

IN THE SEYCHELLES COURT OF APPEAL

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

Criminal Appeal SCA 27/2018

(Appeal from Supreme Court Decision CR 22/2016)

Francis Ernesta	1st Appellant
Brian Mothe	2nd Appellant
Kevin Quatre	3rd Appellant
Danny Sultan	4th Appellant

Versus

The Republic	Respondent
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Heard: 02 December 2019
Counsel: Mr. Clifford Andre for the Appellants
Mr. Jayaraj Chinnasamy for the Respondent
Delivered: 17 December 2019

JUDGMENT

M. Twomey (J.A)

1. The four Appellants were charged under the former Misuse of Drugs Act 1990 with the offences of importation, conspiracy to commit the offence of importation, trafficking in a controlled drug, and conspiracy to commit the offence of trafficking in a controlled drug. They were found guilty of the above offences following trial and convicted accordingly. They are appealing against conviction.
2. The facts reveal that the vessel Canapone entered into Seychelles waters on or about 25 March 2016; this was not disputed by the Appellants on appeal as a ground. The related but unchallenged issue of importation of controlled drugs was raised *suo sponte* by my brother Fernando, an issue which I shall address later in my decision.

3. The material facts in this case are summarised in my brother Fernando's Judgment and I do not see a reason for rehearsing them.

The grounds of appeal

4. The Appellants are appealing against their conviction and have raised several grounds, many of which are intrinsically linked. The crux of the issues arising therefrom are as follows:
 1. If an accused is not found in physical possession of a controlled drug, can they be convicted for the offence of trafficking?
 2. Do the inconsistencies in the prosecution witnesses' evidence amount to a reasonable doubt in the prosecution case?
 3. Does the alleged lack of identification evidence by the witnesses amount to a reasonable doubt in the prosecution case?
5. The Appellants further contend that the learned trial Judge erred in concluding that the Appellants trafficked in 746.9g of substance on 26 March 2016, when the substance was only seized on 28 March 2016. Furthermore, they contend that the court erred in law and fact in not considering that both Jeannia and Xavier Pool did not identify any gunny bags against pictures or video, and in not considering that the drugs were found at the residence of Delores Mounac, and not on the beach. They also contend that Witness Michael Hissen could not identify the drugs as he never saw any heroin on the date in question, so this amounts to a relevant consideration that was also overlooked by the learned trial Judge.
6. It is trite that the burden is on the Appellants to show that the findings of the trial court were unreasonable or could not be supported having regard to the evidence (*Naiken v R* (1981) SLR 19).

Issue 1: If an accused is not found in physical possession of a controlled drug, can they be convicted for the offence of trafficking?

7. The answer in short is yes. Section 2 of the Misuse of Drugs Act 1990 as amended by Act No 3 of 2014, provides that "traffic" means:

*“(a) to sell, give, administer, transport, send, deliver or distribute, or
(b) to offer to do anything mentioned in paragraph (a) or;
(c) to do or offer to do any act preparatory to or for the purposes mentioned in paragraph (a); or
(d) to possess, whether lawfully or not, with intent to supply to another person contrary to this Act;
"trafficking" has a corresponding meaning.”*

8. With the words “does or offers to do any act preparatory to, or for the purpose of [drug trafficking]”, the Legislature extended the range of culpability beyond those who sell, give, administer, transport, send, distribute or transfer the drug. The offence has been widened to include those who merely prepare to do such acts. Therefore the court has to determine on the evidence produced whether the accused did an act that was preparatory to trafficking (*R v Francois* (2000) SLR 103).
9. Possession of drugs implies custody of or control over drugs (*Florine v R* [2008-2009] SCAR 79). Possession of a controlled drug may be established through a continuous act that involves either physical custody or the exercise of control (*R v Albert* (1997) SLR 27). It was further emphasized in *R v Victor* (2014) SLR 55 that a person has possession if they have the power and intent to control the disposition and use of the drugs. Joint possession is sufficient to prove possession; exclusive possession is not required (*Florine v R* [supra]). For these purposes, there can be joint possession or possession by one on behalf of another (*R v Dias* [1985] SLR 66).
10. There is ample evidence on record to prove beyond reasonable doubt that the Appellants jointly orchestrated and participated in this drug operation; from the obtaining of the drugs from ‘Indians’ in a ‘multi-coloured’ boat, to the carting of it into Seychelles waters on the Canapone, to the shifting of the drugs onto a speedboat and transporting them to Praslin, where they were again relocated by one of the Appellants. There are sufficient

