

IN THE SUPREME COURT OF SEYCHELLES

THE REPUBLIC

VS.

LEONEL DODIN (A1)

MERVYN ARNEPHY (A2)

CHRISTOPHER FREMINOT (A3)

HELM SOUNADIN (A4)

MARTIN ARRISOL (A5)

Criminal Side No. 47 2008

Mr. Govinden, The Attorney General for the Republic

Assisted by Mr. Esparon, Principle State Counsel

Mr. Hoareau for the 1st, 2nd, 3rd and 5th Accused

Mr. Georges for the 4th Accused

JUDGMENT

Gaswaga, J

The five accused persons stand before me each charged with two different counts of offences as follows:

Count 1

Statement of offence

Aiding and abetting the importation of a controlled drug contrary to section 3 as read with section 27(a) and section 26(1)(a) of the Misuse of Drugs Act, Cap 133 and punishable under section 29 of the Second Schedule referred thereto in the said Act.

Particulars of offence

Leonel Dodin and Helm Sounadin on or around the 18th of May, 2008 aided and abetted Catherine Ms. Osawo to import into Seychelles a controlled drug namely 498.2gs of heroine (diamorphine).

Count 2

Statement of offence

Aiding and abetting the trafficking of a controlled drug contrary to section 5 read with section 2 and section 27(a) and section 26(1)(a) of the Misuse of Drugs Act 1990 as amended by Act 14 of 1994 and punishable under section 29 of the Second Schedule referred thereto in the Misuse of Drugs Act 1990 as amended by Act 14 of 1994.

Particulars of offence

Leonel Dodin and Helm Sounadin on or around the 18th of May, 2008 aided and abetted Catherine Ms. Osawo to sell, give, transport, send, deliver, distribute or to offer to sell, give, transport, send, deliver or distribute or to do or offer to do any act preparatory to offer or the purpose of selling, giving, transporting, sending, delivery or distributing 498.2grams of heroine (diamorphine)

Count 3

Statement of offence

Aiding and abetting the importation of a controlled drugs contrary to section 3 as read with section 27(a) and section 26(1)(a) of the Misuse of Drugs Act, Cap 133 and punishable under section 29 of the Second Schedule referred therto in the said Act.

Particulars of offence

Christopher Freminot, Martin Arrisol and Mervin Arnephy on or around the 18th of May, 2008 aided and abetted Catherine Ms. Osawo to import into Seychelles a controlled drug namely 498.2gs of heroine (diamorphine).

Count 4

Statement of offence

Aiding and abetting the trafficking of a controlled drug contrary to section 5 read with section 2 and section 27(a) and section 26(1)(a) of the Misuse of Drugs Act 1990 as amended by Act 14 of 1994 and punishable under section 29 of the Second Schedule referred thereto in the Misuse of Drugs Act 1990 as amended by Act 14 of 1994.

Particulars of offence

Christopher Freminot, Martin Arrisol and Mervin Arnephy on or around the 18th of May, 2008 aided and abetted Catherine Ms. Osawo to sell, give, transport, send, deliver, distribute or to offer to sell, give, transport, send, deliver or distribute or to do or offer to do any act preparatory to offer or the purpose of selling, giving, transporting, sending, delivery or distributing 498.2grams of heroine

(diamorphine)

The facts leading to the above charges as presented by the prosecution are briefly thus. In the afternoon of 18th May, 2008 a Kenyan lady by the names of Catherine Atieno Ms. Osawo was arrested at Seychelles International Airport with 498.2 grams of substance which, upon subsequent analysis by the government forensic chemist, Dr. Jakharia (PW2) was found to be illicit heroin. She had arrived from Nairobi aboard a Kenya airways flight number KQ 450. The drugs were concealed in an adult diaper (pampers) which fell off Ms. Osawo's body onto the floor when she removed her lower garments during a body search conducted by the customs officers Tessy Poponneu (PW8) and Betty Luc (PW9). She cooperated with the police and assisted in effecting a controlled delivery. As instructed in Nairobi by one Mama Leira, the lady who had allegedly given her the drugs, USD 1,000 and a SIM card, Ms. Osawo inserted the said SIM card into her cell phone and called Mama Leira on + 254 713403569 immediately after gaining lodging in the Manresa hotel. The phone rang but nobody picked it up. Almost immediately after, Ms. Osawo's phone rang. The number did not reflect on the screen but it was Mama Leila on the phone demanding to know why it had taken Ms. Osawo so long to get in touch with her. She was very brisk on the phone and hung up. Two minutes later she called again and was assured that Ms. Osawo had successfully gone through the security checks and was booked in the Manresa hotel. Mama Leira then told Ms. Osawo not to remove the diaper until she called again with further instructions.

