

**IN THE SEYCHELLES COURT OF APPEAL**

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

**Criminal Appeal SCA 34 & 35/2018  
(Appeal from Supreme Court Decision CO 52/2017)**

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Collin Forte	1 <sup>st</sup> Appellant
Gina Forte	2 <sup>nd</sup> Appellant

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The Republic	Respondent
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Heard: 03 August 2020  
Counsel: Mr. B Hoareau and Mrs. A. Amesbury for the Appellants  
Mr. A. Subramaniam for the Respondent  
Delivered: 21 August 2020

**JUDGMENT**

A. Fernando (President)

1. The Appellants have appealed against their convictions for importation of 1336.5 grams of heroin, aiding and abetting Beverley Michel to import the said drug and conspiracy to import the said drug and the sentences of 30 years imposed in respect of the charge of importation and 27 years for conspiracy. Both sentences had been ordered to run concurrently. The Appellants although found guilty, have not been convicted of the charge of aiding and abetting as the said charge had been in the alternative to the charge of importation and thus left on file.

2. The Appellants have been charged as follows:

“Count 1  
Statement of Offence

Importation of a controlled drug contrary to Section 3 of the Misuse of Drugs Act (CAP 133) read with Section 26(1)(a) of the said Act and Section 22(a) of the Penal Code and punishable under Section 29(1) of the Misuse of Drugs Act (CAP 133) and the Second Schedule referred thereto in the said Act.

Particulars of offence

Collin Forte of Les Cannelles, Mahe and Gina Forte of Les Cannelles, Mahe on or around 9<sup>th</sup> October 2014 to 7<sup>th</sup> November 2014, imported or caused to be imported controlled drugs into Seychelles through a person known to the Republic as Beverly Michel of Anse La Mouche, Mahe and by importing a controlled drug into Seychelles namely causing to be importing a controlled drug into Seychelles namely a substance having a total net weight of 1336.5 grams which containing a controlled drug namely heroin with a purity of 48% and having total heroin content of 642.0 grams of heroin.

In the Alternative to Count 1  
Count 2

Aiding and abetting another person to commit the offence of importation of a controlled drug contrary to Section 27(a) of the Misuse of Drugs Act read with Section 3 and Section 26(1)(a) of the said 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.

Particulars of offence

Collin Forte of Les Cannelles, Mahe and Gina Forte of Les Cannelles, Mahe during the month on or around 9<sup>th</sup> October 2014 to 7<sup>th</sup> day of November 2014 aided and abetted another person known to the Republic namely Beverly Michel

of Anse La Mouche, Mahe to commit the offence of importation of a controlled drug into Seychelles namely a substance having a total net weight of 1336.5 grams which containing a controlled drug namely heroin with a purity of 48% and having total heroin content of 642.0 grams of heroin.

Count 3  
Statement of offence

Conspiracy to commit the offence of importation of a controlled drug contrary to Section 28(a) of the Misuse of Drugs Act (CAP 133) read with Section 3 and Section 26(1)(a) of the said 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.

Particulars of offence

Collin Forte of Les Cannelles and Gina Forte of Les Cannelles, Mahe during the period on or around 9<sup>th</sup> October 2014 to 7<sup>th</sup> November 2014 agrees with another person known to the Republic namely Beverly Michel of Anse La Mouche, Mahe agreed with one another to pursue a course of conduct, that if pursued will necessary amount to or involve in the commission of an offence under this Act namely the offence of importation of a controlled drugs into Seychelles namely a substance having a total net weight of 1336.5 grams which containing a controlled drug namely with a purity of 48% and having total Heroin content of 642.0 grams of Heroin.” (verbatim)

3. The Appellants have filed the following grounds of appeal:

- “(i) The learned trial judge erred in law and on the evidence in convicting the Appellants of the offence of importation of a controlled drug – as set out in Count 1 – in that the Appellants did not import into Seychelles any controlled drug.
- (ii) The learned trial judge erred in law in convicting the Appellants of the offence of aiding and abetting another person to commit the offence of importation of a controlled drug in that the particulars of the offence did disclose the nature of the offence – in contravention of the Appellants’

constitutional rights as protected by Article 19(2) - namely as to how they aided and abetted the importation of the controlled drug.

- (iii) The learned trial judge erred in law and on the evidence in convicting the Appellants of all the offences as the convictions cannot be supported by the evidence, more specifically by the testimony of Beverly Michel.
- (iv) The learned trial judge erred in law in allowing Beverly Michel to refresh her memory from her statement since not all the conditions, to permit the said witness to refresh her memory, had been satisfied.
- (v) The sentences of 30 years and 27 years imposed on the Appellants respectively in respect of Count 1 and Count 3 are manifestly harsh and excessive.” (verbatim)

**Prosecution case in Brief:**

4. It is the case of the Prosecution that the two Appellants, who were in Dubai in October 2014 had made use of Beverly Michel, a cabin crew working for Air Seychelles to import heroin for them to Seychelles. Beverly is said to have arrived in Seychelles on the 11th of October 2014 and handed over the heroin which was contained in an ‘Anlene’ tin placed in a Lulu bag to some unknown and unidentified man. On the 7th of November 2014 officers from the National Drugs Enforcement Agency (NDEA) had recovered a Lulu bag with the ‘Anlene’ tin near a rock in Roche Bois. Heroin had been found placed inside the ‘Anlene’ tin in plastic bags. On examination of the tin a fingerprint that matched with that of the 2nd Appellant had been found inside the lid of the ‘Anlene’ tin on the 20th of November 2014.