witness accounts to highlight each Appellant's direct involvement in the operation, and their knowledge of, and control over, the controlled drugs at various points in time. An operation of this complexity required significant forward-planning and collective effort, and it is evident from the facts that the Appellants carried out acts preparatory to, and for the purpose of, drug trafficking

11. Ultimately, when considering a charge of drug trafficking, once it has been established that the accused had both possession of the controlled drug and knowledge of that possession, circumstantial evidence may be admitted from which a reasonable inference may be drawn that the possession of the controlled drug was for the purposes of trafficking (*R v Albert* (1997) SLR 27).
12. The statutory requirement for a presumption of trafficking under section 14 of the Act requires possession of more than 2 grams of heroin in its pure form (*Simeon v Republic* (2010) SLR 195). The Government Analyst gave evidence that there was a total heroin weight of 746.9 grams, with a purity of 64%. An accused may raise a legal doubt in the prosecution's argument concerning the accused's state of mind in that the accused did not have knowledge of the drugs or their illicit nature, or that he or she had no reason to suspect illicit drugs (*Florine v R*, [supra]).
13. As Lord Slynn of Hadley stated in *Regina v Lambert* [2001] UKHL 37 (where the accused claimed he did not know what was contained in a duffle bag he was carrying):

“The mental element involves proof of knowledge that the thing exists and that it is in his possession. Proof of knowledge that the thing is an article of a particular kind, quality or description is not required. It is not necessary for the prosecution to prove that the defendant knew that the thing was a controlled drug which the law makes it an offence to possess” (at 61).

14. In *Clare v R* [1994] 2 Qd R 619, Davies JA concluded (at 645):

“...I do not think that the element of knowledge which undoubtedly exists in that

concept in its ordinary meaning, extends beyond knowledge, by the accused, of the existence and presence within his physical control of the object; it does not extend to knowledge of the nature of that object. There is nothing in the construction of the Drugs Misuse Act which would suggest that ‘possession; is being used in other than its ordinary meaning.’”

15. In *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 536, the Court held:

“...if the suspicions of an incoming traveller are aroused, and he deliberately refrains from making any inquiries for fear that he may learn the truth, his wilful blindness may be treated as equivalent to knowledge. If he is given a bag or parcel to carry into Australia in suspicious circumstances, or if there is something suspicious about the appearance, feel or weight of his own baggage, and he deliberately fails to inquire further, the jury may well be satisfied that he wilfully shut his eyes to the probability that he was carrying narcotics and for that reason should be treated as having the necessary guilty knowledge.”

16. There is therefore no merit in the Appellants’ ground that the learned Trial Judge erred in concluding that the Appellants were guilty of trafficking on the date as per the charge sheet when the drugs were only seized on 28 March 2016. The evidence adduced at trial leaves this Court in no doubt that the gunny bags transported by the Appellants contained the same drugs which were later seized by the Authorities. The evidence of the Pools and the similar descriptions they provided of the drug packets they had retrieved from the gunny bags on the beach in comparison to the drug packets seized by the Authorities is compelling.

17. In *Republic v Liwasa* [2016] SCSC 94, Dodin J held that:

“A general rule concerning all criminal cases is that a person has to have a ‘guilty mind’ if he is to be convicted...In order to determine whether the accused had knowledge or not ... the Court must look at the circumstances surrounding the

action of the accused and his demeanour and conduct as observed and testified to in Court”.

