

**IN THE SUPREME COURT OF SEYCHELLES****THE REPUBLIC****VERSUS**

1. **ALLEN MARENKO**
2. **ROBERT AZEMIA**
3. **TONY ANTAT**
4. **ROLLY LESPERANCE**
5. **DANNY FRANCOURT**
6. **JULIUS LABROSSE**
7. **PERCY BACCO**
8. **BEDDY PAYET**

**ACCUSED****Criminal Side no 11 of 2003**

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Mr. R. Govinden Principal State Counsel for the Republic  
Mr. D. Lucas for the 1<sup>st</sup> Accused  
Mrs. A. Antao for the 2<sup>nd</sup>, 3<sup>rd</sup> & 8<sup>th</sup> Accused  
Mr. P. Pardiwalla for the 4<sup>th</sup> Accused  
Mr. F. Ally for the 5<sup>th</sup> & 6<sup>th</sup> Accused  
Mr. S. Raja Sundaram for the 7<sup>th</sup> Accused

**JUDGEMENT****Perera J**

The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> 5<sup>th</sup> 6<sup>th</sup> and 7<sup>th</sup> Accused stand charged on two counts, 1 and 4. The 8<sup>th</sup> Accused stands charged under count 6. The 3<sup>rd</sup> Accused Tony Antat was acquitted upon the Court Ruling that he had no case to answer under counts 1 and 4, under which he was charged.

**Counts 1, 4 and 6 are as follows-**

**Count 1**

**“Statement of Offence**

**Unlawful possession** of turtle meat, contrary to Regulation 5(3) of the Wild Animals (Turtles) Protection Regulations (S.I. 46 of 1994), punishable under Section 3 of the Wild Animals and Birds Protection Act (Cap 247), as amended by Act 9 of 2001.”

In the particulars of the offence, it is alleged that all the Accused, save the 8<sup>th</sup> Accused, on or about 30<sup>th</sup> January 2003, at Providence Industrial Estate, had in their possession approximately 1141 Kg of Turtle meat.

**Count 4**

**“Statement of Offence**

**Killing of a protected bird** contrary to Regulation 4(1) of the Wild Birds Protection Regulations of 18<sup>th</sup> April 1966, punishable under Section 3 of the Wild Animals and Birds Protection Act (Cap 247) as amended by Act 9 of 2001.”

In the particulars of the offence, it is alleged that all the said Accused, save the 8<sup>th</sup> Accused, in the month of January 2003, unlawfully killed approximately 40 boobies, the latter being protected birds.

The 8<sup>th</sup> Accused alone is charged under Count 6 as follows -

**Count 6**

**“Statement of Offence**

**Unlawful Possession** of turtle meat contrary to Regulation 5 (3) of the Wild Animals (Turtle) Protection Regulations (S.I. 46 of 1994) and punishable under Section 3 of the Wild Animals and Birds Protection Act (Cap 247), as amended by Act 9 of 2001. \_

**Particulars of Offence**

*Beddy Payet on 31<sup>st</sup> day of January 2003 at Providence Estate, Mahe, had in his possession 58 kg of turtle meat”*

Before I consider the evidence of the case, I propose to deal with several issues relating to matters of procedure and law raised by the defence Counsel.

(1) **Alleged irregularities in procedure**

- (a) *Counsel for the 1<sup>st</sup> Accused submitted that at the voire dire, after hearing the evidence of the Police Officers who recorded and witnessed the retracted statement of the 1<sup>st</sup> Accused, and upon hearing his evidence on oath, the Court proceeded to Rule on its admissibility without affording an opportunity for him to address Court. He further submitted that as other Counsel were given such a right at their respective voire dire, the 1<sup>st</sup> Accused was not given a fair hearing.*

Principally, a complaint that there had been no fair hearing can be made only after an Accused person had been convicted and sentenced, and that too before the Constitutional Court. Even if it is taken as a procedural irregularity, it can be canvassed before the Court of Appeal. However, addressing the issue for present purposes, I rule that there is no requirement in Criminal Procedure that submissions of Counsel for the Prosecution and the Defence should be heard at the end of hearing the evidence at a voire dire. In fact it has been held that an Accused is not entitled to give evidence at this stage of the proceedings (***R. v. Baldwin (1938) 23. Cr. App. R. 62***), but that the Judge may **in his discretion** permit him to do so if the Justice of the case makes it desirable that this should be done (***R. v. Cowell (1940) 27 Cr. App. R. 191***).

In the present case, the 1<sup>st</sup> Accused was given an opportunity to give evidence on oath, and the Court proceeded to make an *ex tempore* ruling on being satisfied that there was no merit in any of the grounds of objection raised. Neither the Counsel for the Prosecution nor the Counsel for the 1<sup>st</sup> Accused were called upon to address Court in those circumstances.

In his statement from the dock, he stated *inter alia* that he did not know how to read and hence did not know what the Police Officers had written in the statement and also whether they had added anything. He did not state anything about “oppression” which he relied on at the *voire dire*. Hence he only relied on a *repudiation*, which in any event did not require the holding of a *voire dire*.

In the United Kingdom, a *voire dire* is not held in Magistrates’ Court proceedings, as the Justices are Judges of both fact and law and determine guilt or innocence as well as admissibility (***F(an infant) v. Chief Constable of Kent (1982) Crim. L.R. 682***) why this procedure should not be followed in Seychelles in summary trials before the Magistrates’ Court and the Supreme Court, is a moot point.

In any event, the inability of Counsel to make submissions on matters of pure facts at a *voire dire* cannot constitute a likely contravention of his right to a fair hearing, or prejudice to his defence.

(B) *Counsel for the 1<sup>st</sup> Accused also submitted that the Court failed to prepare a report of the visit of the locus in quo, and to read it in Court, thus depriving Counsel an opportunity to consider its veracity. It was therefore submitted that the specimens of turtle meat produced in Court could not be considered as valid “exhibits” in the case.*

Admittedly, all the Accused, and their respective Counsel were present at the Police premises at the Newport where the exhibits of turtle and bird meat were stored in a container. Sgt. Jean Claude Matombe, the Officer in charge of those exhibits, in the course of his examination in chief in Court, stated that he was unable to produce the 32 bags containing turtle and bird meat as they were in a state of partial decomposition and were infested with maggots and worms, and also that the bags emitted an overpowering foul smell. The Court thereupon decided to permit Sgt. Matombe to continue his examination in chief *in situ* by showing the turtle and bird meat in the container. Still under oath, he showed the condition of the exhibits, and upon the application of the Prosecution, with no objections being raised by any of the Counsel, samples were taken, and the Prosecution thereafter continued the examination in chief of Sgt. Matombe in Court.

In the case of ***Bouchereau v. The Republic 1980 S.L.R. 14***, the Magistrate had refused an application made by an unrepresented Accused for a visit of the ***locus in quo***. In appeal, upon conviction, it was submitted that the failure occasioned a miscarriage of justice.

***Seaton CJ***, rejecting that submission stated –

*“There is no statutory provision in the criminal procedure code or elsewhere regarding this point. It is a matter which should be considered by the trial Court asking itself, if without a visit to the scene, a fair trial could not be had, and if the Court’s visit to the locus was expedient for the ends of justice. The Court has a general discretion whether to grant or refuse such a request, and, in my view, it should be liberally exercised whenever circumstances are such that without itself viewing the scene, the trial Court is in danger of misapprehending the evidence or being hoodwinked”*

In the present case, the visit by the Court was not to view the “*scene of the crime*”, so that whatever is stated by a witness or an observation made by the Judge becomes evidence in the case. It was done due to the physical impossibility of bringing the turtle and bird meat to the Court room due to its putrified condition. Samples were taken from the bag tied with a black rope, which was allegedly found in the possession of the 8<sup>th</sup> Accused. That sample was marked exhibit P1. Random samples were also taken from as many bags as possible from among the other 31 bags alleged to have been seized from the boat. That sample was marked exhibit P2. The Court Reporter, has at page 17 of the proceedings of 31<sup>st</sup> October 2003, accurately summarised the proceedings *in situ*. There was no necessity for the Court to make a further report and to read it in Open Court in view of the circumstances of that visit as that was part of the Court proceedings. Moreover, Counsel had the opportunity to peruse the record before the Registrar. Accordingly the submission of Counsel for the 1<sup>st</sup> Accused has no merit.