**Prosecution evidence:**

5. **Beverly A. C. Michel**, testifying before Court on 21<sup>st</sup> May 2018 of an incident that took place during 9<sup>th</sup> October to 11<sup>th</sup> October 2014 had said that when she was getting ready to go for work on the 9<sup>th</sup> of October 2014, and going through security at the Seychelles International airport, the 1<sup>st</sup> Appellant (herein after referred to as 1A), had called her from a foreign telephone number and asked her to “bring illegal things in the Seychelles”, which she suspected to be drugs. She had said that she could not remember the number but it was a foreign number, which was lengthy. She had refused and hung up. She had been a cabin crew with

Air Seychelles at that time. 1A had called her again when she was on the aircraft and she had told 1A that she would not do it but said she will call back. She had known 1A as he had supplied building materials to her earlier when she was building her house. When Beverly arrived in Abu Dhabi on the 9<sup>th</sup> evening 1A had called again. She had hung up saying she will call on the 10<sup>th</sup>. On the 10<sup>th</sup> she had called 2A from a hotel in Abu Dhabi. There had been no other evidence to show that she had in fact received a call from the 1A or from a foreign number or that Beverly had called 1A or a foreign number on the 9<sup>th</sup> or 10<sup>th</sup> of October 2014. Thereafter Beverly had met 1A and 2A on the streets in Dubai. To the question as to what happened when she met them, her answer had been “I just took the bag and I left back to Abu Dhabi because I had to go back to work.” The Prosecutor had not sought to clarify from Beverly whose bag she took or at least whether when she met the Appellants, they had a bag with them. She had in answer to the Prosecutor said that she did not go anywhere else to meet them apart from meeting them on the street. She had said that she did not go to the Peninsula hotel where 1A and 2A were staying.

6. At this stage the Prosecuting Counsel had asked “*Are you sure what you are telling?*”. Counsel representing the Appellant had challenged the Prosecuting Counsel by saying “*This is cross examining your own witness*”. The learned Trial Judge had intervened and said “no cross-examination of the same witness, we take what she says”. Prosecuting Counsel had then asked Beverly whether she wants to refresh her memory. Counsel for the Appellants at the trial below had objected to the application made to Court by the Prosecuting Counsel, to permit the witness to refresh the memory. The learned Trial Judge had asked Prosecuting Counsel to continue with the examination-in chief stating that he will make an order when necessary. The trial had thus proceeded and Beverly had again in answer to the Prosecuting Counsel said that she met the two Appellants in a street in Dubai and that she did not go to the Peninsula hotel in October 2014 to meet the Appellants. At this stage the Counsel for the Prosecution had renewed his application to permit Beverly to refresh her memory. He had then questioned Beverly regarding the making of the statement to the police. Beverly had then gone on to describe how her statement came to be recorded. She had said in 2014, without specifying a month or date, NDEA officers had come to her house and did a search of her premises and taken her to the NDEA office. There two Irish NDEA officers interviewing her had accused her of importing drugs into Seychelles, which she had denied. They had then shown her a photograph of her

handing over a plastic bag to a man and told that a man had given her name to them and if she does not give a statement, they will remand her. Beverly had stated that the Irish NDEA officer had written the statement and she had signed it. She had identified the statement shown to her by the Prosecuting Counsel, which bore the date 20<sup>th</sup> November 2014.

7. At this stage Counsel for the Appellants at the trial below had once again objected to the refreshing of the memory of the witness, on the basis that in the course of a trial a prosecutor cannot ask a witness to refresh the memory merely because the witness gives an answer, which the Prosecutor does not want. The learned Trial Judge after having taken a short adjournment had made a ruling allowing the Prosecuting Counsel's application for Beverly to refresh her memory with part of the statement. Beverly thereafter had said that she met 1A and 2A in their room at the Peninsula hotel on the 10<sup>th</sup> of October 2014, which she had denied earlier. To the question as to what happened in the room her answer had been: "When I went up there I just took the bag." There is no mention of the Appellants giving the bag to her. She had said that there was a big 'Anlene' milk tin green with a red lid in the bag, which she took along with her to her hotel in Abu Dhabi. While getting ready to pack her bags to go for work, she had noticed that there was glue on the milk tin, which she had tried to clean. She had not opened the milk tin nor did she notice what was inside it. Thereafter she had packed it into her bag and flown back to the Seychelles on the morning of the 11<sup>th</sup> of October 2014. Reaching Seychelles, she had called the 1A and he had given Beverly a number to call. On calling that number a man had come to meet her. There is no mention as to when and where the man met her, the name or any description of the man who met her and she had given him the bag, which she had brought from Abu Dhabi, which was a Lulu coloured bag. She had tried to call the Appellants thereafter several days since she wanted some building materials, but failed to make contact. When shown exhibit 4 a milk tin, for purposes of identification, Beverly had said "Yes, it was like this one".
  