18. In the case of *Nedy Micoock & Anor v R* [2019] SCCA 12 at [68] it was held that, “The element of “knowledge” may likewise be inferred from the facts of the case...”
19. In this regard, the 1st Appellant’s attempt to ram the Canapone into the reef following his arrest is indicative of a ‘guilty mind’, and further that he had knowledge of the illicit nature of his cargo. Similarly, the 2nd Appellant informed the NDEA agents on the Canapone that he wanted protection, and that he would be killed by a man named Danny if he talked. He further stated that Danny had come on the Canapone with him and the 1st Appellant, and that they had taken drugs from Indians in a multi-colored boat. The 3rd Appellant informed Witness Michael Hissen while the gunny bags were being loaded on his boat that he must not be scared and that everything would be okay, a curious thing to say in any other context.
20. When an accused is convicted of simple possession but found to be in possession of a substantial quantity of drugs, there is always a latent risk factor. This reflects the risk to society of the drugs finding their way into other hands apart from an offender’s. The latent risk will be determined from all the circumstances of the particular case, including the quantity of drugs involved and the circumstances of the offender (*R v Anacoura* (2014) SLR 67)
21. I therefore find no merit in the ground of appeal.

Issue 2: Do the inconsistencies in the prosecution witnesses’ evidence amount to a reasonable doubt in the prosecution case?

22. With regard to inconsistencies in the evidence of witnesses generally, this Court stated in *Beeharry v R* (2012) SLR 71:

“In all criminal cases discrepancies in the evidence of witnesses are bound to occur. The lapse of memory over time coloured by experiences of witnesses may lead to inconsistencies, contradictions or embellishments. The Court however on

many occasions is called upon to assess whether such discrepancies affect the very core of the prosecution case; whether they create a doubt as to the truthfulness of the witnesses and amount to a failure by the prosecution to discharge its legal burden.”

23. The Appellants contend that the evidence of Jeannia and Xavier Pool were contradicted by that of Defence Witness Ryan Accouche, who stated that he never saw the Pools on the date in question, nor did he see the 4th Appellant. They further contend that the Pools were lying in their testimony as their claims were unsupported by the evidence adduced at trial. To this end, the Trial Judge held as follows:

“[29] ...Further, understandably Witness Ryan Accouche denied any knowledge of being in possession of Class A controlled drugs or any involvement in any of the incidents referred to by Witness Xavier Pool for fear of being prosecuted for same.”

24. It is trite that the court accepts findings of facts that are supported by the evidence believed by the trial court unless the trial Judge’s findings of credibility are perverse (*Beeharry v R* [supra]). This Court agrees that the testimony by Witness Accouche was entirely self-serving and aimed towards absolving himself of any ties to the crime.
25. The Appellants in their grounds of appeal further allude to an inconsistency in terms of the date of the offence as per the charge sheet (26th March 2016 in the initial charge sheet) and the date of the offence as per the evidence adduced during the trial (predominately 25th March 2016). The particulars of the offences in the Amended Charge Sheet read “on or around the 26th March 2016”, therefore this ground has no merit. In any event, if the statement and particulars of an offence can be seen fairly to relate to a known criminal offence but have been pleaded in terms which are inaccurate, incomplete or otherwise imperfect, a conviction on that indictment can still be confirmed (*Jules v R* (2006-2007) SCAR 77). Further, not every defect in a charge will result in quashing a conviction; the misstatement of the offence may be acceptable where it has not misled the appellant and has not caused a miscarriage of justice (*Rene v R* (1998-1999) SCAR 233).

26. The Appellants also contend that the court erred in law and fact in not considering that both Jeannia and Xavier Pool did not identify any gunny bags against pictures or video, and in not considering that the drugs were found at the residence of Delores Mounac, and not on the beach. In this respect, the learned Trial Judge held as follows:

“[32]... The controlled drugs were produced as P6 (a), and (b) and P8 (a) to (f) and the contents and wrappings were identified by Witness Xavier Pool as that taken from the gunny bags unloaded by the 4th accused Danny Sultan on the beach at Anse Boudin. Jeannia too identified the contents of P8 (a) to (f) as one of the heroin packets brought by Ryan Accouche and Xavier Pool.”