- (C) Another submission made jointly by Counsel is that the samples taken from the bulk in the container cannot be produced as evidence in the case. In the present case, the “*bulk*” of the alleged salted turtle meat was seen by the Accused, their respective Counsel, Counsel for the Prosecution, the Court and the Expert Mr. Selby Remy, where the container was kept. The samples were taken after giving all the Accused an opportunity to raise any objection. Mrs Antao, Counsel for the 8<sup>th</sup> Accused alone made an application to weigh the bag marked exhibit P1 as the charge against her client states that he was in possession of 58 kg of turtle meat.

That application could not be granted as there was no calibrated weighing scale. There is however other evidence in the case

regarding the weight of that bag. In any event, weight is not a material factor in the offence, unless it is alleged in defence, that the Accused was in possession of a bag of a lesser or higher weight containing some other substance. In the present case, the contents found in the bag seized from the pickup of the 8<sup>th</sup> Accused were identified as "*salted turtle meat*". Hence, given the circumstances of the situation, no valid objection can be taken regarding the samples taken, unless it was established that there has been tampering with those samples subsequent to such taking and production in Court. In the case of **Sheha Jumbe Sheha v. R S.C.A no. 18 of 1997 (Crim)**, the entire quantity of drugs recovered had not been produced as exhibit at the trial, as part of the drugs had been stolen while in the custody of the Police. Only one out of four plastic bags were produced. However the Analyst produced his report in Court. There was therefore evidence of the Analyst which, taken along with relevant evidence of other witnesses, was sufficient to show the nature of the substance found in possession of the Appellant and its weight. The trial Judge found that the non production of all the exhibits was not fatal to the Prosecution case.

The Court of Appeal found *inter alia*, that in those circumstances the production as exhibits of the entire drugs recovered would have been a mere formality, and that the non production of the exhibits did not affect the quality of the rest of the evidence nor did it lead to a failure of the Prosecution to attain the standard of proof required of the Prosecution.

In this respect the Court has considered the evidence of S.I. Legaie, P.C. Ghislain, Asp. Matombe, Sgt. Matombe and Mr. Selby Remy, and is satisfied beyond a reasonable doubt that the turtle and bird meat seized from the boat "*Kal Kal*" and from the pick up of the 8<sup>th</sup> Accused were kept in

safe custody in a container after being weighed, and that the samples taken and produced in Court were those taken in the presence of the Court, the Prosecution, and the Accused and their respective Counsel. As regards bird meat alone, the Court is satisfied that Mr. Remy had analysed the carcasses of birds produced before him, but that due to the putrefied condition of the meat stored in the container, it was not possible to obtain any sample. Hence the chain of evidence regarding the production of the exhibits has been established.

- (d) *It was also a common submission made by all Counsel in the case that the Ruling made by Court disallowing cross-examination of the Police Officers involved in the recording and witnessing the statements made by the Accused persons, after Rulings were made on their voluntariness at the end of the voire dire caused prejudice to the defence.*

This submission was based on the decision in the case of **Wong Kam Ming v. R (1980) A.C. 247**. In that case, the Court considered *inter alia*, two issues concerning the voire dire.

- (1) *Is the Prosecution permitted, on the resumption of the trial proper, to adduce evidence of what the Accused stated during the voire dire?*
- (2) *Is the Prosecution permitted in the trial proper to cross examine the Accused upon what he said during the voire dire?*

The Privy Counsel, in answering these questions stated that at the voire dire the sole issue was whether the statement had been made involuntarily, and that hence, its truth or falsity was irrelevant. Answering the 1<sup>st</sup> question, the Board held that the Prosecution had been improperly permitted to adduce before the jury, evidence of the answers given by the Accused on the voire dire, and that a clear distinction must be made between the voluntariness and the guilt of the Accused. As regards



the 2<sup>nd</sup> question it was held that the Prosecution had been improperly permitted to cross-examine the Accused on inconsistencies between his evidence before the Jury, and his statements at the *voire dire* resulting in the admission of the confession, and the Accused giving evidence before the jury on some matter other than voluntariness of the confession, which is no longer in issue.

In the present case, it was Counsel for the defence who sought to cross examine the Police Officers involved in the recording of the statements to impugn their credibility, after the Court had already ruled on the voluntariness, and when voluntariness was no longer an issue. Such cross examination would have been justified had the Police Officers testified on matters irrelevant to the issue at the *voire dire*. But there was no such evidence. Hence the decision in the case of ***Wong Kam Ming*** (*supra*) has no application to the attempt made by defence Counsel to cross-examine the Police Officers in a bid to re-agitate the issue of voluntariness in the guise of attacking their credibility on matters relating to other evidence in the case.

(2) **Submissions on Law**

Apart from these submissions based on procedure, Mr. Pardiwalla, Counsel for the 4<sup>th</sup> Accused, with other Counsel concurring, challenged the legality of Regulation 5(3) of the Wild Animals (*Turtles*) Protection Regulations, 1994 (S.I. 46 of 1994) under which counts 1 and 6 are based, as being *ultra vires* the powers vested in the Minister under Section 2(2) of the Wild Animals and Bird Protection Act (*Cap 247*). It was submitted that that Section empowers the Minister to make regulations, *inter alia* to “prohibit the shooting, killing, or taking of any wild animal or bird” (Section 2(2) (a), and that hence, the prohibition contained in Regulation 5(3) against *possession* of turtle meat was *ultra vires* the powers vested in the Minister.

When Power to make Regulations is granted by the legislature in an enabling Act of parliament, impliedly, power is given to a Public Body or Authority to do everything which is necessary for the purpose of carrying out the objects and purposes of the Act. As **Parke B** stated in the case of **Clarence Rly v. N of England Rlyn (1845) 13. M & W. 706**, “*where anything is conceded, there is conceded also anything without which the thing itself cannot exist*”.

Accordingly, Section 2(1) empowers the Minister to make Regulations for the Protection of Wild Animals and Birds. This is the general enabling power. Sub Section (2) sets out five categories of offences in respect of which the Minister may make Regulations “without prejudice to the generality of the power vested in Section 2 (1)”. Hence the offences contained in Section 2(2) (a) to (e) are not exhaustive. It is therefore open to the Minister to prohibit by Regulation any species of the offence contained in Section 2(2) of the Act in so far as it was within the ambit of the powers contained in Section 2(1), for the purpose of carrying out the purposes of the Act.

The prohibition contained in Regulation 5(3) falls into two categories, namely (1) possession, selling, exposing for sale consequent to shooting, killing or taking a wild animal, which includes a turtle, and (2) purchasing, or receiving any meat or part of the flesh or calipee of a turtle, which obviously should be from someone who had shot or killed a wild animal, or one who had also purchased or received from a person who had killed a wild animal. Hence one who possesses after killing, or possesses after purchasing or receiving from a person who had killed or otherwise, would both be liable. Accordingly, on a charge of “*possession*”, it would be no defence that the “*possessor*” himself did not kill.

In the case of **Flower v. Watts (1910 2. K.B. 327)**, the extent of the power exercised by the Secretary of State in an enabling Section of the Wild

Birds Protection Act 1880, came up for consideration. Section 3 of the said Act provided that any person who, between March 1<sup>st</sup> and August 1<sup>st</sup> in any year, shall knowingly and willfully shoot or attempt to shoot, or shall use any boat for the purpose of shooting, or causing to be shot, any wild bird, or shall use any trap etc, for the purpose of taking any wild bird, or shall expose or offer for sale, or shall have in his control or possession after March 15<sup>th</sup> any wild bird recently killed or taken, shall be liable to a penalty. Section 8 enabled the Secretary of State to “*extend or vary the time during which the killing or taking of wild birds or any of them is prohibited*” by the Act. Accordingly, by an order, the Secretary of State extended the time during which the “*killing or taking*” of certain wild birds, including the larks, was prohibited, to the whole of the year. This order was challenged as being ultra vires the powers vested in Section 8. It was contended that there was no power to extend or vary the time with regard to the particular offences specified in Section 3, which were not those of “*killing and taking*”. The Court held that Section 8 dealt in a compendious manner with the offences specified in Section 3, and that when it provides for an extension or variation in any county of the time during which the killing or taking of wild birds is prohibited by the Act, it includes all the offences specified in Section 3, making the offences specified in that Section offences in the extended or varied time.

