

IN THE COURT OF APPEAL OF SEYCHELLES

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**Reportable**

[2020] SCCA ...  
SCA CR 21 & 22/2019  
(Appeal from CR 61/2018)

**Tony Ricky Vidot**

**Kiera Marshia Maria**  
(rep. by Mr. Joel Camille)

**Appellants**

and

**The Republic**  
(rep. by Mr. George Thachett)

**Respondent**

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**Neutral Citation:** *Vidot / Maria v R* (SCA CR 21 & 22/2019 [2020] SCCA – 18 December 2020)

**Before:** Fernando, President, Robinson JA and Dingake JA

**Summary:** The two Appellants had been convicted of trafficking in drugs. The evidence against the 1<sup>st</sup> Appellant was that of a witness who had seen him handling the drugs on a date the prosecution had failed to establish, and the finding of the 1<sup>st</sup> Appellant's thumb impression on a shopping bag in which the drugs were concealed. As regards the 2<sup>nd</sup> Appellant, who was the girl-friend of the 1<sup>st</sup> Appellant the only evidence was the finding of her DNA profile in a condom that was found along with the drugs.

**Heard:** 1 December 2020

**Delivered:** 18 December 2020

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**ORDER**

The convictions of both Appellants are quashed and they are acquitted forthwith.

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## JUDGMENT

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### **FERNANDO, PRESIDENT**

1. The 1<sup>st</sup> and 2<sup>nd</sup> Appellants have appealed against their conviction for trafficking, by virtue of been found in unlawful joint possession of heroin having a net weight of 62.3 grams with an average purity of 35.5 grams on or about the 5<sup>th</sup> of October 2018 and the sentences of 5 years and 2 years of imprisonment imposed against the 1<sup>st</sup> and 2<sup>nd</sup> Appellants respectively.

#### **Grounds of appeal**

2. “1. The Learned trial judge erred in law and on the facts to have concluded that the Republic/Respondent had proven beyond reasonable doubt, that both Appellants had possession and control of the drugs found in the tin and this in light of the totality of the evidence in the case.
2. The learned trial Judge erred in law and on the facts, in having failed to sufficiently and adequately address the defence of the 1<sup>st</sup> Appellant, in regards to the explanation given relating to the presence of his thumb print on the bag obtained from the crime of scene.
3. The learned trial judge erred in law and on the facts, in having failed to sufficiently and adequately assess the 2<sup>nd</sup> Appellant’s right to remain silence and in concluding that in relation to other evidence relating to the 1<sup>st</sup> Appellant solely, 2<sup>nd</sup> Appellant was to be held liable for the offences, charged against her.

4. The sentences meted against the Appellants by the learned trial Judge is manifestly harsh and excessive and goes contrary to sentencing principles relating to the same offences charged.” (verbatim)

### **Prosecution evidence in brief**

3. **PW 10, Dominic Larue** testifying before the Court had stated that he had been working as a plumber at SCAA, 6 months before he testified in Court, namely prior to November 2018. He worked under a manager and two supervisors, one of whom was the 1<sup>st</sup> Appellant. According to the witness during the period he was working at the SCAA, he had seen the 1<sup>st</sup> Appellant in the clubhouse on a particular day. He has not given the period he was working at the SCAA. A person by the name of Neil Suzette had also been present at that time, doing some painting. He had heard the 1<sup>st</sup> Appellant open the door of the store. The 1<sup>st</sup> Appellant had “removed yellow and red coloured tin of milk marked ‘Pearl’ and then there was a black plastic bag and around that tin of milk there were black pepper. There was the smell of pepper as well as around the tin. The tin had been a bit big, 30 cm in height”. He removed it and “showed me what it contained. He showed me some long and oval shaped drug bullets rounded on both about 2 ½ inches in length, that was inside. And there also two small square shaped plastic containers, and a scale. He told me that it came through the post”. The 1<sup>st</sup> Appellant had also shown this to Neil. PW 10 had identified the tin and a photograph of the bullets that was shown to him in court as the one he saw that day. Neil Suzette had not testified before the Court.

Under cross-examination PW 10 had said that he cannot recall the date this incident happened. Bearing in mind that the incident happened at a time when he worked for the SCAA, namely 6 months before he testified, the Prosecutor had failed to ascertain how long before he left the services of SCAA had this incident taken place, at least in days, weeks or months or whether it was in the year 2018. He had said the “clubhouse is accessible to a lot of people including SCAA staff”. The witness had said in addition to the Appellant, Moses Dogley, Andrew Figaro and Jim Albert also had the key to the store of the club house that was kept “sometimes at the office and sometimes in my office.” It

has been suggested to the witness under cross-examination that the Appellant “never showed anything at all from the store” to him, and what he had told court was something he had “been told to write in his statement” by the police and that he had not been truthful to court. Larue had denied the suggestions made to him.