“[33] It is to be borne in mind that Xavier Pool identifies his packet as having three 5’s on it. The packet produced in Court found in the melody tin P8 which was the packet Ryan Accouche had, as identified by Jeannia Pool in her evidence also had three 5’s on it, indicating the packets taken by both Ryan and Xavier from the same gunny bag were of very similar nature with similar marking.”

27. The court transcript reveals that photographs of the scarab and the drug packets were shown to Xavier Pool. The transcript further reveals that all the photographs in exhibit P8 were shown to Jeannia Pool and were identified. In light of the above, this Court does not find that much could be gained from showing these two witnesses the video and imagery of the gunny bags over and above their descriptions of the same. This would do little to strengthen the prosecution case. If the Defence was desirous of putting the video and imagery of the gunny bags to these Witnesses in furtherance of their defence strategy, they ought to have done so in cross-examination. It has also been borne sufficiently from the facts as narrated by the learned trial Judge that the drugs were initially found by Xavier Pool on the beach in white gunny bags, and he took a packet to his mother’s house to sample and hide it.
28. The Appellants further contend that Witness Michael Hissen could not identify the drugs as he never saw any heroin on the date in question, so this amounts to a relevant

consideration that was also overlooked by the learned trial Judge. This Court is satisfied that there is enough circumstantial evidence to corroborate this witness's evidence and to prove that the gunny bags contained the same packets of heroin which were later seized by the relevant Authorities. In *Onezime v R* (1978) SLR 140, the Court held that for a conviction to be based on circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilty. This Court is satisfied that this is the case here.

Issue 3. Does the alleged lack of identification evidence by the witnesses amount to a reasonable doubt in the prosecution case?

29. The Appellants contend in their grounds of appeal that there was no, or an insufficiency of, identification evidence to implicate them in the commission of the crimes for which they have been charged. From the outset, it is worth noting that this Court in *Labrosse v R* SCA 27/2013 [2016] SCCA 35 (09 December 2016) emphasised that evidence of identification must be approached with caution, citing the case of *S v Mthetwa* 1972 (3) SA 766 in which Holmes JA held:

“Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive.”

30. With respect to the 1st Appellant, namely Francis Ernesta and the 2nd Appellant, namely Brian Mothe, it is not in dispute that these two Appellants were identified aboard the

Canapone on the date in question by numerous witnesses, including Samir Ghislain and other NDEA Agents.

31. With regard to the 3rd Appellant, namely Kevin Quatre, Witness Michael Hissen gave detailed evidence concerning the 3rd Appellant's direct involvement in the orchestration of the offences. The two were childhood friends, and Hissen testified that the 3rd Appellant arranged for them to go on a boat trip on the date in question, that the Appellant received a phone call once they were at sea and directed Hissen to the Canapone subsequently, only to then inform Hissen to not be scared as gunny bags were loaded onto his boat and they were joined by a 'rasta man'.
32. In respect of the 4th Appellant, namely Danny Sultan, the identification evidence by Xavier and Jeannia Pool serve to corroborate the evidence of Brian Mothe pertaining to one Danny from Les Mamelles. The facts reveal that the 4th Appellant used to reside on Praslin, then later moved to Les Mamelles on Mahe.
33. Although the prosecution failed to make any obvious link between the 4th Appellant and Hissen's description of the 'rasta man', there is enough circumstantial evidence to prove beyond reasonable doubt that the two personas are one and the same. This is borne from the evidence of Mothe initially that one Danny had boarded the scarab with a Chinese man (Hissen) and left with all the gunny bags of drugs, from the evidence of Hissen who stated that he captained the scarab at the material time and that a rasta man had boarded the boat along with 10 or so gunny bags, and that they had gone to Anse Boudin on Praslin, and from the evidence of the Pools who recognised Danny Sultan on the beach at Anse Boudin offloading gunny bags from a blue and white speedboat. Moreover, thermal imagery evidence adduced at trial corroborated the above evidence because it showed one passenger disembarking from the scarab and heading up the beach.
34. The learned Trial Judge considered the following corroborative evidence in this respect:

