IN THE SEYCHELLES COURT OF APPEAL

[Coram: A.Fernando (J.A) , B. Renaud (J.A), F. Robinson (J.A)**]**

Criminal Appeal SCA 14 & 15/2018

(Appeal from Supreme Court Decision CR 07/2017)

Neddy Conrad Micock	1st Appellant
Nelson Vivian George Domingue	2nd Appellant

Versus

The Republic	Respondent

Heard: 23 April 2019

Counsel: Mr. Clifford Andre for the 1st Appellant

Mr. Joel Camille for the 2nd Appellant

Ms. Brigitte Confait for the Respondent

Delivered: 10 May 2019

JUDGMENT

B. Renaud (J.A)

Background Information

1. The Appellants Nedy Conrad Rodney Micock, (hereinafter referred to as "the 1st Appellant") and Vivian Nelson Georges Domingue, (hereinafter referred to as "the 2nd Appellant") are appealing against the decision of the Learned Trial Judge given on 5th March, 2018, convicting them under Count 1 for the offence of importation of a controlled drug, and under Count 2 for the offence of conspiracy to commit the offence of importation of a controlled drug, as set out below.

2. Both Appellants were sentenced to life imprisonment under Count 1 and life imprisonment under Count 2 and in each case the terms of imprisonment for the two Counts were ordered to run concurrently.

The Charges

3. On 20th February 2017 the two Appellants were charged with two count of offences, **Count 1** - *importation of a controlled drug contrary to* ***Section 3 as read with Section 26(1)(a) of the Misuse of Drugs Act 1990 Cap 133*** *as amended, and further read with* ***Section 22(a) of the Penal Code Cap 158,*** *and Punishable under* ***Section 29(1) of the said Misuse of Drugs Act*** *read with the Second Schedule of the said Act.*

4. The particulars of the offence were that - *Nedy Conrad Rodney Micock and Vivian Nelson Georges Domingue, between the months of February 2015 and March 2015, with common intention, imported into Seychelles controlled drugs, namely Heroin (Diamorphine) having a total net weight of 35,923.90 grams containing 23,474.90 grams of pure Heroin (Diamorphine) by causing the said controlled drug to be imported into Seychelles through the Seychelles International Airport, Pointe Larue, Mahe.* (underlining added)

5. **Count 2** – the Appellants were charged with the offence of - *conspiracy to commit the offence of Importation of a controlled drug contrary to* ***Section 28(a) read with Sections 3 and 26(1)(a) of the Misuse of Drugs Cap 133*** *and punishable under* ***Section 28 and 29 of the Misuse of Drugs Act*** *and the Second Schedule referred therein.*

6. The particulars of the offence were that - *Nedy Conrad Rodney Micock and Vivian Nelson Georges Domingue, between the months of February 2015 and March 2015 agreed with one another and with other persons, known to the Republic, namely, Vincent Florentine and Theresette Barbe, that a course of conduct shall be pursued which, if pursued, will necessarily involve the commission of an offence by them, under the Misuse of Drugs Act, namely the offence of importation of a controlled drug, namely, Heroin (Diamorphine) having a net total weight of 35,923.90 grams containing 23,474.90 of pure Heroin (Diamorphine).*(underlining added).

Memoranda of Appeal

7. On 13th September, 2018 Learned Counsel Joel Camille file two separate Notice and Memorandum of Appeal in respect of the two Appellants setting out 14 grounds of appeal. He thereafter appears only for the 2nd Appellant Vivian Domingue and Learned Counsel Clifford Andre appears for the 1st Appellant Nedy Micock. Learned Counsel Clifford Andre adopted the same Notice and Memorandum of Appeal previously filed by Learned Counsel Joel Camille.

8. Learned Counsel for the Appellants submitted separate Heads of Arguments in respect of each Appellant but these contained almost identical submissions. Learned Counsel for the Appellants have taken **Grounds 1, 2, 3, 4 and 5 together**; **Grounds 6, 7 & 8 together**; **Grounds 9, 10 & 11 individually**, and **Grounds 12, 13, & 14 together.**.

9. This judgment is in respect of all the grounds of appeal raised by both Appellants in their respective Memorandum of Appeal.

Ground 1 – *Insufficiency of Evidence to Convict*

Ground 1

10. **The learned Chief Justice erred in law and on the facts, in concluding her findings, that the Appellant was guilty of the offence of importation of a controlled drug and the offence of conspiracy to commit the offence of importation of a controlled drug made under the Misuse of Drugs Act 1990, Cap 133, this in light of the totality of the evidence before the court.**

Grounds 2, 3, 4 and 5 – *Appropriateness of the Charges*

Ground 2

11. **The learned Chief Justice erred in law in convicting the Appellant on charges made under the Misuse of Drugs Act 1990, Cap 133 when the same Act had been replaced, remained obsolete and superseded by Act 15 of 2016 (the Misuse of Drugs Act 2016) and could not therefore have created the *offences* from which the Appellant was**

charged with.

Ground 3

12. **In the alternative to Ground (ii) above, the learned Chief Justice erred in law for having convicted the Appellant for *offences* which were not known to law at the time the charges were laid before the Court.**

Ground 4

13. **The learned Chief Justice erred in law for failing to address her mind sufficiently or at all, on and/or consider the arguments and the authorities as raised by the Appellant in his written *submissions* at the close of the case against him, pertaining specifically to the legality of the charges against him.**

Ground 5

14. **The learned Chief Justice erred in law for having concluded that the charges against the Appellant would have been lodged legally and would have been properly laid in terms of Section 55 of the charges against him.**

15. Learned Counsel for both the Appellants in their respective written skeleton heads of arguments as well as at the hearing did not specifically argued Ground 1. Understandably so because we find that this ground of appeal is of a general nature and the issue raised will be considered when we addressed the other grounds of appeal. Whether or not the Learned Trial Judge ought to have found the Appellants guilty as charged on the basis of the evidence adduced by the Prosecution is obviously the ultimate issue.

16. Later in this judgment we have addressed the issue of the elements of the offences which the Learned Trial Judge found the two Appellants guilty of.

17. The Appellants were charged on 20th February 2017 under the Misuse of Drugs Act, 1990 CAP 133 **(the Old MODA**). The Old MODA was amended and superseded by the Misuse of Drugs Act, 2016, Act 5 of 2016 **(the New MODA).** Learned Counsel submitted that at

the time the charges were proferred against the Appellant the Old MODA was no longer in force, hence the indictments against the Appellants were offences unknown in law. They submitted that the proper charges ought to have been made under the New MODA. Therefore the Appellants were effectively charged with offence unknown to the law.

18. Learned Counsel for the Appellant submitted that even the New MODA made provisions that the Old MODA would continue to exists, this is surely only for a while and such could not be made to exist indefinitely. He added that as if this is the case then why have a new Misuse of Drugs Act 2016, Act 15 of 2016 New MODA when you can remain with the old one.

19. In support of their respective submissions in respect of Grounds 1, 2, 3, and 4 Counsel for the Appellants cited the following cases:

20. Firstly, the English case of ***R v Shields [2011] EWCA Crim 2343*** where it was stated at para 11 that –

> *"…. This was a case of an indictment which was not merely defective, leading to a possible issue on appeal as to whether a conviction was 'unsafe' or not for the purposes of Section 2 of the Criminal Appeal Act 1968, but was a nullity charging an offence unknown to law. This despite the fact that mere drafting defects are not favoured as invaliding an indictment."*

21. In that case the Trial Court concluded that it had no power under Section 3 of the Criminal Appeal Act 1968 to substitute a conviction for breach of another Act.

22. Secondly, the case of ***R v MC [2012] EWCA Crim 213*** the Appellant was convicted of an offence of indecent assault. The offence was alleged to be made contrary to Section 14(1) of the Sexual Offences Act 1956 of England. By the date of the offence, Section 14(1) had been repealed and replaced by the provisions under the Sexual Offences Act 2003. All parties including the Judge proceeded on the basis that the offence charged was an offence

contrary to the Sexual Offences Act 1956 of England. The Appellant was convicted of that offence. The Prosecution did not attempt to uphold the conviction but focused on the Court's power under Section 3 of the Criminal Appeal Act 1968. The Court concluded that the Appellant had been convicted of an offence not known to law and that Section 3 did not allow the Court to substitute the verdict.

23. Thirdly, the case of ***R v Taylor (1924) 18 Cr. App. R. 105,*** where the Appellant was convicted of the offence of delivering forged nomination paper contrary to Section 74 of the Municipal Corporations Act 1882. This provision of law had been earlier repealed and replaced by another. The Court of Appeal held that the wrong section had been stated in the indictment and the indictment must be quashed.