The learned Trial Judge at paragraph 58 of the judgment in deciding to act on the evidence of PW 10, had stated that the 1<sup>st</sup> Appellant had testified that PW 10 Dominic Larue was forced to make a statement but there was no evidence led on this fact and that Dominic Larue was not cross-examined at all on his alleged coercion to testify. In making this statement the learned Trial Judge had erred as it is clearly contrary to the proceedings as recorded and as stated above.

4. **PW 1, C. Herminie, an officer attached to the ANB**, had stated that he had been instructed to collect the 1<sup>st</sup> Appellant from the Mont Fleuri Police station and take him to the Seychelles International Airport on the 5<sup>th</sup> of October. Arriving at the airport he had gone to the clubhouse and conducted a search in the store room of the SCAA clubhouse. The key was in the possession of J. Rath, one of the SCAA staff. While searching the storeroom he had found on the left side of the store a blue and green coloured STC shopping bag. In opening it he found a black bin liner and inside the bin liner a big yellow coloured tin of milk, marked ‘Pearl’. From inside the tin of milk he had removed a red plastic bag and a piece of cling film containing 5 cylindrical shape bullets and part of a condom, a small black coloured digital scale.

Under cross-examination PW 1, had corroborated the 1<sup>st</sup> Appellant’s evidence as to how the bag came to be recovered from the store and the search of his car on the 5<sup>th</sup> of October. PW 1 had said he had not been given any instructions to search inside the clubhouse building but only the store. He had also stated that that it was at the ANB office that everything was laid out and photographed. PW 1 had admitted that the Appellant had told him: “You have set me up...get the hell out of here.”

5. **PW 2, JP Lucas and PW 3 A. Quatre, both officers attached to the Scientific Support and Criminal Record Bureau** testifying before the court had stated that they had developed impressions from four of the prints taken from the seized items. On subjecting them for examination they had found the left thumb impression of the 1<sup>st</sup> Appellant on the blue and green coloured, STC shopping bag. They had not specified whether it was outside or inside the shopping bag that the finger print was found. At the stage of examination, they had four suspects in mind. The other three impressions taken were not identifiable.
  
6. **PW 4, Y. E. Leon, an officer attached to the ANB** had taken buccal swabs from the 1<sup>st</sup> and 2<sup>nd</sup> Appellants, W 9 Dominic Larue and Neil Suzette.
  
7. **PW 8, S Sohun, A Senior Forensic Scientist employed by the Mauritius Forensic Science Laboratory** had stated that he had done DNA testing on the latex condom by checking with the buccal swabs of the 1<sup>st</sup> and 2<sup>nd</sup> Appellants, PW 10 Dominic Larue and Neil Suzette, that was brought by the Seychelles Police. The black and white powdery material detected inside the condom on examination had not revealed the presence of any dangerous drugs. There had been “no visible stains of blood which refers at for biological evidence”. In processing the condom for epithelial cells both the interior and exterior surface had generated a female DNA profile which matched at corresponding loci of the DNA profile obtained from the swab of the 2<sup>nd</sup> Appellant. On being questioned by Court as to from which part of the body epithelial cells may come from PW 8 had said they “can be said to be skin cells, they can be from outside the body which we all shed skin cells. But it could also be from inside for example when we take buccal swabs from an orifice.” To the question by Court as to whether there are epithelial cells in the vagina of a woman, PW 8 had answered in the affirmative. PW 8 had said anybody coming into contact with the condom would naturally leave evidence of epithelial cells. PW 8 has gone on to describe the DNA analysis and the 4 different steps involved in the process. “Firstly the DNA is extracted from the cells any material that is gathered from the exhibit. It is quantified to see how much DNA is present, and then it is amplified to get enough DNA to give a profile. And then it is genetically processed to give a DNA profile”. PW 8, when

asked whether he conducted all four tests in relation to this case had said: “I did not conduct all four processes. I did the first part and the last part. I did the evidence recovery part which is to examine the exhibit, and process for epithelial cells. I did the extraction process which is to recover the DNA from the cells, and I did the genetic analyser process which is the last part. There were two processors in between which are done by other members of the staff”. He had said that he did not have records of the test done by other members of staff. The other members involved in the process of analysing had not been called as witnesses. PW 8 had not been able to state from which part of the body the epithelial cells had come from.