In the same way, although the offence of “*possession*” as contained in Regulation 5(3) is not specifically mentioned in the Regulation making power in Section 2(2) of the Wild Animals and Bird Protection Act of Seychelles, the generality of the powers vested in the Minister by Section 2(1) enables him to include any Act connected with the shooting, killing or taking of any Wild Animal or Bird, as an offence, for the purpose of carrying out the object and purpose of the Act. Accordingly, Regulation 5(3) is intra vires the powers vested in the Minister under Section 2(1) of the said Act. \_

### **Strict Liability**

In the Ruling on the submission of “*no case to answer*”, I stated that “*Environment and Wild Life Protection offences*” are based on strict liability. In the final address, Mr. Pardiwalla, with other Counsel concurring, differed. Generally, the criteria in determining whether *mens rea* as a necessary ingredient of the offence are –

- (1) The subject matter, purpose and the scope of the Act.
- (2) The object of the prohibition.
- (3) The mischief aimed at.
- (4) Whether the statute relates to Public health or Public welfare.
- (5) The social evil involved.
- (6) The nature and extent of the penalty.
- (7) The ease of evasion of the prohibition if absence of *mens rea* were a defence.

Considering the first three criteria cumulatively, the purpose of the Wild Animals and Birds Protection Act is conservation. Confining ourselves for present purposes only to turtles and Wild Birds, given the limited replacement capacity of their populations, and the need to avoid “*over-cropping*”, the legislature seeks to achieve the objective of seeking to prevent exploitation exceeding the maximum sustainable yield for a species. In doing so, legislation of this nature sometimes permit regulatory authorities to exempt certain wild animals or birds altogether, or to *limit the prohibitions to particular areas, or to a particular time or period in a year, as has been provided in Section 2(3) of the said Act.* *Strict liability means, liability to punitive sanctions despite the lack of men rea.* *The need for conservation is a self evident principle of rational management for a naturally sustained, but exploited population of turtles and wild birds.*

Article 38 of the Constitution of Seychelles is as follows-

*“38. The State recognizes the right of every person to live in and enjoy a clean, healthy and ecologically balanced environment and with a view to ensuring the effective realization of this right the State undertakes-*

- (a) *to take measures to promote the protection, preservation and improvement of the environment,*
- (b) *to ensure a sustainable socio-economic development of Seychelles by a judicious use and management of the resources of Seychelles,*
- (c) *to promote Public awareness of the need to protect, preserve and improve the environment.”*

What is relevant is the right to live and enjoy an ecologically balanced environment. Article 38 of the Constitution has not been tested before the Constitutional Court, and it is not within the jurisdiction of this Court, as presently constituted, to make any Constitutional pronouncement thereon. However in the Constitution of India, the 42<sup>nd</sup> amendment which came into effect in 1977, introduced Article 48 A, under the title *“Protection and Improvement of Environment and Safeguarding of Forest and Wild Life”*. That Article is as follows-

*“48 A. The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.”*

Hence the right to a healthy environment has become a fundamental right. In Seychelles that right extends to the Management of Marine Resources as well as protected Land or Sea Birds. In this respect, in other jurisdictions the fundamental *“right to life”* has been given a liberal interpretation to include the protection and preservation of the environment and natural resources, for the benefit of future generations and for the sustainable development of the country. The Supreme Court of India, in the

cases of ***Indian Council for enviro-legal action v. Union of India (1996) A. I. R. (S.C 1446, and M.C. Metha v. Union of India (1997) A.I.R. 761*** confirmed the ***absolute liability*** notion in respect of offences under the environmental law.

Hence to the fourth criteria to determine whether *mens rea* is a necessary ingredient of the offence, must now be added environmental law, and the Wild Animals and Birds Protection Law.

The fifth criteria is relevant in the context of depriving future generations of the right to enjoy the natural heritage. In the case of ***P. Rathinam v. Union of India (1994) 3. S.C.C. 399***, it was held that that right “takes within its fold some of the fine graces of civilization which makes life worth living, and the expanded concept of life would mean the tradition, culture and heritage of the person concerned”. Hence any offence involving pollution of environment, destruction or depletion of Marine Resources and the protected Fauna and Flora, would now be indirect violations of the right of life. In that respect it is a Social evil which the regulations under the Act seek to deal with.

The sixth criteria concerns the nature and extent of the penalty. Under Section 3 of the Act, the penalty for any offence was a fine *not exceeding* R.1000 *or* imprisonment *not exceeding* one year. However, by the amending Act no 9 of 2001, the penalty was increased to a fine *not less than* Rs5000 and *not exceeding* Rs.500,000 *or* to a term of imprisonment *not exceeding* two years. The maximum punishment is a factor to be taken into account in deciding whether an offence is one of strict liability. If the offence is punishable with imprisonment, and the maximum term is severe, then parliament cannot have intended it to be one of strict liability, partly because it cannot be said to be concerned with Acts which are not criminal in any real sense. As was held in the Canadian case of ***Beaver v. The Queen (1957)***

**S.C.R. 531**, “had there been a minimum penalty imposed, that would be a strong argument in favour of the offence not being absolute”. The penalty prescribed in Section 3 of the amending Act, does not carry a severe term of imprisonment, nor a minimum term, and is in the category of a misdemeanour. There is also provided an alternative penalty in the form of a heavy fine with a minimum, which in default of payment by the offender, is recovered by sale of the boat used in committing the offence. What is relevant therefore is the custodial sentence with no stipulation of a minimum period. The stipulation of a minimum fine does not remove the absolute nature of the offence. In this respect, offences under the Wild Animals and Bird Protection Act fall under the category of Regulatory offences where the mental element becomes irrelevant.

Consequently, as regards the seventh criteria as to whether an offender could easily evade the prohibition if the absence of mens rea is a defence, it is obvious that, if that be so, offenders of “*possession*” and “*killing*” of turtles and Birds could, in the absence of other evidence, easily evade the prohibition.

On a consideration all the seven criteria, I find that the offences prohibited in Wild Animals and Birds Protection Act and the Regulations thereunder are based on strict liability.

### **The Prosecution Case**

(1) On 31<sup>st</sup> January 2003 around 10 am, upon receiving a message regarding a boat carrying turtle meat which was moored at the Providence, close to the Workshop of one Mr. Souris, Asp. James Matombe went to the scene with S.S.U Officers, L/Cp Angelin Jean, P.C. Dorthée, P.C. Danny Marie, P.C. Garry Ernesta, L/Corp. Vel and P.C. Solin. He also sought assistance from the “*Adam Unit*” of the Police. At the scene, he saw the 8<sup>th</sup> Accused Beddy Payet standing near his pick up. He came

towards Asp Matombe, who asked him where his boat was. Beddy Payet showed a small two engined boat. He also showed a bigger boat, said to belong to one Jean. He requested him to lend the boat to him and the other Officers to board the boat of "*Jean*", but he stated that it was not possible due to the low tide at that time. He advised that a smaller "*rescue boat*" moored near the beach be used instead.

Before going to the boat, he was asked by one Joel Belle attached to the "*Adam Unit*" whether he had been informed that the bag on the pick up of Beddy Payet had some meat in it. He did not question him before, as he was on the shore with his pick up, and as there was nothing to suspect him. Thereupon he went back to the pick up, opened the bag and found salted meat. From his experience he suspected it was turtle meat, as there were flippers on it. He did not question Beddy Payet then, but after he and his Officers had brought the gunny bags from the boat of Jean, he asked him to whom that bag belonged. He replied that "*a gentleman*" had placed it there and gone away. On being questioned by Court, ASP Matombe stated that Payet told him that the bag was given to him by a "*friend*".

Asp. Matombe boarded Jean's boat with four Officers using the "*rescue boat*". There was no one on the deck. However there were some white boxes containing salt, and there were some clubs of different sizes, some with hooks at their ends. In the hold of the boat, there were two men sleeping on gunny bags, they were the 1<sup>st</sup> Accused Allen Marengo and the 2<sup>nd</sup> Accused Robert Azemia. The 1<sup>st</sup> Accused told him that the Captain, Tony Antat and the mechanic Rolly Lesperance (4<sup>th</sup> Accused) had disembarked and gone ashore early morning, and that he and Azemia were asked to remain on board to unload the bags. They helped the Officers to unload the bags to the "*rescue boat*". Some bags were tied, and some were open.