24. Fourthly, the case of ***Meek v Powell 1952 K.B 164*** where the Defendant was convicted of selling milk unlawfully for human consumption that contained added water. The information alleged contravention of Section 24 of the Food and Drugs Act 1938. By the time of the offence, this section had been repealed by Section 9 of the Food and Drugs (Milk, Dairies and Artificial Cream) Act 1950 and re-enacted in the same terms. **Lord Goddard CJ** stated at p.168 –

> *"... it seems clear that if the conviction took place without the indictment being amended, the Court of Criminal Appeal would have no option but to quash the conviction. That seems to have been decided in **R v Taylor**, where a wrong section had been referred to in the indictment, although the particular section had been repealed by another section the Court of Criminal Appeal held that, as the wrong section had been mentioned in the indictment, the indictment must be quashed."*

25. Fifthly, the case of ***R v Abdul [2012]EWCA Crim 1788*** where the Appellant was charged with the offence of possession of a false identity document with an improper intention, contrary to Section 4(1) of the Identity Documents Act 2010. He was however charged and convicted of one count of possessing a false identity document with intent, contrary to Section 25(1)(a) of the Identity Cards Act 2006. The latter provision had been repealed at

the date of the offence. The Prosecution accepted that the Appellant had been convicted of a non-existence offence and the conviction must be quashed in accordance with the principles in ***Shields*** and ***MC*** *(cited supra)*. The Court then went on to consider whether it had power under Section 3 of the Criminal Appeals Act, and at p 11 the Court concluded, in respect to the same section hence:

> *"... cannot be used in order to substitute a verdict of guilty of an offence for which the defendant could, if charged, have been convicted when the offence of which he was in fact convicted did not exist at the date when the alleged criminal conduct occurred."*

26. Learned Counsel also submitted the case of ***R v Jackson [1993] 4 S.C.R. 573.*** This case is not of much assistance as it bears no relevance to the issue under consideration.

27. Learned Counsel for the Appellants submitted that **Section 55 of New MODA** is <u>only</u> applicable to instances where the Republic has begun due process under the Old MODA lawfully and thereafter preferred charges under the Old MODA and subsequently continued under New MODA, when the Act came into force. That Section would be inapplicable should the Republic filed charges under a law which, at the time of filing of the charges, did not exist. Effectively the Republic has filed charges which did not exist in law, as the same law had been repealed and superseded by the New MODA.

28. Learned Counsel further submitted that this is fatal to the Prosecution's case and as such the Learned Trial Judge erred in law in concluding at paragraph 7 of her judgment that Section 55 would be applicable.

29. In the instant case, during the material times that the Appellants committed the offences, between February and March 2015, the law applicable to such offences were found in the Old MODA as amended, and further read with Section 22(a) of the Penal Code Cap 158, and Punishable under Section 29(1) of the said Misuse of Drugs Act read with the Second Schedule of the said Act.

30. For ease of reference the law cited in the charges against the Appellants are reproduced hereunder.

Section 3 of the **Misuse of Drugs Act (1990) CAP 133** reads as follows:

> *"3. Subject to this Act, a person shall not import or export a controlled drug."*

Section 26(1)(a) Misuse of Drugs Act (1990) CAP 133 *as amended reads as follows:*

> *"(1) A person who –*
> *(a) Contravenes this Act;*
> *(b)… to (f) …*
> *is guilty of an offence."*

Section 28(a) Misuse of Drugs Act (1990) CAP 133 reads as follows:

> *"28. A person who agrees with another person or persons that a course of conducts 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) …*
>
> *is guilty of the offence and liable to the punishment provided for the offence."*

Section 29 of the Misuse of Drugs Act (1990) CAP 133 is concerned with Penalties for offences committed under the said Act.

Section 22(a) of the Penal Code Cap 158 reads as follows:

> *"When an offence is committed, each of the following person is deemed to*

have taken part in committing the offence and be guilty of the offence, and may be charged with actually committing it, that is to say –

(a) every person who actually does the act or makes the omission which constitutes the offence;"

31. The **Old MODA** under which the Appellants were charged, was repealed and replaced by the **New MODA.**

32. **Section 55 of the New MODA** reads:

"*The repeal under subsection (1) shall not*

(a) affect the previous operation of the repealed Act or anything duly done or suffered under it

(b) affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed Act

(c) affect any penalty, forfeiture or punishment incurred in respect of the offence under the repealed Act

(d) affect any investigation, legal proceedings or remedy in respect of any right.

and the investigation, legal proceedings or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as the Act." (Emphasis added)

33. The provisions of Sections 30 and 31 of the **Interpretation and General Provisions Act Cap 103** which applies to any Act read thus –

Section 30.(1) *Where an Act repeals a previous written law and substitutes provisions for the written law repealed, the repealed written law remains in force until the substituted provisions come into force.*

(2) *Where an Act repeals and re-enacts with or without modification, any provisions of a previous written law then, unless the contrary intention appears, -*

(a) *any reference, whether express or implied, in any other written law to the provision so repealed shall be construed as a reference to the provision re-enacted;*

(b) *notwithstanding section 29(2), in so far as any statutory instrument made or other thing done under the written law so repealed, or having effect as if so made or done, could have been made or done under the provisions re-enacted, it has effect as if made or done under that provision."*

Section 31.(1) *The repeal of an Act does not –*

(a) *affect the previous operation of the Act or anything duly done or suffered under it;*

(b) *affect any right, privilege, obligation or liability acquired, accrued or incurred under the Act;*

(c) *affect any penalty, forfeiture or punishment incurred in respect of any offence against the Act; or*

> *(d) affect any investigation, legal proceedings or remedy in respect of any right, privilege, obligation or liability referred to in paragraph (b), or any penalty, forfeiture or punishment referred to in paragraph (c), and the investigation, legal proceedings or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the Act had not been repealed.*

34. The Savings provisions in **New MODA** as well as in the **Interpretation and General Provisions Act Cap 103** as stated above, preserve the legal effect of the repealed legislation, namely the **Old MODA** and the rights and powers thereunder. The provisions are more or less verbatim Section 31 of the Interpretation and General Provisions Act which applies to any Acts *"enacted after [its] commencement ... except in so far as a contrary intention appears in the other Act."* The Savings provision referred to, preserves the legal effect of the repealed legislation and the rights and powers thereunder.

35. It must be recalled that the Appellants committed the offences in February 2015 and March 2015. Criminal investigations started and certain persons residing in Seychelles were apprehended in 2015 and were accordingly charged in the Supreme Court in case CR 23 of 2015. Those persons in that case CR 23 of 2015 eventually turned State witnesses. When the criminal investigations were on-going in Seychelles, the two Appellants deliberately kept outside the jurisdiction. They could only be apprehended and brought within the jurisdiction and prosecuted in February 2017.

36. We have considered the various authorities cited by the Learned Counsel for the Appellants in support of their submissions that the offences were *"not known to law"*, which were framed under provisions of the Seychelles Legislation that are repealed and not saved by succeeding legislation. The circumstances of the instant is distinguishable from the cases cited because in the instant case there are specific Savings provisions in the New MODA.

The cases cited made no reference that there were any Savings provision that were made when the amendment and/or repealed were made.

37. The authorities cited by Learned Counsel for the Appellants relate to offences *"not known to law*" that were framed under provisions of legislation that were repealed and not saved by succeeding legislation. We hold the view that the authorities cited by Learned Counsel are inapplicable to the present where there is a specific Savings provision in both the New MODA and in the Interpretation and General Provisions Act Cap 103.

38. The Learned Trial Judge in her judgment, addressed the issues raised by the Learned Counsel for the Appellants and *inter alia* stated that –

> *"the logic of prosecuting under the Old Act is that the New Act is not retrospective as regards factual situations arising during the application of the Old Act and which had been framed and concluded before the New Act came into force. In the present case, the investigation of the offence involving the two accused persons had started prior to the enactment of the New Act and during the currency of the Old Act. There were persons charged in connection to the same offence who have now turned state witnesses in the present case. I have no doubt of the propriety of a prosecution under the Old Act although prosecuted after its repeal given these circumstances".*

39. We are in agreement with the interpretation of law made by the Learned Trial Judge and we therefore find that she had not erred in law or on the facts in coming to the decision she reached.

40. We will now address what constitute the elements of the offences with which the two Appellants were charged with and which the Learned Trial Judge ultimately found them guilty of.