8. **PW 5, J Rath, the Administration Manager, SCAA**, had said although the clubhouse store key was in the possession of the 1<sup>st</sup> Appellant, PW 10 Dominic Larue, Mr. Andrew Figaro, and the rest of the administration staff could also have access to the store.

#### **Defence evidence**

9. 1<sup>st</sup> Appellant had given sworn evidence before the Court, while the 2<sup>nd</sup> Appellant had opted to remain silent.
10. The 1<sup>st</sup> Appellant had stated that in October 2018 he had been working at the SCAA as a maintenance supervisor. He had gone to Abu Dhabi on the 27<sup>th</sup> of September 2018 and returned to the Seychelles on the 2<sup>nd</sup> of October 2018. On arrival having cleared through immigration and customs he was met by the 2<sup>nd</sup> Appellant, his girlfriend. He had thereafter gone to Dr. Murthy’s clinic as he was having an abscess on his buttock and thereafter gone to the 2<sup>nd</sup> Appellant’s mother’s house at Pointe Larue around 10 to 11 am. A little later four NDEA officers had arrived at the house and wanted to do a search of the premises for drugs. On being requested the 2<sup>nd</sup> Appellant had assisted in the search. She was pregnant at this time. Nothing illegal had been found inside or outside the house. One of the NDEA officers had thereafter told the 1<sup>st</sup> Appellant that he had received instructions to take him and the 2<sup>nd</sup> Appellant to the police station. While arriving at the police station he had seen PW 10, Dominic Larue and Neil Suzette. Late in the evening he was asked to give a statement and thereafter arrested. On the 3<sup>rd</sup> morning he along with the 2<sup>nd</sup>

Appellant, PW 10, Dominic Larue and Neil Suzette had been taken to court. Thereafter they had taken PW 10, Dominic Larue and Neil Suzette and himself to the airport and searched the lockers of each one of them and the maintenance office. Nothing illegal had been found. On the 3<sup>rd</sup> the NDEA had not searched the store. All three of them had been brought back to the Mont Fleuri Police station. The 1<sup>st</sup> Appellant had remained in the cell on the 4<sup>th</sup> of October; and on the 5<sup>th</sup> taken back to the airport. Arriving at the airport the NDEA officers had taken him to the clubhouse. Having entered the main living room, the officers had asked him for the key to the store. He had said that he does not have a key. The officers had then opened the store with a key they had with them and had asked the 1<sup>st</sup> Appellant to assist in the search. The 1<sup>st</sup> Appellant had not assisted in the search. One of the NDEA officers had then pulled out a bag and placed it on the floor. Thereafter they had searched his car which was parked in the cargo terminal carpark. Nothing illegal was found in the car. The car had been parked since the 27<sup>th</sup> of September when the 1<sup>st</sup> Appellant went to Dubai and according to the 1<sup>st</sup> Appellant “other people had access to the car and the keys were at the plumber’s office”. The evidence of the Appellant set out above, especially the underlined part, had not been challenged by the Prosecution. The NDEA officers had not shown him the contents of the bag they had recovered from the store. The 1<sup>st</sup> Appellant had categorically denied what PW 9, Dominic Larue had said about him and stated: “What I am aware of, is that Dominic was forced to make his statement.” This is corroborated by PW 1 who had admitted that the Appellant had told him: “You have set me up...” as stated at paragraph 4 above.

The 1<sup>st</sup> Appellant had said that the blue bag in which his finger print had been found and produced in court as an exhibit is similar to the bag he left in his car to place his tools. The 1<sup>st</sup> Appellant had categorically denied that the drugs and the condom that was found along with the drugs were in the possession of the 2<sup>nd</sup> Appellant, his girlfriend and himself. He had said that he and his girlfriend, had been set up possibly because of a previous case. He had also said that the drugs were found at a place that everybody had access to.

**Summary of the case for the Prosecution and the Probability of the Prosecution version:**

11. The 1<sup>st</sup> Appellant was working as a maintenance supervisor at the Seychelles Civil Aviation Authority (SCAA) on the 5<sup>th</sup> of October 2018, as of the date he is charged for trafficking in heroin. The 2<sup>nd</sup> Appellant is his girlfriend.