“[27] This Court is of the view that the evidence of Michael Hissen was corroborated by the evidence of several witnesses namely the airforce officers who stated the scarab drew alongside the Canapone. His evidence on the route

taken by the speedboat thereafter was corroborated by the airforce officers and officers of the coast guard, the unloading of the gunny bags from the scarab also witnessed by Xavier Pool and his sister Jeannia Pool who further identif[ied] the speedboat or scarab as the Oceanwave which witness Hissen admits he used for the operation. Further the evidence of Hissen that a Rasta man unloaded the gunny bags from his speedboat, is also witnessed by Xavier Pool and Jeannia Pool who go further by identifying the Rasta man as Danny Sultan the 4th accused. In any event it is the view of this Court that the evidence of Witness Hissen though subject to lengthy cross examination withstood the rigours of cross examination as no material contradictions or omissions were noted. I therefore refer to the case of Dominique Dugasse & Ors v Republic SCA Cr 25, 26 and 30/20 and hold that on consideration of the sworn testimony given by Witness Michael Hissen, I see no reason to look for corroboration even though in actual fact it exists, as I am satisfied even though he is an accomplice, his evidence even if it stands on its own, is acceptable to Court and there is no basis or shortcomings in his evidence to look for corroboration.”

35. In light of the above, this Court finds no merit in this ground and the grounds of appeal as raised by the Appellants.
36. As I have indicated at the beginning of my decision, my brother Fernando raised issues *suo sponte* in the course of this appeal. I distanced myself from this approach and I now give the reasons. I am aided by a comparative study of other jurisdictions.
37. The European Commission for Democracy Through Law (The Venice Commission) in an Amicus Curiae Brief for Georgia on this issue reported in Strasbourg on 29 June 2015 in its conclusions that the *non-ultra petita* rule enjoins the court to review a case within the limits of the questions of law or fact which have been raised by the parties to a dispute. It adds that courts may intervene *suo sponte*, but “such an intervention must be exercised sparingly and in very specific circumstances, namely, errors of fact or law allegedly made by a lower court should not be addressed unless these infringe fundamental principles.”

38. It recognised that the American Supreme Court has power to intervene for what it termed “plain error” if the errors are “obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings” (*United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

39. It added that :

“On the European level, in the Case of Foti and Others v. Italy (1982), in which the applicants did not assert that the criminal proceedings against them were being unduly prolonged, the European Court of Human Rights has held that the international system of protection established by the ECHR functions on the basis of applications either by governments or by individuals alleging violations. This system does not enable the Court to take up a matter irrespective of how it came to know about it, to seize on facts that have not been adduced by the applicant and to examine whether they are compatible with the ECHR.”

40. In the the case of *R v Mian* [2014] 2 SCR 689, the Canadian Supreme Court attempted to strike a balance between the competing roles for the appellate court, that of neutral arbiter and of justice-doer. In its unanimous decision overturning the decision of the Court of Appeal of Alberta which had raised a new issue on appeal *suo sponte* it stated:

“[The courts represent an adversarial system] which relies on the parties to frame the issues on appeal, and reserves the role of neutral arbiter for the courts...” (para 1)...

[the fundamental reason for preserving this system]is to ensure that judicial decision-makers remain independent and impartial and are seen to remain independent and impartial” (para 39).

41. The Supreme Court of Canada recognised in *Mian* (following *R v Phillips* [2003] ABCA 4) that if the court intervenes, in the very limited cases where it is permitted to do so, it must remain unbiased and refrain from “descend[ing] from the bench and becom[ing] a spectre at the accused’s counsel table, placing himself ‘in the impossible position of being both advocate and impartial arbiter’” (*Phillips*, para 24).