Elements of the Offences

Actus Reus

41. We have considered whether all the elements of the offences have been proved beyond a reasonable doubt. The first element of the offence is the - *actus reus*.

42. **Barbe** testified that he was in Dubai between 8th and 18th March, 2015 and saw **Florentine** and both the **1st Appellant** and **2nd Appellant** there. The **1st Appellant** requested him to collect two boxes of silicon and to leave them at the New Peninsula Hotel, Dubai, which he did. **Barbe** returned to Seychelles on 20th March, 2015. The **2nd Appellant**, who was still in Dubai, phoned and requested him to collect a consignment of goods from Dubai which was to arrive the next day, 21st March, 2015. The **2nd Appellant** called him again on 21st March, 2015 reminding him to collect the consignment, which comprised of 3 wooden boxes, and to deliver these to a place at Souvenir, La Misere, Mahe. Those 3 wooden boxes were later found to contain 16 black packets of illegal drug. The silicon that **Barbe** collected in Dubai were also found in the false compartment of those 3 boxes and the silicon had even spilled on those packets of controlled drugs.

43. The Analyst (ASP Bouzin) confirmed, that the brownish substance found in those 16 packets removed from the 3 wooden boxes, were Heroin (Diamorphine) of a total weight of 35,923.90 grams and contained 23,474.90 grams of pure Heroin (Diamorphine).

44. In our considered judgment, the foregoing facts are sufficient to constitute an act preparatory to **"importation"** thus proving beyond reasonable doubt the ***"actus reus"*** which is the first element of the offences with which **both Appellants** were charged**.**

Mens Rea

45. The second element of an offence is ***"mens rea"***. This element may be inferred from acts of the two Appellants. This concept was held by this Court in the case of ***Jean Cinan & ors V R SCA 26 and 27 of 2009,*** where we held that what is required to form common intention is that the act must be at least a tacit and common design conceived immediately before it is executed on the spur of the moment, without the need of proof of direct meeting or combination nor need the parties to be brought into each other's presence. Such agreement may be inferred from circumstances raising a presumption of a common plan to

carry out the unlawful design.

46. We have considered the evidence of Florentine who, *inter alia,* testified that the **1st Appellant** paid his (Florentine's) ticket to Dubai in March 2015 just as on several previous occasions during the year 2014. That was done with the intention for **Florentine** to go to Dubai on their behalf to handle the arrangement to ship the 3 wooden boxes to Seychelles. When **Florentine** was in Dubai in March 2015, **both Appellants** also travelled to Dubai, albeit on different dates, and staying at different hotels.

47. The **1st Appellant** had instructed **Barbe** to collect silicon which was later found in the 3 boxes containing controlled drugs, this shows the intention of the **1st Appellant** to consign those drugs to Seychelles.

48. The **1st Appellant** e-mailed **Theresette** the shipping documents, and even created another e-mail address and providing her with the password to access those documents. That shows the intention to provide the documents for the preparation of the Bill of Entry for clearing the consignment containing the controlled drugs.

49. The **2nd Appellant** provided **Florentine** with the address in Sharja; he also provided him with money to pay for taxi; he paid for the shipping the consignment; together with the **1st Appellant** who provided **Florentine** with relevant shipping documents for the consignment containing controlled drugs – these sequence of activities, in our considered judgment, led the Learned Trial Judge to correctly conclude that it amounted to a joint enterprise by the **two Appellants** to import controlled drugs into Seychelles. Furthermore, **both Appellant**, albeit playing different role, acted in collaboration with each other to facilitate the shipping of the controlled drugs even if they did not directly handle or was not actually in possession of those drugs.

50. The driver of the vehicle, which transported the shipment of drugs, arrived at the Airport Cargo Terminal soon after **Theresette** had made a *"miss call"* to the **1st Appellant** on his Dubai cell phone number. The **2nd Appellant** called **Barbe** on his cell phone on 21st

March, 2015 which shows that there was an arrangement between the **two Appellants** to import the 3 boxes containing controlled drugs to Seychelles. The **2nd Appellant** had also called **Barbe** and informed the latter that he was being followed and admitted to **Barbe** that there were controlled drugs in the 3 boxes that he (Barbe) had collected at the Airport as instructed by the **2nd Appellant.**

51. Section 3 of the Old MODA states:

> "*Subject to this Act, a person shall not import or export a controlled drug."*

52. There are necessarily components to the offence of importation of drugs: first, that there was an **importation,** secondly that the drugs were **controlled** by law, thirdly that the person committing the act of **importation** did so **intentionally**.

53. With regard to the first element of the offence, the Act does not define the term *"import'.* It has been defined in section 22 of the Interpretation and General Provisions Act (CAP 103) as meaning *"to bring, or cause to be brought, into Seychelles."*

54. In ***Clarisse v Republic (1982) SLR 75*** Sauzier J held that the expression **"importation"** meant to bring or cause to be brought into Seychelles and that where a parcel arrives by post from abroad, it constituted importation. Similarly in ***Republic v Dubignon*** **[1998] SLR 52** Perrera J stated: –

> "*In Seychelles, in the absence of any definition, the word "**import**" must be taken in the broader sense of "to bring" or "cause to be brought" by air or sea."*

55. It would suffice therefore that for a substance to be imported that it arrives in Seychelles and is delivered to a point where it will remain in Seychelles. In the present case it was established and not disputed that the substance arrived into Seychelles on board EK707 on 20 March 2015 and remained in Seychelles.

56. In relation to the second element of the offence, there is no doubt that drugs are **controlled** if they are specified as being of Class A, B or C as set out in Schedule 1 of the Act. In the

context of the present case, the drugs, heroin (diamorphine), is a Class A drug and is therefore **controlled**.

57. There is a paucity of authority with regard to the third ingredient of the offence, namely the **mental element** in **importation**. In criminal offences generally, statute includes the mental element or the state of mind of the offender. When the definitions are silent as in this case, we rely on authorities to guide us.

58. In ***Assary v The Republic*** **[2012] SCCA 33,** Msoffe J.A held that **possession,** or **knowledge of possession**, was a necessary component to be considered with regard to the offence of importation, stating –

> "*There is yet another dimension of the case which needs discussion here. This is in relation to the evidence of the witnesses that the appellant possessed the drugs by virtue of the fact that she knew about their importation and actually possessed them."*

59. While we do not think it necessary that one has to actually possess the substance being imported or demonstrate a direct preparatory act by the accused unless the charge is drafted so as to include this element.

60. In ***Republic v Liwasa*** **[2016] SCSC 94**, Dodin J held that as at

> *"A general rule concerning all criminal cases is that a person has to have a 'guilty mind' if he is to be convicted…In order to determine whether the accused had knowledge or not … the Court must look at the circumstances surrounding the action of the accused and his demeanour and conduct as observed and testified to in Court".*

61. The finding that **both Appellants** had a guilty mind is based on the sworn evidence of **Florentine**, who pursuant to a conditional offer agreement with the Attorney-General under section 61 (A) of the Criminal Procedure Code (Cap 54), which evidence was corroborated by the evidence of **Theresette** and **Barbé,** two other Prosecution witnesses pursuant to a similar agreement.

62. The Learned Trial Judge rightly considered the evidence **Theresette** and **Barbé,** as that of an *"accomplice"* when considering the evidence of **Florentine.** We find that the The Learned Trial Judge addressed her mind to the established rule of law that it is dangerous to convict on the evidence of an accomplice unless it is corroborated, although it has since been established, in ***Dugasse v R* [2013] SLR 67** and ***Lucas v R*, SCA 17/09,** that in dealing with the evidence of an accomplice, there is no requirement for a corroboration.

63. There is also ample evidence of knowledge on the part of **both Appellants** emanating from their own testimony in Court. They both testified that they had travelled together on multiple occasions to Dubai and once on to China. They gave no proper explanation why they did not return as planned from China to Seychelles on 31st March 2015 and instead went to East Africa. The 1st Appellant's travel movements from Lungalunga in Kenya to Tanzania, on several occasions, to Mia in Kenya, and to Mombasa, is not sufficiently explained by him. It points to the inference that he was evading arrest from the Police since a blue alert had been issued by Interpol for both him and the **2nd Appellant**. Neither of the two Appellants explained what seemed to be too much of a coincidence, that is, of travelling together or in the company of **Florentine** to Dubai and back on several occasions or being in Dubai on at least three occasions at the same time as him.