8. Under cross-examination Beverly had stated that the two Irish police officers put pressure on her by showing her a photo of her holding out a bag from a car and threatened to remand her. They refused to permit me to speak to a lawyer and they asked me to repeat what they were saying. They said that Ali Sicobo had mentioned her name to the NDEA. Ali Sicobo had not testified in this case.

Beverly had then testified before the Court how the statement came to be recorded. "I was in a crisis at that moment. I was basically crying, depressed because this is a first time situation in my life and he said he helped me so he wrote it down, then he wrote the statement down then he read it to me to agree I did and then I signed and then he released me to go home and the next called me to bring me to the attorney general's office to sign a deal I don't know what it's called. I told them however I knew the 1 A as he had helped me to get building materials to her place at Anse La Mouche. It is from that the NDEA officers gathered that I had a relationship with the 1A." She had categorically denied having stated in the statement that she brought drugs into the country. The NDEA officers had told her that if she does not sign the statement she will be remanded and would have to go to jail. The officers had shown her a tin and said that was what she brought from Dubai and said if she did not say that in her statement she will be sent to jail. Beverly had said that the milk tin shown to her is the same as she uses at home. She had however admitted that she does bring milk tins back to Seychelles when she travels as they are low fat and healthier. She had said that the statement she was forced to make was partly wrong, namely the part that she had imported drugs into the Seychelles.

9. She had also said that she signed another agreement, agreeing to state in court what was in the statement the NDEA officers had written for her. Beverly had said that she had spoken to the Prosecutor on the Friday before she testified in Court and she had told him that she had not imported any drugs into Seychelles and had she done so she would have been caught. But the Prosecutor had told her that she had already signed an agreement to testify and would have to go along with what she had said in the statement. It was improper for a Prosecutor to have said so and all that he could have said was to make a true disclosure of the whole of the circumstances within her knowledge relative to the offence. The Prosecutor had told her that he was not sure of the facts of the case as it had been passed on to him and that it was the case of the NDEA. She had said that there was no need to refresh her memory as she had spoken to the Prosecutor on the Friday before she testified in Court. She had agreed to go along with what had been recorded in her statement as she did not want to go to jail. She had said that she had a baby and also did not want to embarrass her mother by going to jail.
10. In answer to Court Beverly had said that she collected a milk tin from the "accused" and had taken the bag and gone without asking what was inside the tin.

It is to be noted that there is no direct evidence from Beverly that she brought in the milk tin she collected from the Appellant to the Seychelles save that for an assumption from the rest of her testimony in Court. It was necessary for the prosecution to have cleared this when she testified, in view of Beverly's unchallenged evidence that she did not import any drugs into the Seychelles.

11. An analysis of the evidence of Beverly Michel shows that she had denied importing any drugs to the Seychelles. It is unchallenged evidence that pressure had been brought upon Beverly by the NDEA officers in recording her statement and to testify in Court in accordance with the statement that the NDEA officers had written for her and got her to sign. Her evidence also shows that she had been pressured to enter into an agreement to testify in Court under section 61A of the Criminal Procedure Code.

12. **Section 61(A) of the Criminal Procedure Code of Seychelles** which deals with conditional offer by Attorney-General reads as follows:

*“(1) The Attorney-General may, at any time with the view of obtaining the evidence of any person believed to have been directly or indirectly concerned in or privy to an offence, notify an offer to the person to the effect that the person-*  
*(a) would be tried for any other offence of which the person appears to have been guilty; or*

*(b) would not be tried in connection with the same matter, on condition of the person making a full and true disclosure of the whole of the circumstances within the person's knowledge relative to such offence and to every other person concerned whether as principal or abettor in the commission of the offence.*

*(2) Every person accepting an offer notified under this section shall be examined as a witness in the case.*

*(3) Such person if not on bail may be detained in custody until the termination of the trial.*

