

**IN THE SEYCHELLES COURT OF APPEAL**

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

**Criminal Appeal SCA 21/2018**

**(Appeal from Supreme Court Decision CR 02/2013)**

---

Roy Brioche

Appellant

Versus

The Republic

Respondent

---

Heard: 25 April 2019

Counsel: Mr. Clifford Andre for the Appellant

Mr. Hemanth Kumar for the Respondent

Delivered: 10 May 2019

**JUDGMENT**

B. Renaud (J.A)

**The Charges**

1. By an Amended Charge Sheet dated 25<sup>th</sup> August, 2016, the Appellant along with other persons were charged in criminal case CR 02 of 2013 with 14 counts of offences. We have set out hereunder only the offences with which the Appellant was charged and which are the subject of this appeal, namely counts 1, 2, 3, 4 and 8.
2. Count 1 - Trafficking in a controlled drug contrary to section 5 of the Misuse of Drugs Act CAP 133 read with section 14(d) and further read with 15(3) and section 26(1) (a) of the same Act punishable under section 29(1) of the Misuse of Drugs Act CAP 133 and the Second Schedule referred thereto in the said Act.
3. The Particulars of the Offence are that – Roy Patrick Brioche, Robert Billy Jean, Danny

Dereck Bresson, Franky Clement Thelermont and Naddy Peter Delorie on 07<sup>th</sup> December 2012 on Vessel CHARITA in Seychelles Water were found in possession of controlled drugs having net total weight of 79 Kilograms and 779.6 grams of Cannabis Herbal material which gives rise to the rebuttable presumption of having possessed the said controlled drugs for the purposes of trafficking.

4. Count 2 (Alternative to Count 1) – Trafficking in a controlled drug contrary to section 5 of the Misuse of Drugs Act CAP 133 read with section 2 and section 26(1) of the same Act and read with section 23 of the Penal Code punishable under section 29(1) of the Misuse of Drugs Act CAP 133 and the Second Schedule referred thereto in the said Act.
5. The Particulars of the Offence are that – Roy Patrick Brioché, Robert Billy Jean, Danny Dereck Bresson, Franky Clement Thelermont and Naddy Peter Delorie on or around 22<sup>nd</sup> November 2012 to 07<sup>th</sup> December 2012 at Vessel CHARITTA in Seychelles Water were found to be Trafficking in a controlled drugs with common intention having net total weight of 79 Kilograms and 779.6 grams of Cannabis Herbal material by transporting, delivering or by offering to sell, give, administer, transport, send, deliver or by offering to transport, deliver or distribute; or to do or offer to do any act preparatory to or for the purpose of selling, giving, transporting, sending, delivery or distributing.
6. Count 3 - Trafficking in a controlled drug contrary to section 5 of the Misuse of Drugs Act CAP 133 read with section 14(d) and section 26(1)(a) of the same Act and punishable under section 29(1) of the Misuse of Drugs Act CAP 133 and the Second Schedule referred thereto in the said Act.
7. The Particulars of the Offence are that – Roy Patrick Brioché on 08<sup>th</sup> December 2012 on Vessel CHARITTA in Seychelles Water was found in possession of controlled drugs having net total weight of 3 Kilograms and 954.6 grams of Cannabis resin which gives rise to the rebuttable presumption of having possessed the said controlled drugs for the purposes of trafficking.

8. Count 4 (Alternative to Count 3) - Trafficking in a controlled drug contrary to section 5 of the Misuse of Drugs Act CAP 133 read with section 2 and 26(1)(a) of the same Act punishable under section 29(1) of the Misuse of Drugs CAP 133 and the Second Schedule referred thereto in the said Act.
9. The Particulars of the offence are that – Roy Patrick Brioche on or around 25<sup>th</sup> November 2102 to 08<sup>th</sup> December 2012 at Vessel CHARITA in Seychelles Water was found to be Trafficking in a controlled drug having net total weight of 3 Kilograms and 954.6 grams of Cannabis resin by transporting, delivering or by offering to transport, deliver or distribute; or to do or offer to do any act preparatory to or for the purpose of selling, giving, transporting, sending, delivery or distributing.
10. Count 8 - Conspiracy to commit the offence of Trafficking in a controlled drug contrary to Section 28(a) of the Misuse of Drugs Act CAP 133 read with Section 5 and Section 26(1)(a) of the same Act and punishable under Section 29(1) of the same Act and punishable under Section 29(1) of the Misuse of Drugs Act CAP 133 and the Second Schedule referred therein.
11. The Particulars of the Offence are that – George Michel, Roy Patrick Brioche, Robert Billy Jean, Danny Dereck Bresson, Franky Clement Thelermont and Naddy Peter Delorie on or around 11<sup>th</sup> November 2012 to 07<sup>th</sup> December 2012 agreed with one another and with other persons known to the Republic namely Michael Joseph Hoareau and Daniel Theophane Leon 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 Trafficking in a controlled drug having total net weight of 79 Kilograms and 779.6 grams of Cannabis Herbal material.

### **Convictions**

12. The trial of the case started on 19<sup>th</sup> September 2014 and was concluded on 06<sup>th</sup> April, 2018. The Trial Court found the following persons guilty as charged.

**Under Count 1** – Only the Appellant **Roy Patrick Brioche** was found guilty and convicted under this count.

**Under Count 2** – The Appellant **Roy Patrick Brioche**, Robert Billy Jean, Danny Dereck Bresson, Franky Clement Thelermont and Naddy Peter Delorie were each found guilty, convicted and sentenced.

**Under Count 3** - Only the Appellant **Roy Patrick Brioche** was found guilty and convicted.

**Under Count 4** - Count 4 is alternative to Count 3. Under Count 4 only the Appellant **Roy Patrick Brioche** was found guilty and convicted.

**Under Count 8** – The Appellant **Roy Patrick Brioche**, Robert Billy Jean, Danny Dereck Bresson, Franky Clement Thelermont and Naddy Peter Delorie were each found guilty and convicted.

### **Sentences**

13. **Under Count 1** - This count being in the alternative to Count 2 no sentence was imposed on the Appellant.

**Under Count 2** - The Appellant was sentenced to **20 years imprisonment** and the others namely Robert Billy Jean, Danny Dereck Bresson, Franky Clement Thelermont and Naddy Peter Delorie were each sentenced to undergo 26 months imprisonment.

**Under Count 3** - The Appellant was sentenced to undergo **4 years** imprisonment.

**Under Count 4** - The Appellant was sentenced to undergo **4 years** imprisonment.

**Under Count 8** - The Appellant was sentenced to undergo **20 years** imprisonment and

the others namely Robert Billy Jean, Danny Dereck Bresson, Franky Clement Thelermont and Naddy Peter Delorie were each sentenced to undergo 26 months imprisonment.

14. The Trial Court ordered that the terms of **20 years and 4 years** imprisonment in respect of the Appellant and the terms of 26 months imprisonment of the other convicts run **concurrently**. The Trial Court also ordered that the time spent on remand shall count towards his sentence.

### **Grounds of Appeal**

15. The Appellant, **Roy Patrick Brioché**, raised 10 Grounds of appeal against his conviction and sentence. Learned Counsel in his written submissions addressed **Grounds 2, 5 and 8** together; **Grounds 3 and 7** together, and **Grounds 9 and 10** together. For the purpose of this appeal we have addressed them in the same order.

### **Ground 1**

16. **The learned Judge erred in law and fact in coming to a finding that the Appellant was guilty of the offence under count 1 when all others were also charged with the same offence. The Judge was wrong in her finding that control was exercised by Roy Brioché, when all the crew members were present and that the said drugs were onboard the boat which was under the control of Captain Hoareau and not Roy Brioché. Furthermore, the Appellant went in the engine room on the instruction of the Captain who had control of the said vessel and there is no evidence that he went with anything in the engine room. Therefore the prosecution failed to prove beyond reasonable doubt that he indeed had control over the said drugs.**
17. Learned Counsel for the Appellant submitted that the elements of the offence were not proved as there was doubt as to whether the drugs were indeed for and under the control of the Appellant who was at the time of the seizure not even present and was not shown any of the drugs. There was no evidence produced before the Court to prove that the Appellant was **not** under the control of Capt. Hoareau who had turned state witness to

save himself and he was the Commander of the said vessel and knew that there were drugs on board. In his capacity as the Captain of the vessel, he was the one who instructed how to store the said cargo as the Captain of the vessel. Shifting the blame is not in order and there has been no proof that the Appellant acted on his own but was simply following the orders of the Captain as did all others on the said vessel.

18. Learned Counsel also submitted that the Trial Judge was wrong in not considering the final submission of the defence that the areas where the drugs under Count 1 were found, was an area frequented by more than the Appellant and that it was not restricted to him only. When those drugs were discovered by the then NDEA, no one stated that these were for the Appellant and this was also the case even when the Appellant was arrested and placed in the sun at the front of the vessel. Had this drug found to be for Appellant and since it was found in his absence, someone would have said that this belonged to the Appellant, but this never happened, indicating that the said drugs could not have been for the Appellant and could have really been for the Captain or any of his accomplices and the Captain was simply transporting it.
  
19. Learned Counsel further submitted that the Trial Judge erred in not considering the evidence of NDEA Agent Jimmy Louise who stated that when he asked the Captain if he had anything illegal on board, the answer was that he had herbal materials which he picked up on the ground when he was picking coconuts. This, according to Learned Counsel, is reflected in the following manner:

*Q. So prior to leaving the wheelhouse and after handing over the SMG to Agent Siguy Marie, did you ask Mr. Michael Hoareau anything?*

*A. I asked again if there were anything illegal on the boat.*

*Q. What did Mr. Michael Hoareau tell you?*

*A. There is a gunny bag of herbal material that he picked up on the ground when he was picking up coconuts on Providence Island.*

20. In view of the above, Learned Counsel submitted, that Mr. Michael Hoareau (hereinafter Capt. Hoareau) knew full well as to what was onboard the vessel which he was in charge of and this is also very clear in view of the answer given by the said Agent during examination-in-chief. Capt. Hoareau also stated that the said cannabis was in the compartment where they store salted fish and sea cucumber.
21. Learned Counsel added that at no point in time did the said Agent state that Capt. Hoareau told him that all these were for the Appellant. That this is clear indication that the evidence of Capt. Hoareau which is tainted with doubt should not have been taken into consideration and that the Appellant should not be held responsible for something that the Captain who was present had admitted to the said Agent.
22. Ground 1 of Appeal raised the following issues:
  - (i) Did the learned Trial Judge err in finding that the Appellant had control of the drugs which was in an area accessible by many other persons?
  - (ii) Did the Appellant go to the engine room on the instruction of Capt. Hoareau who had control of the vessel?
  - (iii) Did the Prosecution prove beyond a reasonable doubt that the Appellant had control of the drugs? and,
  - (iv) Did the Learned Trial Judge err in finding the Appellant guilty under count 1?
23. This ground of appeal goes to the fundamental issue as to whether the Trial Court erred in finding the Appellant guilty under the various counts of offences as charged. To avoid being repetitious we would address all such related issues only once.

## **Ground 2**

24. **The learned Judge erred in law and fact in coming to a finding that the Appellant was guilty of the offence when the evidence produced before the court made it true**

**that the prosecution didn't prove the offence beyond reasonable doubt.**

**Ground 5**

25. **The learned Judge erred in both law and fact in not considering the fact that at the time that the drugs which was found in the cabin apparently under the bunker of the Roy Brioche. The said bunker was occupied by more than one person and therefore it could not be said that the said Appellant had control over it as it could also be someone else including the Captain Mr. Hoareau who could have had control over the said drugs. It is clear that the said space was entered by many and all the crew at different time. Therefore attributing the said drugs to Roy brioche is unfair and no evidence beyond reasonable doubt has been given before the court.**

**Ground 8**

26. **The learned Judge erred both in law and fact in not considering that the Appellant was on a vessel with other people and that things were being done under the orders and supervision of the captain, Mr. Hoareau.**
27. Learned Counsel for the Appellant submitted that, firstly, there was no sufficient evidence to show and independently prove that the Appellant was guilty of the offence when there was not enough evidence to justify such.
28. Secondly, the Trial Court erred in coming to the conclusion of guilt of the Appellant when the evidence shows that it was clear that he was not present.
29. In support of his submission, Learned Counsel cited the case of *Com v Valette 531 Pa. 384 (1992) 613 A.2d 548* which according to him illustrates the concept of possession and control which should have been applied in this case.
30. Grounds 2, 5 & 8 raised the following issues –

- (i) Did the Prosecution adduce evidence to prove the charge against the



Appellant beyond a reasonable doubt?

- (ii) Were the drugs under the control of only the Appellant since these were found in a location used by persons other by Appellant?
- (iii) Was not the Appellant on the vessel with other persons under the supervision of the Captain?

31. We will consider these three grounds of appeal which relate to the issue of the guilt of the Appellant, when we consider Ground 1 later on in the judgment .