The main witness for the prosecution was PW 10, Dominic Larue. He had been working at the SCAA as a plumber at the SCAA prior to November 2018 under the supervision of the Appellant. PW 10 was also treated as a suspect in this case according to the prosecution evidence in this case. His finger prints and DNA were checked and analysed during the course of the investigations with the objects that were seized. According to the evidence of PW 10, the alleged incident where the 1<sup>st</sup> Appellant had made a display of the drugs and the other objects to him and Neil Suzette (Suzette, was also treated as a suspect at the initial stages of the investigation of this case according to the prosecution evidence) had taken place, on an unknown date, before November 2018. PW 10 had not been able to recall the date, week, month, year or even the period this incident happened. The Prosecutor had failed to ascertain how long before he left the services of SCAA (namely November 2018) had this incident taken place, at least in days, weeks or months or whether it was in the year 2018. There is no conceivable reason that could be attributed as to why the 1<sup>st</sup> Appellant, should just walk into the Store room and take the blue and green coloured STC shopping bag and pull out its contents in the presence of PW 10 and N. Suzette making a public display of them and simply leave the drugs there without removing them. Truth it is said is sometimes stranger than fiction, but a Court has to necessarily take into consideration the probabilities and improbabilities of evidence before placing reliance on them. The improbability of the prosecution version makes giving weight to the other two items of evidence difficult, namely, the finding of the finger print of the 1<sup>st</sup> Appellant on the blue and green coloured STC shopping bag and the DNA profile of the 2<sup>nd</sup> Appellant in the condom that was found along with the drugs, taken in conjunction with the evidence that the shopping bag containing the drugs had been found at a place that others had access to, that three of the prints found on the seized items were not identifiable, and the Appellant's testimony that he had been framed. The failure of the Trial Judge to comment on the version of PW 10, shows that she had accepted the evidence of PW 10, as the gospel truth, without any form of scrutiny.

12. I take note of the definition of ‘possession’ in the Penal Code, which can be applicable in interpreting the word possession under the Misuse of Drugs Act, and which reads as follows: “*possession*”, *be in possession of*” or “*have in possession*” (a) *includes not only having in one’s own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to, or occupied by oneself or not) for the use or benefit of oneself or of any other person;* (b) *if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody or possession of each and all of them*”. Possession, includes two elements: being in physical control of the thing (includes joint control with another / others); and. knowledge (or intention) of having it in any place. For a person to be said to ‘knowingly’ have something in possession in “any place” it necessarily entails reference to a specific place and a specific time or a time period. The simple question is when did the person have it or how can it be said that a person had something in his or her possession without any evidence as to when he/she had possession of it. In this case PW 10 has not given any identifiable date, week, month, or year; when he alleged that he saw the 1<sup>st</sup> Appellant removed the capsules from the milk tin. There is also no other evidence as to when the 1<sup>st</sup> and 2<sup>nd</sup> Appellants are said to have possession of the drugs. Merely because the drugs were found inside a bag which had the thumb impression of the 1<sup>st</sup> Appellant on a search of the Clubhouse store room, on the 5<sup>th</sup> of October 2018, a place where others had access to, it cannot be said that the drugs were in the joint possession of the 1<sup>st</sup> and 2<sup>nd</sup> Appellant on the 5<sup>th</sup> of October 2018. This is more so as the 1<sup>st</sup> Appellant was not in the country from the 27<sup>th</sup> September to 2<sup>nd</sup> October and had no access to the store room since his arrest on the 2<sup>nd</sup> and up to the 5<sup>th</sup> of October, when the drugs were seized. Even if it could be said that the 1<sup>st</sup> Appellant knowingly had the capsules on that unspecified date that PW10, is alleged to have seen him with the capsules, there is no evidence to establish that the 1<sup>st</sup> Appellant knowingly had the ‘same’ capsules at the storeroom on or about the 5<sup>th</sup> of October. Further there is no evidence that the capsules that PW 10 claims to have seen with the 1<sup>st</sup> Appellant on that unspecified date, contained heroin.

13. The uncontradicted evidence of the Appellant that the ANB officers conducted a search of the lockers of himself, PW 10 and Neil Suzette and the maintenance office on the 3<sup>rd</sup> of October 2018 and found nothing and that on the 5<sup>th</sup> of October 2018 the ANB officers, went straight to the Store room in the clubhouse gives credence to the Appellant's testimony that he and the 2<sup>nd</sup> Appellant had been framed.