All this conversation went on in the presence and hearing of Inspector Francoise (PW4) and a Custom's officer, Miss Lindy Freminot (PW11) who were also in the same hotel room because Ms. Osawo's phone had been switched to

speakerphone mode.

That ten minutes later the phone rang. It was a local *Cable and Wireless* telephone company number, 578938. The caller identified himself as Jim and was checking to find out whether Ms. Osawo was ready to meet him. He was advised to call again after thirty minutes since Ms. Osawo needed some time to freshen up. Three minutes later another call came in but this time with a different caller on a local number, 747959 belonging to *Airtel* Telephone Company. He identified himself as Tony, and just like the first caller he asked about her flight to Seychelles and whether she was ready to meet him. Ms. Osawo promised to call Tony to let him know the time when they would meet after she had freshened up. From this point on it seems everything moved very fast. No sooner had she hung up than she received a text message from Mama Leira in Kenya with the following instructions ***“Give Jim 250 and Tony 250 and make sure that Jim does not know that the total was 500”***.

After a number of calls to and from Jim as well as Tony, Ms. Osawo was informed by Jim that he would be sending his driver, a dark skinned man in a blue Subaru car to pick her up from the hotel parking and bring her to his residence. This was at about 06.00 pm. Tony called immediately but was advised to try later as Ms. Osawo was at the time waiting for Jim’s driver. Almost an hour later Jim called telling Ms. Osawo to go to the hotel parking where the driver was waiting. Inspector Francoise handed back the diaper containing the drugs to Ms. Osawo which she placed in her bag. The two met and before getting into the car exchanged pleasantries. As the driver was starting the engine to drive away the National Drug Enforcement Agency (NDEA) officers, who had taken cover in strategic positions all around and opposite the hotel, surrounded the car and arrested him. He now stands charged before me as accused number 1, Mr.

Leonel Dodin. The blue Subaru car bearing registration number S14846, as portrayed in the exhibited photographs (PE2) taken by Sergeant Joachim Allisop (PW1) belongs to the Government of Seychelles and, the registered owner thereof is President's office. More of this to come later.

Ms. Osawo returned to the room to call and speak to Tony. As instructed by Tony she walked across the hotel and stood at the bus stop where he would come in a small silver car to meet her. She had also carried with her a lady's handbag which contained the diaper stashed with the drugs. In cross examination however she stated that she feared to walk further down to the bus stop and instead remained at the road junction opposite the hotel gate because the place and road ahead was dark yet she was new in the area. After a twenty minutes wait the silver car came and stopped at her feet. The driver identified himself as Tony and asked Ms. Osawo to get into the car. But Ms. Osawo hesitated a bit on seeing two other people in the car where upon the driver said '*no, don't worry about these people, just enter the car, they are okay, they are with me*' She then entered the car and sat right behind the driver. The car immediately made a u-turn and sped off back in the direction of town (Victoria). Although it was a bit dark by then the place was well lit by the security and street lights around the area. At this point the NDEA agents who had mounted tight and close surveillance in the vicinity quickly got into their vehicles and gave chase. As they drove through Victoria one of the NDEA jeeps overtook the silver car and as they were nearly approaching the Roche Caiman round about the police and NDEA agents signaled and instructed them to pull over. In the process as the cars slowed down the package containing the diaper was thrown out of the front left passenger window of the silver car. Inspector Francoise who was driving his jeep right behind the silver car stopped and picked it up from the road side. He had left the car lights on flashing the whole area in front of him including where

the silver car was parked upon being stopped. The street lights too provided sufficient lighting. The occupants were ordered to remain in the car as they attempted to escape. Inspector Francois accessed the silver car. He was assisted by the NDEA agents to effect arrest on all of its occupants. It came to light then that the driver, Tony, now accused number 3, his real names are Mr. Christopher Freminot while the white man who was seated in the co-driver's seat was Mr. Martin Arrisol, now accused number 5. The third man who was at the back with Ms. Osawo is Mr. Mervin Arnephy and is cited in these proceedings as accused number 3. I shall revert to this in the due course.