### **Ground 3**

32. **The learned Judge erred in law and fact in coming to a finding that the Appellant was guilty of the offence under count 2 as it was indeed the alternative to count one and all the accused person were charged with such offence. Count one was trafficking in control drug which was similar to count 2 and this makes it that the Appellant was charged twice for the same offence. It is clear that the judge erred in law in not finding the other accused guilty of count 1 but found them guilty of count 2. The alternate charge is to be taken in alternate and not in line the rules of the alternate charge principle which should be one or the other.**

### **Ground 7**

33. **The learned Judge erred both in law and fact in not considering that the Appellant cannot be found guilty for the principal count and then be found guilty for an alternative offence.**

34. Learned Counsel for the Appellant submitted that the Trial Court erred in finding that the Appellant was guilty of the offence under count 2 as it was alternate to count 1 and all the accused persons were charged with such offence. Count 1 was trafficking in control drugs which were similar to count 2 and this makes it that the Appellant was charged twice for the same offence. He added that the Trial Judge erred in not finding the other accused also guilty of count 1 but found them guilty of only count 2. According to Learned Counsel the alternate charge is to be taken as an alternate and must be in line

with the rules regarding alternate charge principle, which should be one or the other.

35. Learned Counsel for the Appellant submitted that the Trial Court erred in finding that the Appellant was guilty of the principal offence and also the alternate offence. He added that in reality one cannot be guilty of both, as alternate charges are set to allow the person in taking a plea bargain and should therefore not be found guilty of both. Learned Counsel cited the case of *Celestine v R [SCA 08/2013] SCCA 33* and *Sifflore v R [2015] SCCA 41*.

**Grounds 3 & 7 raised the following issues -**

- (i) Did the Trial Court err in finding the Appellant guilty under count 2 which was the alternative to count 1?
  - (ii) Was the Appellant charged twice for the same offence?
  - (iii) Did the Trial Court err in finding the Appellant guilty for the principal as well as the alternative count?
36. Once again we find that these two grounds of appeal relate to the issue as to whether the Trial Court erred in finding the Appellant guilty as charged. These issues will be addressed alongside Ground 1 in detail in the course of this judgment.

**Ground 4**

37. **The learned Judge was wrong in law and fact in not considering the defence that at the time the Appellant stated that the drugs on board the Charitas was his, he was being beaten and had no other choice but to say such. The court failed to consider that if the Appellant had stated that had such was true, the prosecution would not or should not prosecute the other accused persons. The learned Judge was wrong in not considering that the version of Roy Brioche was indeed true as evidence of the prosecution stated that it was only Roy Brioche who was kept on the bridge in the sun all along the trip.**
38. Learned Counsel submitted that the Appellant testified in Court that he was being beaten

and was indeed afraid for his life, he was told that today you will tell us for whom these drugs are for. According to Learned Counsel, the Appellant simply stated that all the drugs were his and also the gun, but added that it is clear from the evidence of Agent Louise that he was told by the Capt. Hoareau that he (Capt. Hoareau) had a gun and that the drugs on board, and when he (Agent Louise) went to look at it where the Captain told him it was, he found more than what he was told by the Captain. It is the submission of Learned Counsel that the Trial Court erred in finding that the said drugs belong to the Appellant and that his story was not believed when there is reasonable doubt not to believe the story and version of the Prosecution and their own witness version was totally different from that of Capt. Hoareau. That the Appellant gave evidence because he feared for his life and that of the crew.

39. Learned Counsel further submitted that the Trial Court had found the other accused persons not guilty and should have given the same treatment to the Appellant as the Prosecution had not proved beyond reasonable doubt that there was no duress. According to Learned Counsel this is therefore clear indications of that the Appellant was telling the truth. Learned Counsel cited the case of *A-G v Whelan [1993] IEHC 1* which states that:

*“Threats of immediate death or serious personal violence so great as to overbear the ordinary powers of human resistance”*

40. Learned Counsel submitted that it is for the jury to decide whether the threat was sufficiently serious to warrant the defence of duress which will be balanced against the seriousness of the offence. Learned Counsel added that the elements of duress were recently stated by Lord Bingham in the House of Lords decision in *R v Hassan [2005] 2 WLR 709* as follows:

*Elements of the defence of duress by threat:*

*Specific Crime*

*Immediate threat*

*Threat of death or serious injury*

*Threat of violence must be to the defendant or a person for whom he has responsibility*

*Threat must be so great as to overbear the ordinary powers of human resistance.*

41. Learned Counsel submitted that there was indeed a - **“specified crime”** as demonstrated in the case of ***R v Cole Crim LR 582*** (not attached) and as he had stated to Court *that his father informed him that there were drugs on board only after the boat was at sea for 5 hours and also threaten him and the crew. He also said that, knowing his father who has 25 children and was not living with his mother, he really feared being killed, if he had informed the others, they would have wanted to return and may have caused issues on board.*
42. Learned Counsel submitted that there was also - **“threat of immediate death or serious injury”** as the evidence given was clear that the threat was real and immediate as the Appellant was being kicked and the NDEA Officers had side weapons and semi-automatics weapons with them.
43. Learned Counsel submitted that - **“the threat was so great as to overbear the ordinary powers of human resistance”**. According to Counsel the test which was not respected in the case is established in ***R v Graham [1982] 1 WLR 294*** (not attached) and is whether the threat was so great as to overbear the ordinary powers of human resistance.
44. Ground 4 raised the following issue –

Was the Appellant under threat and duress when he made the admission that the drugs were his?
45. Whether the Appellant had control of the drugs for which he was found guilty relate to the same issues that we will address in Ground 1 of this appeal.

### **Ground 6**

46. **The learned Judge erred both in law and fact in not considering that the Appellant was simply transporting what was given to him to the Captain, Mr. Hoareau and had no control of the bag as it was not his.**
47. Learned Counsel submitted that it is clear from the evidence of Agent Louise that when he asked Capt. Hoareau if he had illegal stuffs on board, Capt. Hoareau answered that – yes he had drugs which he had picked up on the island and the Captain also indicated where these drugs were on the boat. Counsel submitted that this is clear indication that the Appellant was not aware of such and, if he did, he was in the same position as the others and therefore he should be given the same treatment as the others. In support of his argument, Learned Counsel again cited the case of *Com v Valette 531 Pa. 384 (1992) 613 A.2d 548.* (not attached)
48. Ground 6 raised the issue as to whether –

The Appellant was simply following the orders of the Captain who had control of the vessel or acting on his own.

49. **Again it is suffice to say that this ground will be addressed alongside the other grounds raised above in the subsequent pages of this judgment..**

### **Ground 9**

50. **The learned Judge erred in law in imposing different sentence on the Appellant compared to the other accused. The principle of parity of sentences should be applied in this case and the Appellant should have the same sentence as the other accused.**

### **Ground 10**

51. **That the sentence is manifestly harsh and excessive considering the principle of sentencing.**

52. Learned Counsel for the Appellant submitted that the Trial court erred in imposing a different sentence on the Appellant compared to the other accused persons. He submitted that the principle of parity of sentences should be applied in this case and that the Appellant should have received the same sentence as the other accused persons. That the trial Court was wrong in imposing different sentences when the charges were the same and there exists reasonable doubts which will make the Appellant to benefit with the same discount given to the others as all of them were present on the same vessel and participated in the same operation. Counsel added that it is clear from the evidence that it was the Captain who told the Appellant to go in the engine room and it was another crew member who told the NDEA that there was someone in the engine room, therefore it is clear that they all knew that the Appellant was in the engine room with the said drugs that were found the following day by the NDEA. Counsel also submitted that this is clear indication that the Appellant was unaware that the said drugs were in the engine room or that he had the same knowledge as the others of the said drugs and that this was only the Captain who had full knowledge of those drugs and these were brought on board and delivered to him (the Captain) who had placed it in the engine room as these were of another class of drugs.
53. Learned Counsel also submitted that the sentence is manifestly excessive when considering the principle of sentencing and what the others who were charged with the same offences had been given. He added that the sentences ought to be set aside and that the Appellant be given the same sentences as the others as the Prosecution failed to prove beyond reasonable doubt that the Appellant was guilty of the stated offences. That this is referred to in the case of ***R v Randolph Joubert***, as proof beyond reasonable doubt whereby the said elements were seriously looked into.
54. Learned Counsel further submitted that with respect to the Appellant, the Trial Court erred in not considering his lack of knowledge that the said drugs were on board the vessel. That the Appellant also gave evidence as to his lack of knowledge. Counsel cited Section 17 of the Misuse of Drugs Act Cap 133 which read as follows:

*“Where a controlled drug is found in any vessel or aircraft arriving from any place outside Seychelles, it shall be presumed, until the contrary is proved, that the drug has been imported in the vessel or aircraft with the knowledge of the master or captain of the vessel or aircraft”*

55. In conclusion, Learned Counsel submitted that it is clear that the Trial Court failed to consider that the Captain had full knowledge and this was in fact confirmed by the evidence of Agent Louise, and that the sentence in this case, considering the facts of his case are manifestly harsh and excessive in that in cases of similar nature the sentence has been more lenient.
56. Learned Counsel is seeking for the conviction of the Appellant to be set aside and be substituted with the same conviction as that of the other accused in this case, and, that the sentence of the Appellant be set aside and that his sentence be accordingly made to reflect what was given to the other co-accused in this case.

**Grounds 9 & 10 raise the following issues for consideration –**

- (i) Should the sentences imposed on the Appellant be at par with the other convicted persons?
- (ii) Are the sentences of the Appellant harsh and excessive?

57. To sufficiently address the grounds raised above, this Court felt the need to reproduce salient extracts from the proceedings of the court below as extensive reference will be made to them in deciding the grounds of appeal raise herein.

**The Record of Proceedings**

58. The records of the proceedings in this case are contained in 10 volumes with a total of 4,259 pages. We do not intend to reproduce all the relevant proceedings in support of our findings. Suffice to say that we have generally reviewed the proceedings in the light of

the grounds of appeal that have been raised. We reviewed, in particular, the facts of the case as summarized by the learned Trial Judge in her judgment. We would like to place on record that we are satisfied that the summary of facts as found by the learned Trial Judge in effect reflect what generally transpired during the trial. She did a commendable job in that respect and this has assisted us tremendously in our appellate task. Learned Counsel for the Appellant has not drawn our attention to any particular shortcoming on the part of the learned Trial Judge in her summary.

### **Findings of Facts by the Trial Court**

59. We have extensively reviewed all the facts upon which the Learned Trial Judge based the conviction of the Appellant of the counts of offences which he was charged. We have as far as possible reproduced the evidence and analysis of the Learned Trial Judge.

### **Prosecution Evidence**

60. On 7 December, 2012, at about 7 a.m. NDEA Agent Marc, Agent Louise, Agent Florentine, Agent Charles, and Agent Moumou proceeded by boat to the vicinity of Providence Island where they boarded the fishing vessel CHARITA which 5 crew members. As they were approaching the CHARITA, there were 2 people in a small fiberglass boat leaving the CHARITA and heading towards the island. They shouted at them to come back to the CHARITA. The two men were Daniel Leon (PW-15) and Franky Thelermont (A4). As the Agents boarded the CHARITA, those 2 people also came on board. All of the 5 crew members were shocked and surprised when the NDEA Agents boarded the CHARITA. The 5 crew members were Jean (A2), Leon (PW-15), Bresson (A3), Thelermont (A4), Delorie (A5) and also the Captain (PW-21).
61. The Agents conducted a search for drugs on the boat. Agent Louise found an AK-47. He also found 11 gunny bags containing controlled drugs. Agent Louise arrested Capt. Hoareau for the offence of possession of drugs. All the 11 gunny bags were returned to the hold of the boat. Thereafter, they arrested each crew member.
62. Then Bresson (A3), alerted the Agents that there was somebody hiding near the engine



room. Agent Marie went towards the engine room, opened the door and shouted - "NDEA, come out". The Appellant came out and Agent Marie asked Appellant why he was hiding in that place. The Appellant shouted the following –

*"all those people does not know anything and the drugs belong to him [Roy Brioche] and the gun also belongs to him [Roy Brioche] "*.

63. The Agents asked Capt. Hoareau if there was anything illegal on the boat and he answered that there were 3 gunny bags containing turtle meat and also an AK-47. Thereafter, the Appellant was also arrested for possession of drugs, ammunition and firearm. Agent Marie informed Capt. Hoareau that they were going to conduct a search on the front part of CHARITA. After a further search they saw and took possession of 6 gunny bags containing turtle meat.
64. Later, Agent Moumou (PW-6) and Agent Louise also boarded the CHARITA and searched in the wheelhouse in the presence of Capt. Hoareau and found a gunny bag containing herbal material and that was under the bed where the Appellant sleeps. Agent Marie opened the gunny bags, looked at its contents and showed to the other crew members. Agent Marie then put the gunny bag with the rest of the exhibits down in the hold of CHARITA.
65. On 8 December, 2012, Agent Cadence boarded the CHARITA and went to the kitchen and from there down to the engine room. Agent Cadence searched the engine room where the Appellant was caught hiding the day before and Agent Cadence returned with a jerrycan that had been cut. The jerrycan contained a padlocked dark blue bag stitched with white gantline. Agent Marie removed the gantline and inside the bag there were 2 blue packets with sellotape, one of the packets contained 20 rectangular brown substance, and 1 contained 10 rectangular brown substance. There was another clear plastic packet with sellotape, which contained 10 rectangular brown substances. In addition, there were 2 pieces of brown substance and vanilla sticks. Agent Marie confirmed that Agent Cadence handed him the jerrycan and the dark blue bag and its contents which was

placed with the other exhibits in the hold of the boat.

