monthy, Mr. Patrick Pillay, Mr. Clifford Andre and the Second Accused in conversation at the courthouse on 10th April 2017. It is certainly not the only inference that can be drawn from this gathering that witnesses were colluding. Counsel for the Appellant accepted that complaints were made by Mr. Pillay to the Judiciary about his constituent, Daniel Monthy that the case was taking an inordinate time to complete. Further, the inference that the whole of the Second Accused's evidence ought to be discredited on the basis that he denied knowing Daniel Monthy when he was clearly seen in his company and had taken a lift to court with him is untenable. One may be acquainted with someone without knowing him intimately. In this regard, we have already addressed the issue of the danger of compartmentalizing evidence.

[35] In respect of both Lozé's and the Second Accused's testimony, especially with regard to the fact that they had been told about the agreement between the Appellant and the Second Accused to set fire to the *Madras*, Mr. Hoareau has submitted that accomplice evidence can only be admitted if an adequate warning is given as to the dangers implicit in the situation. He submitted that the court was not empowered to change the law in this respect as it did in the case of *Dugasse v R* (2013) SLR 67 and that only parliament can effect such a change. This is certainly a novel suggestion with regard to the law in Seychelles, but one which we must categorically reject. We remain of the view that common law rules (judge-made law) as adopted by Seychelles and the principle of judicial precedent, together with situations of legal lacunae (as is the present case relating to the absence of statutory provisions for accomplice evidence), dictate that

judges interpret statutory law and case law but make decisions according to the circumstances of each case and societal developments.

[36] In *Adrienne & Another v R* SCCA 25 (11 August 2017), Fernando JA explained the history of the administration of warnings in cases involving accomplice evidence and the practice's rationale. In tracing the evolution of the rule from its mandatory nature in the common law to its abrogation in the English Criminal Justice and Public Order Act of 1994 and the developing jurisprudence which held that the warning was discretionary and left to the trier of fact, he stated that with respect to our own jurisdiction,

“[t]o say that every accomplice is less worthy of belief than another witness is an affront to their dignity and violates the right guaranteed under article 27(1) of the Constitution”.

[37] In this regard, and in comparative juxtaposition of the abandonment of the mandatory corroboration warning in sexual cases, he held in *Dugasse v R* (2013) SLR 67, relying on *Lucas v R* (2011) SLR 313, that it was not obligatory to give a corroboration warning in cases involving accomplice evidence. Rather, such a warning should be left to the discretion of judges to look for corroboration when there is an evidential basis for it.

[38] We apply these authorities to the present appeal as did the learned trial judge. We do find that Lozé, Francourt and the Second Accused were both accomplices and their evidence ought to be treated with caution, but as we have already established, there is further corroborative evidence to support their narration of the events. The phone records are one such piece of evidence, as is the evidence of Jude Denis, the fisherman who lent the Second Accused the *Kelly*. Further, the Second Accused's scarring from the fire is certainly compelling circumstantial evidence of the fact that he set fire to the *Madrás*. He had no motive of his own to burn the boat. He was not involved in any brawl with the Monthys. The learned trial judge therefore rightly found credible his evidence that he was paid by the Appellant to set fire to the *Madrás*.

[39] The testimony of Daniel Monthy further corroborates the version of fact accepted by the learned trial judge. Yet a further piece of corroborative evidence is that of Ronny Appasamy, who testified as to the close relationship between the Appellant and the First Accused.

(6.) The ownership of the boat

[40] Mr. Hoareau has submitted that the learned trial judge erred in not holding that the *Madras* was owned solely by Errol Dias and not Daniel Monthy. We do not find merit in this submission simply because the evidence is against it. Although it is not disputed that, insofar as the Seychelles Fishing Authority is concerned, the boat's owner is registered as Errol Dias and its skipper as Daniel Monthy, we also have the evidence of Mr. Dias that the *Madras* is jointly owned by himself and Mr. Daniel Monthy. The latter also testified to that effect. It is not unusual in everyday life to have a house or a car registered in the name of an owner and for another person to have some beneficial ownership of it. There is no reason it would not be possible to have the same arrangement for a fishing vessel.

(7.) The discrepancy between the charge and the evidence adduced

[41] In laying the conspiracy charge against the Appellant, the words "*on a boat belongs to Daniel Monthy*" was included in the indictment. Apart from being grammatically incorrect, the inclusion of those words in the charge has been the cause of a much ink being spilled.

[42] Mr. Hoareau has submitted, relying on the authorities of *Krishnamart Pillay v R* (1993-1994) SCAR 21, that since it was established that the *Madras* belonged to Errol Dias and not Daniel Monthy there was a variance between the evidence and the particulars of offence, and that therefore the prosecution had failed to discharge the burden of proving the charges it elected to particularise in the indictment.

