IN THE COURT OF APPEAL OF SEYCHELLES

Reportable
[2024] (19 August 2024)
SCA CR 21/2023
(Appeal from CR 05/2022)

In the Matter Between

KEVIN QUATRE **Appellant**

(rep. by Mr. Ryan Laporte)

And

THE REPUBLIC **Respondent**
(rep. by Ms. Ketlynn Marie)

Neutral Citation:	*Quatre v R (*SCA CR 21/2023 (Arising in CR 05/22 [2024] (19 August 2024)
Before:	Twomey-Woods, Robinson, Andre, JJA
Summary:	Aiding and abetting the trafficking of controlled drugs, whether charges duplicitous when they involve three counts of inchoate offences - ingredients of the offence of aiding and abetting a crime - reliance on inadmissible hearsay evidence.
Heard:	5 August 2024
Delivered:	19 August 2024

ORDER

The appeal is upheld. The conviction and sentence are set aside.

JUDGMENT

DR. M. TWOMEY-WOODS JA

(Andre JA concurring)

Background

[1] In a Report by the Prison Reform Trust of the UK in 2016[1] on joint enterprise crime, the following remark is made:

> *"Most criticisms of joint enterprise have focused on what is said to be the potential for individuals to be convicted and sentenced, under the doctrine, for the most serious offences on the basis of highly peripheral involvement in the criminal acts. It is argued that in many such cases the level of participation in the offence is so slight, or the evidential threshold of conviction so low, that the conviction amounts to a substantial injustice. These include, for example, cases in which individuals are said to have been convicted on the basis of presence at the scene of an offence rather than active involvement in it; or where it is said that an apparent prior association between co-defendants was deemed sufficient evidence of shared criminal intent."*[2]

[2] The common law concept of secondary or accessorial liability, as applied in our jurisdiction, raises similar concerns. It is the contention of Mr. Kevin Quatre, the appellant in the present case, that he was arrested, charged, and sentenced simply for being at the scene of a crime without any involvement in any crime.

[3] He testified that on 22 February 2022, he was driving from Anse aux Pins, where he worked as a mechanic, to his parent's home at La Louise when he stopped to give a female pedestrian a lift. He was pounced upon by the police, who removed the key from the car's ignition, arrested him and brought him to Michel Apartments, where the female pedestrian, Hilda Anena, was residing.

[4] Mr. Quatre was initially charged together with Hilda Anena of Kampala, Uganda, with two charges of conspiracy to import controlled drugs, and conspiracy to traffic in

[1] Jessica Jacobson, Amy Kirby, Gillian Hunter, 'Joint Enterprise: Righting A Wrong Turn? Report of an exploratory study, (2016) Institute for Criminal Policy Research, Birkbeck, University of London.
[2] Ibid, fn 1.

controlled drugs, namely 989.99 grams of a controlled drug, having a total average content of 564.60 grams of diamorphine (heroin).

[5] Hilda Anena pleaded guilty on 27 April 2022 to a single count of importation of a controlled drug and, on conviction, sentenced to ten years imprisonment.

[6] An amended charge sheet was subsequently preferred against Mr. Quatre on 17 October 2022. It read:

Count 1

Statement of offence

Conspiracy to commit the offence of importation of a controlled drug contrary to section 16 (a) read with section 5 of the Misuse of Drugs Act 2016 and punishable under section 5 as specified in the Second Schedule of the said Act

Particulars of offence

In that Kevin Quatre of La Louise, Mahe, being a citizen of Seychelles along with other persons unknown to the Republic, on or around 2nd February 2022, at Michel Holiday Apartment, Les Mamelles, conspired with one Hilda Anena of Kampala, Uganda, by agreeing with one another to pursue a course of conduct, that if pursued would amount to the commission of an offence under the Misuse of Drugs Act 2016, by one or more parties to the agreement, name Nadine the offence of importation in a controlled drug having net weight of 999.98 grams with heroin (diamorphine) content of 564.60 grams.

Count 2

Statement of offence

Conspiracy to commit the offence of trafficking in a controlled drug contrary to section 16 (a) read with Section 7 of the Misuse of Drugs Act 2016 and punishable under section 7 (1) as specified in the Second Schedule of the said Act.