66. Agent Marie denied assaulting the Appellant and denied that he and/or the other Agents forced the Appellant on the deck of the boat and he dismissed the claim that one of the Agents placed his feet on the Appellant's head and forced him to accept that the drugs were his.
67. It was a crew member who volunteered the information that the Appellant was hiding in the hold. Agent Marie insisted that he did not beat a confession out of the Appellant. The Appellant shouted out loudly that all the drugs on the boat and the gun were his and that no one else on the boat knew anything about all the illegal things on the boat. The Appellant was the only one kept under strict NDEA surveillance while the rest of the crew were allowed to get on with their tasks.
68. When the Agents were still in the wheelhouse, Capt. Mr Hoareau was asked if he had any other illegal items on board. He replied that there was a gunny bag of cannabis that he had picked up while he was picking coconuts on the island. The cannabis was in the compartment where they stored salted fish and sea cucumber. Agent Louise found 11 gunny bags of herbal material and most of the bags were open and there were just a few that were tied. A crew member, informed Agent Marie that there was a person by the name of "*Pti Roy*", the Appellant hiding in the engine room. Agent Marie opened the hatch door leading to the engine room and told the individual in the engine room to come out with his hands up. When the Appellant got up and stepped out, he put his arms up and said that all the drugs, the gun and ammunition on board were his. Agent Louise testified that Agent Marie (PW-4) arrested the Appellant.
69. Around 6.30 p.m., on 7 December, 2012, on the way back to Mahe, Agent Louise asked Agent Moumou to come with him and they conducted a search in the wheelhouse accompanied by Capt. Hoareau (PW-21). Underneath the Appellant's bed in the wheelhouse, they found a white gunny bag which contained herbal material suspected to be controlled drug. Agent Moumou showed the contents of the gunny bag to all the crew

members and the NDEA agents. The Appellant said that the gunny bag belonged to him. Agent Louise stated that Agent Moumou untwisted the bag, rolled it down until it revealed the contents, which were herbal material suspected to be controlled drugs. Capt. Hoareau, Robert Jean (A2), Naddy Delorie (A5), Daniel Leon (PW-15), Franky Thelermont (A4) and Danny Bresson (A3) were present when Agent Moumou showed the gunny bag and its contents.

70. At about 9:45 a.m., on 8 December, 2012, Agent Cadence boarded the CHARITA as per the request of Agent Marc and he was asked to conduct a search in the engine room. Agent Louise and Capt. Hoareau accompanied Agent Cadence down to the engine room. While Agent Cadence was searching on the port side steering, he discovered a brown container (jerrycan) which had been cut at the side. Inside the brown container there was a blue bag which had been sewn at the side, stitched with white gantline and there was a padlock at the back.
71. Agent Cadence handed the container and the dark blue bag to Agent Marie who was the exhibit officer. Agent Marie removed the blue bag from the brown container, unstitched the white gantline and removed 3 packets from inside. There were 2 blue packets in a blue plastic and 1 packet which was in clear plastic. There were 2 separated pieces and also vanilla sticks in a plastic. Capt. Hoareau denied any knowledge of the blue bag. After showing the bag and its contents to the crew, Agent Marie reminded the crew that they were still under caution, he then went down to the compartment and placed the blue bag therein.
72. Under cross-examination Agent Louise testified that the exhibit store is not under his responsibility as quartermaster. When he asked Capt. Hoareau for the second time whether there was anything illegal on-board the CHARITA, he testified that Capt. Hoareau said that there was 1 gunny bag of herbal materials that he has found on the island while picking up coconuts. Agent Louise confirmed that Capt. Hoareau had only mentioned the turtle meat and AK-47 when asked if there were anything illegal. Agent Louise testified that it was only upon further inquiries that Capt. Hoareau told him of the

gunny bags of illegal substances that had been collected from the island. From the 7 at 7 a.m., until the 10 at 10:30 p.m., Agent Louise never saw the Appellant getting assaulted by any NDEA agents. The only time the Appellant was removed from the CHARITA was at Alphonse. The blue bag and its contents were the only thing Capt. Hoareau denied any knowledge of. Agent Louise confirmed that the Appellant had said that the drugs belonged to him and that "*sa bann boug lo sa bato pa konn naryen*". The Appellant did not implicate George Michel (A6) or Kenneth Esparon (A7). Capt. Hoareau was asked again whether he had any more drugs on the boat and he replied that there were no more. His answer turned out to be a lie.

73. Agent Marie was cross-examined by all Defence Counsel. Agent Moumou testified that the CHARITA is small and that as soon as you board the boat, you could see people in the wheelhouse. When he boarded the CHARITA and went to the wheelhouse, he did not see the Appellant. Capt. Hoareau was present while he searched. He found the bag underneath the mattress, but that it was not concealed. He indicated that the mattress was twisted and had been lifted. He explained that as soon as one entered the room with the bunks, the bag could be seen. He indicated that he was aware that prior to his search, there had been other searches conducted.
74. When the cross-examination of Agent Moumou resumed, he testified that when he removed the package from underneath the mattress, he asked Capt. Hoareau who slept on that bunk and he replied that it was the Appellant who slept there. He then called the Appellant to not only confirm who used the bunk but to also question him with regards to the gunny bag found underneath the mattress. Agent Moumou insisted that he confronted the Appellant regarding the bag; and that the bag was opened in his presence. In the wheelhouse, the Appellant indicated that the bag and the herbal material belonged to him. Moreover, he testified that had the exhibit been planted, as suggested by Learned Counsel Camille, the Appellant would never have admitted that it belonged to him, he would have defended himself.
75. When cross-examined, Lawyer Juliette put it to Agent Moumou that he was being

untruthful but in response, Agent Moumou testified that at that time he was one of the Agents who were trying to remove the Appellant where the engine was, – for safety reasons.

76. Agent Cadence was asked by Agent Marc to come on board the CHARITA to do a search in the engine room. As he searched the port side and the steering gear, he found a brown jerrycan cut on the side. There was a blue bag inside the jerrycan, which he handed to Agent Louise in the presence of Capt. Hoareau who in turn gave it to Agent Marie.
77. The bag was sewn up with white gantline and it also had a padlock. In the presence of the captain and the Appellant, Agent Marie (PW-4) cut the white gantline and found 2 packets, 2 blocks suspected to be cannabis resin with tape on them, as well as vanilla sticks. Thereafter, he testified that Agent Marie showed the entire crew the bag - the Appellant, the Capt. Hoareau, Daniel Leon and 2 others whose names he did not know were present. After handing the items to Agent Marie, Agent Cadence testified that they returned to Mahe.
78. Agent Marie was cross-examined by all Defence Counsel. *Mr Camille for the Appellant.* When cross-examined by Lawyer Camille, Agent Cadence stated that when the boarding team began the search he was not present. After finding the bag, he gave it to Agent Louise in the presence of the Capt. Hoareau. Agent Louise handed the bag to Agent Marie who cut the bag and showed the Appellant the contents and displayed them to the Capt. Hoareau and Agent Louise. While the copy of his statement did not state that the Appellant was present, he testified that the Appellant was in fact there close by at the time the bag was cut open. Agent Cadence confirmed that the Appellant saw those items.
79. After Alphonse they went to Cosmoledo. On the way to Cosmoledo there was intensive use of the phone by the Appellant and Capt. Hoareau and the Appellant was speaking in French and at times he was speaking in languages that he was not able to understand.

80. On 22 November, 2012, the same group went to look for sea snails again and the Appellant, Naddy Delorie (A5), Danny Bresson (A3), and Franky Thelermont (A4) went to Grande Île to get coconuts. When they got back he noticed that the Appellant was carrying a yellow plastic bag and when he brought it on board, they were able to see that the yellow plastic contained herbal cannabis. Daniel Leon heard the Appellant saying to Capt. Hoareau -"*they have seen parking*". Later he saw Danny Bresson (A3) in possession of the bag.
81. On 25 November, 2012, a non-Seychellois catamaran, named Belize, with people speaking another language came along with provisions and the Appellant went on board. The Appellant returned carrying a blue bag, which Daniel Leon indicated as being 15 to 16 inches with hard locks. The Appellant opened parts of the bag and inside there were vanilla sticks, sealed hashish, and "*several pieces of packets*". The bag was sewed and kept in the possession of the Appellant.
82. The Captain of the catamaran later invited them to dinner on his boat, where they were given alcohol and drugs. The next day, the crew consisting of the Appellant, Naddy Delorie (A5), Danny Bresson (A3), Franky Thelermont (A4), and maybe Robert Jean (A2), went with a small fiberglass boat to get sea cucumber and salt. They came back with drugs they had collected on land, and the drugs were brought on board the CHARITA. Everyone, including the Captain, helped with putting the salt and drugs on board the CHARITA. The drugs were in gunny bags and some were sealed in a packet. Some of the gunny bags were half opened and some were opened. He saw herbal material inside the bags. The drugs were put in the hold of the boat.
83. He heard the Appellant and Capt. Hoareau talking and discussing that upon reaching Mahe, the drugs would not be going through to Mahe but Praslin first and that a small boat would come and pick up the drugs on Praslin.
84. Thereafter, Daniel Leon stated that on 7 December, 2012, he saw a small boat coming towards them, the "INTERCEPTOR". Capt. Hoareau used a satellite phone to call Benny

Michel and asked him if he knew about any boats coming towards them. Benny Michel responded by stating that he would check with the Seychelles Coast Guard. He panicked and grabbed a fiberglass boat with Franky Thelermont (A4) to go ashore. The crew were throwing the gunny bags in the fiberglass boat, but the NDEA Agents had already reached them. He and Franky Thelermont (A4) returned on the CHARITA and that was when he saw the Appellant run to the engine room to hide a blue bag.\_

85. The NDEA agents searched the CHARITA and when they opened the hold they saw all the drugs. The crew were brought to the front of the boat and they were shown the drugs. Then he and Franky Thelermont (A4) informed the NDEA that there was someone else in the engine room. The Appellant was allowed to come up from the engine room. The Appellant was handcuffed and he was shouting that all the drugs and ammunition were his.
86. The following day, NDEA Agents conducted another search and discovered the blue bag in the engine room. Daniel Leon also recalled that on the day they were apprehended, the NDEA Agents found a gunny bag hidden under the bed where the Appellant slept.
87. Finally, Daniel Leon confirmed that the AK-47 together with the bullets and the magazine, the 12 gunny bags containing cannabis herbal material, and the 6 gunny bags of turtle meat were retrieved by the NDEA Agents on 7 and 8 December, 2012.
88. Lawyer Camille for the Appellant cross-examined Daniel Leon who had signed an Agreement with the Chambers of the Attorney General to provide evidence in this case in exchange for not being tried or prosecuted before the Supreme Court. The *"CONDITIONAL OFFER BY THE ATTORNEY GENERAL UNDER SECTION 61A OF THE CRIMINAL PROCEDURE CODE AS AMENDED (CAP 54)"*.
89. Daniel Leon knew Capt. Hoareau from before when he was working as a skipper at Sea Harvest. He did not really talk to Capt. Hoareau about what they would do. Daniel Leon could not confirm when the Appellant joined them. He explained that a stowaway *"means*

*like in Creole it is like a cockroach that came without permission on boat".* He did not know what had transpired for the Appellant to be on the boat CHARITA, and he did not know why the Appellant went and hid when they approached a boat called St. Paul.

90. The gun was kept in the custody of Capt. Hoareau under the mattress where he slept. He never approached Capt. Hoareau to find out why he had the gun.
91. It was while they were approaching Cosmoledo and upon reaching it that he observed the phone was being used extensively. He could not hear and understand what the Appellant was saying on the phone, as he was speaking in French.
92. On 22 November, 2012, they again went looking for sea snails on the small fiberglass boat. He went on a fiberglass boat with Capt. and Robert Jean while the Appellant, Franky Thelermont (A4), and Danny Bresson (A3) went on the other one. They eventually returned to the CHARITA where they cleaned the snail. He added that at that time, the Appellant, Naddy Delorie (A5), Danny Bresson (A3) and Franky Thelermont (A4) went ashore to search for coconuts to cook and also to get sea cucumber that were left on the island from the previous journey. He heard Capt. Hoareau asking Franky Thelermont (A4) to check whether the sea cucumber were still there. When they returned from ashore, it was almost dark, but he could see that the Appellant was carrying a small yellow plastic bag in his hand. Although he could not determine what was initially in the bag, he testified that the Appellant opened the bag in his presence and there were herbal material which the Appellant said was cannabis. Daniel Leon acknowledged that his statement to the Police did not reflect that the Appellant had opened the bag and indicated that it contained herbal material that was cannabis. However, Daniel Leon, explained that despite him not explaining those details, that was what had happened.
93. On 25 November, they were anchored inside the lagoon next to Grande Île when a catamaran approached the CHARITA in the morning. When the catamaran stopped alongside the CHARITA they removed provisions from it. The Appellant went on board and then he saw the Appellant come back with a blue bag.