After spending twenty minutes at the Central Police Station Ms. Osawo and Leonel Dodin left for Anse Royal in the blue Subaru car. NDEA agent, Naiken (PW5) drove the car until the Fairy Land hotel when he pulled over and asked Dodin to get onto the driver's seat. Ms. Osawo moved from the rear seat to the co-driver's seat. Naiken sat at the back. The diapers containing the drugs had been handed back to Ms. Osawo who placed same into her bag. In the mean time Dodin kept on receiving calls on his phone. In a couple of minutes Dodin branched off the main road to approach some residence. The other vehicles in the convoy went on a little ahead and branched off into a secondary road before the NDEA agents disembarking and taking positions in the bushes around the small house on that property. The blue Subaru car had tinted windows and agent Naiken remained seated in the rear seat unnoticed. There was a white man with a torch flashing them to drive on in the direction of the house. The man with the torch quickly led Ms. Osawo and Dodin into a small house near the big house. That while in the house the man with the torch identified himself as Jim and asked Ms. Osawo for his package. Ms. Osawo removed the package containing the diapers from her handbag and as she was in the process of handing it over to Jim the NDEA agents and Inspector Francoise burst into the

small house and arrested Jim. It is now known that Jim's real names are Mr. Helm Sounadin and is arraigned before this court as accused number 4. A search was conducted in the big house and a cell phone containing a *Cable and Wireless* telephone company line 578938 was retrieved. This is the same number that Jim had been using all along to call Ms. Osawo.

Defence

The court having found that a *prima facie* case had been established by the prosecution all the five accused persons were put on their defence pursuant to section 184 of the Criminal Procedure Code, Cap 54. Accused persons No. 1, 2 and 5 (Leonel Dodin, Mervin Arnephy and Martin Arrisol) exercised their constitutional right enshrined in Article 19 (2) (h) and remained silent. The court drew no adverse inference from their election. Accused persons No. 3 and 4 (Christopher Freminot and Helm Sounadin) opted to make a brief statement from the dock in their defence. Further, accused persons No. 2, 3, and 5 (Mervin Arnephy, Christopher Freminot and Helm Sounadin) called evidence from one and the same witness, Ronie Alice (DW3) in support of their case. However, the single witness expected by accused No.4 (Helm Sounadin) did not turn up despite several adjournments and as such his counsel, Mr. George closed his case.

Accused No.3, Christopher Freminot (DW1) stated that on the 18th of May, 2008 he was driving a rented Charade car together with Martin Arrisol and Mervin Arnephy. That they went to the North through Beau-Vallon and North-East Point and on reaching Anse-Etoile near the Manresa Hotel they noticed a lady standing at a nearby bus-stop with her hands covered over her face. They stopped and

realized that the lady was crying. She asked for a lift to the airport and was allowed into the car. That while in the car she stated that she wanted to go back to her country. As the car approached the Roche Caiman gas station Mervin Arnephy noticed that the lady was not stable. She kept on turning and looking back and when asked what was wrong she stated that the police were following behind their car. That at the same moment the lady removed a bag and gave it to Mr. Arrisol and told him to throw it away because it contained drugs. The lady also tried to jump out of the moving vehicle but Mervin Arnephy prevented her from doing so. Further that Martin panicked and threw away the bag whereupon some powder poured in the front part of the car. All the occupants were arrested by the police. Freminot concluded his testimony by stating that there was no diaper nor mobile phone thrown out of the car as shown in the exhibits.