Particulars of Offence

In that Kevin cut of La Louise, Mahe, being a citizen of Seychelles along with other persons unknown to the Republic, on or around on or around 2nd February 2022 at Michel Holiday Apartment, Les Mamelles, conspired with one Hilda Anena of Kampala, Uganda, by agreeing with one another to pursue a course of conduct, that if pursued would amount to or in the commission of an offence and that the Misuse of Drugs Act 2016 by or more of the parties to the agreement, namely the offence of trafficking in a controlled drug having net weight of 999.98 grams with heroin diamorphine by way of selling, brokering, supplying, transporting, sending, delivering or distributing the said controlled drug.

Particulars of Offence

In the alternative to counts 1 and 2

Count 3

Statement of offence

Aiding and abetting the trafficking of a controlled drug contrary to section 15 (1)(a) & (c) read with section 7 (1) and section 2 of the Misuse of Drugs Act,2016 and punishable under section 7 read with the Second Schedule of the said Act .

Particulars of offence

In that (sic) Kevin Quatre of La Louise, Mahe, being a citizen of Seychelles along with other persons unknown to the Republic, on or around 2nd February 2022 at Michel Holiday Apartments, Les Mamelles, aided and abetted one Hilda Anena of Kampala, Uganda to traffic in a controlled drug having net weight of 999.98 grams with heroin (diamorphine) content of 564.60 grams, by way of doing or offering to do any preparatory acts for transporting and delivering by going to collect the said controlled drug from said Hilda Anena at Michel Holiday Apartments.

[7] A trial ensued, at the end of which the learned trial judge delivered a judgment with the following conclusion:

> *[67]… in the circumstances, on account of the totality of the evidence laid before this Court in this case, I find, that the prosecution has failed to discharge its evidential burden to prove the charge of conspiracy to commit the offence of importation of a controlled drug, (count 1) and the offence of conspiracy to commit the offence of trafficking in a controlled drug (count 2) against the 2nd accused. As such, the prosecution has not proved the accused's guilt beyond reasonable doubt for these two offences. I therefore proceed to acquit the 2nd accused, Kevin Quatre, for both count 1 and count 2.*
>
> *[68] In the light of the evidence laid before this Court, I am satisfied that the prosecution has adduced sufficient evidence to discharge both its evidential burden and its burden of proof beyond reasonable doubt proving the 2nd accused's guilt for the offence of aiding and abetting the trafficking of a controlled drug (count 3). I therefore convict the 2nd accused, Kevin Quatre of one count of aiding and abetting the trafficking of a controlled drug contrary to section 15 (1)(a) & (c) read with section 7 (1) and section 2 of the Misuse of Drugs Act, 2016 and punishable under section 7 read with the Second Schedule of the said Act.*

[8] After reading a probation report requested by Mr Quatre's Counsel, the learned trial judge sentenced him to 6 years imprisonment.

[9] Dissatisfied with this decision, Kevin Quatre has appealed to this court.

Grounds of Appeal

[10] He has filed five grounds of appeal, namely that:

1. *The learned trial judge erred in law and in fact in convicting the appellant for aiding and abetting the trafficking of a controlled drug when the principal offender was found guilty of importation and not trafficking.*

2. *The learned trial judge erred in law and in fact by failing to appreciate that there was no evidence to support the conviction on account of aiding and abetting the trafficking of a controlled drug.*

3. *The learned trial judge erred in law by misapplying the legal principles governing aiding and abetting.*

4. *The learned trial judge erred in law by convicting the appellant on a charge that is ambiguous, defective and references both aiding and abetting, trafficking and attempting the commission of the offence (sic).*

5. *The learned trial judge erred when he failed to appreciate that the prosecution had failed to establish beyond reasonable doubt that the appellant did not have the necessary intent (mens rea) to aid and abet trafficking.*

[11] The five grounds raise three main issues, in my view, in the following order of significance:

1. Were the charges as framed defective since they reference three inchoate offences? (Ground 4)

2. Can a secondary party be convicted for an offence not committed by the principal offender? (Grounds 1, 3 and 5)

3. Did the prosecution discharge its legal and evidential burdens of proof with regard to the conviction for aiding and abetting trafficking of controlled drugs? (Ground 2)

1. Defective charges (Ground 4)

[12] Mr. Laporte, Counsel for Mr. Quatre, has submitted that the charges against Mr. Quatre were both ambiguous and defective as they conflated the principles of conspiracy, aiding, abetting, and attempting to commit an offence. He adds that legal clarity is paramount in criminal charges to ensure the accused can adequately prepare his defence and that the ambiguity of a charge could potentially violate the accused's fair trial rights under the

Constitution. He contends that charging an individual with both conspiracy to traffic drugs and conspiracy to import a controlled drug for the same conduct also leads to confusion, and the overlapping of charges can violate his right to a fair trial.