94. Daniel Leon maintained that the blue bag was always with the Appellant where he slept. The Appellant had a designated place of sleep on the boat. There were 4 crew members who had a sleeping area. He explained that the 4 who slept on the bunk beds were Capt. Hoareau, Naddy Delorie (A5), Franky Thelermont (A4) and the Appellant; and Naddy Delorie (A5) occupied the bottom bunk while Capt. Hoareau slept on the top bunk. He stated that Franky Thelermont (A4) slept on the bottom bunk and the Appellant occupied the top bunk. Daniel Leon slept on the floor as well as Danny Bresson (A3) and Robert Jean (A2). Daniel Leon indicated that when the blue bag was being stitched he saw its content as he was holding the bag while the Appellant stitched it.
95. When eating dinner on the catamaran everyone, apart from Robert Jean (A2), were drinking and taking drugs. He saw the catamaran leave on Tuesday. He stated that on the following day after the dinner, they were instructed to get salt and sea cucumbers on the nearby island. On the second trip they all helped to bring the drugs on board. The drugs were placed in the hold of the boat. There were some gunny bags which were not sealed. He did not know who placed the drugs there.
96. The Appellant was removed from the engine room by Agent Marc and Agent Charles. As the Appellant came up, they had guns pointing towards his head, as it was the first part of his body that appeared as he came up out of the engine room. Daniel Leon did not see the agents beating the Appellant), however, he saw them put a gun to his head to make him come up and he was handcuffed. He did not see Agent Charles stomp on Appellant. He further added that only Capt. Hoareau) and the Appellant were handcuffed. He also testified that when they were at the front of the boat with NDEA Agents, the Appellant stated that all the drugs and all the weapons were his.
97. On their way to Mahe, in the afternoon, Agent Moumou conducted another search in the cabin and during that search he found a gunny bag a  $\frac{1}{4}$  full of cannabis. He took it out and showed it to them and asked to whom it belonged. They told him that it belonged to the Appellant, since he slept there. They took the Appellant to the back in the cabin of the

boat and showed it to him and the Appellant stated that it was his. Agent Moumou took the gunny bag and handed it to Agent Marie. The gunny bag was placed in the hold along with the other exhibits.

98. Capt. Hoareau testified that the Appellant, whom he knows as "*Ti Roy*" called him to discuss about work. He stated that the Appellant wanted to come and work and that the Appellant also told him that - "*there is a parking of drug to take at Cosmoledo.*". Capt. Hoareau spoke to George Michel (A6) about it, who said yes. Lawyer Camille put to him that the Appellant had only approached him about a job; and that the drugs were his. Capt. Hoareau denied that the drugs were his and replied that they were for the Appellant. He stated that the evidence he has given in court was consistent with what he had stated in his first statement. From a question from Court about the word "*parking*" Capt. Hoareau stated - "*can mean that you have put something, someplace. You have put it there and to come and collect after.*"
99. Capt. Hoareau denied the allegation that he instructed the Appellant to hide upon the CHARITA reaching St Paul. He did not see the Appellant hiding in the boat. He stated that he did not give instructions to the Appellant to hide upon the CHARITA reaching the boat MARIE LOUISE. On their way to Cosmoledo from Alphonse the Appellant had asked him for the phone to call his family. No crew member was allowed to use the satellite phone without his permission. From Alphonse to Cosmoledo he used the phone to call the owner of the CHARITA to inform him that he was leaving Alphonse. The purpose of going to Cosmoledo was to pick sea cucumber which had been left there since the trip in July and the Appellant had told him that there were drugs on Cosmoledo to take and he was asked by George Michel (A6) to find sea cucumber to send to Madagascar. He denied the suggestion of Lawyer Camille that the drugs were his and was adamant that the drugs belonged to the Appellant, who had told him to go and get it there.
100. Capt. Hoareau then stated that he did not expect them to find drugs ashore because when the Appellant had said that there were drugs on Cosmoledo he did not say whether or not they were on Menai or Grande Île because Cosmoledo is a big place. When the 4 crew

members came back on the boat after 6 p.m., he saw a yellow plastic bag in Naddy's (A5) hands. Naddy (A5) told him that the Appellant took them to "*a parking of drugs a lot of drugs ashore*". He stated that he asked the Appellant when this could have been put ashore because there were no boats. He only wanted to ascertain when the drugs were placed there but he was not surprised because he had been told by the Appellant that there were drugs for him to pick up at Cosmoledo.

101. On Sunday 25, when they went to eat on board the catamaran called "*Beliz*", the captain informed him that he had put the drugs there. The captain told all the crew, except the Appellant who was down in the cabin with a bald headed man. He did not attach any importance to what the captain had told him. It was then put to him that his evidence was a fabrication because he had stated those facts only in his third statement. Capt. Hoareau denied the suggestion that his evidence is a fabrication and told Lawyer Camille that other members of crew who were on deck heard it too. He did not verify from the Appellant about what Naddy Delorie (A5) had told him about the "*parking*" because the Appellant went ashore and came to Cosmoledo for his drugs and that it was not an invention on his part. He stated that the Appellant did not bring anything with him on the boat. The Appellant had not put anything on the island and that night he questioned the origin of the drugs and when they were placed there. Lawyer Camille put to him that had the Appellant approached him about collecting the drugs at Cosmoledo, then it did not make any sense that that evening he had queried about the origin of the drugs and when they were placed there.
102. On Monday 26, after waking up, he assigned crew members to go ashore to get salt. The first fiberglass trip Robert Jean (A2), the Appellant, Naddy Delorie (A5), Danny Bresson (A3) and Franky Thelermont (A4) went ashore and brought back salt. On their second fiberglass trip the said crew members brought back salt and gunny bags of drugs. He [Capt. Hoareau] and Leon remained on board CHARITA. He knew that there were drugs in the gunny bags. He [Capt. Hoareau] and "*Ti Leon*" helped load the drugs on board the CHARITA. He was adamant that he did not instruct the crew members to bring drugs on board the CHARITA. He reiterated that the Appellant brought his drugs on the

CHARITA. He added that the Appellant had told him that - *"he will come with us to get his drug at Cosmoledo he went ashore and got his drugs and brings it back to Charitas and I helped upon loading the drugs on board"*. He added that he never instructed the members of crew to bring drugs from ashore; he instructed them to collect salt. He denied that he had dinner with the captain of the catamaran because the latter was his friend and who had informed him that he had brought his drugs 5 days earlier. He stated that he got to know the captain of the catamaran upon the invitation of the Appellant when they went on board the catamaran. Robert Jean (A2) had already started preparing the food to cook. He denied that he had instructed the crew members where to put the drugs on board the CHARITA. He stated that the Appellant - *"went down into the hold and he was the one to fix his drugs down in the hold."*

103. He stated that he saw the Appellant and Daniel Leon sewing a bag with a padlock on while they were still in the lagoon on 26. He was not aware about the contents of the bag yet. He did not see who brought the bag on board the CHARITA but he saw the Appellant and Daniel Leon sewing it. The bag was for the Appellant because it was being sewed close to where he sleeps.
104. When the Appellant was retrieved from the engine room - *"from the engine room on the deck, he said that all the drug on board and the drug was his"*. Lawyer Camille suggested to him that - *"even though he had said that all those drugs on the boat is his, those drugs were in your charge, in you custody, you were responsible for those drugs, so it could not have been true when he said those drugs were his"*. Capt. Hoareau replied - *"Yes it was in the boat but the drugs did not belong to me it belong to him"*. Lawyer Camille put to him that the Appellant had said those things because he was beaten at the back of the boat before he was brought to the front of the boat, where Capt. Mr Hoareau was standing by the NDEA agents. Capt. Hoareau said that he did not see and did not hear any cry.
105. Agent Marie showed him the contents of exhibit P18C; and that it was the first time that he had seen its contents. It was the same bag that he saw Daniel Leon and the Appellant sewing when the CHARITA was leaving Cosmoledo. The position of the Appellant through Lawyer Camille was that the bag belonged to Capt. Hoareau who had instructed

the Appellant to collect from the catamaran on 25 November, 2012. Capt. Hoareau denied the suggestion of lawyer Camille and replied - "*[t]hat never happened, if the bag was mine I would have gone and get it myself*".

106. Capt. Hoareau saw the vanilla sticks in the blue bag for the first time when Agent Marie opened the blue bag and showed them to him at Providence. The position of the Appellant through Lawyer Camille was that he [Capt. Hoareau] had removed the masala which was in the blue bag for the purpose of cooking on the boat. He denied the suggestion of Lawyer Camille and stated that he had never touched and opened the blue bag. Lawyer Camille continued - "*Q. I will put it to you that that vanilla stick that we see exhibit P32 was also in the that blue bag along with the masala that you had control of. It was yours at all times?*" He replied - "*A: I have never seen this, I have never taken any masala and if the boat was still there you could go and have a look open the kitchen up and see any masala from Madagascar or from wherever*". Then Lawyer Camille put to him that it was his bag because he had removed "*a block*" from it for his personal use and that he had instructed the crew to "*get coconut to use with the masala*". Capt. Hoareau denied both suggestions of Lawyer Camille.
107. On 22 November, 2012, at about 5 p.m., some of his crew members namely, the Appellant, Danny Bresson (A3), Franky Thelermont (A4) and Naddy Delorie (A5) went ashore to get sea cucumber. He testified that he stayed on board with Daniel Leon and Robert Jean (A2). The crew took some time and as the fibreglass was getting nearer to the CHARITA he saw Naddy Delorie (A5) at the front of the boat holding a yellow plastic bag, which contained drugs. Naddy Delorie (A5) informed him that the Appellant had brought them to a "*parking of drugs on the island*". That night there were crew who smoke cannabis, except for Robert Jean, who is not a smoker.
108. The fishermen who had nothing to do with the drugs transaction were Robert Jean (D2), Franky Thelermont (D4), Delorie Bresson (D5) and Daniel Leon. In his evidence the said fishermen gave a helping hand to load the drugs on board the CHARITA. About the cannabis resin, he stated that the said fishermen are "*innocent*". He added that he was guilty and directly involved in the drug transactions. The drugs belonged to the Appellant

and he was part of the team to retrieve the drugs.

109. One day when the CHARITA was in the lagoon a catamaran arrived in the morning and anchored alongside the CHARITA. He stated that the catamaran gave a box of fruits and lemonade to the CHARITA; and that the Appellant went on board the catamaran. He went at the back of the CHARITA with Robert Jean (A2) and they removed what was contained in the box. He *"thought"* that the Appellant had returned on board the CHARITA. He added that all this happened at about 7, 8 or 9 a.m..
110. The catamaran left and docked a little bit away from the CHARITA. Later in the proceedings he stated that when the Appellant returned on board the CHARITA from the catamaran he did not see him returned with a blue bag. Later in the proceedings he stated that the Appellant told him that a catamaran will be bringing a *"konmisyon" meaning "something on board the Catamaran for him"* when he was at Cosmoledo. He testified that the Appellant did not tell him what the *"konmition" was*. It turned out to be the blue bag. He added that the *"konmisyon"* was not opened in front of him; and that therefore he did not know what was inside. He never told George Michel (A6) about the *"konmisyon"*.
111. Capt. Hoareau testified that on board the catamaran he sat upstairs drinking with the skipper. The Appellant and another man went down into the cabin of the catamaran. He added that he did not recall whether or not the Appellant took the satellite phone with him into the cabin of the catamaran; and that he did not recall if the satellite phone received any call when he was on the catamaran. The captain of the catamaran told him that he had left the drugs on the island approximately 1 week or 4 days ago.
112. Capt. Hoareau stated that the Appellant was the only person who had contacts in Madagascar; and that Lawyer Juliette should ask the Appellant about it. He stated that if the telephone transcript had recorded 101 connections when the CHARITA was in the lagoon for the period of 21 and 26, then it must be true. He agreed that there were only 6 telephone connections between George Michel and the CHARITA during that 6 day period of 21 to 26, and that on 27, there were no calls. Lawyer Juliette put to him that it

was not reasonable to have all these calls unless something was going on, to which he replied that "*[l]ike I have stated I am not aware but it must have been that there something happening. Just like all the numbers coming from Madagascar and this only Roy would know his dealings as he was the one doing it*". He added "*If it is on record and all these calls have appeared like I have stated previously I did not make any calls if it has been received it must be Roy Brioché (the Appellant) that received his calls*". He stated that, given where the phone is situated on the boat, it was easy for the Appellant to take it outside and receive his calls. He added that A2, A3, A4, and A5 did not use the phone on board the CHARITA, only A1. He denied the suggestion of Lawyer Juliette that he gave permission to the Appellant to use the phone; and added that he gave the Appellant permission only on 21. He admitted that he heard the Appellant talking on the phone about money to be transferred. He denied the suggestion of Lawyer Juliette that he participated in the conversation in Madagascar and Seychelles. He stated that he did not know those numbers; and that the only person who knew those numbers was the Appellant.