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



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

13. Beverly had also stated that she met with the Prosecutor on the Friday before she testified in Court and had gone through her statement. Beverly at the initial stages of her examination-in-chief had been an unwilling witness until the application of the Prosecuting Counsel to refresh her memory, had been allowed by Court.
14. It is to be noted that Beverly while testifying in Court did not indicate any forgetfulness on her part as regards her meeting the Appellants at the Peninsula Hotel in Dubai. In fact, she had categorically said that she met them on the streets in Dubai and did not go to the Peninsula hotel where 1A and 2A were staying or anywhere else, thus materially departing from the statement that Brendan Burke of the NDEA had written and made Beverly to sign. It was not a case of her saying that she does not recall going to Peninsula Hotel or where she met 1A and 2A in Dubai. The need to refresh her memory therefore did not arise. Further, it had been Beverly’s unchallenged evidence that there was no need to refresh her memory as she had spoken to the Prosecutor on the Friday before she testified in Court. I could understand if the issue pertaining to refreshing the memory was as regards the name of the hotel or the number of the room or the location of the hotel in which she is alleged to have met 1A and 2A or the date she met them. It was incorrect for the Prosecutor to cross-examine his witness on the pretext of making an application to refresh her memory and the Trial Judge allowing such an application. It is clear from section 61A (2) referred to at paragraph 12 above that every person accepting an offer notified under this section shall be examined as a witness in the case. This is more so as Beverly was a witness testifying before the Court on a conditional pardon offered by the Attorney General.
15. It is to be noted that before the exercise of his discretion under section 61(A) of the Criminal Procedure Code of Seychelles Act, the Attorney General must satisfy himself that the person whose evidence he seeks to obtain has been directly or indirectly concerned or privy to the offence of which the evidence is sought to be obtained and could make a full and true disclosure of whole of the circumstances in relation to the offence. This is made clear by the words: *“The Attorney-General may, at any time with the view of obtaining the evidence of any person **believed** to have been directly or indirectly concerned in or privy to an*

*offence*”, and “*on condition of the person making a full and true disclosure of the whole of the circumstances within the person’s knowledge relative to such offence*” in section 61A(1) of the Criminal Procedure Code of Seychelles Act referred to at paragraph 12 above. There should have been a reasonable basis for the Attorney General to entertain the belief that a person has been directly or indirectly concerned in or privy to an offence and he should use his discretion judiciously before deciding to act under section 61A (1). A belief is something more than a suspicion. In this case Brendan Burke, the NDEA officer who arrested Beverly Michel does not even give a reason for the arrest of Beverly Michel as seen from paragraphs 25 and 26 below. A belief could not be entertained on the basis of a statement recorded after threatening a person with prosecution as happened in this case. This section should not be made use of to get the witness to state what the Prosecution wants. Section 61A does not state that a witness is bound when testifying before the Court to give evidence in accordance with the statement recorded under section 61A(5) as the learned Trial Judge had stated. What is important is for the witness who has accepted a conditional offer under section 61A to give evidence without willfully concealing anything material and to ensure that he does not give false evidence.

16. In my view the only avenue that was open to the Prosecutor in the circumstances of this case, if he had been satisfied that Beverly had willfully concealed anything material or gave false evidence, was to make an application to treat Beverly as a ‘Hostile Witness’ and then deal with her under the provisions of section 61A (4) of the Criminal Procedure Code referred to at paragraph 12 above. In the Canadian case of **R v Booth, 1984 CanLII 338 (BC CA)** it was held that a witness should not be permitted to refresh memory from a prior statement where the witnesses is merely being evasive. The preferred route would be through a s.9(2) Milgaard application. i.e. an application to treat a witness as a hostile witness under the Evidence Act of Canada. Section 61A in my view should not be made use of to force an unwilling witness to testify on the threat of prosecution. It was only after the refreshing of her memory that she had given evidence in line with the statement that Beverly had alleged that BB wrote and got her to sign. The trial Court permitting the Prosecuting Counsel to refresh the memory, would also have been a reminder to Beverly of the Section 61A agreement, and the consequences that would follow.

17. I wish to state that a court needs to bear in mind that the evidence of a witness after refreshing the memory is not the best evidence a court has. As a justification for allowing a witness to refresh memory it must be stated that witnesses are mortals and that you can hardly expect to find a 'perfect witness' at all times. As stated in the case of **R V Aden & Ors [Ruling] (CO 75/2010) [2011] SCSC 99 (February 2011)** "They are all human, and being so they generally have a defective memory. They will sometimes forget common things and details of an incident which they witnessed such as colour, time, dates, numbers, etc."
18. In my view to refresh a witness's memory simply means to remind such person of a past fact, event, experience, etc that had actually happened in the life of that person, which that person presently has no recollection of, as a result of forgetfulness due to the passage of time, or a confused state of mind during the trial. What is paramount is that such fact, event, experience, etc, should have actually happened in the witness's life. One cannot have a memory of something that did not in reality take place. It is for that reason that in placing reliance on such evidence the Trier of fact will have to consider whether the evidence given after refreshing the witness's memory is something that has actually happened in the witness's life, whether the witness could have easily forgotten it and thus how truthful and reliable is the witness's evidence. In the Canadian case of **R V B (K, G.) 1998 CanLII 7125 (ON CA)** it was held "When a witness refreshes her memory from some external source or event, she has a present memory, albeit one that has been refreshed; how reliable and truthful her recollection is, will be determined by the trier of fact..."
19. Present memory revived is the method of "jogging" a memory and bring it back into the witness's mind. The witness may examine a thing, such as a note, which has the effect of putting a memory into mind. Refreshing memory is permitted by the doctrine of "present memory revived" which permits a testifying witness to jog their memory. See **R V KGB (1998). 198 CanLii 7125**. According to **Paciocco and Stuesser, The Law of Evidence, Fourth Edition, (2005, Irwin Law Inc.), at p. 377** the document merely sparks an actual recollection of the event recorded. It is not the aid that becomes the evidence but rather it is only a mechanism to evoke the memory of the witness which produces the evidence. See **Cornerstone Co-operative Homes Inc. v Spilchuk, 2004 CanLII 32328(ON SC), [2004]**. See also **R v Gadzo, 2009 ONCJ 126 (CanLII)**.