#### **Finger print evidence**

14. A person may be convicted merely on the basis of finger print evidence, especially if the person has failed to offer an explanation as to how his/her finger print came to be found in a crime scene, in certain circumstances, such as at a place that the person normally does not visit and does not have access to. The difficulty in this case is even if it has been established that the fingerprint on the shopping bag is that of the 1<sup>st</sup> Appellant there is no evidence to conclude that the fingerprint on the shopping bag came to be placed at the time the drugs were put inside the milk tin; or to exclude the possibility that the drugs found inside the milk tin that was inside the bin liner that was inside the shopping bag, were placed therein by someone else; in view of the absence of any evidence as to when they were placed therein and the fact that others had access to the store. Further the fact that three of the prints found on the seized items were not identifiable casts a serious doubt on the prosecution case. It is to be noted that the drugs were found wrapped in a cling film inside a red plastic bag that was inside the tin. In view of the manner the drugs had been concealed, namely inside a cling film, red plastic, milk tin, and bin liner the finding of the finger-print of the 1<sup>st</sup> Appellant loses its significance. It is also noted that the Appellant was out of the country from the 27<sup>th</sup> of September to the 2<sup>nd</sup> of October and there had been in his car that was parked at the SCAA car park, a bag similar to the blue bag that was seized from the Store in which his finger print had been found. The car had remained parked at the car park at the time of the arrest of the Appellant and he did not have access to his car or to the store room after his arrival in the country and prior to his arrest.

15. In the case of **Forte & Ano v R (SCA 34 & 35/2018) [2020] SCCA 12 (21 August 2020)** where the facts were somewhat identical to that of this case, this Court said:

*“The NDEA had found and seized the bag containing the drugs on the 7th 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 whatever drugs that were found inside the tin on the 7th of November 2014, were the same drugs that 1A and 2A had placed therein, even if the prosecution version is to be accepted...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..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 11th of October 2014 that was recovered from Roche Bois on the 7th 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.”*

16. In the instant case, the facts are even less incriminating as regards the Appellants. PW 10 has not been able give a date as to when he saw the 1<sup>st</sup> Appellant with the capsules. There is absolutely no evidence to show that the capsules that were found inside the ‘Pearl’ milk tin on the 5<sup>th</sup> of October 2018, were the same capsules that PW 10 saw with the 1<sup>st</sup> Appellant on that unknown date, even if the prosecution version is to be accepted. Save for the finding of a fingerprint of 1A on the shopping bag, there is no evidence to prove that what was inside the shopping bag belonged to the Appellants. It is also strange that there were no fingerprints of anyone of the Appellants detected on the pearl milk tin and the other items found inside the shopping bag. In the said circumstances the fact that three of the prints found on the seized items were not identifiable casts a serious doubt on the prosecution case.
17. 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 'Pearl' milk tin, later analysed, and found to be heroin had been allegedly seen with the 1<sup>st</sup> Appellant on a date unknown to the Prosecution. 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.**

### **DNA Evidence**

18. There is also nothing to link the condom, that was found inside the milk tin that was inside the bin liner that was inside the shopping bag, to the drugs and thus to the 2<sup>nd</sup> Appellant, since there is no evidence of any traces of drugs being found in the condom. It is only by guesswork, speculation, or conjecture that it can be said that the 2<sup>nd</sup> Appellant is liable. That is not proof beyond reasonable doubt as required in a criminal case. The example used by the learned Trial Judge at paragraph 69 of her judgment, of "a hammer with an

accused's DNA being found next to a dead body as strong circumstantial evidence that the accused killed the person" and thus necessitating an explanation from him as to how his DNA got there is not an appropriate example. This is because in that situation, there is a clear link between the hammer and the death. In the case of **The People V Pedro Arevalo, the Court of Appeal, Fourth District, Division 3, California, G047523, decided on March 10, 2014** it was held that there must be a connection between an object found at the scene of the crime and the crime itself, rather than just a connection between the object and the defendant. The need for a connection between the object and the crime rather than just a connection between the object and the defendant was confirmed in **Birt v. Superior Court (1973) 34 Cal.App.3d 934, 936–937**. For a conviction to be based on DNA evidence there must be other corroborating evidence.