64. Moreover there was no explanation of another coincidence, that is, that shipments were made from Dubai to Seychelles including the one of March 2015 which was intercepted by the NDEA at the time when the two Appellants were in Dubai. The **1st Appellant** could not satisfactorily explain the reason for the number of phone calls and texts from phones registered to his girlfriend Shirley Gabriel (2600797 and 2607581) and Dubai number 971525122161 to **Barbé's** phone (2590767 and 2541949), **Theresette's** phone (2527847) and **Florentine's** phone (2580016).

65. The fact that **both Appellants** were together in Dubai at the material time, and neither of them returned to Seychelles when they learned the NDEA were looking for them, indicates their guilty mind.

66. In the circumstances, despite the fact that there is no direct evidence adduced in relation to the commission of the offence by the **two Appellants** and each of the different strands of evidence on their own may not sustain a conviction, taken together or as a whole, we are satisfied beyond reasonable doubt *"that the inculpatory facts are incompatible with the innocence of both accused and incapable of explanation upon any other reasonable hypothesis other than that of the guilt of the accused".*

67. We find that the Prosecution has proved beyond reasonable doubt that **both Appellants** did **import** the drugs as charged.

68. The element of **"*knowledge***" may likewise be inferred from the facts of the case. The evidence adduced by the Prosecution goes beyond demonstrating a mere association of two Appellants. The planning inferred from the travel plans of the two Appellants, the coincidence of their presence in Dubai together, the money paid or promised and fares bought for the prosecution witnesses to or promised to the other participants, the emails and phone calls to the prosecution witnesses, the subterfuge and careful masterminding of the whole operation to import the drug into Seychelles, all point to the irresistible conclusion that the two Appellants conspired to import the drugs into Seychelles.

69. We have earlier address the issue of corroboration provided by other co-accused persons in Count 1 which is equally applicable to the present count. There is sufficient independent corroborating evidence which is equally relevant and point to an irresistible inference of the guilt of the two Appellants.

70. Section 28 of the Old MODA defined "*conspiracy"* as follow:

> *"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".

71. The essential ingredient of the offence of "***conspiracy"*** is - an agreement between persons to do an unlawful act. In the instant case, the unlawful act is the importation of controlled drugs in Seychelles. The central issue is whether or not the evidence established that there was an agreement between the two Appellants to import controlled drug in Seychelles.

72. **Halsbury's Laws (5th Edn) paragraph 73** states that the offence of *"conspiracy"* is committed where two or more persons agree to pursue a course of conduct which, if carried out in accordance with their intentions, will necessarily amount to or involve the commission of an offence by one or more of the conspirators, or would do so, but for the existence of facts which render the commission of the offence impossible.

73. *Conspiracy* arises and the offence is committed as soon as the agreement is made; and the offence continues to be committed so long as the combination persists, that is until the conspiratorial agreement is terminated by completion of its performance or by abandonment or frustration or however it may be. The *actus reus* in a *conspiracy* is therefore the agreement for the execution of the unlawful conduct, not the execution of it. It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose (***Celestine v R [2015] SCCA 33).***

74. Fernando JA at paragraphs 32-34 in ***Dugasse & Ors v R*** **[2013] SLR (Vol. 1) 67** stated that there must be evidence to show that there was an agreement between two or more persons to do an unlawful act. If it cannot be found that they have combined to commit an offence,

there can be no conviction. It must be noted that no one conspiring to commit a crime draws a contract of the intended actions with a co-conspirator. Such agreement is inferred by the court on the evidence adduced. **Archbold (2013) 33-14** states that:

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

75. Beyond the agreement, intent must also be established. In ***R v Anderson*** **[1986] AC** at page 39 paragraph E, Lord Bridge stated the following –

> "*But beyond the mere fact of agreement, the necessary mens rea of the crime is, in my opinion, established if, and only if, it is shown that the accused, when he entered into the agreement, intended to play some part in the agreed course of conduct in furtherance of the criminal purpose which agreed course of conduct was intended to achieve. Nothing less will suffice; nothing more is required."*

76. The central feature of a *conspiracy* is that the parties agree on a course of conduct that will necessarily amount to or involve the commission of an offence by one or more of the conspirators. Thus, a mere association of two or more persons will not constitute a criminal *conspiracy*. The main elements of *conspiracy* are a specific intent, an agreement with another person to engage a crime to be performed, and the commission of an overt act by one of the conspirators in furtherance of the *conspiracy* (***Celestine*** (supra)).

77. In ***R v Taylor*** **[2002] Crim. L. R 205 at 37**, the court held that - *what must be proved is that the accused knew the course of conduct agreed upon. The accused must agree to a course of conduct which involves an act or omission by at least one of them which is prohibited by the law.*

78. In effect, therefore, where a *conspiracy* count identifies in the particulars of offence a particular controlled drug, it must be proved against each defendant not merely that he knew that the agreement related to the importation, supply, etc. of a controlled drug, but also that either (i) to have known that it related to the particular drug mentioned in the indictment, or (ii) to have known it related to the drug of the same class (***Celestine*** (supra)).

79. To constitute ***conspiracy*** there must be an agreement between two or more persons to commit an unlawful or illegal act. The question arising is – Did the 1st and 2nd Appellants agreed with one another and/or with other persons known to the Republic, namely, **Florentine** and **Theresette** to import controlled drugs into Seychelles, which is an unlawful act and an offence under the Misuse of Dugs Act?

80. Prosecution witnesses **Theresette, Florentine** and **Barbe** testified that **both Appellants** agreed with each other, whilst the **1st Appellant** agreed with witness **Florentine** to import controlled drugs from Dubai into Seychelles.

81. **Theresette** testified that **1st Appellant** was in possession of her telephone number well before March 2015. The **1st Appellant** contacted her by phone and informed her that he was leaving for Dubai, and instructed to find someone from Flash Clearing Agency (FCA) to clear his consignment arriving in March 2015 which will be addressed on PUC. The **1st Appellant** already knew that FCA was the sole authorized Agent to clear cargoes for PUC. **Theresette** agreed to do that. **Theresette** also agreed to speak to Agent Daniel Delcy to ensure that the consignment is not searched and further agreed to distract the Screener. **Theresette** agreed to speak to Heather Longhurst of FCA and the latter agreed to get one of her staff to report for work on Saturday 21st March, 2015 to prepare the Bill of Entry. The **1st Appellant** e-mailed **Theresette** the shipping documents to facilitate the preparation of Bill of Entry.

82. The **2nd Appellant** had already informed **Florentine** that he would have to ship another consignment when he went to Dubai in March 2015. The very moment that the **2nd Appellant** informed **Florentine** of that and **1st Appellant** paying the air fares and arranging

for visa for **Florentine** who agreed to go to Dubai knowing full well that drugs were being shipped to Seychelles.

83. We have reviewed the evidence upon which, the Learned Trial Judge as the judge of facts, relied upon to establish beyond reasonable doubt the elements of the offences that constitute the offence of conspiracy. Those facts as found by the Learned Trial Judge form the basis upon which she based her findings and made her decisions.

84. We bear in mind that it is within the province of the Learned Trial Judge to consider all evidence of facts tendered before the Court at the hearing and to analyze and evaluate such evidence taking into consideration the factors and circumstances of the case, before reaching a final verdict. In the process, the Learned Trial Judge is entitled to judiciously accept or reject any circumstantial evidence or indeed any other evidence in establishing the facts of the case. An appellate Court is more concerned with the law, which includes its application to the facts. But it may not substitute its own conclusion to the conclusion reached by the trial court. In the case of ***Akbar v R (SCA 5/1998)*** this Court stated –

> *"A appellate court does not rehear the case on record. It accepts findings of facts that are supported by the evidence believed by the trial court unless the trial's judge's findings of credibility are perverse."*

85. But that is not the only duty of the appellate court in relation to findings of facts. It is also a well-established principle that the appellate court will and should interfere with the findings of fact of trial,court when satisfied that the trial judge gas reached a wrong decision about a witness – vide that Lord Reid in the case of ***Benmax v Austin Motor Company Ltd [1955] 1 All ER 326 at 327 –***

> *"Where there is no question of credibility or reliability of any witness, and in cases where the point is dispute is the proper inference to be drawn from proved facts, an appeal court is generally is as good a position to evaluate the evidence as the trial judge … Though it ought, of course, to give weight to his (her) opinion."*

86. We hold that the Learned Trial Judge was correct in reaching the conclusion she did on the basis of those evidence relied upon in her judgment, which we have set out above. In order to do so, the Learned Trial Judge must have first addressed her minds to the entire evidence, including any discrepancies which she must have considered before making her findings and reaching her conclusions.

87. Any inference that the Learned Trial Judge drawn could not be faulted in the light of the totality of the evidence. The conviction of the Appellants were proper and based on the facts as found by the Learned Trial Judge based on evidence before Court.