42. Those very limited cases are set out in the test in *Mian*, namely, (1) the issue must be a new issue (2) failing to raise a new issue would risk an injustice; and (3) the procedure followed by the court in raising the issue must be fair.
43. I endorse these sentiments. In civil cases, the courts in Seychelles in this regard, have applied the principles that a court may not formulate a case for a party after listening to the evidence or grant relief not sought in the pleadings, nor may a judge adjudicate on issues that have not been raised in the pleadings. (See *Vel v Knowles* (1998-1999) SCAR 157; *Tex Charlie v Marguerite Françoise* Civil Appeal No. 12 of 1994 (unreported), *Marie-Claire Lesperance v Jeffrey Larue* (Civil Appeal SCA15/2015) [2017] SCCA 46 (07 December 2017)).
44. In any case, in view of the fact that the issue of importation has been raised from the Bench, I am duty bound to highlight the relevant strands of evidence supporting the finding of the learned trial Judge.
45. Section 3 of the Misuse of Drugs Act (Cap 133) reads as follows:
- “Subject to this Act, a person shall not import or export a controlled drug.”*
46. The term “import” is defined in section 22 of The Interpretation and General Provisions Act as follows:
- “‘Import’ means to bring, or cause to be brought, into Seychelles.”*
47. The Court of Appeal in *Nedy Micoock & Anor v R* [2019] SCCA 12 held that, “[t]here are necessarily components to the offence of importation of drugs: first, that there was an importation, secondly that the drugs were controlled by law, thirdly that the person committing the act of importation did so intentionally.” There is no dispute that heroin, which is a Class A drug, qualifies as a controlled drug, nor was there any dispute regarding the drugs having been imported intentionally.
48. The Court in *Nedy Micoock & Anor v R* [supra] at para [55] held as follows:

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

49. Similarly, in the present case before the Court, there is no dispute that the drugs arrived in Seychelles by sea and remained in Seychelles. The Government Analyst confirmed that there was a total heroin weight of 746.9 grams, with a purity of 64%. The Defence made no suggestion, nor did they lead any evidence, to indicate that the drugs were sourced locally. In the case of *Beehary v Republic* [2012] SCCA 1, the court held:

“Nonetheless, once the prosecution has established a prima facie case, as has been done in the present case, the defence runs a serious tactical risk in not calling evidence to rebut it, not because the defendant is called upon to prove his innocence (which would be contrary to the rule in Woolmington’s case) but because the court may exercise its entitlement to accept the uncontroverted prosecution evidence. ... and although the prosecution must in all cases prove the guilt of the defendant, there is no rule that the defence cannot be required to bear the burden of proof on individual issues such as whether the drugs could have been planted by the police to foist a false case against the defendant, This does not require the appellant who stood charged with trafficking in drugs to prove his innocence.....”

50. Similarly, in Australia, section 300.2 of the Criminal Code Act 1995 defines importing as including the bringing of the substance into Australia; and dealing with the substance in connection with its importation. It has been held that this covers arranging importation into Australia as well as physically bringing the drugs in (*R v Handlen & Paddison* [2010] QCA 371; (2010) 247 FLR 261 at [47]). In *Handlen* (supra), the Court held, “The act of importing is not something that occurs or ceases in a single moment.”

51. In the same regard, in the Seychellois case of *R v Dubignon* (1998) SLR 52, it was held that “Import” must be taken in the broader sense of “bring” or “cause to be brought” by air or sea, and that if the prosecution succeeds in proving a preparatory act was done by the accused or through an agent, the offence of importation can be maintained.

52. So much for the law. With regard to the evidence of importation, there is sufficient evidence on record to prove that the Appellants engaged in preparatory acts in furtherance of the offence of importation. The collective effort and forward planning required in orchestrating and carrying out an exploit such as the present one is abundantly clear from the evidence adduced during the trial.
53. The transcript of proceedings (Vol I Pg 147) reveals the following exchange between the 2nd Appellant and former NDEA Investigator Samir Ghislain once the Canapone had been boarded:

“Q: Now can you tell the Court did Mr. Mothe talk to you?”