113. The evidence of Bella Azemia a Police Sergeant attached to the NDEA, was on duty on 13 December, 2012. Following a *voire-dire* she tendered the statement under caution of Danny Bresson as Exhibit P77. The Trial Court had reproduced the statement in part, as follows –

*"The statement starts at 12.26. I am staying at La Gogue, Glacis I am a fisherman and also a diver... Before we reached Cosmoledo Roy Brioché told us that there was supposed to be a Catamaran boat which was to bring 'en konmisyon' which is referred to as something for him. From there we fished, after 2 days around 7am I saw a white Catamaran which anchored next to the boat Charitas that we were onboard. Roy went onboard that Catamaran alone. Onboard that Catamaran there were six men who looked like the Malagasies. After about 30 minutes Roy returned with a bag which I cannot recall the colour but if I saw the bag I would recognise it. The bag was on his back and as soon as he arrived on Charitas he went directly into the cabin together with the boat skipper*

*Mike Hoareau. No one knew what Roy brought in the bag that was on his back. But I was aware that there is an illegal transaction that Roy was doing as before we reached Cosmoledo Roy was communicating with correction Malagasy people through satellite telephone. The voice which was talking to Roy was that of a woman. At one stage Roy mentioned to us that the Catamaran boat will bring a consignment for him and all of us understood that the consignment meaning drug. The next day nearly 6pm the Catamaran left. During the time that the Catamaran was anchored Roy has been going to and from the Catamaran boat and upon his return he brought back food. And we stayed there on Cosmoledo and we fished for about 4 to 6 days then we moved towards the direction of Providence. After 2 days we reached Providence and there was no illegal transaction that went on there. I would like to point out that when we were on Cosmoledo we correction harpooned six turtles and salted it, we collected also salt from the shore. When we were collecting salt on one of the island of Cosmoledo that I do not know the name I saw Roy transporting herbal material namely Cannabis which were in yellow plastic, one in green plastic and some in white gunny bags. We helped him to bring them on the Charitas boat. All of the Cannabis drugs were put in the hold of the boat. It was only after 5 or 6 days later that we went to Providence. After 4 days that we have been on Providence that the NDEA came on our boat and they searched the boat and found the Cannabis that was collected on the Cosmoledo island and then they found an AK 47 riffle which belongs to the boat skipper Mike Hoareau which was under his mattress where he slept. They also saw all the sea turtle meat which was in the gunny bags on the deck of the boat. Regarding the AK 47 riffle I saw it when we were near the Cosmoledo. From there NDEA arrested all of us and then brought to Mahe, correction and then brought us to Mahe. It was after 10 to 20 minutes that the NDEA had searched on the boat that they saw Roy Brioche hiding in the hold of the boat in the engine/correction where the engine is. When we were coming to Mahe the next day that we were*



*arrested it was then that I told the NDEA Agents that there is a bag which belongs to Roy that they have not seen yet. They searched and they found the bag in the engine room and it was then that I learnt that inside the bag there was Cannabis raisin known as Hashish locally. Statement ends at 1.30pm."*

### **The case for the Appellant**

114. The Appellant elected to make a statement from the dock. The Trial Court warned itself that the dock statement of the Appellant is not evidence against any of the co-Accused Persons. The Appellant's dock statement is to the following effect.

"I wish to explain in regards to the incident, upon getting on the boat I boarded the boat with Mike I asked him for a job and he told me that he was ready to take me with him. When I saw Mike there, there was another person with him that every time I went to see Mike he was there. I stated that there was a moment when I saw Mike I asked him for a job on board the boat, he told me yes after that I never saw him again, the next time I saw him Mike he told me was going for a trip from there he told me to come and see him at "Semen Serret" at his house. When I went to "Semen Serret" there, there were 2 of us who were coming on the boat, at the time when I was going with Mike on the boat there were 2 of us and before going on the boat Mike said only I would go. The moment before that when I was at Mike's place at "Semen Serret" there he told me that he was going on the trip, I saw him with a gunny bag he came to the road with it and inside the bag I saw the gun which I am used to seeing here in Court, he told me that he was ready, he was leaving and it was there that he showed me the gun. After that I do not quite recall the date when I was ready Mike said we were leaving the Port from there, there were 2 of us and Mike made us understand that only I would go. When I went on the boat I saw most of the people that I know here in the accused box. There was also Leon from there I went on the boat. On the boat we left, we were all there, we were all present and Leon was sleeping in the cabin at the front

and I was sleeping there next to him. When we were leaving Port I heard Mike talking to the Port Authority, there when he was telling about the crew members I saw that he was not stating the exact number of crew members on the boat. From there I was asking him how come he was mentioning the exact number of crew members and I quickly understood from there that there was something that Mike was also hiding from me. On the way Mike was skippering the boat at the same time that we were leaving he was given "Tyalas" which is now as Hashish to smoke and Leon was there, I was there with Leon he was giving it to Ti Leon and we were rolling the cigarette and was giving it to Leon. We made journey there was a moment I do not recall the date nor the day we were approaching a boat, I saw Mike disembarking with Leon and going to that boat with the battery from thereafter they came back to the boat. We continued the journey, I do not recall the island we went to but we were close to that island, after that we continued the journey. On the journey Mike told me that there was something he was going to take over there and that he needed me to talk to those people as and went and we passed by these islands which I do not know I have never been there was a moment where we went to this Island and we entered the lagoon which is called Cosmoledo, we were on the route to enter the lagoon and Mike told us that there was a boat we needed to look out for, we did not see any boat we entered the lagoon and there since I had left my wife behind and my child from there I called my wife before that the phone was being used by Mike to make calls and when I wanted to call my wife I asked Mike and from there I called my wife. My wife called me on several different numbers, I want to state that the phone that was with Mike was a satellite phone which the call was made on and he was very strict and serious about this because I think this you need to put a card it is not like the phones here in Seychelles because when I asked him to call my wife he told me that I need to be careful even when I was talking to my wife he was telling me hurry up. Even when after calling my wife, call came in I spoke to my wife, I do not know which phone my wife was using but from time to time she called me because she was living on Praslin she came to Mahe after that, I think that maybe she used the phone there on Praslin to call and also she may have used a phone

here in Mahe. When Mike was explaining to me when we were going inside the lagoon when he was telling me to look out for a boat there was a boat that we were supposed to meet. He told us to all look out for the boat it was supposed to be a catamaran we did not see the boat. When we were there in the lagoon Mike made a call which I supposed was to Madagascar and I also want to add that with the phone the call that I made using that phone was to my wife there were calls that came through via that phone and the 1<sup>st</sup> call that was made that was made by Mike and when calls came like he would tell me the call is mine this is the call I took from Seychelles. Even at times when he would give me the phone when a call would come I recognized that he was very strict he would say do not be too long talking, he would even say hurry up on the phone and if I had not completed the call he would grab the phone. Like when a call would come through he would tell me that, like when he would pass the phone I would hear him because the only person that will call is my wife. From there I would notice that even when I had not finished talking he would take the phone and he would state that do not take long.

Also when calls would come that when he would be talking I have not made any calls on that phone other than the call I made to my wife, at times I realized, I noticed that when Mike was receiving a call he would pass me the phone I would not here the voice properly I would try to listen to the voice he would tell me that he is not understanding there I understood that at times it was Malagasy voice. We were there in the lagoon after that there was a moment which I do not recall the day that a call came in there Mike answered he passed the phone to me and as if I was not quite understanding, hearing the conversation was between that person and Mike because when I took the phone it is as if a person is communicating something to someone but as I was listening I could not quite hear because the phone was in static at one point that he passed the phone I was not hearing properly I heard “sous le cocotiers”. As I was listening I heard that person say “sous le cocotiers” and I repeated the same thing “sous le cocotiers”, here was a moment that we went ashore upon having heard “sous le cocotiers” we went

there all of us who are present and as we got close to the shore, we all went on shore upon the island and there were many packets of salt that were there on the side, we passed by there next to the salt and there I heard someone say “there it is”, when I heard the person say “there it is” I was on the other side, not on the other side but close to the side, like you disembark on the beach it is one beach. Like when you are going on the Island for instance one will pass on one side, the other on one side I was on the side. We were all there when I heard say “there it is” I went up where the person was saying “there it is” I saw a large tarpaulin and there I saw some things that were in a gunny bag. We were all there we saw some in the gunny bags. [...]

We took a little bit from the bag for smoking and we went back to the boat. On the boat Mike was aware because we took some from the bag and we went onboard the boat with it. There we were smoking and Mike was also smoking. Mike stated that what we had seen on the shore he would tell us when to go and get it because he was the one giving all the orders on the boat. After that I forgot which day we embarked this on the boat but before putting this on the boat Mike gave the instructions to put this onboard the boat because everything that we need to do on the boat Mike has to decide. If we would take a small boat to go ashore we cannot do this without Mike because he is the one who gives the orders. Even if you would take the boat and go there somewhere you cannot just do that because it is Mike who needs to decide. Before boarding the boats with these things Mike told us to go ashore to see the sea cucumber that was already there. That place I know it as Cosmoledo from there I understood that Mike had been there before, the things was sea cucumber, salt and he gave us the instruction myself and other crew which I do not recall to go and get the sea cucumbers, I think there were 3 of us Ti Leon which I called quiet well and Casa which is Franky Thelermont we went to get the sea cucumbers and went back on board. After that I recall a catamaran I do not recall if it was before we went ashore or after but there was a catamaran, I saw that the catamaran had come and it came close to the boat, it docked and there Mike told me to take the boat and go and see

these people. I was not alone on the boat, I do not recall who was there, Mike told me to skipper the boat. When I arrived close to the Catamaran I saw people that I know as Malagasy and when I was there I saw a person that came out and started talking in French to me. He stated where is commander and I said commander is on the boat. There were one or two things provisions which he brought. After that it was then that they gave me a bag, when they gave me the bag I saw that the bag was a bit torn and I could see what was inside. I could see at the top because it was torn and I noticed packets of Masala from there I returned to the boat. That person stated to give the bag to the commander it seemed to be the captain of that boat.

When I was on the boat I do not recall how the bag was given but I took it to the boat and there I saw Mike like opening the bag there he removed packets of Masala and there was a place under the bunk of Naddy which were storing food like provisions, Mike took the Masala and placed it there next to the things that we use for cooking. Also in the bag there was Vanilla and also there were blocks of Hashish. When the bag was there Mike took a piece of Hashish and he was using, consuming. Even myself I am a victim I took a piece and started to smoke and the bag stayed there because where the cabin of the boat is and where I was sleeping, inside the cabin of the boat there are 2 bunks on the right and 2 bunks on the left and then there is where the steering wheel is at the front and then there is a part where you stand to steer and the bag remained there. Ti Leon slept there, there was a time that the bag was there but there was a time when Leon said he knew how to sew and he sewed the bag but the bag was there it was always there. Then there was the materials that Mike had asked to load on the boat, this he had load I believe the day before we left the lagoon from there all the merchandised Mike had placed inside the hold of the boat and there each time we had to go there it was Mike that went there or Ti Leon. Even when he would need some of the herbal material it would be either him or Ti Leon that would go down; there is also a moment which I wish to add that when police officers boarded the boat there was a gunny bag that they stated was mine this I wish to state that it was

Leon that had removed this from the hold of the boat, Mike had him bring this to the back, Mike had the lights connected I do not know in which way but there was a light this I believe was a bit in the evening and this Mike had Leon go and get and bring to the back and clean, this was being cleaned. I was stating that there was a gunny bag that when the officers boarded the boat and they said that it belonged to me, I wish to state that the materials inside that gunny bag and including the material inside the other gunny bag. [...].

I am stating that there was a gunny bag that when the officers boarded the boat that they were saying was mine this is what Mike had Leon go and get that had some sticks still on it but this had already been cleaned and this when it was being cleaned it was on a day that it was not very clear, it was in the dark, Mike connected a light and there it was placed at the back on the ground close to the kitchen and there Mike had put on his glasses and was cleaning and there were others which I do not recall who, they were cleaning and this upon finished being cleaned some sticks were thrown in the sea. The part of the gunny bag which had started being cleaned this was placed inside of the boat, I think that Mike had Leon place it there and not return it to the front of the boat because the sorting process was to be continued.