88. It is our conclusion that the Learned Trial Judge could not be faulted in her finding that the **1st and 2nd Appellants** agreed with one another and/or with other persons known to the Republic, namely, **Florentine** and **Theresette** to import controlled drugs into Seychelles, which is an unlawful act and an offence under the Misuse of Dugs Act.

89. It is therefore our considered judgment that the Learned Trial Judge was correct when she found that the actions of the **1st and 2nd Appellants** enumerated in the evidence as set out earlier above, when taken together, constitute **conspiracy** in furtherance of an agreement between the **1st and 2nd Appellant** to import controlled drugs into Seychelles.

90. The findings and conclusions of the Learned Trial Judge at paragraphs 89 and 100 of her judgment that in the light of the totality of the evidence all the elements of the offence of **importation** of controlled drugs and of the offence of **conspiracy** had been proved beyond reasonable doubt, and that her decision cannot be faulted. The alleged discrepancies were properly weighted and do not have any consequential effect on the finding of guilt of the Appellants by the Learned Trial Judge.

91. When all the facts are viewed cumulatively, criminal intention on the part of both Appellants in furtherance of a joint criminal enterprise or common intention on their part to jointly import controlled drugs in Seychelles, is beyond a reasonable doubt, manifestly

evident. It is our considered judgment that the **1st and 2nd Appellants** had criminal intention and conspired to import controlled drug into Seychelles and they did so with common intention.

92. We hold that the Prosecution had adduced evidence, albeit circumstantial in certain respect, yet these are sufficient to prove beyond a reasonable doubt all the elements of the offences, thus the guilt of the Appellants as charged.

93. Arising from our analysis and review of the law and circumstances of the case as earlier stated, we hold that the Appellants were appropriately, correctly and legally charged with offences that were and are known to law.

94. **We therefore find and hold that there are no merits in all the issues raised by the two Appellants in their Grounds 1, 2, 3, 4 and 5 of their appeal.**

Grounds 6, 7 & 8 - ***Material Discrepancies.***

Ground 6

The learned Chief Justice erred in law and on the facts in coming to the wrong conclusion of facts that the discrepancies in the evidence of the prosecution witnesses, points to the guilt of the Appellant on both charges laid against Appellant.

Ground 7

The learned Chief Justice erred in law and on the facts in coming to the wrong conclusion of facts that the discrepancies in the evidence of the prosecution witnesses, points to the guilt of the Appellant on both charges laid against Appellant.

Ground 8

The learned Chief justice erred in law and on the facts in not attaching sufficient weight on the fact that the evidence of the prosecution contained material discrepancies relating specifically to telephone records in as far as same evidence

sought to implicate the Appellant on the charges laid against him.

95. Learned Counsel for the Appellants submitted that despite the discrepancies in evidence of certain Prosecution witnesses, namely, **Barbe,** the Learned Trial Judge proceeded to conclude her findings of guilt against the two Appellants on the basis of those same evidence, which she treated as circumstantial evidence, yet, clearly no drugs were found on the two Appellants.

96. Learned Counsel also submitted that in applying Lord Reid's pronouncement/formula in ***Baxman***, the Learned Trial Judge could not have reached the conclusion on the basis of those evidence, without first having addressed her minds to the above discrepancies, discounted them and then conclude her findings. Learned Counsel added that the inference of the Learned Trial Judge was wrong and flawed, rendering the conviction of the Appellant, based on those evidence, unsafe.

97. Learned Counsel for the Appellants further submitted that the Learned Trial Judge relied on the evidence of **Barbe** who was treated as an accomplice and state witness and the evidence of **Florentine**, in convicting the **Appellants.**

98. We have reviewed the evidence adduced by the Prosecution upon which the Learned Trial Judge relied to convict the two Appellants, in order to assess whether her findings as the Judge of facts is perverse or overtly or deliberately bias against the Appellants.

99. We also reviewed the analysis, findings and conclusions made by the Learned Trial Judge on the issues of the alleged discrepancies in the evidence of the Prosecution witnesses and the weight that she attached to these evidence despite the fact that no illegal drugs were actually found on the two Appellants.

100. We find that the Learned Trial Judge had sufficiently addressed her minds to the alleged discrepancies in the evidence of **Florentine** at paragraphs 6, 7, 8 and 9 of the Judgment. She also analyzed the evidence of **Barbe** at paragraphs 17, 18, 19, and 20 of the Judgment.

At paragraph 32 of the Judgment the Learned Trial Judge also considered the evidence of the **1st Appellant** and his relationship to **Florentine**.

101. **Florentine** testified that he travelled approximately 5 to 6 times to Dubai between the period 2012 and 2015, during that period he had only once paid for his own ticket and travelled on his own accord. On all occasions it was the **1st Appellant** who gave him money to pay for his ticket and provided him with his visa to travel to Dubai. **Florentine** also testified that in 2014, he was hired by **both Appellants** to ship two wooden boxes for them from Dubai to Seychelles. In Dubai, he stayed in the New Peninsula Hotel. In 2015, the **2nd Appellant** informed him that there was another cargo consignment to be shipped from Dubai for the **1st and 2nd Appellants**. The **1st Appellant** gave him cash for his ticket aboard Emirates Airline and his visa for Dubai. He once again stayed at the New Peninsula Hotel. **Both Appellants** stayed at a different hotel from his in Deira.

102. **Florentine** also testified that the **2nd Appellant** instructed and directed him to collect the cargo from an apartment in Sharjah, from which tree wooden boxes were handed to him by some African Nationals. He then collected an envelope containing documentation for the cargo from the **1st Appellant**. **Florentine** took the boxes to Maltrans, where he was informed that he was late and that the weighing of the cargo would have to take place at the airport instead of the cargo terminal. Once he **(Florentine)** had completed the weighing at the airport, he returned to Maltrans to inform **both Appellants** of the weight of the boxes (450Kg). **Florentine** then collected the money for the payment of the cargo from the **2nd Appellant** in his hotel in Deira, and paid for the shipment at Maltrans.

103. It is the evidence of **Florentine** that two days following the shipment, **both Appellants** telephoned him to inform him that the NDEA had intercepted the cargo and that the driver who had collected the cargo, **Barbe**, and the Customs Officer had been arrested. **Both Appellants** further informed **Florentine** that they were leaving Dubai for China and asked Florentine if he would like to join them. **Florentine** declined the offer and returned to Seychelles instead, not wanting to worsen his situation.

104. The evidence of **Florentine** is corroborated by the evidence of prosecution witnesses **Barbe** and **Theresette** who gave evidence pursuant to a conditional offer agreement signed with the Attorney-General under section 61(A) of the Criminal Procedure Code. **Theresette** altogether gave five statements to the Police in 2015, and one in 2017, and stated that she gave the most recent one pursuant to the Conditional Offer Agreement with the Attorney-General.

105. It is the evidence of **Theresette** that the **1st Appellant** informed her that he was importing drugs, addressed to PUC, through the Airport Cargo Section, and that he had the assistance of someone at customs who was on rotation. **Theresette** testified that the **1st Appellant** had introduced her to the **2nd Appellant** and told her that they were in the drug business together. In March, 2015, the **1st Appellant** telephoned her from Dubai to inform her that he had emailed her relevant documentation, including the airway bill, the freight invoice and invoice for consignments, which were required for the preparation of the bill of entry. **Theresette** also testified that she was responsible for making arrangements with Flash Clearing Agency to prepare the said bills of entry and to clear the cargoes of the 1st Appellant. The Airway Bill number was 4290, the consignee was PUC, the shipper was Industrial Supplies, and he issuing carrier was Maltrans Emirates. Further, Flight EK707 travelled on 20th May, 2015 and the consignment consisted of three pieces, with a net weight of 450 kg, and the description of the consignment specified "hardware".

106. **Theresette** further testified that the **1st Appellant** while in Dubai, would remain in constant contact with her via mobile phone to verify the release of the 3wooden boxes. She *'miscalled'* the **1st Appellant** once the said boxes were ready for collection, and subsequently **Barbé** arrived to collect them. She was able to correctly identify the boxes in the photographs as the ones she released for the **1st Appellant** and was able to identify their contents.

107. **Theresette** testified that the consignee's name was PUC, the consignment was shipped from Dubai aboard an Emirates flight which was to arrive on 20th March, 2015, and the weight of the consignment, which comprised of 3 pieces, was 450kg.