20. There is, as correctly stated in the cases of **R V Mawena 1961 (3) SA 362 SR, and R V Elijah 1963 (3) SA 86 (SR)**, a distinction between memory refreshed and past recollection of an event that the witness has recorded, namely, where the witness has no present memory, but is able to state that he/she has accurately recorded a past event in a document shortly after the event. It permits the admission of a record that is a past memory reduced to record, regardless of the witness's ability to bring the memory back into mind. The evidence, to the extent there is any, is the past record. It is an exception to the 'Hearsay evidence Rule'. See **R V Wilks, 2005 MBCA 99 (CanLII)**. This type of situation arises in relation to the evidence of expert witnesses, police officers, medical personnel, etc. who keep a record of their day to day activities and who generally have no personal interest in the incident. In such situations the document is generally presented as evidence and is exhibited in the proceedings. Acting on such evidence does not involve the same risks as acting on the evidence of Beverly Michel whose memory had been refreshed from a statement that Brendan Burke had written and given her to sign.
21. The Court prior to allowing an application for refreshing memory must be satisfied that the evidence of the witness is from his personal knowledge of the event or incident and not one the witness has been compelled to give under threat or compulsion. In the case of **R V Mawena 1961 (3) SA 362 SR** the Trial Court had permitted the witness to refresh memory from a collective report made from various notes from detectives of the Criminal Investigation Department who attended a meeting for security purposes and had edited to make it readable. On appeal, turning down the Trial court decision to permit refreshing of the witnesses memory by using the collective report the Court said: *"...I know of no authority for the proposition that a witness can be allowed to refresh his memory from a document which, in the first place, represents the result of the combined memories of two or more persons of what was said at a lengthy meeting and, in the second place, is in effect a paraphrase of that combination made by another person who was not present at the meeting at all..."* In the instant case the position is much worse as the refreshing of memory had been done from a statement that was recorded by an officer from the NDEA after threatening Beverly and getting her to place her signature to a statement Beverly claims she did not make.

22. Our law in relation to refreshing memory is that of the law of England, as at 1962, in accordance with section 12 of the Evidence Act. 12. **Section 12 of the Evidence Act (Cap 74)** reads as follows: “*Except where it is otherwise provided in this Act or by special laws now in force in Seychelles or hereafter enacted, the English law of evidence for the time being shall prevail.*” Interpreting section 12 of the Evidence Ordinance (Cap 81) as amended by section 3 of the Seychelles Judicature Ordinance 1962, which had an almost identical provision to what is contained in section 12 of the Evidence Act (Cap 74), save for the word ‘colony’ instead of the word ‘Seychelles’, this Court in **Kim Koon & Co Ltd V R [1969 SCAR 64]** said: “*...In our judgment the effect of the section is to apply to Seychelles the English law of evidence as it stood on the 15<sup>th</sup> October 1962, the date of enactment of the Seychelles Judicature Ordinance, 1962...*” This Court also said in **Lucas V Republic [2011 SLR 313]** that “*...the principle enunciated in the Kim Koon & Co Ltd judgment as regards the applicability of the English law of evidence in the Seychelles should be only if it is not otherwise inconsistent with the 1993 Constitution and if considered relevant and keeping in line with the modern notions of the law of evidence acceptable in other democratic countries.*”

23. It is trite law that an application to refresh the memory of a witness is made, where a witness indicates that he or she cannot recall at the trial the details of events because of the lapse of time, and wishes to have an opportunity to read the statement, and not when a prosecutor finds, that the witness is not giving evidence favourable to the prosecution. It is stated at **F6.17, Blackstone’s Criminal Practice 2010**: “*It is open to the judge, in the exercise of his discretion and in the interests of justice, to permit a witness who has begun to give evidence to refresh his memory from a statement made...provided he is satisfied that the witness indicates that he cannot now recall the details of events because of the lapse of time since they took place, the witness had not read the statement before coming into the witness-box, and the witness wished to have an opportunity to read the statement before he continued to give evidence.*” It is also trite law that the statement by which the memory is sought to be refreshed should have been made by the witness voluntarily and not one written by a police officer which the witness was pressured to sign. It is stated at **F6.9, Blackstone’s Criminal Practice 2010**: “*At common law, a witness in the course of giving evidence, may refer to a document in order to refresh his memory provided that the document was made or verified by him either at the time of the event in question or so shortly thereafter...*”. In the case of **R v Bryant & Dickson (1946) 31 Cr App R**

146 it was said: “A witness who has ‘forgotten’ what had occurred, may refresh his/her memory from notes, provided the notes accurately depict what occurred and at the time of writing the witness was satisfied with its accuracy”. It is also important that the witness should have read the notes when the facts were fresh in his/her memory and agreed with the content of the notes as being accurate, see **R v Richardson** [1971] 2 QB 484; (1971) 55 Cr App R 244; [1972] 2 WLR 889; [1971] 2 All ER 773; **Lau Pak Ngam v R** [1966] Crim LR 443; **R v Keeley** (1982) 74 Cr App R 213 & **R v Mills & Rose** [1962] 1 WLR 1152; [1962] 3 All ER 298; (1962) 46 Cr App R 336.