[43] *Krishnamart Pillay* concerned a charge of conspiracy to commit theft. The particulars of the offence were to the effect that three individuals had conspired to steal the tax

documents of Mr. Krishna Murthy Pillay from the Seychelles Trade Tax Department. The evidence adduced was that the documents in question pertained not to Mr. Pillay but to a company of which he was a director. This was brought to the attention of the prosecuting counsel by the trial judge but he chose to disregard the clear indication from the court. The Court of Appeal held that Mr. Pillay and the company were two distinct juridical entities. The goods stolen pertained to one and not to the other. They referred to the Mauritian case of *Pillay v R* (1955) MR25 in which the Appellant was convicted of unlawful possession of stolen property obtained by means of larceny committed on certain premises. The evidence adduced showed that the larceny had been committed on premises other than those mentioned in the information. The conviction was quashed and the court found that the appellant had in affect been convicted of an offence upon evidence relating to the commission of another offence.

[44] Mr. Hoareau also referred us to the case of *Samson v R* (unreported) SCA 11/1998 in which the appellant was charged with importing cannabis and the evidence revealed that he had in fact imported cannabis resin. The Court of Appeal relying on its judgment in *Pillay* (supra) quashed the appellant's conviction on the basis of the variance between the evidence and the charge. The court also referred to the English case of *R v Gregory* [1972]56 Cr. App R. 441,[1972] ALL ER 861 in which the appellant was charged with handling a stolen starter motor, "the property of William Alan Wilkes". The Court of Appeal held that the trial judge was wrong in treating the words as surplusage as they informed the defendant of the nature of the case.

[45] We note that the authorities relied upon by the Appellant all stem from the principles espoused in *Gregory* (supra). The Court in *Gregory* upheld an appeal challenging the amendment of a charge sheet to strike the name of the owner of the property at issue in a felony receiving charge. The Court ruled that the name of the owner of the property was not "mere surplusage" in a receiving case, and that the allowance for an amendment at a late stage in the trial, accompanied by a direction to the jury that it was competent to convict the accused of receiving stolen property belonging to any unspecified owner, was a violation of the accused's right to a fair trial.

[46] The Court in *Gregory* made the holding based on four distinct reasons:

1. The Recorder who had tried the case and allowed the amendment had reasoned that the words struck out were “mere surplusage and that a receiving charge did not and should not name the owner of the property involved.” The Court rejected this categorical legal theory and reasoned that there were many conceivable cases, particularly in the case of “property of a common and indistinctive type”, where an accused would need to know the identity of the owner in order to adequately understand the charge and be able to mount a defence.
2. The Judge noted that the words bearing the identity of the owner had been central to the case made by the prosecution, and that this case had “later disappeared into thin air”. It was not a case which supported a charge of stolen goods belonging to an unspecified owner.
3. The judge remarked that the amendment to the plea was particularly unjustified as it had been effected at such a late stage in the proceedings and the defence had not been invited to make submissions on its prejudicial effect.
4. The judge held that the amendment was a drastic shift in the offence charged, and reasoned that the accused *a quo* would have, in fact, presented a different defence had he known that he could be convicted of receiving stolen property belonging to an unknown person. The judgment goes on to elaborate on the legal and evidentiary standards which would properly have guided such trial – such as considerations that should inform when a reasonable person can deduce that he is dealing with stolen property – which could no longer be litigated. He thus concluded that the appellant’s fair trial rights had been, in fact, violated.

[47] The reasoning of the Court in *Gregory*, and the legal authorities it relies on, illustrate that the decision was not motivated by a dogmatic adherence to perfectly precise pleadings, nor to a principle that correctly naming an owner of property involved in an alleged

criminal offence is an absolute requirement in every instance. The Court ruled to remedy an injustice which had occurred in the procedure of a criminal trial and deduced that the appellant had been denied adequate opportunity to understand the nature of the charge which ultimately stood against him.

[48] The Court quoted section 3(1) of the Indictments Act of 1915 which is equivalent to our Section 311 of the Criminal Procedure Code:

“Every indictment shall contain and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.”

[49] It is clear that the function of particulars is to enable an accused to know the nature of the charge which he is called on to meet. The Court in *Gregory* went on to state:

“The description of property in a count in an indictment shall be in ordinary language and such as to indicate with reasonable clearness the property referred to, and if the property is so described it shall not be necessary (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property to name the person to whom the property belongs or the value of the property.”

[50] The court underscored :

“There is no doubt authority for the position that in many cases in which it is unnecessary in the particulars of a charge similar to the one with which we are now concerned to specify the owner of the property concerned.”

[51] The application of the principle outlined in *Gregory* and followed by the court in *Krishnamart Pillay* to this dispute clearly does not support the Appellant. The charge at issue satisfies the pleading standard which was laid down in that case. The accurate description of property is not an end unto itself; the description serves the purpose of

enabling an accused to identify what property is being referred to. Even if the description in this case is technically incorrect (which we have already found it was not as his brother did indeed have beneficial ownership of the boat), the Appellant would have known without a shadow of a doubt what property was being referred to. If he was accused of burning “[his] brother’s boat”, is there any other boat he would have thought of other than the *Madras*? There was only one boat on which his brother’s business relied, and by the time he was finally charged with the offence he would be well aware that the *Madras* had been burned and that it was that act of arson with which he was accused. Even in his statement from the dock he stated that he did not burn his brother’s boat. Thus he did not have an unfair trial in any way, and there is no variance between the charge and evidence adduced.