Also when we were there upon leaving I think there was one crew member that was not feeling very well it was either Casa or Naddy and there whereby the others had to dive, there was a day that the crew was supposed to dive there was one that was sick then Mike took us ashore whilst the others were diving and Mike brought back 2 gunny bags and was telling us to sort out and when we went ashore Naddy fell there in a corner and slept and I myself slept because I found it difficult to go and sort this out. Later on Mike came back to get us, when he came back Mike was telling me he saw the gunny bag which he himself had brought ashore and we had those returned on the boat, it was in a small boat we were going on the bigger boat and from there he told me that if all this time we had not sorted this out so I told him I was tired, he went on the big boat and had Leon replace

this in the hold of the boat. From there we went back and continued the journey, we went back to the Island I do not recall exactly and it was there that we had reached an Island and then there was another boat and it was there that we understand that it was a boat for Mr George. Mike said do not let this boat see me as if and we were there, we stayed there in that area, there were calls coming in and the person who was calling me was my wife, she stated that the police the NDEA was coming to us and Mike even as I was telling him even I had not finished talking on the phone he was telling me hurry up because it was only him that was supposed to be talking. He stated that at times he would receive calls from Mr George and Mr George was checking to see how the work was progressing. Moments that was on the boat at the cabin one morning I saw the others looking out and there I also came out of the cabin and was looking and I saw a boat coming as if quickly. It was there that the boat was approaching Mike stated to me go to the cabin and there I went inside the cabin, when I entered I entered with my back pack that had my clothes and when I was there in the boat at one point I could hear some noise and suddenly I saw the hold of the boat being opened and from there I immediately saw a gun being pointed at me I was on my knees and to avoid getting a shot I immediately raised my hand. Upon going up there was an NDEA officer that was hitting me, even cocked the gun and pointed at me, threatening me and he was stating to me you will tell me for whom the drugs are for and from there they pulled me up. The way this was being hit and the gun being cocked at me there he stated you will tell me for whom the drugs are for and it was there that I stated that all of these things are mine because I was thinking I was going to be beaten some more, I was pulled outside, they covered me entirely with a bed sheet and for more than an hour I could not see anything with the exception of one foot being pressed upon my body. Before that there was an officer called Ken he was the one that came to pull me out.

I also wish to state in regards to the phone at times where I went with Mike on the boat and the 1<sup>st</sup> instances where I knew Mike the person who was supposed to go with me and Mike, when I asked Mike for a job he had also asked for a job

because that person has a small boat as well a boat like for excursions, it was one time that we had gone together that we saw Mike on the big boat. There I saw Mike with some divers and there there was one of them who was cousin Anthony and there when we berth close to that boat he gave us some turtle meat and I saw a lot of drugs on that boat. When we went on that boat I saw some meat and drugs he gave us some meat, when we had left that boat, the boat that Mike was on it was then that I understood they were being closely watched by the NDEA and that he was doing transactions. I also wish to state that when I was with Mike, I wish to state that I am not the skipper of a boat and I cannot chart the route. Even where I went there with Mike it was there that I went that there was the transaction it is a difficult place it would need someone who is used to that area and even the catamaran which we received there if it is not a person who does not know the area it is impossible for that person to enter upon a 1<sup>st</sup> time and I wish to also say that it is not a 1<sup>st</sup> time I believe that this boat comes here. [...].

I forgot to add something when I was with Mike I asked him for a job I never knew Mr. George Michel. Mr. Michel I met him upon being arrested."

115. We have here above set out in quite detail the evidence upon which the Learned Trial Judge based her analysis to determine the guilt of the Appellant. We reviewed her analysis to establish whether it is a fair reflection of the evidence before the Court upon which the fair trial of the Appellant would be based. We are of the opinion that the analysis reflects a balanced view of the evidence in relation to the Appellant charged with such offences. We have edited her analysis to refer only to the case of the Appellant.

## **ANALYSIS OF THE TRIAL COURT**

### **Under Count 1**

116. The Learned Trial Judge stated as follows;- The offence of trafficking in a controlled drug referred to in count 1 is set out in section 5 of the Misuse of Drugs Act read with



section 14(d) and further read with section 15(3) and section 29(1) of the Misuse of Drugs Act. The aforesaid offence is punishable under section 29(1) of the Misuse of Drugs Act read with the Second Schedule referred in the said Act.

117. We found that Learned Trial Judge correctly set out the principle relating to the concept of possession as it should apply to this case. She referred to the case of ***DPP v Brooks*** [1974] 2 All ER 840 at 842, [1974]AC 862 at 866, where Lord Diplock delivering the judgment of the Privy Council said —

*"In the ordinary use of the word "possession", one has in one's possession whatever is to one's own knowledge, physically in one's custody or under one's physical control."*

118. That was said in the context of a case about unlawful possession of drugs. In a similar context and to similar effect, Lord Scarman said in ***R v Boyesen*** [1982] 2 All ER 161 at 163, [1982] AC 768 at 763 —

*"Possession is a deceptively simple concept. It denotes a physical control or custody of a thing plus knowledge that you have it in your custody or control."*

119. The Trial Judge correctly identified that the 3 ingredients that must be proved by the Prosecution, beyond a reasonable doubt, before an offence is made out under count 1, are —

- (i) the item must be in the physical custody or control of the Accused Person;
- (ii) the Accused Person must know, or at least could reasonably have known, of the existence of the item;
- (iii) the item must be a controlled drug.

120. Mere knowledge of the presence of the offending substance is not enough because the person must be in a position to exercise practical control over it in some way: ***see Black v. H.M. Advocate, 1974 S.L.T. 247 and Hughes v. Guild, 1990 S.C.C.R. 527.***

121. In the Hughes case it is stated that -

"... control is necessary for there to be possession and that the power to dispose of the article is the essence of control. Mere knowledge of the presence of the article is not enough, because the person must be in a position to exercise practical control over it in some way: see Black v. H.M. Advocate 1974 J.C. 43 , at p. 52. That was said in the context of sec. 4 (1) of the Explosive Substance Act 1883". This is because, for all practical purposes, they can do what they want with them, dispose of them or use them or retain them and place them wherever they choose".

122. The Trial Judge applied the test to the facts of this case. She found that it is without question that **the Appellant** knew about the presence of the cannabis herbal material which was on board the CHARITA.

123. In the case of Searle [1971] Crim.L.R. 592, C.A., drugs were found in a vehicle which was used by the defendants on a touring holiday. The Prosecution could not say which defendant intended to benefit from each type of drug found. The case was put on the basis of joint enterprise. The Judge told the jury - " ... *if they all knew that those drugs were then in the possession of other people and they knew they were drugs then you probably will not have any difficulty in deciding that they are guilty...*". It was held that the judge misdirected the jury by equating knowledge with possession. A direction that ought to have been given was to ask the jury to consider whether the drugs formed part of a common pool from which each defendant was entitled to draw. It was unnecessary for the prosecution to assert joint enterprise. The crucial feature in this case was that each defendant intended to draw from the common pool, each defendant exercised control over the pool and accordingly, each defendant was in possession of the drugs in question.

124. It was the Trial Judge's view that there are facts found as established by the evidence to suggest that **the Appellant** exercised practical control over the cannabis herbal material

which was on board the CHARITA. The Trial Court had considered only some of those material facts.

125. The Trial Judge interposed to consider the evidence of Capt. Hoareau, who is an accomplice turned Prosecution witness. Capt. Hoareau admitted that he was "*directly*" "*concerned and privy to the commission of the offences of trafficking in a controlled drug*" "" contrary to what was stated in the "*CONDITIONAL OFFER BY THE ATTORNEY GENERAL*", Exhibit A1 (3). Exhibit A1 (3) stated expressly that he was "*indirectly concerned and privy to the commission of the offences of trafficking in a controlled drug*". He added when cross-examined by Lawyer Juliette that when he accepted the Attorney General's offer he did not tell the Attorney General about his involvement but since he was apprehended with drugs, then it meant that he was involved.

126. *Dugasse v Republic SLR (2013) p 86*, states –

"[20] ... it is not obligatory on the courts to give a corroboration warning in cases involving accomplice evidence and we leave it at the discretion of the judges to look for corroboration when there is evidential basis for it..."

127. In the case of *Dugasse* the Court cited with approval the case of *Singh v State of Punjab Crim APP no 523-528/2009* (Supreme Court of India) which stated –

*"The law on the issue can be summarised to the effect that the deposition of an accomplice in a crime who has not been made an accused/put on trial, can be relied upon, the evidence is required to be considered with care and caution. An accomplice who has not been put on trial is a competent witness as he depones in the court after taking the oath and there is no prohibition in any law not to act upon his deposition without corroboration."*

128. The Trial Judge had summarised the evidence of Capt. Hoareau in advance and in view of the content of Capt. Hoareau's evidence and the issues raised in this case, the Trial

Judge Court warned herself that it is dangerous to convict on the evidence of Capt. Hoareau unless it is corroborated. Henceforward, the Trial Judge found it wise to look for some supporting material before acting on Capt. Hoareau's impugned evidence.

129. Capt. Hoareau was adamant that the drugs belonged to the Appellant and that he was part of a team to collect the drugs at Cosmoledo. The dock statement of the Appellant stated that - "on the journey Mike told me there was something he was going to take over there. ". At a later stage in the dock statement the Appellant stated —

*I have not made any calls on that phone other than the call I made to my wife, at times I realized, I noticed that when Mike was receiving a call he would pass me the phone I would not hear the voice properly I would try to listen to the voice he would tell me that he is not understanding there I understood that at times it was Malagasy voice. We were there in the lagoon after that there was a moment which I do not recall the day that a call came in there Mike answered he passed the phone to me and as if I was not quite understanding, hearing the conversation was between that person and Mike because when I took the phone it is as if a person is communicating something to someone but as I was listening I could not quite hear because the phone was in static at one point that he passed the phone I was not hearing properly I heard "sous le cocotiers". As I was listening I heard that person say "sous le cocotiers" and I repeated the same thing "sous le cocotiers", there was a moment that we went ashore upon having heard "sous le cocotiers" we went there all of us who are present and as we got close to the shore, we all went on shore upon the island and there were many packets of salt that were there on the side, we passed by there next to the salt and there I heard someone say "there it is", when I heard the person say "there it is" I was on the other side, not on the other side but close to the side, like you disembark on the beach it is one beach. Like when you are going on the Island for instance one will pass on one side, the other on one side I was on the side. We were all there when I heard say "there it is" I went up where the person was saying "there it is" I saw a large tarpaulin and there I saw some*

things that were in a gunny bag. We were all there we saw some in the gunny bags. [...]

*We took a little bit from the bag for smoking and we went back to the boat. On the boat Mike was aware because we took some from the bag and we went on board the boat with it. There we were smoking and Mike was also smoking. Mike stated that what we had seen on the shore he would tell us when to go and get it because he was the one giving all the orders on the boat. After that I forgot which day we embarked this on the boat but before putting this on the boat Mike gave the instructions to put this onboard the boat because everything that we need to do on the boat Mike has to decide.*

130. The dock statement of the Appellant stated at the beginning that the Appellant saw Capt. Hoareau on one occasion and asked him for a job on board the CHARITA. Capt. Hoareau agreed to give him a job on the CHARITA. The Appellant saw Capt. Hoareau on a second occasion, who told him that he was going on a trip and asked him to come and see him at St Louis "Semen Serret". The Appellant went to see Capt. Hoareau at "Semen Serret", who told him that he was ready to leave and showed him a gun. He did not quite recall the date Mike (Capt. Hoareau) said "we were leaving the port". The dock statement explained that Capt. Hoareau told the Appellant that only the 2 of them were going on the trip.
131. The Trial Judge examined the dock statement of the Appellant in light of the testimony of Capt. Hoareau and Daniel Leon and other relevant witnesses for the Prosecution.
132. The Trial Judge interposed to state that Daniel Leon is also an accomplice who turned Prosecution witness. Daniel Leon stood the test of cross-examination and there was nothing adverse in his answers that could allow the Trail Court to say that his evidence was unworthy of belief. There were some discrepancies and inconsistencies but they are not material to the substance of the case. The Trial Judge allowed itself to be guided by the Dugasse case and will look for corroboration when there is an evidential basis for it.

133. The Trial Judge found the dock statement of the Appellant incredible. The telephone records of 11 November, 2012, proved that the Appellant and Capt. Hoareau had been actively communicating with each other until as late as 22:31 p.m. (5 incoming calls received by 2739189 (used by Capt. Hoareau) from 2586095 (used by the Appellant) and 2 outgoing calls made by 2739189 towards (2586095). The Trial Judge added that Capt. Hoareau was very economical with the truth when he stated, under oath, that he did not recall his telephone number; and that he did not recall having had that many telephone conversations with the Appellant (58 calls + "10 missed calls"). Lieutenant Colonel George Adeline (PW-25) testified that Capt. Hoareau told the Seychelles Coast Guard, on 15 November, 2012, when the CHARITA was leaving port, that his phone number was 2739189. At a later stage of the proceedings, when subjected to intense cross-examination, by Lawyer Juliette, Capt. Hoareau admitted that he used the telephone number 2739189. Telephone records of 11 November, 2012, showed telephone communication between Capt. Hoareau, the Appellant (2586095), numbers in Mahe (2560135-Jeanne Maria Antat, St Louis) and 2510549 (Tracey Louis Marie, Bel Air), in Praslin (2580760 - Jean Pierre Lesperance) and 2 numbers from Madagascar, 261325643997 (the number that the CHARITA satellite phone first dialled upon arrival in Cosmoledo on 21 November, 2012) and 261344030121 (the number that called the CHARITA on 22 November, 2012, on the day the drugs were located ashore). The evidence revealed that all these phone numbers called or received calls from the CHARITA (881632557831) a number of times during the Cosmoledo period (21 to 27 November, 2012) and after (Exhibit A6(20)).
134. Mr D'Offay (PW-26) told the Trial Court, when asked by Lawyer Camille, that from July, 2012, to August 2012, the number 2586095 was registered in the name of Linda Barbe, Praslin; and that as from August, onwards the number was not registered on the Cable and Wireless network. The Trial Judge having considered the facts and circumstances of this case is convinced that the telephone number 2586095 was being used by the Appellant. The Trial Judge noted that Capt. Hoareau when examined and cross examined did not deny calling the Appellant on the telephone number 2586095.