Helm Sounadin (A4) testified before the court that on the 18th of May ,2008 he requested his long time friend Lionel Dodin (A1) who was travelling from the north to collect a lady who had come from Kenya from Manresa hotel. That Sounadin's friend, one Sony, of Nairobi had sent her to deliver some things to him. That when Dodin arrived Sounadin got out of the house with a torch where upon he saw a group of men crouching near the road at a hedge trying to make their way towards his house. He flashed the torch and saw two foreign looking men who approached and as they started asking him questions a jeep pulled into the drive way from which Inspector Francoise and Ms Lindy Freminot disembarked. That agent Marcel Naiken pressed his gun against Sounadin's back as Inspector Francoise asked him questions in creole and also requested to search his house. Some items were retrieved from the house. It is also his evidence that during the search the Kenyan lady together with Ms Lindy Freminot came in and requested to use the toilet. Sounadin emphasized that that was the

first time he saw the Kenyan lady and the second was in court, and further that there was nobody who went to the small house at any one point in time unless in his absence. It was then that Inspector Françoise arrested Sounadin and placed him at Anse Boileau police station.

The Law

A person abets the doing of a thing, who intentionally aids, by any act or illegal omission, the doing of that thing. Abetment is a separate and distinct offence provided the thing abetted is an offence and does not in itself involve the actual commission of the crime abetted. It cannot be held in law that a person can never be convicted of abetting a certain offence when the person alleged to have committed that offence, in consequence of the abatement, has been acquitted. The question of the abettors guilt depends on the nature of the act abetted and the manner in which the abatement was made.

Therefore, a person abets by aiding, when by any act done either prior to, or at the time of, the commission of an act, he intends to facilitate, and does in fact facilitate, the commission thereof. The intention should be to aid an offence or to facilitate the commission of a crime. Mere presence at the commission of a crime cannot amount to intentional aid unless it was intended to have that effect. Furthermore, a mere giving of an aid will not make an act an offence, if the person who gave the aid or lends his support did not know that an act of offence was being committed or contemplated. Even a person that comes to collect property which has already been stolen cannot be said to have aided and abetted, he is an accessory to the act. Intentional aiding and therefore active complicity is the gist of the offence of abatement. It implies a certain degree of activity in the abettor. The *actus reas* referred to here must be either actual or

constructive presence.

It was held in **Nim Chand Mookerjee (1873) 20 WR (Cr) 41** that “...for a conviction to be entered on this offence it is not only necessary to prove that the accused has taken part in those steps of the transaction which are innocent, but in some way or other it is absolutely necessary to connect him with those steps of the transaction which are criminal.”

Ratanlal and Dhirajral’s Law of Crimes, 23rd Edition, page 336 reads:

“When an offence is committed and several persons take part in the commission of it, each person may contribute in a manner and degree different from the others to the doing of the criminal act. The act may be done by the hands of one person while another is present, or is close at hand ready to afford help; or the actual doer may be a guilty agent acting under the orders of an absent person; and besides these participators, there may be other persons who contribute less directly to the commission of the offence by advice, persuasion, incitement or aid. It is proper to mark the nature, manner and degree of participation of each person which is essential to criminal liability, but it will be seen that the several gradations of action above referred to are not always treated as denoting necessarily different measures of guilt with a view to distinction in respect of punishment”

Witnesses and their Evidence

I find it imperative to comment on the witnesses and their evidence adduced generally, and specifically about the status of Ms. Osawo as a witness and her evidence. Generally, human perception, power of observation and mental

retention differ from one witness to another. Although at some instances slightly different accounts of the same incident herein were given by some witnesses the court considered the degree of divergence, truthfulness and effect such variations and contradictions had on the prosecution case. It was held in **Marie-Celine Quatre Vs Rep. SCA No. 2 of 2006**, where police officers did not only contradict each other but also their testimonies were at variance with their statements that *“..the alleged contradictions and inconsistencies did not affect the substance of the case.* Further, the Justices stated thus *“Indeed we would not expect the two witnesses to say the same thing, all the time. What is fundamental to the case is whether there are basic, material contradictions with regard to the main issue before the trial court”*

One witness may be struck by something which the other witness has completely missed or thought unimportant. The circumstances and prevailing conditions at the time of commission of the crime too cannot be ignored. Generally it will be noted that the arrest of all the accused persons which occurred in three distinct and quite distant places and situations happened in a period of about four hours, from 18.00 hour to 22.00 hours. It is largely evident that time was of the real essence. Everything happened very fast for fear of detection of the police surveillance by the accused persons. The police and NDEA officers had no idea of what and who exactly to expect. They quickly planned and made decisions at each and every stage of the mission as the events unfolded before swinging into action. Ms. Osawo herself was new in the country and it was at night. She had been crying off and on since her arrest that afternoon. She was neither familiar with the people and the Creole language spoken around nor the general terrain and architectural design of the houses in Seychelles. One could also describe her situation at the time as that of a person who was under a considerable amount of pressure after being apprehended by the authorities. It would therefore

be expecting too much of the witnesses, especially Ms. Osawo, to describe the small house and other relevant places as well as the manner and sequence in which the events of that evening unfolded, with such deep detail and certainty, as demanded by the learned defence lawyers in cross-examination, as if it were a drama recital or film recording in Hollywood.