When Asp. Matombe came ashore, he met S.I. Leggaie, to whom he handed over the 1<sup>st</sup> and 2<sup>nd</sup> Accused. He accompanied the Police vehicle loaded with the gunny bags, first to the Central Police Station, and then to the "*Oceana Fisheries*" for weighing them. All the bags including the bag which was on Beddy Payet's pick up were weighed in the presence of the 1<sup>st</sup> and 2<sup>nd</sup> Accused, the Environment Officers and S.S.U Officers. Beddy Payet's pick up remained at the Central Police Station. The total weight of the turtle meat was 1141 kg and the bird meat, 36.42 kg.

Before weighing, the Environment Officers confirmed that there was turtle meat as well as bird meat. After weighing and noting the total weight, they were taken back to the Central Police Station, where on the instructions of Superintendent Quatre, they were taken to "*Adam Unit*" at the New Port. The exhibits were handed over to Sgt. Jean Claude Matombe.

Asp. James Matombe stated that from the time the gunny bags were seized from the boat until they were weighed and handed over to Sgt. Matombe, he was in charge, and that he confirmed that no one had access to them.

On being cross examined, Asp Matombe denied that he threatened the 1<sup>st</sup> Accused with a pistol to unload the bags. He stated that they assisted when requested.

As regards the exhibits, ASP Matombe stated that he saw the bird meat in the bags; they were without feathers, were sliced into two, and were of "*tender birds*".

S.S.U. Officer Angelin Jean, was one of the Officers engaged in the operation on 31<sup>st</sup> January 2003. He and the other Officers were informed by their commanding Officer ASP James Matombe about the boat suspected of

carrying turtle meat, which was moored at Providence. At the scene, he saw the 8<sup>th</sup> Accused standing near a pick up. There was a white gunny bag tied with a black rope on it. From his previous experience, he identified the contents as turtle meat from its odour. He asked the 8<sup>th</sup> Accused to whom the bag belonged, and he replied that *it belonged to him*. This Officer was ordered to stay near the pick up, while other Officers including Asp. Matombe went to the boat and started to unload gunny bags. The bag in the pick up was taken in the same vehicle to the Central Police Station and later transferred to a Police pick up to be taken for weighing. Until then no one had access to its contents. It was earlier opened only at Providence for inspection by the Environment Officers and Police Officers.

S.I. Sonny Leggaie testified that on 31<sup>st</sup> January 2003, around 10.40 a.m, he was instructed by the Commanding Officer of the C.I.U, to proceed to Providence and commence investigations into a complaint that a boat moored there had a load of turtle meat . He arrived there with P.C. Samy Ghislain a few minutes later and saw a “*blue and orange*” coloured fishing vessel close to the shore. He also noticed a white pick up bearing no. S 4741 which was loaded with one gunny bag. The owner of the pick up, Beddy Payet (8<sup>th</sup> Accused) was standing beside it. He stated that it contained “*salted fish*”. With his permission the bag was opened, and Mr. Selby Remy, the Expert witness in the case, identified the contents as salted turtle meat. Gunny bags from the boat were also unloaded, and loaded into the Police pick up vehicle. Mr. Remy similarly identified the contents as salted turtle meat. The 1<sup>st</sup> and 2<sup>nd</sup> Accused had been apprehended by the S.S.U. Officers who were already on the boat where the gunny bags were stored. They, together with the 8<sup>th</sup> Accused were arrested by him for the offence of illegal possession of turtle meat, and brought to the Central Police Station. S.I. Leggaie observed that the 1<sup>st</sup> and 2<sup>nd</sup> Accused from their appearance, looked as two men who had been away at sea for a while. At the Police Station the

three Accused made statements under caution, and they were remanded in custody.

S.I. Legaie stated that Beddy Payet did not state at Providence when he was initially questioned about the bag in his pick up, that he came there to see his boat which was moored there. However he only stated that in his statement under caution which was recorded at 12.45 p.m. the same day. The bag was opened by P.C. Ghislain in the presence of S.I. Legaie, and the 8<sup>th</sup> Accused. On being cross examined, S.I. Legaie stated that he did not see any of the other Accused at that time.

P.C. Sammy Ghislain, accompanied S.I. Legaie on 31<sup>st</sup> January 2003 in the investigation at Providence. At the site, were Officers of the S.S.U and "Adams" Officers. The boat suspected to contain the turtle meat called "*kal kal*" was moored about 50 metres from the beach. The Officers were unloading the bags from the boat. Beddy Payet was standing beside his pick up. He saw a white plastic bag tied with a black rope. The bag was "*greasy like and there was oily liquid substance coming from the bag*". Suspecting that it was a bag taken from the boat, as it had the odour of turtle meat, he asked who the owner of the pick up was. Then the 8<sup>th</sup> Accused told him "*here, I am*". When he asked him what was in the bag, he said "*salted fish*". He then called S.I. Legaie and in his presence he untied the bag and found "*meat mixed with salt.*" From his experience in similar cases on Praslin and La Digue, he identified the meat as turtle meat. After the 1<sup>st</sup> and 2<sup>nd</sup> Accused were brought from the boat, all three Accused were cautioned and taken to the Central Police Station with the bags taken from the boat in the Police vehicle. The bag taken from the pick up was marked "*B.P*" with white paint for identification purposes. On a subsequent day, that bag, which was kept in a container at the "Adams" Unit was taken back and weighed at the "*Oceana Fisheries*", in the presence of the 8<sup>th</sup> Accused, and it weighed 58 kg. The other bags had already been weighed by other Officers. The bag seized

from the possession of Beddy Payet was later stored in the container after weighing.

Subsequently, when the Court visited the premises where the container was kept, he identified the bag marked "B.P" still tied with a black rope, and he saw samples being taken therefrom into another plastic bag marked P1. On being cross examined, P.C. Ghislain stated that when he questioned the 8<sup>th</sup> Accused, his demeanour was that of a "normal person".

Sgt. Jean Claude Matombe, was the Officer in charge of exhibits at the "Adams Unit" at New Port. Around 1.30 p.m. on 31<sup>st</sup> January 2003, he received a quantity of gunny bags being exhibits, from S.I. Ron Marie and the Environment Officer Mr Remy. He locked them in a container and was in sole custody of the key. The bags contained "chopped" salted turtle meat. On 3<sup>rd</sup> February 2003, P.C. Ghislain came with the 8<sup>th</sup> Accused, and took away one bag for weighing and returned it. Sgt. Matombe in the course of his examination in chief on 31<sup>st</sup> October 2003 stated that he was unable to produce the gunny bags in Court as part of the meat had decomposed and was covered with maggots and worms and also that they emitted a foul odour. Thereupon, the Court visited the site where the container was kept, with all the parties and Counsel, and Sgt. Matombe, still under oath, took samples from the bag found in the pick up of the 8<sup>th</sup> Accused (P1) and from as many other bags as possible (P2). The condition of the meat in the gunny bags did not permit the location of bird meat.

On being cross examined, Sgt. Matombe stated that he was in continuous custody of the exhibits in the container and that no one other than him had access to them, except on 3<sup>rd</sup> July 2003 when one bag was given to P.C. Ghislain for weighing.

On a consideration of the evidence of Sgt. Matombe, the Court is satisfied beyond a reasonable doubt that the contents in the gunny bags stored in the container were not tampered by anyone, and that the samples taken therefrom as exhibits P1 and P2 taken in the presence of Court, the Accused and their respective Counsel were untampered until produced in Court. Hence as stated earlier, the chain of custody has been established.

Robert Souris is a boat builder who has his workshop near the beach at Providence. Around 6.30 p.m. on 30<sup>th</sup> January 2003 when he was at work, four men came after the boat "*Kal kal*" arrived, and asked his permission to use the telephone. He stated that sometime in the beginning of January 2003, he repaired the boat "*Kal kal*", and thereafter it was taken to Victoria by Rolly Lesperance the 4<sup>th</sup> Accused. He saw the boat thereafter only on 30<sup>th</sup> January 2003. There were around six or seven men there, on the day, but among them he knew only Rolly Lesperance and Tony Antat (3<sup>rd</sup> Accused). He saw only Rolly Lesperance coming from the boat "*Kal kal*". It was he who used the telephone.

On 31<sup>st</sup> January 2003, he returned from Victoria, and saw Police Officers unloading gunny bags from "*Kal Kal*". He did not know what the contents were.

Joliff Juliette, the son of Robert Souris assisted his father in the boat building workshop. He corroborated the evidence of his father and stated that in early January 2003, the "*Kal Kal*" was repaired. He did the fibre glass work, while Rolly Lesperance did the electrical wiring. The boat was taken away after repairs by Rolly Lesperance. Rolly used the workshop telephone, when the boat arrived on 30<sup>th</sup> January 2003, and went away with Tony Antat. He was carrying a white gunny gag which was "*mostly empty*", on his shoulder. The next day when he came to work he saw Police Officers there.