Moreover, Maxime Morel (A6W-6) gave a comprehensive account of all the telephone communication between 739189 and 2586095 (telephone number used by the Appellant) and confirmed that the last registered phone call between those 2 numbers was at 22:47:14 hours on 15 November, 2012. Capt. Hoareau stated that he contacted the JRCC at 11:06 p.m., and departed. His evidence is supported by the testimony of Lieutenant Colonel George Adeline (PW-25).

135. Daniel Leon testified that he overheard the Appellant saying on the phone - *"il faut revient... on va faire arrangement... sous les cocotiers..."*. Daniel Leon did not give the court any reasons not to believe his testimony. The Appellant admitted in his dock statement, related above, that he repeated the words *"sous les cocotiers"*, during a phone conversation. The Appellant stated in his dock statement –

***"We were there in the lagoon after that there was a moment which I do not recall the day that a call came in there Mike answered he passed the phone to me and as if I was not quite understanding, hearing the conversation was between that person and Mike because when I took the phone it is as if a person is communicating something to someone but as I was listening I could not quite hear because the phone was in static at one point that he passed the phone I was not hearing properly I heard "sous le cocotiers". As I was listening I heard that person say "sous le cocotiers" and I repeated the same thing "sous le cocotiers", there was a moment that we went ashore upon having heard "sous le cocotiers" we went there all of us who are present. and as we got close to the shore, we all went on shore upon the island and there were many packets of salt that were there on the side, we passed by there next to the salt and there I heard someone say "there it is", when I heard the person say "there it is" I was on the other side, not on the other side but close to the side, like you disembark on the beach it is one beach. Like when you are going on the Island for instance one will pass on one side, the other on one side I was on the side. We were all there when I heard say "there it is" I went up where the person was saying "there it is" I saw***

*a large tarpaulin and there I saw some things that were in a gunny bag. We were all there we saw some in the gunny bags. [...]*

136. The Trial Judge found that the version of the Appellant is simply implausible. The Trial Judge found that a reasonable inference to be drawn in view of the above facts and in the circumstances of the case is that the phone call had informed the Appellant that drugs had been placed ashore. This explains why the Appellant went ashore to see whether the drugs were "sous le cocotiers". Daniel Leon testified that indeed there are 3 coconuts trees on Grand Île.
137. The Appellant stated *"we took a little bit from the bag for smoking and we went back to the boat. On the boat Mike was aware because we took some from the bag and we went on board the boat with it"*. The behaviour of the Appellant is clearly contrary to the actions of somebody who had nothing to do with the drugs found on Grand Île. The Trial Judge's belief was reinforced by reason of the fact that the Appellant was seen coming from the catamaran with a blue bag. The Appellant admitted in his dock statement that he knew of the existence of the *"blocks of hashish"* or cannabis resin which was contained in a bag that *"was a bit torn"*. The Trial Judge found that clearly the Appellant did not leave the *"blocks of hashish"* untouched. He admitted that he *"took a piece and started to smoke"* which proved that he had more than a general interest in the content of the bag. Earlier in his dock statement he had stated that —

*"Then there was the materials that Mike had asked to load on the boat, this he had load I believe the day before we left the lagoon from there all the merchandised Mike had placed inside the hold of the boat and there each time we had to go there it was Mike that went there or Ti Leon."*

138. Having considered the facts and circumstances of this case the Trial Judge rejected the version of the Appellant. The Trial Judge accepted the evidence of Daniel Leon that the Appellant, Danny Bresson (A3), Naddy Delorie (A5) and Franky Thelermont (A4) transported the drugs by fiberglass to the CHARITA; and that the Appellant Danny



Bresson (A3), Naddy Delorie (A5), Franky Thelermont (A4), he [Daniel Leon], Robert Jean (A2) and Capt. Hoareau (PW-21) all assisted to load the cannabis herbal material on board the CHARITHA.

139. The Trial Judge found and noted that the Appellant stated in his dock statement that Capt. Hoareau told him to go into the cabin, on 7 December, 2012, when the CHARITA was intercepted by the NDEA. The Trial Judge rejected that version and accepted the testimony of the Prosecution witnesses that the Appellant hid in the engine room, and came out when ordered to do so by Agent Marie and that upon coming out of the engine room he shouted that the drugs on board the CHARITA belonged to him. The blue bag containing the cannabis resin was retrieved from the engine room on 8 December, 2012, by Agent Cadence. Again the behaviour of the Appellant is contrary to the actions of somebody who was adamant that he exerted no control over the drugs on board the CHARITA.
140. Having considered the above evidence the irresistible inference that the Trial Judge made was that the Appellant exerted control on the cannabis herbal material. As the sole Judge of facts we find that the Trial Judge did not err in coming to that conclusion.
141. The Trial Judge on a consideration of the evidence was satisfied that the Appellant exerted control over the cannabis herbal material and therefore was in possession of the cannabis herbal material.

### **Chain of evidence**

142. The Trial Judge then proceeded to consider the question of the integrity of the cannabis herbal material admitted in this case. The Prosecution bears the burden of proving beyond reasonable doubt that the herbal material analysed by ASP Bouzin (PW-2) was the same as those allegedly seized from the Appellant, Robert Jean (A2), Danny Bresson (A3), Franky Thelermont (A4) and Naddy Delorie (A5) on board the CHARITA. Where there is a break in the chain of evidence and a reasonable doubt arises as to the identity and

integrity of the cannabis herbal material then the Prosecution have not discharged their burden. Any break in the chain of evidence goes to the weight afforded to the evidence, not to its admissibility.

143. In the case of *Josiane Vital v Republic* **Criminal Appeal No. 3 of 1997**. This Court allowed the appeal against conviction, on the basis that there was a break in the chain of evidence. This Court held thus —

*" [t]he whole issue is shrouded with mystery. The onus was upon the respondent to adduce satisfactory evidence to show that the substance that had been brought from the Appellant's residence was the same substance that was handed over to the analyst. This they failed to do with the result that there was a break in the chain of evidence to link the drugs analysed by the Drug Analyst to the Appellant.*

"

144. The Defence Counsel contended that the Prosecution have to prove that from the time of seizure of the cannabis herbal material on board the CHARITA up to the time it was analysed by ASP Bouzin (PW-2), there has been no tampering with the drugs seized; and that the integrity of the chain of evidence was maintained (*Gabriel v Republic (2010) SLR 394, p 6, 7 and 8*). On the same point the Defence Counsel contended that with respect to the weight of the cannabis herbal material seized on board the CHARITA there was a break in the chain of evidence. The Defence Counsel contended that the Prosecution failed to investigate or to even come up with a credible justification to explain the about 12 kilograms discrepancy in the weight sworn 3 times in the Affidavit of Agent Malvina (PW-16) on 11 December, 2012, (91 kilograms), and what was contained in the formal charge sheet (79 kilograms 779.6 grams). As a result the Prosecution have failed to establish that the chain of evidence was maintained with respect to the cannabis herbal material seized between the time it was weighed on 11 December, 2012, by Agent Seeward (PW-17

145. The Trial Judge having considered the evidence of Agent Seeward in light of the submissions of the Defence Counsel is satisfied that Agent Seeward is not an expert witness; and that his estimation of the weight (91 kilograms) cannot be relied on compared to ASP Bouzin's weighing or physical analyses of the Exhibits. The Trial Judge had no reason to doubt that the cannabis herbal material have been kept without tampering and that all persons who had contact with the cannabis herbal material were accounted for. In the light of the available evidence we find no reason to disturb the finding of the Trial Judge. The Trial Judge was satisfied that the Prosecution have proved beyond reasonable doubt that the herbal material analysed by ASP Bouzin were the same herbal material seized from the Appellant, Robert Jean (A2), Danny Bresson (A3), Franky Thelemont (A4), Naddy Delorie (A5), Capt. Hoareau and Daniel Leon on board the CHARITA.
146. The Trial Judge was satisfied that the Prosecution have proved the offence under Count 1 against the Appellant and convicted the Appellant of the offence under Count 1.

### **Under Count 2**

147. The offence of trafficking in a controlled drug referred to in Count 2 is set out in an alternative count to Count 1. The offence of trafficking is referred to in section 5 of the Misuse of Drugs Act read with section 2 and 26(1) (a) of the said Act. The said offence is punishable under section 29 (1) of the Misuse of Drugs Act and read with the Second Schedule of the said Act.
148. The offence of trafficking, charged under Count 2, concerns the Appellant, Robert Jean (A2), Danny Bresson (A3), Franky Thelemont (A4) and Naddy Delorie (A5).
149. The Trial Judge had considered the evidence on record and was satisfied that the Appellant, Robert Jean (A2), Danny Bresson (A3), Franky Thelemont (A4) and Naddy Delorie (A5) transported the cannabis herbal material from Grand Île, by fiberglass, and

were assisted by Daniel Leon and Capt. Hoareau, who were on board the CHARITA, to load them on board the CHARITA, for them to be transported to its destination.

150. The Trial Judge found the Appellant, Robert Jean (A2), Danny Bresson (A3), Franky Thelermont (A4) and Naddy Delorie (A5) each guilty of the offence under Count 2 and convicted each Accused person of the offence under Count 2.
151. We find and hold that the Trial Judge did not err in reaching the conclusion she did.

### **Under Count 3**

152. The offence of trafficking in a controlled drug referred to in count 3 is set out in section 5 of the Misuse of Drugs Act read with section 14 (d) and further read with section 15 (3) and section 29 (1) of the Misuse of Drugs Act. The aforesaid offence is punishable under section 29 (1) of the Misuse of Drugs Act read with the Second Schedule referred in the said Act.
153. The offence of trafficking, charged under count 3, concerns only the Appellant.
154. The Trial Judge had already set out the principle relating to the concept of possession as it should apply to this case.
155. The issue for the determination of the Trial Judge was whether the Appellant was in possession of *"controlled drugs having total net weight of 3 kilogrammes and 954.6 grammes of cannabis resin which gives rise to the rebuttable presumption of having possessed the said controlled drugs for the purposes of trafficking"*.
156. The Appellant stated the following in his dock statement in relation to this count.

*"After that I recall a catamaran I do not recall if it was before we went ashore or after but there was a catamaran, I saw that the catamaran had come and it came*

close to the boat, it docked and there Mike told me to take the boat and go and see these people. I was not alone on the boat, I do not recall who was there, Mike told me to skipper the boat. When I arrived close to the Catamaran I saw people that I know as Malagasy and when I was there I saw a person that came out and started talking in French to me. He stated where is commander and I said commander is on the boat. There were one or two things provisions which he brought. After that it was then that they gave me a bag, when they gave me the bag I saw that the bag was a bit torn and I could see what was inside. I could see at the top because it was torn and I noticed packets of Masala from there I returned to the boat. That person stated to give the bag to the commander it seemed to be the captain of that boat.

When I was on the boat I do not recall how the bag was given but I took it to the boat and there I saw Mike like opening the bag there he removed packets of Masala and there was a place under the bunk of Naddy which were storing food like provisions, Mike took the Masala and placed it there next to the things that we use for cooking. **Also in the bag there was Vanilla and also there were blocks of Hashish.** When the bag was there Mike took a piece of Hashish and he was using, consuming. Even myself I am a victim I took a piece and started to smoke and the bag stayed there because where the cabin of the boat is and where I was sleeping, inside the cabin of the boat there are 2 bunks on the right and 2 bunks on the left and then there is where the steering wheel is at the front and then there is a part where you stand to steer and the bag remained there. Ti Leon slept there, there was a time that the bag was there but there was a time when Leon said he knew how to sew and he sewed the bag but the bag was there it was always there.

157. The Appellant had clearly admitted in his dock statement that he knew of the existence of the "blocks of hashish" or cannabis resin which were contained in a bag that "was a bit torn". The Trial Judge found that clearly the Appellant did not leave the "blocks of

*hashish*" untouched. He admitted that he "*took a piece and started to smoke*" which proved that he had more than a general interest in the content of the bag.