Before the amendment of the charge sheet Ms. Osawo had been arraigned as the first accused person. Pursuant to a plea bargain under **section 61A of the Criminal Procedure Code, Cap. 54** Ms. Osawo was dropped from the charge sheet and instead listed and called as a prosecution witness. As an accomplice (*participes criminis*), whether as a participant in the offence charged, in the capacity of principal or aider and abettor, obviously the defence as well as the court would fear the danger arising from the motive of avoiding or minimizing such witness' own involvement in the offence charged, and of emphasizing, or it may be, fabricating, that of the accused. This calls for such evidence to be treated with utmost caution. Direction has been sought from the authorities of **The King Vs Baskerville, KB Division [1916] Page 658, Rex Vs Atwood (1787) 1 LEACH, 464 and Reg Vs Stubbs, Dears. 555** which propounded the guiding principles in the following terms:

“There is no doubt that the uncorroborated evidence of an accomplice is admissible in law....However, that corroboration (if provided) need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. But it has long been a rule of practice at common law for the court to warn itself of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice(s). In the absence of such warning by the judge the conviction must be quashed. Further, it should be pointed out that it is within the legal province or discretion of the court to convict upon such unconfirmed evidence.”

If believed and allowed by the court as a competent witness, Ms. Osawo's evidence therefore would be unquestionably sufficient to establish the facts which she deposed and would require no corroboration as long as the obligatory warning is sounded. Otherwise corroboration of the nature and, in the manner prescribed by the above cases will be of necessity before a conviction being entered.

Cross Examination

Many witnesses were summoned to adduce evidence in connection with all the four incidents of arrest leading to the arraignment of the accused. In fact this case was like a four-in-one. The accused were represented by a number of advocates who had to cross-examine prosecution witnesses on behalf of each accused. There is no doubt that cross-examination is a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story. It is entrusted to the hands of counsel in the confidence that it will be used with discretion; and with diligence and due regard to the assistance to be rendered by it to the court, not forgetting at the same time the burden that is imposed upon the witness. The kind of cross-examination mounted by the defence in this case led to some of the witnesses being questioned for more than a week each, and answering the same questions as many times as ten. On perusing the record once again I found that the bulk of that cross-examination yielded worthless results, the same having been directed mostly toward the credibility of witnesses and some irrelevant and peripheral matters which could not in any way break or dent the impeccable and concrete core story that had been built by the prosecution. Clinging onto the smallest or minute mistakes, details and or omissions in the evidence adduced or

procedures, even if considered together, may not be of much help where the opponent's case is clear and tight. In some instances it seemed like the cross-examination was calculated to humiliate, belittle and break particular prosecution witnesses. Needless to re-state that cross-examination should be relevant and directed to the facts in issue.

The Drugs (Exhibit PE10)

There is ample evidence to clearly show the nature and type of drug herein and, chain through which it was handled from the time of its dispatch from Nairobi till it was tendered in court as an exhibit (PE10). It was deposed that on the morning of 18th May, 2008 one Mama Leila and Sony, a Nigerian national came into Ms. Osawo's hotel room at about 06.00 am. In their company was another person who was not introduced to Ms. Osawo. The latter's duty was to immediately remove some layers of tissue in one of the diapers which properly fitted Ms. Osawo. He then placed two small clear-polythene packets containing a light brown powder at both ends of the diaper before completely masking the same with celotape. Although she did not touch nor participate in the packaging of the powder, Ms. Osawo witnessed the whole exercise and was also told that the powder was the heroin she was to take to Seychelles. Mama Leila dressed Ms. Osawo with the diaper. She was taken direct to the airport at 08.00 am. The hotel was not far from that airport.