### **Expert Evidence**

The Prosecution relied on the evidence of Mr. Selby Remy, Director of Conservation in the Ministry of Environment, regarding the identification of the turtle and bird meat seized and produced in the case. Mr Remy has a degree in Biological Sciences from a University in the United Kingdom, and since 1992 had been working in the Conservation Section of the Ministry. He has had "*on the job*" training on aspects of turtles and wild birds, from the various consultants who were attached to the Ministry from time to time. No objections being raised by any of the defence Counsel against him being called as an Expert for purposes of the exhibits in the case, he proceeded to give his evidence.

Mr Remy testified that on 31<sup>st</sup> January 2003 around 10 a.m. he arrived at the Providence beach upon receiving a request from S.I. Leggaie to identify certain meat seized from a boat, he went there accompanied by Elvina Henriette, another Officer of the Ministry. S.I. Leggaie and another Police Officer and several S.S.U. Officers were there. There was a pick up with one bag on it. He opened the bags seized from the boat, and identified the contents as "*salted turtle meat*". In two of the bags there was salted bird meat. He opened the gunny bag on the pick up, and also found the same type of meat. Asked by Counsel for the Prosecution how he could make the identification, he stated-

*"A. Yes, it was quite easy in fact, and based on the characteristics of the meat, they were green turtles."*

As regards the bird meat, he stated -

*"A. I could not identify the exact species, but it was from the "boobies" family."*

He further stated that these birds are found in several islands, such as Cosmoledo and Aldabra. As regards the meat in general, he stated that it was "*freshly salted*" in the sense that "*the salt was still in the meat*".

Describing the characteristics of green turtles, he stated that from among the species of turtles found in Seychelles waters, only the green turtle had one claw. That was observed in the meat produced for his inspection. There was also the colouration within the scales. Another distinguishing feature was the presence of greenish fat, not seen in other species. He stated that he had identified turtle meat before as part of the training with the Consultants, and also in training other members of the Ministry staff.

As regards the bird meat, he stated that looking at the morphology, the meat was from a sea bird. Further identification was not possible as the heads and feet were chopped off. The wings were intact except for the feathers. However, from his training with Consultants in this field for at least two years, he could positively identify the meat as that of "*boobies*" specially from the size of the thighs. He further stated that 31 gunny bags were taken from the boat, and one from the pick up. The total weight of the turtle meat weighed in his presence at "*Oceana Fisheries*" was 1141 kg and bird meat 36 kg. However, after the bag seized from Beddy Payet's pick up was weighed separately the second time, the Police informed him that the weight of that bag alone was 58 kg.

He stated that based on historical data available when turtle meat was legally exported from Seychelles, the meat of one turtle was about 30 kg on an average, and that after drying and salting it would have been about 20 kg, Mr Remy estimated that about 57 turtles would have been slaughtered. In respect of the "*boobies*" he stated that the average dead weight being

less than 1 kg, about 40 birds would have been killed to get 36.42 kg of meat. It was not possible to count them as they were cut into pieces.

Explaining the condition of the meat he saw in the container when the Court visited the premises, he stated that the humid condition in the container was the ideal breeding place for bacteria, and that consequently the meat had decomposed. In Court he identified the samples as meat of green turtles by a flipper in it.

Mr. Lucas, Counsel for the 1<sup>st</sup> Accused sought to discredit the evidence of Mr Remy on the ground that he was not a Marine Biologist. Mr. Remy stated that he identified the meat by visual observation on the basis of his academic degree in biological sciences, “*on the job*” practical training, and experience in previous cases of turtle poaching in the country.

**As *Adrian Keane states in “The Modern Law of Evidence” (Page 377)-***

*“As a general Rule, opinion evidence is inadmissible. A witness may only speak of facts which he personally perceived, not of inferences drawn from those facts. To this general Rule there are two exceptions; (1) An appropriately qualified Expert may state his opinion on a matter not calling for the expertise which he possesses, and (2) a statement of opinion on a matter not calling for any particular expertise may be made by a witness as a way of conveying the facts which he personally perceived”*

*“Expert opinion evidence is admitted because the drawing of certain inferences calls for an expertise which the tribunal of fact simply does not possess.”* It is settled law, that the expertise may have been acquired through study, training or experience. Thus an engineer who understands



the construction of harbours, the causes of their destruction and how remedied, may express his opinion on whether an embankment caused the decay of a harbour (***Folkes v. Chadd (1782) 3. Doug. K.B. 137. (Cited by Adrian Keane at Page 382).*** Similarly a Police Officer with qualifications and experience in accident investigation may give Expert opinion evidence on how a road accident occurred (***R. v. Oakley (1979) 70 Cr. App. Rep. 7 (C.A.).***

In the present case, the expertise needed by Court concerns the identification of the meat produced by the Prosecution from the possession of the Accused. Are they turtle meat and meat of “*boobies*” or of some other animal or of some other species of sea mammals or unprohibited birds? Although, the study of the sea turtles falls strictly within the field of Marine Biology, Mr Remy by virtue of his qualifications in biological science in general, and particular training in sea turtles, together with his experience, was adequately competent to identify the turtle meat by visual observation of the basic morphology, especially of the one claw flipper. The IUCN/SSC Marine Turtle Specialist Group Publication entitled “Research and Management Techniques, for the conservation of sea turtles, at page 26, confirms Mr Remy’s assertion than the species of green turtles have one claw. As regards the bird meat, the 2<sup>nd</sup> and 7<sup>th</sup> Accused in their respective statements under caution referred to the meat of a bird called “*fou*”. Adrian Skerett, a recognised authority in the field of birds in Seychelles, in his book “*Birds of Seychelles,*” gives the creole name of the “*masked booby*” as “*fou zenero*”, that of the “*red footed booby*” as “*fou bef or fou Rozali*” and the “*brown booby*” as “*fou crispin*”. Hence all “*boobies*” are “*fou*”.

I find that, for the limited purposes of this case, there was no necessity for scientific, or DNA tests to be done to identify the meat, as was claimed to be necessary by Mr. Lucas. The Court therefore finds that Mr. Remy was a competent expert witness on whose opinion the Court could rely on in

determining that the exhibits produced as P1 and P2 are indeed turtle meat, and that although samples of bird meat could not be obtained due to the condition in the container, there was indeed 36.42 kg of bird meat which he identified as that of “*boobies*”, which was in two gunny bags together with the bags containing turtle meat. The non production of bird meat was therefore due to impossibility, and hence the Court accepts the secondary evidence of Mr. Remy.

### **The Defence Case**

Upon the Court Ruling that the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> to 8<sup>th</sup> Accused had a case to answer, the 1<sup>st</sup>, 4<sup>th</sup> 7<sup>th</sup> and 8<sup>th</sup> Accused opted to give statements from the dock. The 2<sup>nd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Accused opted to remain silent. Subsequently, the 7<sup>th</sup> Accused changed his mind and also opted to remain silent. The Court draws no adverse inference against the Accused who opted to exercise their right to remain silent.

Count 1 contains the charge of joint possession of turtle meat. Hence it must be established that all the Accused had knowledge and were capable of exercising control over what they possessed. Mere possession would be inadequate. As regards on 8<sup>th</sup> Accused, who is charged under count 6, the elements of possession, knowledge and control has to be established. Being a strict liability offence, knowledge of the “*quality*” of what he had in his possession would be immaterial, as long as it can be established by evidence, either direct or circumstantial.

I shall first refer to the dock statements of the 1<sup>st</sup>, 4<sup>th</sup> and 8<sup>th</sup> Accused.