108. The evidence of **Theresette** was further corroborated by that of Officer Daniel Delcy, who was approached by her to assist with the importation of drugs by ensuring that the consignment was released without being subjected to a search. He was offered SR150,000.00 - for this service.

109. Georges D'Offay from Cable & Wireless, testified and corroborated the account of **Theresette** regarding the telephone calls. He produced telephone records which showed communication between Dubai number 00971525122161 with Seychelles number 2600797, registered to Shirley Gabriel, between the period of 17 March 2015 and 21 March 2015.

110. Heather Longhurst, the owner of Flash Clearing Agency, also corroborated the evidence of **Theresette** by giving evidence that she assisted **Theresette** in clearing the drugs on one occasion in March 2015 by instructing her employees, Shannon Barbé and Brigitte Jumeau, to prepare and handle the relevant paperwork.

111. Shannon Barbé corroborated the testimony of Heather Longhurst when she testified that Heather Longhurst on 20th March, 2015, instructed her to prepare the Bill of Entry for a consignment for PUC on 21 March 2015.

112. **Barbé** testified that he was introduced by **1st Appellant**, to the **2nd Appellant**. He would often collect consignments for them from the Post Office, Port Authority, and from the Airport Cargo. He would have to deliver the consignments either to the **2nd Appellant's** house at Belvedere, or at the **1st Appellant's** house at Belonie, or at the **1st Appellant's** shop at OJ Mall.

113. Between 8th and 18th March 2015, **Barbé** travelled to Dubai where he stayed at the New Peninsula Hotel. During this trip he saw **Florentine** at the said hotel, and also saw **both Appellants** at the discotheque at that Hotel. When he left Dubai to return to Seychelles on 18th March, 2015, **Florentine** and **both Appellants** remained in Dubai.

114. On 20th March 2015, **Barbé** received a call from a Dubai telephone number from the **2nd Appellant,** who asked him to collect a consignment for him from the Airport Cargo the following day. The **2nd Appellant** called him again on 21st March 2015 with the same

request. He saw **Theresette** at the Airport when he went to collect the cargo. At around 10:00 am after he had collected 3 wooden boxes, the **2nd Appellant** who was still in Dubai called him to inform him that he was being followed by the National Drug Enforcement Agency (NDEA). The **2nd Appellant** then revealed to him that the wooden boxes contained drugs. The **2nd Appellant** then instructed him to change the place of delivery to Souvenir, La Misere, where he removed the boxes from his pickup and hid them. While driving down the hill from La Misere **Barbé** was intercepted by NDEA. Thereafter, he brought the NDEA Agents to Souvenir but did not show them exactly where he had concealed the boxes, as he was scared. Later at the NDEA Headquarters he was shown the contents of each box.

115. We also bear in mind that apart from the evidence adduced by the Prosecution there was also the evidence adduced by the two Appellants and their witness which the Learned Trial Judge considered when addressing the alleged discrepancies. We have set these testimonies when we consider the defence evidence.

116. Having considered all the evidence and in particular those stated above, we conclude and hold that the Learned Trial Judge did not err when relying on those evidence, in addition to other evidence, to eventually found the Appellants guilty as charged.

117. We hold and find that there is no merits in **Grounds 6, 7 and 8.**

<u>Ground 9</u> – ***Defence Evidence***

118. **The learned Chief Justice erred on the facts and in law in not attaching sufficient weight and or any weight at all, to the Appellant's evidence before the trial Court, thereby amounting to a failure on her part to consider the thrust of the Appellant defence, before the trial court.**

119. Learned Counsel for the Appellants submitted that the review and treatment by the Learned Judge of the evidence of each Appellant's case in her conclusion of facts and considerations of the evidence in this case, and this renders the conviction of the Appellant unsafe. Learned Counsel relied on the authorities stated in **Paragraph 7-65 of Archbold 1998**.

120. Learned Counsel for the Appellants further submitted that the Learned Judge failed to consider the Defence contention that Barbe and Florentine had conspired with each other and not with the Appellants. Hence the Learned Judge failed to address her mind to the fact that Barbe admitted to have met and socialize with Florentine in Dubai; that one day prior to shipping cargo, Barbe came down to Seychelles; that on the 8 March 2015 before Barbe left Seychelles for Dubai, he contacted Florentine on number 2541949 at 8.00 am.

121. Learned Counsel for the Appellants also submitted that the Appellant having admitted that he had contacted the number 2600797 for reason of purchasing goods, was never consider by the trial judge. He added that, rather a wrong inference was drawn from the evidence that this particular contact, proved conspiracy between Appellant and Neddy Micock.

122. Learned Counsel for the Appellants observed that the Prosecution's own submission that the records of Shirley Gabriel's number "may or may not" prove a contact between Neddy Micock and Florentine, Theresette Barbe and Andy Barbe, clearly shows a doubt in the prosecution case pertaining to Shirley Gabriel's number.

123. The Learned Trial Judge reviewed and analysed the testimonies of both Appellants and their five witnesses who gave sworn evidence and considered these evidence at paragraphs 32 *et seq* of her Judgment.

124. The **1st Appellant** testified that he is a businessman and that **Florentine** was a friend of his and had installed a music system in his car on two occasions. The 1st Appellant denied having any dealings with **Florentine** in the New Peninsula Hotel in Dubai, but accepted that he had the capability of facilitating the visa process for a Seychellois travelling to Dubai. The 1st Appellant testified that upon reaching Dubai, the person would have to pay for his or her visa. He further gave evidence that Sadie Zialor, not **Barbé**, was entrusted with the task of collecting his cargo. He stated that he knew the 2nd Appellant because they both worked at the Indian Ocean Tuna (IOT) factory and testified that they were good friends. He stated that he travelled to Dubai in 2014 with the 2nd Appellant to show him around Dubai, and also to carry out his own business. He denied ever having gone to Dubai for any dealings with the 2nd Appellant. In 2015, he went for a business trip to Dubai and

then went to China with the 2nd Appellant, who knew China well, in order to purchase goods from a trade festival.

125. The **1st Appellant** testified gave evidence that he knew **Theresette**, who was a close friend to his girlfriend. He denied having introduced **Barbé** to the 2nd Appellant, and ever asking her to clear cargo for him. He further denied having had any dealings with **Barbé** for the purpose of importing drugs into Seychelles. He further denied all allegations made against him, including having contacted **Barbé** or **Florentine** while he was in Dubai in March 2015, and that he imported or conspired to import controlled drugs into Seychelles with **Florentine** or **Theresette**. He denied ever having seen the three wooden boxes in issue, and denied that the contents thereof belonged to him.

126. In cross examination, reference was made to the case of **The Financial Intelligence Unit v Nedy Conrad Micock & Shirley Gabriel MC23 of 2014** in which the 1st Appellant had admitted in evidence that he knew his business associate, one Richard Battin, who had been arrested in Kenya for a drug offence. He further accepted that in November 2013, a large sum of cash was seized from himself and his girlfriend, Shirley Gabriel, but that it was later released to him because of an amendment to the law.

127. It was put to the **1st Appellant** that the Supreme Court in its order of 18th January, 2016 was satisfied that he could not account for the sum of money seized, given that he had been unemployed since 2011, nor could he account for the source of the money or for the discrepancies between the sums of money in his bank account and the goods he allegedly imported. He maintained that he was a businessman and that he could not recall having this money in his bank account. It was also put to him that the Court further satisfied itself that the cash and the two vehicles belonging to him were benefits of criminal conduct but he stated that he did not understand the question.

128. The **1st Appellant** testified and accepted having travelled on the same dates and flights as the 2nd Appellant on multiple occasions, and that the two of them with **Florentine** travelled back together in March 2015. He further accepted that **Florentine** was hired to play music at the New Peninsula Hotel in Dubai but denied that he had made arrangements for **Florentine's** visa. He denied having ever sought **Florentine's** assistance to ship

consignments for him in 2014 and 2015 from Dubai to Seychelles. He said that he had used an agency for two years in Dubai to do that, but could not remember its name. He testified that he only ever called **Barbé** concerning a pool competition, and that it was his girlfriend who would call **Theresette**.

129. The **2nd Appellant** also testified and stated that he had his own maintenance and construction business, with a number of staff under his employ. He further testified that he met the 1st Appellant in 2005 while they were both working at IOT. He confirmed that he travelled to Dubai in 2015 to sort out a shipment for his wife and then travelled to China for a trade festival with the 1st Appellant. Instead of returning to Seychelles after March 2015, he testified that he went to stay with his wife and child in Tanzania.