The contents of the diaper were first made known to the Seychelles authorities by Ms. Osawo herself during a body search when, in answer to a question put to her by the customs officer – Ms Brigitte Vallentin (PW10), she stated that '*it was drugs, heroin*'. The same answer was also given by Ms. Osawo to Inspector Francoise who had soon after the arrest been called to the airport and right into

the room by Ms Brigitte Vallentin. Her answer was believed by these witnesses. The court too has no reason whatsoever to doubt that statement otherwise one would wonder why a normal and more so intelligent person as Ms. Osawo could say she was carrying controlled drugs when actually she wasn't, well knowing the consequences of such revelation. Ms Valentin, the other customs officers namely Tessy Popeaunou (PW8), Betty Luc (PW9) and Lindy Freminot (PW11) as well as Inspector Francoise testified that the state of the diaper was maintained and it was never opened. It was then placed in a pink plastic bag and handed to Inspector Francoise who together with Ms. Osawo and customs officer Ms. Lindy Freminot went with it to the Manresa hotel. At the hotel they all went into the same room from where the diaper, still wrapped in a pink plastic bag, was given back to Ms. Osawo while going to meet Mr. Dodin. After the arrest of Dodin she returned to the room immediately with it. Again she left with the same package and entered Tony's car with it. This is the very package that was thrown out of the co-driver's window of that car and picked by Inspector Francoise. That while in the car Tony had ordered Ms. Osawo to pass on that package to Martin Arrisol (A5) who was seated in the co-driver's seat and later, the said Martin Arrisol to throw it away when they noticed that the police was following them. The package was soon thereafter returned to Ms. Osawo for delivery to Jim at Anse Royale.

On arresting Jim the package remained intact and under the custody of Inspector Francoise who delivered same to the government analyst, Dr. Jackaria (PW2) on the 20th may, 2008. **See** forwarding letter (PE14). Detective Joachim Allisop (PW1) took photographs at each stage of the opening of the diaper. **See** photo album (PE1). The two small packets retrieved from the diaper were photographed before and after they had been cut open by Dr. Jackaria. He also photographed the two beakers into which the powder had been poured. Samples

of the substance from each beaker were subjected to three different tests (the color test, ultraviolet spectrophotometry, the thin layer chromatography) all of which confirmed the light brown powder to be illicit heroin. A qualitative as well as a quantitative analysis was also done. The first beaker contained 249 grams of the powder and the other weighed 249.2 grams, making a total of 498.2 grams, all with a purity of 66.6%. **See** analyst's report (PE3). Before returning the analysed drugs to Inspector Francoise, same was kept safely in a locked room to which only Dr. Jackaria holds the key. The whole package was also sealed in a white exhibit envelope on which Dr. Jackaria and Inspector Francoise signed in various conspicuous places and a piece of celotape placed over their signatures. The envelope was then put in a clear plastic bag before taking it back to the police for safe custody. Inspector Francoise produced it in court as an exhibit (PE10).

Dr. Jackaria and Inspector Francoise confirmed to the court that the powder as well as the diaper and white exhibit envelope were still in the same state as they had been packed and sealed in the envelope and that they had not been tampered with. Ms. Osawo herself confirmed in cross examination that those were the two small packets of powder she had seen being stashed in the diaper she wore, transported to Seychelles and subsequently got impounded and handed over to Inspector Francoise. I have not seen any evidence to suggest that the package (diaper with the powder) produced before court now is not the one that was found on Ms. Osawo. Whatever the origin of the pink plastic bag that was used to carry the diaper from the airport, the court is fully satisfied that this has no effect at all on the drug itself and the flow as well as chain of evidence thereof. The exhibit had been handled properly all through the stages of the various arrests, the analysis and storage before production in court.

Ms. Osawo also confirmed throughout her testimony that the powder she carried was light brown. Detective Joachim Allisop who saw the powder with his naked eyes in the laboratory corrected himself during examination in chief, and in his statement (DE1) – during cross examination as to the color of the powder. That it was due to a typographical error that the color of the powder was indicated as white in the statement instead of light brown, which he had seen and observed while taking shots of the exhibit. It will be recalled that apart from Ms. Osawo none of the witnesses had opportunity to see the actual powder and therefore its color before the diaper and small packets being cut open by Dr. Jackaria. Both of the clear small plastic packets (sachets) had been masked with brown celotape and concealed in the diaper. As for Inspector Françoise, once told by Ms. Osawo that the powder was heroin, he immediately assumed it was white just like the heroin he and other police officers in Seychelles are used to seeing and handling. This satisfactorily explains why the forwarding letter (PE14) by Inspector Ron Marie to Dr. Jackaria described it as a white powder. Moreover, Dr. Jackaria testified in cross examination that unless opened, it was difficult to tell the actual color and nature of that substance.