Allen Marengo, the 1<sup>st</sup> Accused, in his dock statement stated – (*with corrections of the interpretation incorporated*)

*"I was hired by the Captain to go on a fishing trip. Arriving on the island, they went ashore, 2 or 3 of them went ashore with some gunny bags. But I stayed on the boat.*

*They came back with the gunny bags, but I did not see what was there in the gunny bags. Arriving here, the Captain asked me to stay on the boat, then I stayed. The next morning, at around 10, and while I was cleaning the engine, I saw Police Officers arrive. They told me they had a search warrant for turtle meat, and I told them they could search if they want, but the owner of the boat is not here, neither the Captain. They searched and saw the gunny bags in the hull of the boat. They took me to the Police Station. They forced me to talk and stated that I am responsible for killing of the birds and the turtles. But I had never killed any bird or turtles. Then I was brought to Court, but I do not know what they had written, because I do not know how to read. I do not know if they had added anything to my statement. That is all"*

Rolly Lesperance the 4<sup>th</sup> Accused stated in his dock statement-

*"I was a mechanic on board. There was someone who came to testify that he saw me coming from the boat with a bag. But it was my tool bag. I never told the Officers that there were turtle meat on board. This has been added up by the Officers. That is all"*

Beddy Payet, the 8<sup>th</sup> Accused stated in his dock statement-

*"I was asked by the fisherman to provide them with transport, as I usually do, and that day I provided them with the transport, as I usually do with other fisherman. I was not aware what was there in the bags. The Officer arrested me by the sea and took me to*

*the Police Station, and they did not even open the gunny bag to show me what was in there. It was in Court that I became aware that there was turtle meat in the gunny bag, and I do not know anything more about the turtle meat. That is all”.*

As was held by **Parker CJ in the case of Frost v. Hale (1964) 48. Cr. App. R. 284**, an unsworn statement from the dock is “*clearly not evidence in the sense of sworn evidence that can be cross-examined to; on the other hand it is evidence in the sense that the jury can give to it such weight as they thing fit”.* Hence such unsworn evidence can be taken into consideration in deciding whether the Prosecution have made out their case so that the jury or the judge be sure that the Accused is guilty. However where such evidence inculcates a co-accused, that part of inculcation must be entirely disregarded.

As was also held in **Green v. R (1972) S.L.R. 54** an unsworn statement made from the dock, is evidence which must be weighed along with other evidence, *including* the statement made by the Accused to the Police after caution, and produced by the Prosecution.

Before the statements made by the Accused under caution are considered, it becomes necessary to consider the need for corroboration of retracted confessions. In the case of **Guy Pool v. R. (1965 - 1976) S.C.A. R. 88**, it was held *inter alia* that while each case must depend on its own circumstances, “*in general, the need to look for corroboration, in Seychelles, will arise in retracted confessions, while, in the case of a repudiated confession, it will depend entirely on the circumstances whether corroboration should be regarded as an essential element.”*

In the case of **Tuwamoi v. Uganda (1967) E.A. 84**, the East African Court of Appeal took the view that –

*“.....corroboration is not necessary in law, and the Court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot, but be true”.*

In the case of ***R v. Jose Pillay (crim. Side 8 of 1986)*** (unreported) **Seaton CJ** found no corroboration in a retracted confession. However considering the dicta in the case of *Pool (supra)*, as containing a “rule of prudence”, and also approving the dicta in the case of ***Tumamoi (supra)***, held that -

*“But, while bearing all this in mind, the Court is of the view in all the circumstances of the case, that the statement is true and may safely be acted upon. I have come to the conclusion after carefully considering the evidence and of seeing the demeanour of the witnesses, including the Accused as they gave evidence”.*

***Ratnalal and Thakore in “Law of Evidence” 4<sup>th</sup> Edition at Page 88***, considering the requirement of corroboration of a retracted confession, as against the maker, states that *“the retracted confession may form the basis of a conviction if it is believed to be true and voluntarily made.”*

***Wood J, in the case of Dugasse v. R (1978) S.L.R. 28***, also took the view that -

*“It is dangerous to rely upon a retracted confession in the absence of corroboration, but a Court may do so if fully satisfied that the confession must be true”.*

The rule contained in *Guy Pool (supra)* therefore is a general one based on prudence and caution, and is therefore not a rigid rule. The need for corroboration therefore depends on the facts and circumstances of each case. The Court looks for corroboration as a matter of practice to assist it in determining which of the two stories told by the Accused is likely to be the truth. In the present case, all the Accused before the Court retracted their statements, while some of them also repudiated them in addition to retraction. The retraction was based on alleged Acts of “*oppression*” in the form of threatening with electrocution with a live electric wire.

As was held in the case of ***R v. Priestly (1965) 51. Cr. App. Page 1***, “oppression imports something which tends to sap, and has sapped the free will which must exist before a confession can be said to be voluntary. Also, in the case of ***Otar v. R (1987 S.L.R. 26***, it was held that the totality of the circumstances must be taken into consideration in deciding whether to infer from the circumstances in which a statement is taken, that there had been a probability, not only a likelihood, of oppression, *but also of actual oppression*. In the present case, the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup> to 8<sup>th</sup> Accused alleged that the statement were obtained by duress and threat of electrocution. The 6<sup>th</sup> Accused, stated in addition that the recording Officer had a baton with him. The 4<sup>th</sup> Accused did not allege threat of electrocution, but alleged that he was induced to make the statement by promising that he would be released if he signed it before Asp Quatre left the Police Station for the day. In his evidence at the *voire dire* he characterized all Police Officer as “*birds of the same feather*”. Questioned by Court as to why he then relied on such a promise, he changed his stance and stated that he formed that view only after he was not released as promised. I found his allegation to be utterly false. As regards the other allegations regarding threats of electrocution and threatening with a baton I found, on a consideration of all the surrounding circumstances, that there was neither a possibility, nor a probability of such threats being offered. There is nothing at the end of the trial to induce this

Court to hold that those statements had been made in circumstances other than voluntarily.

However, as the statements contain admissions against the maker as well as against other co-accused, (the latter not being considered as evidence against them), prudence and fairness requires that corroboration be found in respect of each and every statement, but limited to its maker. As regards corroboration, the rationale for the requirement was succinctly stated by Lord Reid, in the case of ***D.P.P v. Kilbourne (1973) A.C. 729 at 750***. Stating that there is nothing technical in the idea of corroboration, he stated -

*“When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement, one naturally looks to see whether it fits in with other statements or circumstances relating to the particular; the better it fits in, the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in”*

*Corroboration must relate to (1) the factum of the crime and (2) as to the identity of the of the person. What is sought for is something connecting the Accused with the offence outside the statement itself, which tends to show that its contents are probably true”.*

The general circumstances that afford corroboration in the present case are-

- (1) *The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> to 7<sup>th</sup> Accused have admitted in their respective statements that they went on a “fishing trip on board the “Kal Kal” on 11<sup>th</sup> January 2003 and returned on 30<sup>th</sup> January 2003. They have also*

*stated that they set off from the Fishing Port in Victoria, but they returned to the beach at Providence.. The evidence in Court is that the boat had 32 gunny bags, the contents of which have been identified by an Expert as being salted turtle and bird meat. These independent circumstances fit the respective statements made by the Accused, and provide corroboration to establish the Prosecution case that they were in illegal possession of turtle meat.*

2. *On the deck of the boat, Asp Matombe found boxes of salt. In the absence of evidence of any salted fish or meat of any other kind being found, this independent piece of evidence corroborates the fact that the salt was used to preserve the turtle meat found on the boat. The meat seized has been identified as salted turtle meat (exhibit P2).*
  
3. *Asp Matombe also found clubs, batons and poles of different sizes fixed with hooks, and nets. Although these implements may be usually found in any fishing boat for purposes of catching fish, they could also be used to catch turtles and birds and to kill them. The statements refer to drag nets used to catch the turtles. Hence the presence of implements that could have been used in catching and killing turtles and birds and materials such as salt and gunny bags provide independent corroborative evidence of the activities mentioned in the statements.*

Apart from these, I shall deal with particular pieces of evidence corroborating the statements of each of the Accused, in considering their respective statements and weighing them, whenever relevant, with the other evidence in the case.



### Statements under Caution

The statement to the Police made by Allen Marengo (*1<sup>st</sup> Accused*) was after holding a *voire dire*, ruled by this Court to be a voluntary statement. In that statement (P4), the *1<sup>st</sup> Accused* states that on 18<sup>th</sup> January 2003 he left Mahe with the *2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> 5<sup>th</sup> and 7<sup>th</sup> Accused* “to fish for sharks at Remire Island”. He further stated at Remire, “we got eight turtles or four turtles with some people who live at Remire and they told us that turtle have been trapped.....”. Robert (*2<sup>nd</sup> Accused*) “told us that he was going to look for coconuts. Then he came back with some bird in gunny bags. We salted all the meat and the birds on the boat “we threw away all the turtle shell. “The gunny bags were used to keep in and they were in the boat”. “Teddy, Rolly and Tony took the shark and fins and went away with them”. “Last night I slept on board the boat to guard the shark fins and the gunny bag of turtles”. “Later at around 10 a.m Rolly came to see me on board the boat and he asked to help him remove a gunny bag of turtle to sell to the man who had come in a pick up. We put a gunny bag in the small boat and Rolly went with in on shore. When Rolly reached the shore, the driver of the pick up helped Rolly to remove the gunny bag. Then I went to clean the engine boot.” He then proceeded to state, “the Police came down and they saw us. They told us that they have come to make a search and they saw the gunny bags of turtle, the birds and the salted fish. The Police told us that they are going to take the turtles and then we unload the boat and were later brought to Central Police Station. The turtles were to sell and then shared the money”. “I do not know who was going to buy the turtles.”