[52] It is, in the circumstances, not necessary to decide whether the alleged incorrect words are “surplusage.”

[53] Given all the above reasons we are not of the view that the grounds of appeal on conviction have merit and we dismiss them. The conviction of the Appellant is upheld.

[54] Mr. Hoareau has also made various submissions on the grounds pertaining to sentence, which we now address.

(8.) The error in sentencing in excess of the maximum prescribed sentence

[55] Mr. Hoareau has drawn our attention to the interpretation of section 381 of the Penal Code by the learned sentencing judge. Section 381 provides:

“Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Seychelles would be a felony, and which is an offence under the law in force in the place where it is proposed to be done, is guilty of a felony, and is liable, if no other punishment is provided, to imprisonment for seven years, or, if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to such lesser imprisonment.” (Emphasis added)

[56] The Appellant was convicted for the offence of conspiring to commit arson which is punishable under section 318 of the Penal Code to a maximum of life imprisonment.

[57] The learned sentencing judge interpreted section 381 as permitting the court to sentence the Appellant to a sentence over and above 7 years as provided for in section 381 for the conspiracy to commit a felony and sentenced him to 8 years imprisonment.

[58] We agree with Mr. Hoareau that this was an erroneous interpretation of the words, “if no other punishment is provided”. These words cannot refer to punishment provided in respect of the substantive offence (in the present appeal the offence of arson) but rather to special provisions in relation to greater punishment in certain conspiracies to commit specific offences.

[59] The fallacy of the learned sentencing judge’s reasoning is illustrated by Mr. Hoareau in his example of section 211 of the Penal Code which provides for a maximum sentence of 18 years for the offence of conspiring to kill a person. He submits that it could not have been the intention of the legislator to impose a sentence of life imprisonment for the offence of conspiracy to commit arson but one of 18 years for the offence of conspiracy to commit murder.

[60] We find therefore that the maximum sentence that could be imposed for conspiracy to commit arson is 7 years imprisonment.

(9.) The sentence being “manifestly harsh and excessive”

[61] It has not been demonstrated to us that the offence is in any way harsh or excessive. No comparative sentences have been produced to assist this court in the consideration of this ground. In any case, from our limited research we have found that two recent sentences do not support the Appellant’s submission. In the case of *R v Souris* [2007] SCSC 108 (14 October 2007) the accused was convicted of arson and on a plea of guilty and a plea in mitigation showing remorse, drunkenness at the time of the offence and feelings of

jealousy towards his concubine, he was sentenced to 4 years' imprisonment. In *R v Mirabeau* [2015] SCSC 12 (26 January 2015), a sentence of 6 years' imprisonment was imposed) also after a guilty plea.

[62] In the cases we have mentioned above houses were burnt down. In the present case a boat was set on fire. In the circumstances we do find that that distinction could have been taken into account in terms of the severity of the sentence. We therefore reduce the sentence to six years imprisonment.

10. The illegality of the imposition of the fine

[63] The final ground of appeal concerns a compensation order and a fine imposed by the learned sentencing judge. Mr. Hoareau has submitted that section 381 of the Penal Code does not impose a fine as part of the punishment for the offence of conspiracy and consequently the fine of SR 300, 000 with SR 250 000 to be paid in compensation in equal shares to Daniel Monthy and Errol Dias imposed by the judge is contrary to law and cannot be maintained.

[64] We disagree. Section 25 of the Penal Code provides:

“The following punishments may be inflicted by a court-

- (a) Repealed*
- (b) Fine.*
- (c) Payment of compensation.*
- (d) Finding security to keep the peace and be of good behaviour.*
- (e) Liability to police supervision.*
- (f) Forfeiture.*
- (g) Any other punishment provided by this Code or by any other law or Act.”*

[65] Additionally section 26 of the Penal Code provides in relevant part:

“(2) A person liable to imprisonment may be sentenced to pay a fine in addition to or instead of imprisonment”

And section 30:

“Any person who is convicted of an offence may be adjudged to make compensation to any person injured by his offence. Any such compensation may be either in addition to or in substitution for any other punishment.”

[66] We find therefore that the orders by the sentencing judge with respect to the fine and compensation were therefore correct in law and we do not see any reason to interfere with them.

[67] The appeal on conviction is dismissed. The sentence of imprisonment is reduced to 6 years. The fine and compensation orders are maintained and in default of their payment the consecutive sentence of 6 months imprisonment is also maintained.

M. Twomey (JA)

I concur:

A. Fernando (JA)

I concur:

B. Renaud (JA)

Signed, dated and delivered at Palais de Justice, Ile du Port on 14 December 2018.