19. Further, merely on the basis of the DNA profile of the 2<sup>nd</sup> Appellant having been found on the condoms, it cannot be said that it was with the knowledge and consent of the 2<sup>nd</sup> Appellant that the 1<sup>st</sup> Appellant, had the drugs in his custody or possession on or about the 5<sup>th</sup> of October 2018, so as to make the 2<sup>nd</sup> Appellant jointly liable, even if the case against 1<sup>st</sup> Appellant could have been established. The mere fact that the 2<sup>nd</sup> Appellant had failed to offer an explanation as to how her DNA profile came to be found on the condom inside the milk tin, where the drugs were found, in the circumstances of this case cannot amount to proof beyond reasonable doubt of her guilt. As stated earlier there were no traces of drugs on the condoms. The 2<sup>nd</sup> Appellant cannot be penalized for the inability to offer an explanation to the finding of her DNA on the condoms, when the Prosecution itself has not suggested a plausible reason for that. The position may have been different if traces of drugs had been found in the condoms.
20. In the US case of **The People V Pedro Arevalo**, and the Malaysian case of **Hanafi bin Mat Hassan v Public Prosecutor. [2006] 4 MLJ 134 at p 175**, it had been held the mere existence of DNA evidence alone cannot link the accused to the crime. It was not sufficient to prove beyond a reasonable doubt that the accused had committed the offence.
21. In the South African case of **NKwanyana V S (AR108/16) [2016] ZAKZPHC 82 (27 September 2016)**, citing the analysis given by **Nicci Whitear-Nel from the School of Law Pietermaritzburg** analysed the South African Supreme Court of Appeal case of

**Bokolo V S (483/12) [2013] ZASCA 115 (18 September 2013)**, regarding the DNA evidence in general:

*“The probative value of DNA profiling in any particular case will depend on a number of different factors which must be assessed in the context of the facts of that case. Firstly, an important factor will be whether the samples were properly taken so that they were not contaminated or otherwise compromised. Also, the samples must be shown not to have been tampered with before they were tested in the laboratory. This is known as the chain of custody. Secondly, the equipment used to produce the DNA profile through the processes explained above must be shown to have been working properly. Thirdly, the electropherogram must have been properly analysed and interpreted based on logical and cogent reasoning. Fourthly, the probability of the profile match occurring in the particular relevant population must be considered. This is because STR profiling does not conclusively identify an individual because only 9 loci plus gender are analysed. If the profile which has been revealed on the electropherogram potentially matches many people within the population to which the tested individual belongs, the probative value of the evidence is low.”* I am of the view that the learned Trial Judge had not assessed any of the above mentioned factors in convicting the 2<sup>nd</sup> Appellant which was based only on DNA evidence.

22. The evidence in this case shows that the 1<sup>st</sup> and 2<sup>nd</sup> Appellants were at the Police station when the seized drugs were shown to the 1<sup>st</sup> Appellant. There was no evidence led by the prosecution to show that proper procedures had been adopted to avoid contamination at this stage. In the case of **Public Prosecutor v Richard Chia Kok Hiong, a case decided by High Court of Brunei Darussalam. [2007] 3 MLJ 129 at p 166 Steven Chong J** disregarded DNA evidence after he lamented on how the police officers involved in the investigation of the case had little appreciation of the risks of contamination and had disregarded the procedure in the collection, handling and storage of exhibits from the crime scene.
23. It must be noted that DNA analysis involves complicated scientific analysis and experiments and like any other laboratory experiments, the analysis is always open to

mistakes or human errors due to many circumstances. Therefore, DNA evidence must be approached with great caution and subjected to much scrutiny before it can be made admissible in court. In **Hanafi bin Mat Hassan v Public Prosecutor. [2006] 4 MLJ 134** the Court ruled that when testifying, the DNA expert must explain in detail on how he obtained the matching DNA characteristic. In other words, he has to explain all the details as to how the results tabulated in the report were obtained. Apart from that, the DNA expert is also required to explain on how he managed to get the random match probability including the method of calculation used by him. Failure to satisfy on the above requirements would cause the DNA evidence to have no evidential value. An examination of the evidence of PW 8, S Sohun, the Senior Forensic Scientist employed by the Mauritius Forensic Science Laboratory referred to at paragraph 5 above, shows that there is no detailed explanation of how he obtained the matching DNA characteristics. In fact, his evidence had been to the effect that he had not done two of the processes in the DNA analysis and that they were done by other members of the staff.

24. In view of what has been stated above I have no hesitation in allowing the appeals of both Appellants, upholding the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal.
25. In view of my findings above I quash the conviction of both Appellants and acquit them forthwith.

Signed, dated and delivered at Ile du Port on 18 December 2020

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Fernando, President

I concur

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Robinson, Justice of Appeal