[13] Ms. Marie, State Counsel, has responded by pointing out that the charges do not include any element of attempting to commit an offence. Furthermore, neither the convict nor his Counsel raised any objection to the charges as framed at the time the plea to the charges was taken. There is ample jurisprudence for the principle at the proper time to make an application to quash an indictment because its ambiguity is before the plea is taken. She has relied on the authority of *Charles and Parekh v The Republic*[3] for this proposition.

Our deliberation

[14] I agree with Ms. Marie on this issue. First, it must be noted that the charges of conspiracy were dismissed and have no bearing on the present appeal. Secondly, I cannot find how the charge in count 3 conflates aiding and abetting with attempting and/or conspiracy to commit an offence. The word attempt is not mentioned anywhere in the charge. In any case, section 111 of the Criminal Procedure Code provides that

"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

[15] Additionally, section 114 of the Code states;

"The following provisions shall apply to all charges and information and, notwithstanding any rule of law or practice, a charge or an information shall, subject to the provisions of this Code, not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this Code—

(a)(i) A count of a charge or an information shall commence with a statement of the offence charged, called the statement of offence;

[3] (SCA CR 10 of 2022; SCA CR 13 of 2022) [2023] SCCA 6 (26 April 2023).

(ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment, shall contain a reference to the section of the enactment creating the offence;

(iii) after the statement of the offence, particulars of such offences shall be set out in ordinary language, in which the use of technical terms shall not be necessary;

[16] Against the backdrop of the above wording, I examine Mr Quatre's complaint regarding ambiguity and duplicity.

[17] The rule against duplicity is a common law rule concerning how criminal charges are drafted. The rule provides that the prosecution must not allege the commission of two or more offences in a single charge. The reason for the principle is to provide the defence with certainty as to the charge it must face and ensure the fundamental right to a fair trial. In *Samson v The Republic*[4], this Court reiterated that:

"[E]ach count must allege only one offence is a correct statement of the law of what has come to be known as the rule against duplicity, i.e. no one count of the indictment should charge the defendant with having committed <u>two or more separate offences</u>. Where a count is bad <u>on its face</u> for duplicity, the defence should move to quash it before the accused are arraigned." (Emphasis added).

[18] Further, as *Samson* points out, the time for making an application regarding duplicity of charges is before the plea is taken. As submitted by Ms. Marie, this has also been repeated by this court in *Charles and Parekh:*[5] by Fernando PCA as follows:

"I wish to state at the outset that [the second appellant] having pleaded to the charge and not having raised any ambiguity as to the particulars of the charge during the trial and having proceeded along with the trial, without complaint, cannot now be heard to complain about it on appeal. It has been stated in R v Chapple and Bolingbroke (1892) 17 Cox 455 that the proper time for making an application to quash an indictment is

[4] (SCA CR 15 of 2021) [2023] SCCA 7 (26 April 2023).
[5] Supra, fn 3.

before the plea is taken. It is my view that otherwise, the accused may be encouraged to go through the whole trial process, knowing that the charge is defective, but hoping to take it up on appeal in the event of a conviction. The [second appeallant]has not complained, nor do I find, that the charge is a nullity (i.e. where an indictment discloses no criminal offence whatever or charge some offence which has been abolished), that the indictment has been preferred without jurisdiction, nor that the charge has prejudiced or embarrassed [the second appellant].”

[19] In the present case, the charges proffered are not duplicitous in any way as each count only charged Mr. Quatre with a single offence offence, which was different and separate from those charged in the other counts.

[20] In the circumstances, this ground of appeal has no merit and is dismissed.

2. Aiding and abetting the trafficking of a controlled drug (Grounds 1, 3 and 5)

[21] Mr. Laporte has raised several aspects of the law regarding the offence of aiding and abetting a crime. His grounds of appeal aver that a secondary party cannot be charged with aiding and abetting a specific crime when the principal has been charged or convicted with a separate and different crime. He has also complained that the legal principles governing the crime of aiding and abetting were misapplied and that, in any case, the mens rea for the offence was not established in the previous case.