24. In **R v Da Silva** [1990] 1 All ER 29 [(1990) 90 Cr App R 233; [1990] 1 WLR 31; [1990] Crim LR 192] **Stuart – Smith LJ**, delivering the judgment of the Court of Appeal, stated:

*“In our judgment, therefore, it should be open to the judge, in the exercise of his discretion and in the interests of justice, to permit a witness who has begun to give evidence to refresh his memory from a statement made near to the time of events in question, even though it does not come within the definition of contemporaneous, provided he is satisfied*

- (1) that the witness indicates that he cannot now recall the details of events because of the lapse of time since they took place,*
- (2) that he made a statement much nearer the time of the events and that the contents of the statement represented his recollection at the time he made it,*
- (3) that he had not read the statement before coming into the witness box, and*
- (4) that he wished to have an opportunity to read the statement before he continued to give evidence.”*

25. At **F6.7 of Blackstone’s Criminal Practice 2003** it is stated: “A witness may refresh his memory from a document... prepared either by the witness himself or by another, provided, in the latter case, that the witness verified the document at a time when the facts were still fresh in his memory”. In **Phipson on Evidence, 5th ed., p. 466**, it is stated: “A witness may refresh his memory by reference to any writing made or verified by himself concerning and contemporaneously with the facts to which he testifies. ... The writing may have been made either by the witness himself, or by others, providing in the latter case that it was read by him when the facts were fresh in his memory, and he knew the statement to be correct.” In **Graham** [1973] Crim LR 628 it had been held that a gap of a

fortnight or three weeks may be acceptable; but that a lapse of 27 days is such as to lead a judge to hesitate before giving a witness leave to refresh his memory. BB wrote the statement of Beverly Michel on the 20<sup>th</sup> of November 2014. The incident where she met the Appellants was between the 10<sup>th</sup> and 11<sup>th</sup> of October 2014. Hence the statement had been written by BB, 40 days after the incident. In the given circumstances, the facts of this case and in the context of the unchallenged evidence of Beverly, I am of the view that that learned Trial Judge had erred in allowing the application of the Prosecutor to refresh the memory of Beverly. In view of what has been stated at paragraph 14 above none of the conditions set out in the case of **R v Da Silva [1990] 1 All ER 29** referred to at paragraph 24 above were met in the instant case before the application to refresh the memory of Beverly was allowed by the learned Trial Judge. I therefore have no hesitation in allowing grounds (i), (iii) and (iv) of appeal.

26. Brendan Burke (hereinafter referred to as BB), had been head of investigations of NDEA from 2011 to 2016. On the 7<sup>th</sup> of November 2014, (27 days after the alleged importation) on information received that there was a white plastic Lulu bag near a rock in the area of Roche Bois, and someone would come to collect it, BB and NDEA officer Michael Payet had gone there around 4.30 in the morning. They had waited to see whether anyone would come to collect the bag and since no one arrived they had seized the bag around 8.30 in the morning and brought it to the NDEA headquarters. According to BB, the bag had contained a ‘Anlene’ milk tin. On opening it he had found that there was a “yellow plastic with this opened coffee black sachet which had a clear plastic inside and inside was a brown substance suspected to be heroin and some brown carton paper. There was also a sealed black coffee sachet underneath that one which I did not open.” He had then taken the items seized to the Analyst and Fingerprint Expert for analysis and testing of finger prints. BB admitted arresting Ally Sicobo who lives close to the area where the ‘Anlene’ tin was found. He had been arrested for conspiracy to traffic in the drugs that were seized. He was treated as a suspect and cautioned. There is no evidence as to what happened to Ally Sicobo or why he was suspected, the basis on which he was arrested, why he was not charged or why he was not called to testify in this case.
27. He thereafter speaks of Beverly Michel being brought into the police station but does not state the basis of her arrest. He had said “I questioned the lady in relation to an involvement she may have and explained to her the danger she was in

herself in this case if she told lies. She decided to make a witness statement which I recorded.” This corroborates what Beverly had said in regard to the recording of her statement. Beverly’s statement had been recorded on the 20<sup>th</sup> of November 2014. After the arrest of Beverly Michel, the two Appellants had been arrested but released as there was nothing to corroborate the statement of Beverly Michel. It is strange to comprehend the release of the two Appellants and especially the 2A as stated by BB, for according to the evidence of Yves Leon at paragraph 30 below, the right thumb print of 2A which Agent Malvina had given Leon on the 20<sup>th</sup> of November 2014, had matched with the crime mark, namely the finger print found under the lid of the ‘Anelene’ tin.