Throughout the trial the powder concealed in the diaper and wrapped in the pink plastic bag was referred to as '*luggage, package(s), diaper, it, stuff*' etc. I take judicial notice that in crimes or any criminal activity the perpetrators rarely refer to the illegal act, substance, contraband, or object by its true name but normally assign a codename to avoid detection by the authorities. It should be noted that in the circumstances and context of this case all the above references were made in respect of the drugs herein. All the concerned parties knew exactly what was going on and what they were talking about. There was no need to mention the words 'drugs' or 'heroin' whenever reference was made to it. This is neither strange nor farfetched. From my own experience of handling criminal cases I

have noticed many times that the actors usually acquire pseudonyms for each mission of course for obvious reasons. Would you therefore be surprised to learn that the men who identified themselves to Osawo as Jim and Tony later turned out to be Helm Sounadin and Christopher Freminot respectively and as we know them in Seychelles?

While cross-examining Ms. Osawo and Inspector Francoise learned counsel Mr. Basil Hoareau suggested to them that the package which Ms. Osawo passed on to Martin Arrisol while in the silver car contained some white baby powder (a decoy, and not the actual drugs) which eventually got poured into that car, especially on its dashboard. This was denied by the witnesses who also stated that there were no traces of any powder inside or on the outside of that car. Even the testimony of the defence witness, Ronnie Alice (DW3) to that effect was worthless after his evidence had been shattered by the grilling cross-examination. Further, after testing his entire evidence on the touchstone of reliability, credibility and trustworthiness, Ronnie Alice was found to be a witness not to be trusted. His demeanor was wanting, while his testimony was not only tainted with a lot of falsehoods but also malice. It stated in part: *"I left IDEAL car hire feeling bitter. They exploited me like a slave. I have no good to say about this car hire...I now feel like a liberated slave after leaving this car hire"*. It is strange that only he and Christopher Freminot talk about this powder. In fact Christopher Freminot testified that Martin Arrisol is the one who poured it in the car. Martin Arrisol said nothing about it as he did not make a defence.

Mr. Basil Hoareau stressed in his final submissions that the package of drugs produced in court is not the one that was handed over to Martin Arrisol. That the latter substance was a decoy which was poured in the car. The court has not seen any iota of evidence to support this submission. Even if I were to agree with

this view for a moment, still the position would not change in favour of the defence. What matters here is the mental element of the accused when he set out to buy or obtain drugs, and while receiving the package. It matters not whether he is given or sold what he actually intended to receive or buy. The facts in the famous Canadian case of **Beaver Vs The Queen [1957] CanLII 14 (S.C.C)** were that at the appointed time and place, one Tassie (an undercover police) arrived and boarded the car driven by the appellant, Louis Beaver, then in the company of his brother, Max Beaver. Having travelled a certain distance, the car stopped; Max Beaver walked out towards a lamp-post, picked up a parcel, boarded the car and while proceeding to another destination, gave the parcel to Tassie who paid him. At trial, Louis Beaver advanced a defence that since he wanted to “get even” with the person who had “double crossed” him a sale would be arranged and made; but sugar of milk instead of drugs (diacetylmorphine) would be delivered. The trial court and the Court of Appeal did not accept the appellant’s defence that he never intended to deal in drugs and never knew that the parcel delivered contained any. While dismissing the appeal, the Supreme Court, among others held:-

“In the case of any sale made... without ...lawful authority, the accuracy or inaccuracy of the representation made by the seller to the purchaser as to the nature of the substance sold and the honesty or dishonesty attending the representation, if inaccurate, are quite immaterial if the substance sold is represented or held out to be a drug by the seller to the purchaser.”