[22] He has submitted that the learned trial judge failed to distinguish between mere association and active facilitation in the trafficking of controlled drugs. He relied for this proposition on the authority of *Khudabin v R*.[6] He contended that *Khudabin* is also authority for the proposition that knowledge of the crime and intent to assist are paramount in aiding and abetting cases and that the prosecution failed to prove that Mr. Quatre knew of or intended to assist in the trafficking of drugs.

[23] In response, Ms. Marie has submitted that these grounds are misconceived. She contends that there are circumstances in which a principal party has committed numerous offences and the secondary party has only aided and abetted one of these offences, and therefore, the

[6] (SCA 15 of 2012) [2015] SCCA 37 (17 December 2015).

principal might be charged and convicted of a different offence completely unconnected with that of the secondary party. The secondary party might also be charged and be convicted with the only offence for which he has aided and abetted the principal. Each party's charge will depend on the evidence the State has available. Ms. Marie has referred to the case of *R v Dixon & Anor*[7] in which the principal was charged and convicted of the importation of a controlled drug and the secondary party was charged and convicted of aiding and abetting the principal to traffic in a controlled drug she concludes that there can be two separate offences in respect of a principle and a secondary party. She has also referred to the case of *Underwood & Anor v R* [8] in which the court stated that a defendant can be found guilty of aiding and abetting an offence even if the principal is found not guilty of that crime itself.

[24] In respect of the facts of the present case, Ms. Marie submits that it is not contested that Ms. Anena, the principal, had possession of the drugs. The requisite mens rea of the aider and abettor has been articulated by this Court in the case of *Dugasse & Ors v R*[9]*:*

"[T]he secondary party should [have] knowledge as to the essential elements of the type of offence committed although knowledge of the precise crime intended to be committed by the principal is not necessary."

[25] It is, therefore, her submission that in establishing Mr. Quatre's knowledge of the offence, an inference based on his actions and facts at and around the material time of the commission of the crime is the determining factor. She describes the determining factors as being the phone call by Ms. Anena requesting certain food items, another call in which she was told to go to the main road and a white car would stop near her, and the driver would call her by her code name, Anya. Further, the Mr. Quatre was apprehended only after having stopped next to Ms. Anena and was heard saying "Anya, get in, get in,". Moreover, the food items requested were found in Mr. Quatre's car.

[7] (CO 50 of 2022) [2022] SCSC 1081 (9 December 2022).
[8] (SCA CR 21 of 2022) [2023] SCCA 46 (25 August 2023).
[9] (SCA 25, 26 and 30 of 2010) [2013] SCCA 6 (3 May 2013), (2013) SLR 67.

Our deliberation

[26] I have decided to explain the offence of aiding and abetting in detail, if only to set the principles of law on this matter to rest once and for all.

[27] It cannot be understated that an aider or abettor can be convicted of an offence even if the principal offender is acquitted, not charged, or otherwise unamenable to liability. This principle is rooted in the idea that aiding and abetting is a separate and independent form of criminal liability.

[28] A brief historical evolution of the common law on this issue dating back to the mid-19th century is insightful.[10] English law initially required accessories to be indicted as principals in the second degree. As such, their punishments were often different than those prescribed for principals in the first degree. Consequently, much time was spent by lawyers, juries and judges alike, focusing on the often subtle distinctions of fact, which, in any given case, separated the aider and abettor from the accessory before the fact. Consequently, the English parliament moved to eliminate these distinctions by enacting the Accessories and Abettors Act 1861. This Act provided that an accessory before the fact was to be indicted, tried, convicted and punished in all respects as if he were a principal felon.

[29] Section 22 of the Seychellois Penal Code provides, similarly, that:

"When an offence is committed, each of the following person is deemed to have taken part in committing the offence and be guilty of the offence, and may be charged with actually committing it, that is to say—

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

b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

[10] See dictum of Wood J.A in R v Berryman (1990), 1990 CanLII 286 (BC CA), 78 C.R. (3d) 376 (B.C.C.A.)

c) every person who aids or abets another person in committing the offence;

d) any person who counsels or procures any other person to commit the offence". [Emphasis added].