In considering this statement, the Court warns itself that the admission of one Accused in the absence of another Accused is not evidence against the other co-accused. Hence it can be proved only against the maker. The essential element in count 1 is the possession of turtle meat. The *1<sup>st</sup> Accused* has in this statement admitted going on “*fishing trip*” between the relevant dates with a group of people who are co-accused in the case. That

fact has not been denied by the co-accused in their statements. The 1<sup>st</sup> Accused admits catching and killing the turtles. He participated in the salting of the meat of turtles and of the birds. He also admitted knowledge of the presence of turtle, and bird meat in the gunny bags which were in his physical possession. He also had knowledge of the purpose for which the turtle meat was brought to Mahe, namely to sell and to share the money. It was submitted that in spite of all these, the 1<sup>st</sup> Accused was only a pawn in the hands of the others in charge of the operation, especially the Captain, and hence he was not in possession of the turtle meat in the sense of having control over them, and that the evidence that he was found in the hold of the boat with the gunny bags alone was not sufficient to establish the charge. Such a contention would not be valid in regulatory offences based on strict liability, as are involved in the present case. The 1<sup>st</sup> Accused had admitted that the turtle meat was to be sold and the proceeds be shared. Hence the charge of joint possession involving both *mens rea* and the *actus reus* has been established. The circumstances reveal that he was not merely a watchman but was a joint possessor capable of exercising control over the turtle meat he was in possession. Accordingly the Court finds him guilty under Count 1.

As regards count 4 as the 1<sup>st</sup> Accused had admitted to salting the bird meat, I found in the Ruling of no case to answer, that he had a *prima facie* case to answer under that Count. However at the end of the trial the only evidence the Court has is the statement of the 1<sup>st</sup> Accused under caution that he salted birds that had been killed by someone else. Regulation 4(1) prescribes the offences as “shoot, kill or take”. The words “shoot” and “kill” need no clarification. The word “take” has been judicially interpreted as “capturing alive”. In on a charge of killing, the specific *actus reus* has to be established. On the basis of the evidence this element has not been established. Hence, being a strict liability offence, it would be inappropriate

to find him guilty of a lesser offence. Accordingly, the 1<sup>st</sup> Accused is acquitted of the charge under count 4.

Rolly Lesperance, the 4<sup>th</sup> Accused in his statement under caution (P8) admitted being with the other Accused on the "fishing trip". He however stated "I went on that trip simply as a mechanic on board". He also stated "we had on board an amount of salted turtle meat in gunny bags". It is not reasonable to accept that the mechanic of the boat remains a mechanic, like a robot, throughout the fishing trip without engaging in fishing and other activities when his services as a mechanic are not required. Hence he had knowledge that he was jointly in possession of turtle meat. Joliff Juliette testified that he saw the 4<sup>th</sup> Accused carrying a white gunny bag "mostly empty" on his shoulder around 7.30 p.m on 30<sup>th</sup> January 2003. In his statement from the dock he did not deny that he was carrying a bag at that time, but stated for the first time that it was his "tool bag". The observation of Juliette that it was a white gunny bag, permits the safe inference that, as all other bags with turtle meat, found in the boat were similar, and as he was seen by Robert Souris coming from the boat "Kal Kal" soon after it came on shore, and as neither Juliette nor Souris were cross-examined by either of the Accused, that that bag contained salted turtle meat seized from the boat. He had knowledge, and was in joint possession of the turtle meat over which he had control.

Accordingly, I find the 4<sup>th</sup> Accused guilty under count 1. The charge under count 4 has been withdrawn against him by the Prosecution.

Beddy Payet, the 8<sup>th</sup> Accused who alone is charged under count 6 for possession of turtle meat in his pick up, stated in his statement under caution (P3) that on 31<sup>st</sup> January 2003, around 10 a.m he went to the beach at Providence near Souris' Workshop to check his boat called "St Jean". Rolly Lesperance who was with about six other men sitting by the roadside

wanted to transport "*salted fish*" in his pick up. He agreed. After he went under a shed, he saw Police Officers arriving. He stated "*at that time I noticed that there was a gunny bag in my pick up. A Police Officer went to my pick up and then he told me that there is a gunny bag of turtle in my pick up. I told him that I do not know*". He also stated "*I had no idea if there were turtles on board the boat, but I knew that the boat used to (be) moored in town, not at Robert Souris*". This statement was challenged only on the ground that the Judges' Rules were not followed in recording it. This Court ruled that the failure to follow those Rules was not fatal to an otherwise voluntary statement. Hence as there was no retraction, no corroboration was required. In his statement from the dock he stated that it was only in Court that he became aware that there was turtle meat in the gunny bags. In his statement under caution made on 31<sup>st</sup> January 2003, he stated that a Police Officer told him that there was a bag of turtle meat on his pick up. He told Asp Matombe that the bag was given to him by a *friend*. He told S.S.U Officer Angelin Jean that the bag belonged *to him*. The bag was opened by S.I. Leggaie with his permission, and Mr. Remy identified the meat as turtle meat. P.C. Ghislain also corroborated S.I. Leggaie that the bag was opened in his presence and although he stated it contained "*salted fish*", Mr Remy confirmed that it was turtle meat.

"*Possession*" in respect of the 8<sup>th</sup> Accused has to be considered on its own, as the bag was found in his pick up, which admittedly belonged to him. Initially he sought to deny any knowledge of the person who had left the bag on his pick up, but he gave different explanations to the Police Officers.

It has been established in drug offences that physical custody was not necessary and that it is sufficient to prove that the offender had control over the thing. As was held in the case of ***Searle v. Randolph (1972) Crim. L.R. 779***, knowledge of the *quality* of the thing is not required. There is evidence of ASP Matombe and P.C. Ghislain that the bag emitted a peculiar

odour, and also some greasy substance was present. As a prudent person, the 8<sup>th</sup> Accused, if not already aware of the contents, would have suspected that it was not "*salted fish*", and got the person who gave him, or on his own, opened it. Hence a person can, for example be in possession of cannabis in a cigarette which he had found and put it in his pocket, even though he believed it only contained tobacco. However possession cannot begin until the person with control is aware that the thing is under his control. In the present case, the bag was in his control. Similarly if a drug is slipped into a person's pocket without his knowledge, or left in his room, and he does not have any idea that it is there, would not be in "*possession*" of it. Possession once begun, continues as long as the thing is in the person's control, although he had forgotten about it or mistakenly believed it had been destroyed or disposed of. (***R . v. Buswell (1972) 1. A.E.R. 75***)

In these circumstances the Prosecution has proved beyond a reasonable doubt that Beddy Payet had knowledge and control over the bag of turtle meat in his possession. The evidence clearly establishes that he was not an innocent Bailee who had no control over the bag in his pick up and that he genuinely believed that the bag contained "salted fish". Accordingly, I find him guilty under count 6.

The second Accused Robert Azemia was also found in the hold of the boat where the bags of turtle meat was stored, together with the 1<sup>st</sup> Accused. In his statement under caution (P9) he admits going on the trip with the other co-accused during the material period, in the boat "*Kal Kal*". He states that while in Cosmoledo Island, they set the drag net for turtles. He states - "*on the first day we captured 14 turtles*". We killed them and salted the meat. I was in charge for salting the meat. We stayed for eight to nine days on the island, which is one amongst the Cosmoledo islands. We killed about 40 turtles and salted their meat. We killed about 50 birds (*fou*). We buried the shells of the turtles on the beach of that island. We put the salted

meat of the turtles and birds in gunny bags. We left to Mahe. We arrived on Mahe yesterday, that is Thursday the 30<sup>th</sup> January 2003 at around 18.30 hours to 19.00 hours. The boat was moored at the place of Robert Souris ..... "He further stated," "*as we were in the boat I saw the arrival of the Police. They arrested us and seized all the salted meats of turtles and birds.....*"

First, although the Accused had used the word we, the statement is evidence only in relation to against him. Secondly, there is corroboration of this statement in that he had the 1<sup>st</sup> Accused were found in the hold of the boat with the gunny bags of turtle and bird meat. The Prosecution has proved beyond a reasonable doubt that this Accused, like the 1<sup>st</sup> Accused had both knowledge and was in joint possession of the gunny bags containing the turtle and bird meat. He was, also like the 1<sup>st</sup> Accused, not a mere watchman, but an active participant in the illegal poaching. Accordingly I find the 2<sup>nd</sup> Accused, Robert Azemia guilty on count 1.