A: Yes I went with Agent Ragain and in the presence of Agent Ragain he asked me if the NDEA can provide him protection...I responded to him asking him why he thinks he needs protection so then he told me that it is true that they were transporting drugs and he told me that he wants to talk but he is afraid of Mr. Francis Ernesta and a guy named Danny that he does not know the surname might kill him. And he said Danny that he does not know the surname was a guy from Les Mamelles...He told me that ... I was asked by Francis Ernesta and Danny to come along with them they took the drugs from Indians on the sea in a boat of multicolour... a blue and white speed boat came when we were at sea and Danny was accompanied by 2 other person[s]. Danny went with 2 person[s] [who] [were] on the speed boat and they took all the drugs.”

54. Witness Ghislain then correctly identified the 1st and 2nd Appellants in the dock.
55. The above was also reflected in the 2nd Appellant’s Statements made to the police under caution, which were accepted into evidence following a Voir Dire. In respect of statements of an accused person being tendered into evidence, particularly when they have not given sworn evidence in court, the Court must determine whether the statements made to the police are more prejudicial than probative to the accused, in light of his right to a fair trial. Therefore:

“...the question is whether it would be unfair to the accused to use his statement against him ... Unfairness, in this sense, is concerned with the accused’s right to a fair trial, a right which may be jeopardised if a statement is obtained in circumstances which affect the reliability of the statement” [Van der Meer v R [1988] 62 ALJR 656 at 666; 82 ALR 10 at 26].

56. I see no reason to doubt the finding of the trial Judge that the statements were properly obtained and his ruling on their admissibility. This Court notes, as an aside, that it may be worthwhile to adopt the procedure in other jurisdictions, such as Australia, where confessions and admissions must generally be recorded in order to be admissible in court, and unrecorded confessions and admissions would be inadmissible unless the prosecution establishes one of a restricted number of excuses for non-recording. In light of the corroborative evidence, which shall be discussed further below, this Court finds the probative value of the statements to outweigh any prejudice caused to the 2nd Appellant.
57. The 2nd Appellant’s evidence, though deemed admissible, must still be treated with caution. As stated in *Livette Assary v The Republic* [2012] SCCA 33:

“In law, an accomplice is a person who helps another person or other persons to commit a crime. In this regard, it follows that an accomplice may be a person with an interest to serve in a case. In spite of this, the course of justice would fail if the evidence of an accomplice were to be disregarded or ignored completely simply because one is an accomplice... It is however, in the general context of the foregoing that in law there is always a safeguard in dealing with the evidence of an accomplice. On this point therefore, the law in Seychelles is settled that it is dangerous to act on the uncorroborated evidence of an accomplice although the court may convict on such evidence after warning itself of the dangers of doing so. In practice however, the court does not act on such evidence without corroboration - See Republic vs. Marie (1981) SLR 74.”

58. Further, in *Volcere v R* [2014] SCCA 41, Domah J held that, “Judicial appreciation of evidence is a scientific rationalization of facts in their coherent whole not a forensic dissection of every detail removed from its coherent whole.” There is sufficient

corroborative evidence to support the version of events as narrated by the 2nd Appellant, and to render his account reliable and trustworthy. There is evidence to show that the blue and white speed boat, which was sighted by witnesses from the Seychelles Airforce, NDEA and Coast Guard, belonged to the father of Witness Michael Hissen. Michael Hissen gave evidence that he captained the speed boat in question and collected white gunny bags from the fishing vessel. He stated that a 'rasta man' boarded his boat from the Canapone. Hissen gave further evidence that the gunny bags were offloaded from his boat at Anse Boudin on Praslin by the same rasta man.