[30] Section 15 of The Misuse of Drugs Act 2016 is couched in like terms:

"A person who

(a) aids, abets, counsels, incites or procures another person to commit an offence under this Act;

…

commits an offence and is liable to the punishment for the offence…"

[31] The above provision does not attribute a lesser liability to the aider and abettor based on a link to the principal. The implication for aiders and abettors then is of independent liability. This means that even if the principal is acquitted, not charged, or unamenable to liability, the aider or abettor can still be prosecuted and convicted. The court's only concern when it comes to the offence of aiding and abetting a crime is the intent and participation of the suspect. The Canadian authority of *R. v. Thatcher*[11] provides persuasive instruction on this issue. Dickson CJ approved the direction of the trial judge to the jury in which he stated:

"It is not your concern whether some other person or persons have neither been charged or found guilty of the offence... Nor is it your concern whether or not the person who actually committed the crime is known. If you are satisfied from the evidence that [a crime was committed] ...and that this accused aided or abetted in the commission of the [crime], it is open to you [the jury] to find him guilty of [of the crime]. But again if the Crown has failed to satisfy you that [the accused] either committed the [crime] or that someone else did so, aided and abetted by [the accused], then you must give him [the accused] the benefit of the doubt and find him not guilty."[12]

[11] 1987 CanLII 53 (SCC), [1987] 1 S.C.R. 652; [1987] S.C.J. No. 22 (Q.L.)
[12] Ibid, paragraph 63.

[32] Several other Canadian authorities provide persuasive guidance on this issue, including the case of *R. v. Johnson*[13]. In that case, the Nova Scotian Court of Appeal found that a person can be convicted as an aider or abettor even when the person who actually committed the offence is not charged, acquitted, or convicted of a less serious offence.

[33] In *R v. Huard*,[14] the court refered to the judgment in *Remillard v The King*[15], holding that:

> *"First, the decision in Rémillard makes it clear that an aider or abettor can be convicted of a more serious offence than the principal. Said somewhat differently, the culpability of the aider or abettor is not co-extensive with or limited by the liability of the principal.*
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> *In Rémillard, the principal was tried first and convicted of manslaughter on an indictment that charged murder. At the subsequent trial of the alleged aider or abettor, defence counsel asked the trial judge to instruct the jury that the appellant could not be convicted of murder because the principal had only been convicted of manslaughter. The trial judge refused to do so. The appellant, the alleged aider or abettor, was convicted of murder."*[16]
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> The court in *Huard* then went on to state that:
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> *"[The] conviction of the principal is not a condition precedent to, or in any way limitative of, the conviction of an aider, abettor, or other secondary party.*[17]

[34] In the United States, a leading authority is the case of *United States v. Standefer*.[18] In that case, the Court of Appeals for the Third Circuit undertook the first in-depth determination by a federal court of whether the acquittal of one charged as a sole principal in a criminal act should preclude conviction of an aider and abettor. This question involved the

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[13] 2017 NSCA 64.
[14] 2013 ONCA 650.
[15] 1921), 62 S.C.R. 21
[16] ibid, paragraph 59.
[17] Supra, fn. 13 at paragraph 98. See other Canadian cases on this issue *Regina v. Michael* (1840), 9 Car. & P. 356, 173 E.R. 867; *R. v. Berryman*, supra fn 10, *R. v. Devgan*, [2007] O.J. No. 4517.
[18] 447 U.S. 10 (1980).

interpretation of a federal statute, 18 U.S.C. section 2, which provides that one charged as an aider and abettor in the violation of a federal statute shall be charged as a principal. Although this question had previously arisen in the federal courts, it had resulted in conflicting interpretations among the circuits. In an attempt to formulate a decisive answer, the *Standefer* court considered Congress' intent in drafting an aider and abettor statute of general application, precedents bearing on the question, and relevant policy considerations. The Third Circuit ultimately held that acquittal of the sole principal does not preclude conviction of one charged as an aider and abettor.

[35] The court held that read against its common law background, 18 U.S.C., section 2 evinces a clear congressional intent to permit such a conviction. The section gives general effect to what had always been the common law rule for second-degree principals (principals who were actually or constructively present at the crime scene) and aided and abetted its commission. All participants in conduct violating a federal criminal statute are principals, and, as such, they are punishable for their criminal conduct, the fate of other participants being irrelevant.[19]

[36] In our jurisdiction, ***Khudabin***[20] cited by both counsel in this case remains good law for what constitutes the crime of aiding and abetting:

"[11] There are three important elements to prove in a charge of aiding and abetting:-
(i) That another person committed the underlying crime;
(ii) The person charged had knowledge of the crime or the principal's intent; and
(iii) The person provided some form of assistance to the principal offender."