158. When examined Daniel Leon stated that the Appellant came from the boat with a blue bag with padlocks. The Appellant had opened parts of the bag and there were vanilla sticks, sealed hashish in the bag, and several "*pieces of packet*". He stated that the bag was sewed and kept with the Appellant. The position of the Appellant through Lawyer Camille was that the Appellant was instructed to bring the bag to give to Capt. Hoareau. When cross-examined Daniel Leon was adamant that the blue bag was always with the Appellant where he slept. He admitted to holding the bag while the Appellant stitched it.
159. The Trial Judge had considered the evidence of Daniel Leon and warned itself of the dangers inherent in his testimony. However, the Trial Judge was satisfied that the evidence of Daniel Leon, in the absence of corroboration, is the truth and that it can be accepted. The Trial Judge noted that Daniel Leon did not play down his own involvement. The Trial Judge added that Daniel Leon was subjected to thorough cross-examination and had nevertheless not departed from his version. Having considered the evidence of Daniel Leon the Appellant and the dock statement the Appellant the Trial Judge rejected the defence of the Appellant that he was instructed to bring the bag to give to Capt. Hoareau.
160. The Trial Judge having considered the evidence of Agent Marie, Agent Louise and Daniel Leon she was satisfied that the Appellant hid in the engine room, when the NDEA Agents boarded the CHARITA on 7 December, 2012. Agent Marie testified that Bresson (A3) alerted them that the Appellant was in the engine room. The Trial Judge also accepted the evidence of Agent Marie, Agent Louise, and Daniel Leon that the Appellant upon coming out of the engine room shouted that the drugs on the CHARITA belonged to him. The blue bag containing the cannabis resin was retrieved from the engine room on 8 December, 2012, by Agent Cadence. The Trial Judge found Agent Marie, Agent Louise and Agent Cadence to be straightforward and convincing. They stood the test of extensive and exhaustive cross-examination and there was nothing adverse in their

answers that could allow the court to say that their evidence was shaken or was unworthy of belief.

161. In his dock statement the Appellant gave the reasons why he admitted that the drugs were his as follows.

*"It was there that the boat was approaching Mike stated to me go to the cabin and there I went inside the cabin, when I entered I entered with my back pack that had my clothes and when I was there in the boat at one point I could hear some noise and suddenly I saw the hold of the boat being opened and from there I immediately saw a gun being pointed at me I was on my knees and to avoid getting a shot I immediately raised my hand. Upon going up there was an NDEA officer that was hitting me, even cocked the gun and pointed at me, threatening me and he was stating to me you will tell me for whom the drugs are for and from there they pulled me up. The way this was being hit and the gun being cocked at me there he stated you will tell me for whom the drugs are for and it was there that I stated that all of these things are mine because I was thinking I was going to be beaten some more, I was pulled outside, they covered me entirely with a bed sheet and for more than an hour I could not see anything with the exception of one foot being pressed upon my body. Before that there was an officer called Ken he was the one that came to pull me out."*

162. In light of the evidence on record, the Trial Judge found the version of the Appellant to be implausible and rejected it. The Trial Judge was also satisfied that the Prosecution have proved beyond reasonable doubt that the Appellant was in possession of the 3 kilograms and 954.6 grams of cannabis resin. The Trial Judge found the Appellant guilty of the offence under count 3 and convicted the Appellant of the offence under Count 3.

163. We hold that the Trial Judge did not err in doing so.

**Under count 4**

164. The offence of trafficking in a controlled drug referred to in count 4 is set out as an alternative count to count 3. The offence of trafficking is referred to in section 5 of the Misuse of Drugs Act read with section 2 and 26(1) (a) of the said Act and read with section 23 of the Penal Code. The said offence is punishable under section 29(1) of the Misuse of Drugs Act and read with the Second Schedule of the said Act.
165. Having considered the evidence presented under Count 3, We hold that the Trial Judge was satisfied that the Prosecution had proved beyond a reasonable doubt that the Appellant was trafficking in 3 Kilograms and 954.6 grams of cannabis resin by transporting it on board the CHARITA. The Trial Judge found the following facts have been established by the evidence - that the catamaran, which berthed alongside the CHARITA in the Cosmoledo lagoon, brought the blue bag for the Appellant; that the Appellant "*jumped*" on board the catamaran to fetch the blue bag; that he returned on the CHARITA with the blue bag; that on the CHARITA, the blue bag was always in the possession of the Appellant and that the blue bag was retrieved from the engine room; and that the Appellant admitted that the drugs on board the CHARITA belonged to him.
166. The Trial Judge found the Appellant guilty of the offence under Count 4 and convicts him of the offence under Count 4.
167. We hold and find that the Trial Judge did not err in reaching the conclusion she did.

### **Under Count 8**

168. The offence of conspiracy referred to in count 8 is set out in section 28 (a) of the Misuse of Drugs Act. For the purposes of analysis it is convenient to separate the 2 clauses each of which must be taken as indicating an essential element of the offence as follows –
- (i) "A person who agrees with another person or persons that a course of conduct shall be pursued"



- (ii) "which, if pursued will necessarily amount to or involve the commission of the offence under this Act by one or more parties to the agreement."

169. Clause (1) provides that to be convicted an accused person must have agreed with one or more others that "a course of conduct shall be pursued". *R v Anderson* [1985] LRC (Crim) 408 states –

*"the agreed course of conduct may be a simple or an elaborate one and may involve the participation of two or any larger number of persons who may have agreed to play a variety of roles in the course of conduct agreed."*

170. With respect to Clause (2), the *Anderson* case states –

*"Here what is important to note is that it is not necessary that more than one of the participants in the agreed course of conduct shall commit a substantive offence. It is, of course, necessary that any party to the agreement shall have assented to play his part in the agreed course of conduct, however innocent in itself, knowing that the part to be played by one or more of the others will amount to or involve the commission of an offence."*

171. The *actus reus* is the agreement to commit an unlawful object but the whole concept is heavily dependent on the mental element, namely, on the terms of the agreement and the belief held by each party to the agreement. *Anderson* states –

*"[b]ut, 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 the agreed course of conduct was intended to achieve. Nothing less will suffice; nothing more is required."*

172. Paragraphs 33 and 34 of **Dugasse v Republic (2013) SLR** set out the following –

*"[33] To be guilty of conspiracy, it is not necessary that the accused was a party to the original scheme. It is not necessary to prove that the defendants met to concoct or originate the scheme. A conspiracy may exist between persons who have neither seen nor corresponded with each other. If a conspiracy is already formed, and a person joins in afterwards, he is equally guilty with the original conspirators. Vide Archbold (2012) 33-25. So far as mens rea of the offence is concerned it needs be established 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 the agreed course of conduct was intended to achieve. Vide Lord Bridge in R v Anderson [1986] AC 27. Lord Griffiths in Yip Chiu-Cheung v R (1994) 99 Cr App R 406 said:*

*The crime of conspiracy requires an agreement between two or more person to commit an unlawful act with the intention to carry out the crime that constitutes the necessary mens rea."*

173. Count 8 concerns George Michel (A6), the Appellant, Robert Jean (A2), Danny Dereck Bresson (A3), Franky Thelermont (A4) and Naddy Delorie (A5).

174. The facts and circumstances of the case established that Robert Jean (A2), Danny Bresson (A3), Franky Thelermont (A4) and Naddy Delorie (A5) were each not party to the original scheme between the Appellant and Capt. Hoareau. the facts and circumstances establish that Robert Jean (A2), Danny Bresson (A3), Franky Thelermont (A4) and Naddy Delorie (A5) along with Daniel Leon each joined in the agreement when the cannabis herbal material was found at Grand île. The facts and circumstances of the case establish that each of the Accused Person [Robert Jean (A2), Danny Bresson (A3), Franky Thelermont (A4) and Naddy Delorie] when each of them joined in the conspiracy intended to play some part in the agreed course of conduct in furtherance of the criminal

purpose which the agreed course of conduct was intended to achieve. (See the *Dugasse* case.

175. The Trial Judge concluded that the Prosecution have proved Count 8 **the Appellant**, Robert Jean (A2), Danny Bresson (A3), Franky Thelermont (A4) and Naddy Delorie (A5) beyond a reasonable doubt. The Trial Judge also found the Appellant, Robert Jean (A2), Danny Bresson (A3), Franky Thelermont (A4) and Naddy Delorie (A5) guilty of the offence on Count 8 and convicted **the Appellant**, Robert Jean (A2), Danny Bresson (A3), Franky Thelermont (A4) and Naddy Delorie (A5) of the offence under Count 8.
176. We hold and find that the Trial Judge had properly applied the test to the facts of the case.

### **Our Decision**

177. From our analysis of the grounds of appeal and the issues raised thereby, we now address each of such issues and give our decisions with regard the each Ground of Appeal. We based our decisions on our review of the evidence and the pertinent facts established by the Trial Judge. We reviewed the analysis of the Trial Judge of those facts in relation to the counts of offence with which the Appellant was charged. We considered the applicable law supported by precedents which the Trial Judge relied upon to reach her decision. We also considered the conclusion reached by the Learned Trial Judge in relation to the Appellant and the sentences meted out.

### **Ground 1 of Appeal -**

178. We find that the learned Trial Judge did not err in finding that the Appellant had control of the drugs although such drugs may have been found in an area that was accessible by other persons. We also find that the Appellant went to the engine room on his own free will for reasons best known to himself. Capt. Hoareau who although had control of the vessel at the time did not have any control of the Appellant. We further find that the Prosecution proved beyond a reasonable doubt that the Appellant had control of the drugs. Finally we find that the Learned Trial Judge did not err in finding the Appellant guilty as charged.

**Grounds 2, 5 & 8 -**

179. We find that the Prosecution adduced sufficient evidence to prove the charges against the Appellant beyond a reasonable doubt. We also find that the drugs were indeed under the overall control of only the Appellant although these were found in a location used by persons other than the Appellant. We further find that although the Appellant was on the vessel with other persons, he was not operating under the supervision and control of the Captain.
180. We find no merits in Ground 2, 5 and 8 which we dismiss.

**Grounds 3 & 7 –**

181. We find that the Learned Trial Judge did not commit any error in convicting the Appellant of Count 2 although that count of offence was an alternative charge to Count 1. We find that an error could have been committed had the Learned Trial Judge meted an additional sentence to the Appellant in respect of the alternative count, which she did not do. The case was subject to appeal and this Court may consider setting aside this conviction if it found it necessary to do so in the circumstances. We do not find any necessity to do so as it does not serve any real purpose beneficial or detrimental to the Appellant. As such the Appellant was not charged twice for the same offence.
182. We find no merits in Grounds 3 and 7 which we dismiss.

**Ground 4 –**

183. We find that the evidence and the facts of the case had established beyond a reasonable doubt that the Appellant voluntarily admitted that the drug was his and was not under any threat and duress when he did so.
184. We find no merits in Ground 4 which we dismiss.

**Ground 6 –**

185. We find that the Appellant was **not** simply following the orders of the Captain who had control of the vessel. The Appellant was in actual fact conducting his own operation as he pleased. We bear in mind that in the instant case it is only the Appellant who is responding to charges before this Court and not the Captain. Had the Captain been charged and was on trial, the ultimate decision of the Trial Court and possibly this Court might have been different.

186. We find no merits in Ground 6 which we dismiss.

**Grounds 9 & 10 –**

187. We find that the sentences meted out on the Appellant, although appearing not to be at par to the other convicts, it is lawful in the circumstances. We find that in sentencing the Appellant as well as the other persons convicted alongside the Appellant, the Learned Trial Judge correctly applied the law on sentencing and took into consideration all the relevant factors as well as the role played by the Appellant in comparison to the other convicts.

188. Before sentencing the Appellant the Learned Trial Judge reviewed the evidence and took into consideration the following factors:

The role played by each Accused person and their different degree of participation in the drug transaction;

- The seriousness of the offences committed by each Accused person;
- The amount of drugs involved;
- The penalties provided by law;
- The antecedents of the Accused persons where applicable;
- The facts and circumstances of the case;
- The mitigating factors;

- The family circumstances of each of the Accused persons;

189. We reviewed the meticulous reasoning of the Learned Trial Judge when sentencing each of the Accused persons and we find that the sentences meted out on the Appellant by the Learned Trial Judge are not harsh and excessive, in the circumstances of the case.

190. However, we note that the Learned Trial Judge sentenced Appellant to 4 years imprisonment under Count 3 and again convicted the Appellant to 4 years imprisonment under Count 4 which is an alternative count to Count 3. We find that this is now not called for and we accordingly set aside the sentence of 4 years under Count 4.

191. We find no merits in Grounds 9 and 10 which we dismiss save for our setting aside of the sentence under count 4.

**Conclusion and Order**

192. For reasons set out above, we find no merits in all the Grounds of Appeal against conviction of the Appellant which we accordingly dismiss in its entirety.

193. As regard to the sentence we uphold the sentences meted out on the Appellant save for the sentence of 4 years under the Count which we set aside.

B. Renaud (J.A)

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

**I concur:.** ..... M. Twomey (J.A)

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