28. Neither BB nor any officer from the NDEA had testified about seeing Beverly handing over a bag to a man who had mentioned her name or about a photograph depicting Beverly handing over the bag to this unnamed, unidentified man. This had been the threat used by the two Irish Officers to compel Beverly to make a statement according to her evidence before Court as referred to at paragraphs 7 and 9 above.

29. Michael Payet, an NDEA officer, had corroborated BB as regards the discovery and seizure of the drugs at Roche Bois. He had gone with DCO R Songor to Kenya to apprehend the Appellants and had brought them to Seychelles on the 1<sup>st</sup> of October 2017, almost 3 years after the commission of the offence.

30. Yves Leon, had stated that he had carried out a fingerprint examination of the items that were seized in this case that was given to him on the 7<sup>th</sup> of November 2014. He had placed the exhibits in the fuming cabinet, a process used to allow a non-visible fingerprint to be completely formed to allow for it to be then lifted. The next day, namely on the 9<sup>th</sup> of November when he removed the exhibit from the fuming cabinet, he could find a print that he could lift which is referred to as the crime mark. The crime mark was lifted from under the lid of the milk tin. There were no fingerprints on the other exhibits, namely the plastic bags or the coffee sachets. He then placed the crime mark in the Automatic Fingerprint Identification System (AFIS). There was no match. On the 20<sup>th</sup> of November 2014, Leon had received from Agent Malvina a finger and palm print impression of the 1 A and 2A. When he placed the fingerprint of 2A into the AFIS it matched. That was the right thumbprint of 2A. He had then informed Malvina of what he had found. Again, on the 2<sup>nd</sup> of October 2017 Leon had received the finger prints of the 1<sup>st</sup> and 2<sup>nd</sup> Appellants from NDEA Agent Sanders. He had made a chart for



identification and placed the fingerprints into the AFIS on the 4<sup>th</sup> of October 2017 and again he had got a match with that of 2A. There is much confusion in the recorded proceedings as regards the date when he placed the crime scene fingerprint on the AFIS, namely 10<sup>th</sup>, 11<sup>th</sup> and 18<sup>th</sup> November 2014 and also received the fingerprints from Sanders of 2A, namely 01/10/2017, 02/10/2018, and 02/11/2017. I failed to understand why an indictment had not been filed against the Appellants soon after the 20<sup>th</sup> November 2014, when 2As fingerprint is alleged to have matched with that of the print found under the lid of the 'Anlene' milk tin, than wait till the 10<sup>th</sup> of October 2017. This casts a doubt on the evidence pertaining to the finding of the finger print of 2A on the 'Anlene' tin on the 20<sup>th</sup> of November 2014. There was no clarification offered as to why there was no attempt to try the Appellants in absentia under section 133A or for taking of evidence in the absence of the Appellants under the provisions of section 133 of the Criminal Procedure Code of Seychelles.

31. An examination of the evidence of Beverly Michel, Brandon Burke and Yves Leon brings to light a fundamental flaw in the Prosecution case. According to the Prosecution Beverly is alleged to have imported the drugs that was contained in the 'Anlene' tin that was placed in the Lulu bag on the 11<sup>th</sup> of October 2014. Beverly however had categorically denied that she imported any drugs into Seychelles. It had been her contention that she could not have done it without been detected. If we accept her evidence given after refreshing her memory, she had given the Lulu bag containing the drugs to a man whose name is not known. It is also not known when the said bag was given or where it was given or where Beverly had kept it before it was given. The NDEA had found and seized the bag containing the drugs on the 7<sup>th</sup> of November 2014 near a rock at Roche Bois, 28 days after it had been allegedly imported into the country. There is absolutely no evidence to show that the said bag was placed there by the unknown, unidentified man to whom Beverly handed it over or for that matter by whom or when. There is absolutely no evidence to show that whatever drugs that were found inside the tin on the 7<sup>th</sup> of November 2014, were the same drugs that 1A and 2A had placed therein, even if the prosecution version is to be accepted. 1A, 2A, Beverly or the unknown man to whom Beverly is alleged to have given it, have not testified to that effect. Ali Siccobo was never called by the Prosecution to explain why he mentioned the name of Beverly to the NDEA. Save for the finding of a fingerprint of 2A underneath the 'Anlene' tin lid, there is no evidence to prove that the Lulu bag belonged to the Appellants. There was no special identification mark to link

the 'Anlene' tin to the Appellants, save that of the fingerprint of 2A. It is clear to everyone that such tins are available everywhere in abundance. It is also strange that there were no fingerprints detected on the other exhibits, namely the plastic bags or the coffee sachets. The question then arises as to whether it was the same Lulu bag that Beverly is alleged to have imported into the country on the 11<sup>th</sup> of October 2014 that was recovered from Roche Bois on the 7<sup>th</sup> of November 2014 as stated by the Prosecution. Even if we are to accept the entirety of the Prosecution evidence, one cannot conclude with certainty that the drugs found in the tin were those that the Appellants had placed therein, in view of the break in the chain of evidence and the absence of the finger prints of the Appellants on the other exhibits, namely the plastic bags or the coffee sachets.