[37] In addition, ***Dugasse***[21], also cited by both Counsel, further expones on both the requisite actus reus and mens rea of the the offence as follows:

[29] One becomes liable on the basis of aiding and abetting in the commission of a crime when the offence is established and where there is a principal offender. The actus reus of the offence of aiding the commission of an offence involves any type of assistance given

[19] Ibid, at p. 447 U. S. 15-20.

[20] Supra, fn 6.
[21] Supra fn 9.

prior to or at the time of the commission of the offence. The assistance rendered need not be the sine qua non or the sole cause for the offence. The fact that the principal could have carried out the offence without the assistance is not an issue. It is also not necessary to prove that the assistance was sought or the principal offender was aware of the assistance. The important element being that there must be a connection between the assistance and the commission of the offence and should have helped the principal to carry out the offence. However, the principal offender may be free from criminal liability, or the prosecution may not be able to prosecute him/her as his/her identity is not known, or the prosecution may decide not to prosecute him/her and call him/her as a witness for the prosecution. Often the distinction between the principal offender and secondary offender/s is so misty that the law treats all the persons as having individually committed the offence and provides for charging them with committing the offence. Abetting involves inciting, instigating or encouraging the commission of an offence. Any form of encouragement suffices and it does not matter if the principal had already decided to commit the offence or that the encouragement was ignored by the principal. There is an essential difference between aiding and abetting, namely encouragement unlike aiding must have come to the attention of the principal, although it may have been ignored. The mens rea for both aiding and abetting is that the secondary party should have intended to do the act of assistance or encouragement or could have foreseen the commission of the offence as a real possibility, and should have intended or believed that such act will assist or encourage. The secondary party thus should have had knowledge as to the essential elements of the type of offence committed although knowledge of the precise crime intended to be committed by the principal is not necessary."

[38] I emphasise that the law is correctly stated in these cases. The logic in terms of its impact on the administration of justice is inescapable.

[39] Outrightly barring the prosecution of the aider and abettor after the principal is acquitted (not charged or have their charges withdrawn) would operate as an obstacle to justice. In the context of drug trafficking in Seychelles, consider a situation where the principal offenders are international drug lords operating from abroad, making them beyond the reach of local law enforcement. For instance, if a local Seychellois individual (the

aider/abettor) is caught receiving drugs on behalf of these foreign principals, the aider/abettor could still be prosecuted under Seychellois law despite the principal offenders being inaccessible. Tying the aider's/abettor's guilt to the liability status of the principal would be a serious obstacle to justice. As such, these two sets of suspected criminals (and crime) should be treated with some degree of independence.

[40] Any contrary interpretation would mean that if the principal drug lords could not be apprehended, refused to plead, had been pardoned, or died before conviction, the local accessory could not be tried. What happens when the prosecution squanders the case against the principal offender by either mishandling evidence or breaching his constitutional rights? Should the court, in throwing out the prosecution case against the principal, also throw out the case against the aider/abettor? I think not, for this would be a miscarriage of justice. Each case should be evaluated on its own merits, and the guilt of the aider or abettor should be independently assessed based on the available evidence and their involvement in the crime.

[41] In the present case, in light of the above authorities, if I find that there is sufficient uncontroverted proof that Mr. Quatre was at the scene to aid and abet in the trafficking of heroin, then he is as guilty as the facilitator of this crime regardless of the status of Ms Anena.

[42] However, the interpretation of the law as submitted by Mr. Laporte is incorrect, and these grounds of appeal are therefore dismissed.

3. The discharge of the legal and evidential burden in the present case (Ground 2)

[43] The key question that remains to be addressed is whether a substantive offence of trafficking was committed, rather than whether the principal party (Ms. Anena) committed the substantive offence of trafficking. There can be no conviction for aiding, abetting, counselling or procuring an offence unless the actus reus of the substantive offence is shown to have occurred.[22]

[22] *Assistant Recorder of Kingston upon-Hull, ex p. Morgan* [1969] 2 QB 58:(1969) 53 Cr. App. R. 96, DC: *Loukes* [1996] 1 Cr. App. R. 444, CA; *Roberts and George* [1997] RTR. 462, CA in Archbold 2022 200th Edition, Sweet and Maxwell, Page 2217, 18-30.