59. Further corroborative evidence was provided by Donn Zaaiman Dupreez, Operations Officer and Chief Pilot Instructor for the Seychelles Air Force, who stated that on 24th and 25th March 2016, he and his crew tracked a suspicious vessel in bound from the east approximately 200 nautical miles from Mahe (ref Vol 1 Pg 3). He stated that a warship was shadowing the vessel Canapone, namely HMAS Darwin. He testified that the Canapone was deemed to be suspicious on account of the direction from which it was coming, the distance it was from Mahe, it was not flying a flag and it was under sail, which is unusual. Lieutenant Colonel Leslie Benoiton gave evidence that “[t]he 1st location of Canapon[e] was located at 74 nautical miles East of Fregate and by the time Constan[ce] reache[d] Canapon[e] it was in 24 nautical miles.” Commander Tom Esticot from the Coast Guard confirmed that the vessel was intercepted 24 nautical miles outside Fregate Island, which is within the EEZ of Seychelles.
60. Both the 1st and 2nd Appellants maintained that they had taken the vessel out to sea to test the engine. This is despite the 1st Appellant having informed the NDEA agents aboard the vessel that he needed to test his vessel as it was under repair, and evidence revealing that the Canapone had initially been sighted 200 nautical miles from Mahe, which is a significant distance away from the mainland, particularly for an old vessel with alleged mechanical trouble.
61. Witness Dupreez gave further evidence that a speedboat closed in on the suspicious vessel from the stern, did a U-turn and came up behind the vessel within a distance of a meter or less than half a meter. The speedboat remained in that position for five minutes

then went to Anse Boudin on Praslin, where through thermal imagery technology, “it looked like one person disembarking from the high speed boat being met by a person from the shore.” This was also corroborated by the testimony of Witness Michael Hissen.

62. Commander Tom Esticot from the Coast Guard corroborated the version of events as narrated by Donn Dupreez. He confirmed the presence of the 1st Appellant on board the suspicious vessel, Canapone, namely Francis Ernesta, whom he was also able to correctly identify in Court. Hans Redegonde, commanding officer in the Coast Guard, also corroborated the account of Donn Dupreez, as did Lieutenant Colonel Leslie Benoiton, Lieutenant Commander Amith Kumar of the Seychelles Air Force and Samir Ghislain, former NDEA Investigator.
63. Lieutenant Colonel Leslie Benoiton gave the following evidence in examination-in-chief (Vol 1 Pg 110):

“Q: Sir would you mind telling again to the Court who informed you that scarab had reached Anse Boudin?”

A: The pilot of the SAF flight.

Q: And did he say anything about passengers on the boat at that moment?

A: Yes they informed us at that moment on the vessel the scarab stopped, the passenger jumped in the water and walked towards the beach. The pilot reported to me that the boat had stopped and someone has jumped in the water and walking towards the beach.”

64. Lieutenant Commander Amith Kumar stated in evidence the following in reference to the scarab’s movements around Praslin (Vol I pgs 141-142):

“This was the main action initially that fast boat approached the east coast of Praslin, it came very close, turned and somebody jumped from the boat and [went] to the coast. The distance was very close, maybe 5, 6 or 10 meters or even much lesser than that.”

65. Xavier Pool gave evidence that on 25 March 2016 he had witnessed the gunny bags being unloaded from a blue and white boat by Danny Sultan, the 4th Appellant, and kept on the shore. He recognised the 4th Appellant as he had lived in the area for some time. He correctly identified the 4th Appellant in Court.
66. Xavier Pool gave further evidence that after Danny left, he and his friend, Ryan, approached the gunny bags, of which there were about ten or so, and found heroin packets inside. He recognised it to be heroin as he was a drug user. He brought a packet home. He stated that the drugs were packed in clear plastic with three number fives on the front. He identified the packets of drugs against the photographs exhibited, and the scarab.
67. Jeannia Pool, his sister, corroborated his account and gave evidence that the colour of the packet was white and he had three number fives on it in blue. She stated that they sampled the contents and confirmed it to be heroin. Xavier Pool gave further evidence that the next morning, he returned to the beach and saw the 4th Appellant and one Chang Leng taking the gunny bags in a vehicle. Their mother, Delores Mounac, confirmed that Xavier and Jeannia Pool had informed her that they had witnessed the 4th Appellant unloading gunny bags onto the beach.
68. In light of the totality of the evidence, I do not see any reason to disturb the finding of the trial Judge that it was satisfied beyond reasonable doubt that the admissions made by the 2nd Appellant are true, that the drugs were imported into Seychelles, and that the Appellants had carried out acts preparatory to and in facilitation of this importation.
69. The appeal is dismissed in its entirety. The convictions are upheld.

I concur:.

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F. Robinson (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 17 December 2019