32. In the cases of **Josianne Vital V The Republic CR Appeal No. 3 of 1997** and **Vincent Allainson Gabriel V The Republic CR SAC 22/09**, the appeals were allowed simply because there was a break in the chain of evidence to link the drugs analysed by the Government Analyst to the appellant. Both were cases where the chain of evidence was broken after its seizure from the appellant and while the drugs were in police custody, i.e. the failure of the prosecution to prove that it was the same drugs that were seized by the police from the appellant that were taken to the Government Analyst for purposes of analysis. The facts in this case are much more complicated because here, the drugs that were found in the 'Anlene' tin, later analysed, and found to be heroin were found 28 days after they are alleged to have been imported into the country, at Roch Bois and there is no evidence who placed it there. I have set out in detail the difficulty nay more the impossibility of proving the chain of evidence at paragraph 31 above. This Court in the case of **Vincent Allainson Gabriel** said that the failure to prove the chain of custody *"was a fatal irregularity"* and went on to state: *"Maintaining the chain of evidence...is absolutely vital in dealing with a drug case. Investigators and Prosecutors should consider the severe nature of punishments provided by the Act and thus leave no room for doubt in the mind of the court that there could have been any possibility whatsoever that the substance seized could have been tampered with before it reached the Government Analyst...There must always be a balancing of the two interests, namely the public interest of combating drug related crime and the right of an accused person to a fair trial enshrined and entrenched in the Constitution."* In the case of **Valsala V State of Kerala, AIR 1994 SC 117** it was held that when the link evidence relating to the safe custody is missing, the missing link is fatal for the prosecution. Similar views have been

expressed in the cases of **Prafulla Kumar Prharaj V State of Orissa 78 91994) CLT 366, Balaji Sahu V State, 84 (1997) CLT 357 and Ram Phal V State of Haryana, 1997 (1) SFR 151.**

33. As regards ground 1, I also wish to state that the Prosecution itself appears to be in doubt as to the date of importation. If they had placed reliance on Beverly Michel, the protagonist of the prosecution case, it is clear that the importation took place on the 11<sup>th</sup> of October 2014 and the Appellants should have been charged for importation on the 11<sup>th</sup> of October 2014. But all three charges levelled against the Appellants state that the offences had taken place between the 9<sup>th</sup> of October and 7<sup>th</sup> of November 2014. This shows that the Prosecution was in doubt as to whether the drugs found in the ‘Anlene’ tin at Roche Bois near a rock on the 7<sup>th</sup> of November 2014, were the very same drugs the Prosecution had alleged that the Appellants had caused to be imported into the country on the 11<sup>th</sup> of October 2014 by using Beverly Michel.
34. I make no pronouncement in relation to ground (ii) of appeal as the Appellants have not been convicted of aiding and abetting as stated at paragraph 1 above.
35. I am as concerned as anyone else with the increasing drug menace in this country which is destroying our youth and the future of this country, and thus should take firm action with everyone involved especially in the importation and trafficking in dangerous drugs. I am however unable and unwilling to sacrifice the sacrosanct principles of this court, when the Investigation has failed miserably in its duty, the Prosecutor has been unfair in conducting the prosecution and the learned Trial Judge had erred in his judgment.
36. This Court by its unanimous decision stated in the case of **Azemia v R (SCA 14/2012) [2014] SCCA 35 (12 December 2014)**; that:

*“As impartial and independent judges sitting at the Court of Appeal, the highest court of the land, we owe it to ourselves that we own and operate a justice system in our democratic society that works properly with each and every component of the system, discharging its duties and responsibilities properly and professionally. If that is not so, the risk is not only for a defendant who may be imprisoned for life but is also for the nation that is imprisoned for life, through a flawed system that will not uphold the principles of due process and the rule of law, in their courts of law.*”

*Our people desire, and deserve a justice system that is flawless at all critical levels and stages: whether it be at the investigation stage, at the stage of arrest and detention, at the prosecution stage, at the trial stage, at the verdict stage, at the appellate stage or any other relevant stage for that matter. They do not want lapses. Lapses that do not go to the root of the system may be excused and ironed out but lapses that go to the root cannot be condoned. The price to pay is too high.*

*Our constitutional and professional responsibility as impartial and independent Judges require that we satisfy this aspiration of the people not only for a fair justice system but for a fair justice system that operates fairly throughout. One criminal who has escaped the system is one criminal too many. One wrong person convicted is one too many. We owe it to our people, to ourselves and to every single individual: that every single case that comes to us should pass the test of utmost credibility and integrity according to the established principles of law.*

*We uphold the sanctity of the Rule of Law in our courts. When cases such as this end up this way, it is a time for learning from the mistakes, carrying out the necessary audit, filling the gaps and addressing the weaknesses of the prosecution and the conduct of the case.”*

37. In view of what has been stated above, I have no hesitation in allowing the appeals, quashing the convictions and sentences imposed on both Appellants and acquitting them forthwith.

**A. Fernando (President)**

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

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

Signed, dated and delivered at Palais de Justice, Ile du Port on 21 August 2020