[44] Mr. Laporte has submitted that the discharge of the legal and evidential burden in this respect has not been met. He contends that the same reasons the trial judge gave to acquit Mr. Quatre of the other charges should also have been applied to the third count. In acquitting Mr. Quatre of conspiracy to import and conspiracy to traffic, the learned trial judge had this to say:

"[55] [The] prosecution has been unable to prove the existence of a conspiracy between the first accused and the 2nd accused and as such a conviction for the offences of conspiracy to commit the offence of importation of a controlled drug and or conspiracy to commit the offence of trafficking of a controlled drug of which the 2nd accused has been indicted is untenable"

[45] Ms. Marie has contended in opposition that the learned trial judge referred to the circumstantial evidence in this case, namely the phone calls and the fact that items resembling the items Ms. Anena told the police she had asked for were found in Mr. Quatre's car to ground a conviction for aiding and abetting the trafficking of drugs. She also relied on the evidence that a white car stopped by Ms. Anena as she had told the police had been arranged on the phone. Finally, Police Officer Legaie testified that he heard Mr. Quatre call Ms. Anena by her code name.

[46] It must first be noted that the two accused were not tried together. Ms. Anena pleaded guilty to one of the charges - namely, importation of controlled drugs and was sentenced. The trial then proceeded against Mr. Quatre. Ms. Anena was not called to give evidence. And that lapse by the prosecution cannot be underscored. Moreover, the controlled delivery of the carefully prepared decoys for the drugs to Mr. Quatre were never executed.

[47] More importantly, I am extremely concerned by the reliance on hearsay evidence in this case to secure a conviction. It beggars belief that for a case of this magnitude, the prosecution and the learned trial judge relied on the evidence of a police officer who *overheard* phone calls allegedly between Ms. Anena and someone called Boss Soya. To make matters worse, the police officer testified that the phone calls were in a language he identified as "Ugandan" and could not understand. However, he took for granted the

English translation given by someone who was not called to testify. Evidence of the phone calls was never adduced. Additionally, neither the transcript in the foreign language nor the translation was brought into evidence. There is no evidence adduced that Ms. Anena even had a phone. What was her number? What were the numbers she called?

[48] The court also relied on the presence of food items in Mr. Quatre's car that matched those allegedly requested by Ms. Anena, who, I repeat, was never called as a witness. I, therefore, do not know what she requested, if anything at all. The court inferred that Mr. Quatre's act of delivering the food items was a preparatory act to facilitate the trafficking of drugs.

[49] The reliance on this piece of evidence verges on the comedic. Allegedly, Ms. Anena asked someone by the name of Boss Soya to bring her certain items that would facilitate a bowel movement for her to pass the ingested drugs. First of all, this conversation took place after the ingested drugs had already been excreted either by Ms. Anena herself or by the intervention of surgeons at Seychelles Hospital. Secondly, the items allegedly requested were "juice, banana, milk and water."[23] The police officer, Mr Yvon Legaie, on whose evidence the trial judge placed much reliance, stated that:

"[W]hen you drink milk, you eat the banana, and then you drink juice, it facilitates the excretion to be very quick."

[50] No medical evidence was adduced to show that these items taken separately or together were purgative. Yet, great reliance was both placed on the purgative effect of these items and the "coincidence" of similar items discovered in Mr. Quatre's car. For the purpose of the record, the items found in Mr. Quatre's car were biscuits, bread, yoghurt, juice, milk, and two takeaway boxes of unspecified meals. Some of these items were in large quantities: there were 4 cartons of milk and 4 cartons of juice. 12 bottles of water and 24 tubs of yoghurt.[24] The only three items similar to Ms. Anena's alleged requests were milk, water, and juice, yet both the prosecutor and the learned trial judge believed that these items "matched" those requested by Ms Anena.

[23] page 119 of the record.
[24] page 137 of the record.

[51] Mr. Quatre supplied an alternative explanation for why he had these items: that the foodstuffs were purchased for his children as part of the normal end-of-month routine.

[52] The court also found that Mr. Quatre's white car stopping to give a lift to Ms. Anena and the evidence of the police that he called out Ms. Anena's code name, "Ania", were sufficient to find beyond reasonable doubt that he was guilty of aiding and abetting the trafficking of drugs.