130. The **2nd Appellant** testified that, upon learning that he was wanted by the NDEA, he researched what a "blue notice" meant and concluded that it did not mean he was a suspect. Therefore, he did not find it necessary to return to Seychelles. He further confirmed that he was with the 1st Appellant in Kenya when they were arrested in February 2017.

131. **Defence witness Sadie Zialor** testified that he operates A&S Clearing Agency and that the 1st Appellant was a regular customer of his. He testified that he had cleared approximately ten consignments for the 1st Appellant from Land Marine and the Airport Cargo, and that they were addressed either to Nedy Micock, R&N Supplies or All Fashion Boutique. He testified that he did not clear cargoes from the Post Office for the 1st Appellant. He confirmed that he would not be authorized to clear cargoes addressed to PUC and that he was not familiar with documents from Revenue Commission, Emirates and the invoice and receipt relating to a goods consignment.

132. **Defence witness Tony Michel** testified that he was employed by the 2nd Appellant to bring his daughter to school between 2014 and 2015, and would also sometimes transport construction materials for him in a truck belonging to the 2nd Appellant. He confirmed that he never collected any consignment for the 2nd Appellant from the Airport Cargo.

133. **Defence witness Desire Domingue** testified that he was the uncle of the 2nd Appellant and that he also worked with him in the construction business. In 2015, he notified the 2nd Appellant that he was wanted by the NDEA.

134. **Defence witness Samuel Rath** testified that he was a hired truck driver who used to transport construction materials for the 2nd Appellant. He confirmed that he never collected any consignments from the airport cargo for him.

135. **Witness Georges D'Offay** testified again. He produced in evidence the telephone records for phone number 2512958, which the 2nd Appellant stated was a prepaid number he was using until March 2015.

136. In the light of the foregoing, we are satisfied that the Learned Trial Judge analysed and scrutinised all the evidence before the Court. She analysed the evidence adduced by the witnesses for the Prosecution as well as the evidence of the Appellants and their witnesses. She also considered the submissions made by Learned Counsel in defence of the two Appellants before she reached her final decision as to the guilt of the two Appellants. The Learned Trial Judge cannot be faulted.

137. **We find no merits in Ground 9 of appeal.**

<u>Ground 10</u> – *Chain of Custody of Exhibits*

138. **The learned Chief Justice erred in law and on the facts in concluding that the *chain of custody* of the exhibited drugs, was sufficiently proved, despite the fact that the prosecution has failed to prove case CR 23 or 2015 and has further failed to prove sufficiently the contents contained in Exhibit P1, namely Court Exhibit List.**

139. Learned Counsel for the Appellants submitted that the drug exhibits were previously produced in case Criminal Side No. 23 of 2015, a trial conducted before Judge Burhan. According to the Registrar of the Supreme Court who testified for the prosecution, she obtained custody of the drug exhibits first on the 15 November 2016 in regards to case CR 23 of 2015. It is clear that the exhibits were held on the basis of case CR 23 of 2015. Yet

case file CR 23 of 2015 were never produced and proved to Court.

140. Learned Counsel for the Appellants also submitted that there is a clear doubt as regards the basis on which the drugs were kept with the Registrar of the Supreme Court. Case CR 23 of 2015 was completed ahead of the present case. After completion of the case, the status of the drug exhibits remained in limbo.

141. Learned Counsel added that the Prosecution is relying on the Court Exhibit List tendered in case CR 23 of 2015 which was tendered as Exhibit P1. Therefore, the evidence tendered by the Registrar, Mrs. Emmanuella Bonne and Miss Stephanie Joubert, cannot be relied upon by the court as in the absence of proof of case CR23 of 2015, such evidence would amount to hearsay evidence. Specifically in regards to Exhibit P1, the records of this trial will show that the prosecution never get the Registrar to verify the same Exhibit List and confirm that each of the entries relating to the purported records or procedures were ….

142. Counsel for the Prosecution adduced evidence that on 15th November 2016, the Registrar of the Supreme Court received from the court orderly, Stephanie Joubert, Exhibits P2 to P39, which were produced in case CR23/2015 before learned Judge Burhan. The Registrar gave further evidence that, in open Court Agent Jacques Tirant sealed the exhibits (the drugs and their wrappings in a black box) and the Registrar signed the seals thereon. Thereafter, the box was brought for safekeeping into the safe in her office by Ms Joubert, in the presence of Accused Tirant, PSSW officers and Stephanie Joubert. On 18t November 2016, Emmanuella Bonne, in the presence of Agent Tirant and PSSW officers, collected the said box from the Registrar's office and brought it to Court. The seals were cut open by Agent Tirant in open Court and the box containing the Exhibits was resealed following the court session with new seals applied by Agent Tirant, which the Registrar signed. The box was also secured with two padlocks. Thereafter, it was returned to the Registrar's office.

143. This same procedure was carried out by the same parties in relation to CR 23/2015 on 28 November 2016, 29 November 2016, and 1 December 2016. Each time the box was removed from the Registrar's office, Sheryl Agrippine was present. A record was kept to

reflect the movement of the box (Exhibit P44) and the same was signed at the Registrar's office by Emmanuella Bonne. Each time the box was presented in open Court, in the presence of Counsel and the presiding Judge, it was satisfied that the box had not been tampered with. On one occasion, two of the four seals were slightly damaged, one was damaged and the other remained intact, after the box was removed from the safe to allow for construction work to be carried out in the exhibit room.

144. The Registrar of the Supreme Court testified that the box could not be opened without the keys to the padlocks, which were left with Emmanuella Bonne at all times. In any event, while the box was removed from the safe for this purpose, the box remained under supervision at all times. The testimonies of Emmanuella Bonne, Stephanie Joubert and Agent Tirant corroborated the Registrar's evidence.

145. Agent Tirant, testified that while on duty on 21st March 2015, received word that a white pickup truck which had collected three wooden boxes suspected to contain controlled drugs, had been stopped by the NDEA. He found the three wooden boxes in a ravine at Souvenir, obscured under freshly cut leaves, which he identified on photographs 1 to 8 of Exhibit P2.

146. The boxes were brought to the NDEA Headquarters, where they were photographed and documented. He found a hidden compartment underneath the hardware items in the boxes, revealing black packets, each of which contained brownish powdery substance. Each of the black packets were cut slightly open by NDEA Agent Seeward in his presence, and the contents were shown to Witness Theresette Barbé and Witness Andy Barbé, who had been arrested.

147. The evidence was sealed in evidence bags and labelled. On 24th March 2015, he handed them over to Witness ASP Bouzin for analysis. The exhibit bags containing the substance were adduced as Exhibits P2A, P2B and P2C. That same day at 16:45 hours, Witness Agent Tirant recovered the three sealed bags from Witness ASP Bouzin, and handed them to Agent Seeward for safekeeping in the exhibit store at the NDEA Headquarters. On 12th May 2015, Agent Tirant received four sealed evidence bags from Inspector Ralph Agathine in relation to CB 165/15, three of which contained the black packets containing the

substance, and they were handed over to Agent Malvina for safekeeping. The wrappings were adduced as Exhibits P3 to P5. The witness was able to identify the bags and the contents thereof in the photographs and exhibits shown to him in Court as the same he had observed on 21st March 2015. He further corroborated the Registrar's account regarding the movement of the box of exhibits in his presence and the resealing thereof on 2 August 2017, 29 August 2017, 30t August 2017, and 31 August 2017, and on each subsequent hearing date.

148. We find nothing of substance in this ground of appeal that leads us to find that the chain of custody of the exhibits was not maintained throughout as borne out by the evidence.

149. **We find that Ground 10 of the appeal has no merit.**

<u>Ground 11</u> – *Reliance on Extraneous Evidence*

150. **The learned Chief Justice erred in law in admitting and relying on *evidence extraneous* to the charges in concluding the guilt of the Appellant of the same charges.**

151. Learned Counsel for the Appellant submitted that the Learned Judge wrongly exercise her discretion not to exclude the testimony of Florentine and Theresette Barbe, relating to incidents dating back in 2014, which were outside the ambit of the current charge before Court. He added that on that basis, the trial Court's mind was never divorced from these previous transactions and according, was highly prejudicial to the Appellant's case. Learned Counsel for the Appellant relies on the authority of **Archbold 1998 para 7-100.**

152. With regard to the issue of **extraneous evidence**, Learned Counsel for the Appellants did not address us specifically as to what such evidence are but through our analysis we reckoned that the following may be taken as the extraneous evidence referred to.