As regards count 4, there is sufficient admission that he killed the birds, and salted them. There is corroboration in the evidence of ASP Matombe who saw the carcasses of birds, cleaned, cut and salted, in two bags. The same was seen by Mr Selby Remy. These were undoubtedly the birds he admittedly killed. These findings corroborate the admission contained in the statement.

Accordingly, I find the 2<sup>nd</sup> Accused Robert Azemia guilty under count 4 as well.

The 5<sup>th</sup> Accused, in his statement under caution (P6) also admitted joining the "*fishing trip*" with the other co-accused on board the "*Kal Kal*" during the material time. However he made an exculpatory statement that when he was told by others that they were going to catch turtles, he replied

*"I do not do this kind of job". He did not join the others who went ashore. He further stated "they got angry with me because I stayed on board and did not sleep on the boat". But he also stated "during the day I helped them salt the turtles that they had killed during the night. I did this for about two days. I did not know that they had killed birds until they brought on board in gunny bag." ..... "I did not take any turtle meat nor bird meat to go with. I went alone and do not know what happened behind my back."*

This largely exculpatory statement was however retracted as having been obtained by oppression, threat or duress. The Court ruled that it was a voluntary statement. It was submitted by the Prosecution that the admission of salting the turtles killed by others, was sufficient to establish a joint enterprise to slaughter the turtles, and that he had possession of the turtle meat. But in the absence of any other evidence, the statement of the 5<sup>th</sup> Accused discloses that he genuinely believed that it was a fishing trip, and when he came to know it was turtle poaching, he did not participate.

Obviously, he could not have run away from the boat which was several miles away from Mahe. The fact that he helped in the salting of the turtle meat alone cannot establish a charge of joint possession, as possession connotes a measure of control over the thing. In joint possession, the mere fact that he knew that there was turtle and bird meat on board the vessel would not be sufficient to make him a participator in the offence of possession of them. It must be proved that there was a joint enterprise to possess the meat together, and that each could draw from it at will. Although this is a strict liability offence, temporary possession during the salting, would be inadequate for purposes of a charge of possession under count 1, especially in the absence of a charge of common intention. On the basis of these findings, it would be unsafe to convict the 5<sup>th</sup> Accused Danny Francourt under count 1. Accordingly I acquit him on this charge. As the Prosecution

has withdrawn count 4 against him, he is acquitted from all the charges proffered against him.

The 6<sup>th</sup> Accused in his statement under caution (P10) stated that he agreed with the 4<sup>th</sup> Accused, Rolly Lesperance to join in a fishing trip with the other Accused, which commenced on the “blue boat” (which has been identified in the case as being the “Kal Kal”). While at the Cosmoledo island, he joined the others to go on shore. He stated “we saw a turtle on the beach. Rolly, the others and myself drag it further from the beach, we kill it, we took the meat on board, cooked it and we eat. The day after we set drag nets to capture sharks, from this day onwards every night we waited for the turtles on the beach and we kill them by hitting with batons on their heads. The turtle shells were thrown in the sea. During the day we salted the meat that we have got *on the previous night*”. He then states that two others killed about ten birds (*fou*) and salted the same on the beach. He proceeds to state “*we put all the salted meats (turtles and birds) in gunny bags. They were taken on board.*”

The 6<sup>th</sup> Accused then stated “*Rolly instructed me that he will take the responsibility of selling the meat and that I will get a share of the money and some meat to consume later.*”

Considering the inculpatory portions of the statement as against the 6<sup>th</sup> Accused only, there is sufficient evidence of knowledge and control over the turtle meat which was in the joint possession of the Accused. There is particular corroboration of the statement made by him, which was retracted, in the evidence of Asp Matombe regarding the presence of batons on the deck of the boat, as the 6<sup>th</sup> Accused had stated that batons were used to kill the turtles. Hence I find the 6<sup>th</sup> Accused Julius Labrosse guilty under count 1.



As regards count 4, as in the case of the 5<sup>th</sup> Accused, I find it unsafe to convict the 6<sup>th</sup> Accused under that count. Accordingly he is acquitted of the charge of killing birds under count 4.

The 7<sup>th</sup> Accused, Percy Bacco, in his statement under caution (P7) stated that he joined the other Accused in a fishing trip that left the Victoria Fishing Port on 11<sup>th</sup> January 2003 and returned on 30<sup>th</sup> January 2003, in a "Blue Boat". Describing the events at the Cosmoledo island he stated - *"that night Rolly said that we were going to wait for turtles to overturn. I told Rolly that I was not going ashore because I have never overturned any turtle. Nobody wanted to go and wait for turtles to overturn, but Rolly insisted. They argued and then we all went ashore".* ..... *"we stayed ten days on that island and we continuously killed turtles. One day the Rastaman together with the other one whom I do not know the name and myself we went further inland to look for birds. There the Rastaman, and the other started hitting birds with a stick and I picked them up, cleaned them and put in a gunny bag. "We killed about forty birds which we salted on board the boat."..... "I told those on board that I was going because I live far and that I will come down the next day..... The next day Friday I did not come down because I felt sick of what we had done".....*

As regards count 1, the general circumstances in the case, corroborate the retracted statement of the 7<sup>th</sup> Accused. He admitted to killing of turtles. He was in joint possession of the salted turtle meat seized from the boat in which he travelled. Unlike the 5<sup>th</sup> Accused against whom there was inadequate evidence of joint possession, the 7<sup>th</sup> Accused actively participated in the killing of birds, and was in joint possession of the turtle meat, as he indicated that he was coming the next day, inferentially to participate in the other activities they had planned to dispose of the turtle and bird meat. He had therefore knowledge of the nature of the meat, and

he had control over it. He was therefore in joint possession. Accordingly I find him guilty under count 1.

As regards count 4, he has admitted to the killing of birds, the carcasses of those birds were seen by ASP Matombe and were identified by Mr. Selby Remy. The Court has accepted the evidence of Mr. Remy, the Expert that the bird meat examined by him was that of boobies (*fou*). The carcasses of those birds were found among the gunny gags which he examined. The 7<sup>th</sup> Accused, in his statement had admitted not only to killing about 40 birds, but also to picking them up, cleaning them and putting them in a gunny bag. These birds, could not have been any other than the boobies which Mr. Remy examined soon after the gunny bags were unloaded from the boat at Providence. In these circumstances as was held in the case of *Sheha Jumbe Sheha* (*supra*), the production of the bird meat in Court would have been a mere formality, and therefore the non-production due to the unfortunate circumstances in the case would not be fatal to the Prosecution case. Accordingly, I find the 7<sup>th</sup> Accused, Percy Bacco guilty under count 4 as well.

In summary therefore, I find that the Prosecution has proved beyond a reasonable doubt the charges under counts 1, 4 and 6 against the following Accused, as follows -

**1<sup>st</sup> Accused (Allen Marengo)**

Count 1- guilty

Count 4 - not guilty.

**2<sup>nd</sup> Accused (Robert Azemia)**

Count 1 - guilty

Count 4 - guilty.

**4<sup>th</sup> Accused (Rolly Lesperance)**

Count 1 guilty

**5<sup>th</sup> Accused (Danny Francourt)**

Count 1 - not guilty

**6<sup>th</sup> Accused (Julius Labrosse)**

Count 1 - guilty

Count 4 - not guilty

**7<sup>th</sup> Accused (Percy Bacco)**

Count 1 - guilty

Count 4 - guilty

**8<sup>th</sup> Accused (Beddy Payet)**

Count 6 - guilty.

Accordingly, these Accused are convicted as charged in respect of the counts they have been found guilty.

.....

A.R.PERERA

**JUDGE**

Dated this 18<sup>th</sup> day of May 2004