[53] It is well established that a court of appeal does not lightly interfere with the credibility findings of a trial court.[25] In the present case, the learned trial judge attached great credibility to the police's evidence over the appellant's. The court found Mr. Quatre's explanation lacked credibility, particularly due to the timing and circumstances of his actions and the prosecution's evidence regarding why he had these specific food items in his car.

[54] I respectfully disagree with the learned trial judge. The dismissal of Mr. Quatre's defence is insufficiently supported by direct evidence of his intent to aid in drug trafficking. Notably, there was no evidence of direct interaction between Mr. Quatre and Ms. Anena or Boss Soya concerning the trafficking operation, which is fatal for the prosecution's case for aiding and abetting.

[55] The prosecution had the necessary resources to establish this connection, as they had obtained Mr. Quatre's phone. They could have investigated whether the phone revealed any calls or texts, including the list of groceries, between Boss Soya and Mr. Quatre. The police already, if I am to believe them, had Boss Soya's number and should have examined this connection when they obtained Mr. Quatre's phone. Matching the number that called Ms. Anena to the call log in Mr Quatre's confiscated phone was a crucial step that appears to have been completely overlooked.

[56] Yet the trial judge noted:

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[25] S.E. v R (SCA CR 70 of 2022) [2022] SCCA 68 (16 December 2022)

"In his testimony, DW1 [Mr. Quatre] confirmed that when he was stopped by ANB officers, he had a cell phone with him and that the first thing they did was to take the phone from him. He is of the view that the officers had access to whatever information was on his phone at the time because according to him, they took the phone to obtain that information."

[57] This testimony was never disputed and was, in fact, corroborated by Police Officer Yvon Legaie, who stated on page 121 of the record that the police had recovered a Samsung Black phone when they searched Mr. Quatre. So why didn't the police examine the phone records? Why did they not provide evidence to show that the accused had made calls to Boss Soya or that maybe he had deleted these call logs? The burden of proof lies on the prosecution to prove beyond reasonable doubt the guilt of the accused.

[58] Mr. Quatre's defence raises reasonable doubt - that the groceries found in his possession were for his children and part of his normal routine - and is plausible. Parents often purchase similar items regularly, and this explanation is consistent with normal parental behaviour. Moreover, these are items that could be found on anyone's shopping list. The prosecution needed to demonstrate beyond a reasonable doubt that Quatre's purchase of these items was specifically linked to the trafficking operation rather than coincidental routine behaviour. There was no direct evidence presented that Mr. Quatre communicated with Ms. Anena or Boss Soya about the groceries. The prosecution's case relied heavily on circumstantial and hearsay evidence and the alleged intercepted communications between Ms. Anena and Boss Soya. Mr. Quatre's claim of having no prior knowledge or interaction with Ms. Anena was not directly refuted by the evidence of direct communication between him and the traffickers. Similarly, the "coincidence of a white car stopping" is no coincidence at all – the alleged call from Boss Soya did not indicate the make or size of the white car that was supposed to stop. There are too many white cars in Seychelles for the occurrence of Mr. Quatre's white Picanto car stopping to give a woman a lift to be taken as evidence of an act amounting to the trafficking of drugs.

[59] The credibility of the police witnesses is even more severely undermined by the fact that apart from the hearsay evidence of what Ms Anena told them, no evidence, apart from

hearsay evidence, was adduced of any code name attributed to her, which was to be called out by the person collecting her.

[60] In all the circumstances of the case, I find that there was no evidence beyond reasonable doubt that Mr. Quatre was involved in any way in aiding and abetting the trafficking of controlled drugs. His conviction was unsafe and unsatisfactory, and his sentence was, therefore, inappropriate and must be set aside. This ground of appeal succeeds.

Order

[61] The appeal of Mr. Quatre is upheld. Both his conviction and sentence are set aside.

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Dr. M. Twomey-Woods, JA.

I concur

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S. Andre, JA

ROBINSON JA

[62] I have read in draft the judgment of Twomey-Woods JA in this appeal. I agree with the conclusions reached and the order made that the appeal of Mr. Quatre should be upheld and that both his conviction and sentence should be set aside.

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F. Robinson JA

Signed, dated, and delivered at Ile du Port on 19 August 2024.