153. In cross examination, reference was made to the case of ***The Financial Intelligence Unit v Nedy Conrad Micock & Shirley Gabriel*** **MC23 of 2014** in which the **1st Appellant** admitted that he knew that his business associate, one Richard Battin, who had been arrested in Kenya for a drug offence. He further accepted that in November 2013, a large

sum of cash was seized from himself and his girlfriend, Shirley Gabriel, but that it was later released to him because of an amendment to the law.

154. It was put to the **1st Appellant** that the Supreme Court in its Order of 18th January, 2016 was satisfied that he could not account for the sum of money seized, given that he had been unemployed since 2011, nor could he account for the source of the money or for the discrepancies between the sums of money in his bank account and the goods he allegedly imported. He maintained that he was a businessman and that he could not recall having this money in his bank account. It was also put to him that the Court further satisfied itself that the cash and the two vehicles belonging to him were benefits of criminal conduct but he stated that he did not understand the question.

155. Having considered the evidence stated above in relation to the totality of the evidence, we find and hold that that the Learned Trial Judge did not place inordinate reliance on those evidence to eventually found the Appellants guilty as charged.

156. **We find no merits in Ground 11 of the appeal.**

Grounds 12; 13 and 14 – *Mitigation, Sentences and Appeal*

Ground 12

157. **The learned Chief Justice erred in law in meting *sentences* against the Appellant as same sentences on both count are harsh, oppressive and manifestly excessive.**

Ground 13

The learned Chief Justice erred in law in not according the Appellant sufficient and/or adequate time to prepare his *mitigation* before the Court, even when requested for by counsel for the Appellant, upon instructions, thereby depriving the Appellant of the protection afforded to him, under Article 19 of the Constitution of Seychelles.

Ground 14

The learned Chief Justice erred in law in not informing the Appellant of their *right to appeal* as prescribed under the Constitution thereby denying the Appellant of that

same right to be informed.

158. With regard to **Ground 12** on the issue of sentencing, Learned Counsel for the Appellants rely on the recent pronouncement and the review of cases in regards to sentencing, in the case of ***Rashid Liwasa v Republic SCA 02/2016.***

159. When considering Ground 12, we borne in mind that this Court will alter sentences imposed by the Trial Judge only when the Trial Judge acted on wrong principle, or overlooked some material factor or where the sentence is manifestly excessive, considering the circumstances.

160. Were it concerned the issue of "*harsh and excessive sentence*", we have reviewed the cases of ***Randy Florine v R SCA 7 of 2009*** which made reference to the case of ***N. Redeka v R SCA 4 of 2009*** and the case of ***Marie Celine Quatre v R SCA 2 of 2006*** where we held that – *"harsh and excessive is not a ground of appeal but an area of the law in which the Trial Court reigns supreme". "Harsh and excessive" cannot be implied without elaborative specificity not reason to disturb the sentence imposed by the Trial Court."*

161. As to the issue of -*"in view of the circumstances of the case*" – we extensively discussed this in the case of ***Jean Francois Adrienne & ors v R SCA 25 & 26 of 2015*** where the convicts were sentenced to life imprisonment for trafficking in 47.4 kilograms of cannabis. In that case we held that there was no basis to interfere with the sentence of life imprisonment imposed on the Appellants.

162. We reviewed the sentences imposed on the Appellants by the Learned Trial Judge on 5th March, 2018 after taking into consideration the submissions in mitigation. The 1st Appellant is 43 years old, having 2 children aged 7 and 15 years. The 2nd Appellant is 33 years old with 2 families – one in Tanzania and one in Seychelles, having 3 children aged 1 year living in Tanzania, and two living in Seychelles aged 6 and 11 years.

163. The case under consideration is one involving the importation of and conspiracy to import a relatively very large amount of Heroin (Diamorphine) having a total net weight of 35,923.90 grams containing 23,474.90 grams of pure Heroin (Diamorphine). The offences with which the Appellants are charged with, are punishable under Sections 28 and 29 of the Old MODA, and the Second Schedule referred therein. That Schedule as amended, provides for penalty of life imprisonment for the offence of importation of controlled drugs, irrespective of class. For the offence of conspiracy to commit the offence of importation, the same penalty of up to life imprisonment applies.

164. There was no such recommended sentences under the Old MODA in respect of cases arising thereunder. It was left to the Trial Judge to determine what appropriate sentence ought to given depending on the circumstances of the case, such as the amount of drug involved and whether the convict is a first offender or a repeated offender. However, where the amount of controlled drug involved is more than 250 grams the sentence is a mandatory life imprisonment which sentence was altered by the New MODA.

165. The Trial Court meted out sentences on the Appellants as recommended under the New MODA in respect of cases of possession/trafficking on presumption of a Class 'A' drug by 1st offenders. For example, a person convicted of the offence of possession/trafficking on presumption of a Class A drug, if that person is a 1st offender and the drug apprehended is more than 600 grams, the recommended sentence that a Trial Judge may impose is between 20 years to life imprisonment, and a fine at the discretion of the Trial Judge in lesser terms of imprisonment.

166. The Learned Trial Judge considered the case of ***R v Tarani and ors [2017]*** where Burhan J stated that – *"it is the duty of this court to ensure that the benefits applicable to a convict brought about by the change of law are considered when passing sentence. However, the only benefit in the present case to which both convicts are entitled to under the new law, is that the punishment for importation and trafficking in over 250 grams of controlled drug is not a mandatory life imprisonment but a liability to a maximum term of life imprisonment."*

167. The Learned Trial Judge also considered the case of ***Cousin v R SCCA 2 (22 April 2016)*** and that of ***Kelson Alcindor v R [2015] SCCA 7*** where it was held that the Appellant should benefit from the change of law in his favour, along the principle of "*la peine la plus douce.*" The Appellants' sentence in both case were reduced to be in conformity with the new law which was beneficial to the Appellants.

168. The Learned Trial Judge stated that the new regime makes it clear that life imprisonment is to be considered only as the maximum sentence to be imposed but courts are free to impose a sentence lower than the maximum when circumstances demand. She then considered the submissions in mitigation but found that she could not see any special or exceptional circumstances that could be considered to mitigate the severe sentence indicated in the law. She instead found aggravating factors such as the quantity and quality of the controlled drug and that the quantity itself clearly indicates the presence of a commercial to the crime.

169. The Learned Trial Judge took into consideration that the Appellants conspired with each other and others and were a well-organized gang involved on a very large scale in the trafficking of the controlled drug. She found that their careful and sophisticated planning and their involvement and payment of persons at all the different levels of the community to ensure the execution of their plan indicates the extent they were willing to go to make their money. They evaded arrest for a number of years until the law caught up with them in Kenya and they were extradited to Seychelles.

170. The Learned Trial Judge brought out that the drug importation of drug has effect of heroin on the in Seychellois population is apparent to all. The youth of Seychelles is being poisoned by drugs seemingly readily available, brought in by unscrupulous persons such as these Appellants. She added that they have no regard for the overwhelming consequences of their acts and they agreed at the expense of the effects of their trade including a lost youth and work force; the toll on Seychelles and the tax payer to treat and rehabilitate drug abusers, the cost of education programmes for the prevention of drug abuse; and efforts to intercept and prevent the trafficking and importation of drugs and

prevent abuse is lost on them. They are oblivious to the pain and havoc they wreck on individuals, families and the community, she added.

171. The Learned Trial Judge concluded that she was satisfied that a serious deterrent needs to be set for drug importers and this is fit and proper case to impose a term of life imprisonment on each of the convicts.

172. We do not find any reason to interfere with the sentences imposed by the Learned Trial Judge based on the reasons set out, and as such, we accordingly maintained and upheld the sentences imposed by the Learned Trial Judge.

173. At the hearing of the Appeal Learned Counsel for the Appellants did not make any further submissions regarding those issues raised in Grounds 13 and 14. Suffice to state that, under **Ground 13,** the records show that Learned Counsel made elaborate submissions in mitigation, supported by authorities. (E1 to E76 of the records). The matter is now on appeal and the Appellants' right under Article 19 of the Constitution is once again afforded to them.

174. As regards **Ground 14,** since the Appellants were represented by Counsel, we are of the view that such right is well known to Counsel who would have obviously informed the Appellants of such right as confirmed by the fact that they are before this Court pursuing their appeals and have accordingly vindicated their right.

175. **We find no merits in Grounds 12, 13 and 14 of this appeal.**

Conclusion and Order

176. For reasons set out above, we find no merits in all the Grounds of Appeal against the convictions and sentences of the Appellant and we accordingly dismissed the appeal in its entirety.

B. Renaud (J.A)

I concur:. ..... A.Fernando (J.A)

I concur:. ..... F. Robinson (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 10 May 2019