The evidence available indeed establishes that Ms. Osawo (i) imported into Seychelles and, (ii) trafficked in a controlled drug to wit 498.2gs of heroine (diamorphine). It was stated in **Rep vs. Noddy Agathine Criminal side No. 38**

of 2005 that to import is to “bring or cause to be brought into Seychelles by air or water, otherwise in transit...” and further, that “the time of importation, in the case of passengers’ baggage is when the ship or aircraft carrying the drugs entered the port at which it is discharged”. The offence of ‘importation of drugs’ was completed when Ms. Osawo in possession of the drugs got into the airport of Seychelles without necessarily having to clear through the customs controls. For there to be a conviction on the offences in counts I and III the prosecution must link and prove beyond a reasonable doubt that **each** accused individually or in concert with others did an act(s), in one way or another, to facilitate or aid and abet the said importation. Similarly, the same burden and standard of proof is to be applied in respect of **each** of the accused persons in counts II and IV regarding their individual activities of facilitating or aiding and abetting Ms. Osawo in the trafficking of the said drugs in whatever way as outlined in the relevant particulars of offence. It suffices if prosecution proves that the accused knowingly did any of the outlined acts in the charge sheet and not necessarily all of them.

Leonel Dodin (A1)

It is not in dispute that Dodin was arrested at the Manresa hotel when he came to pick Ms. Osawo. He had fallen into the wide open jaws of the police and NDEA officers on entering a deserted car park which was under surveillance. The question is; was Dodin an innocent transporter of a woman carrying drugs from the hotel to the home of Sounadin? There is ample evidence that Ms. Osawo walked to the car with a hand bag containing the drug. The officers had a clear view of the car park and Ms. Osawo as she left the hotel for the car since there was no obstruction by any passing traffic. At that time Dodin was standing and waiting by the car. Ms. Osawo stated that when she came closer to Dodin they

exchanged pleasantries as they entered the car. No sooner had they entered the car than the NDEA officers emerged from their positions and approached it. Marcel Naiken (PW5) went and knocked on the driver's window and ordered Dodin to disembark. He arrested him by placing handcuffs on both of his hands. But before the arrest Marcel Naiken had seen Ms. Osawo open her bag and show Dodin a parcel. It should be noted that although that car's windows were tinted the officers were close to it yet the area was sufficiently lit by the security lights around the hotel and car park.

This evidence corroborates that of Ms. Osawo when she stated that on entering the car Dodin asked her whether she had come with the luggage to which she answered in the affirmative and went on to show it to him although she did not deliver the parcel to Dodin. Officers Brian Nicette (PW6) and Nichol Franchette (PW7) also went to the car and assisted in the arrest of Dodin. They had arrived at the car almost at the same time as Naiken. They also confirmed the above story save for the conversation between Ms. Osawo and Dodin which they did not hear.

Apparently some contradictions in the evidence of Inspector Francoise especially regarding the aspect of arresting Dodin could not go unnoticed and therefore escape scrutiny. The said contradictions are however not material to the substance of the case to warrant a rejection of his entire testimony. Besides, there is sufficient independent evidence on the matter which has been properly corroborated.

As for his defence Dodin elected to remain silent. He did not call any witnesses to his aid. However, his pre-trial statement written while at the police station with the guidance of his lawyer, Mr. Charles Lucas, and admitted as DE2 will be analyzed.

The said lawyer also signed the statement as a witness. Dodin stated therein that he never made any conversation with Ms. Osawo and did not know that she had drugs. It is inconceivable how one could go to collect a visitor and they just get into the car to drive away without talking or even exchanging pleasantries. Further, if Sounadin had asked Dodin only to collect the woman (Ms. Osawo) from the hotel and convey her at his home then why was Dodin asking Ms. Osawo whether she had it (as already explained herein referring to drugs). In his defence (statement PE9), Sounadin stated that he was expecting a bottle of whisky from his friend Sony in Nairobi. Now it cannot be that Dodin was asking Ms. Osawo for or about this whisky, otherwise had it been so, Dodin or Ms. Osawo would have said it. Dodin simply says he was asked to convey the woman.

The fact that Ms. Osawo was caused to move from her hotel room to come to the car to be transported and or conveyed by Dodin, well knowing that she was carrying drugs, to me is enough to show Dodin's active role in this crime. Had he not come there Ms. Osawo would not have moved out of the room with drugs to go and distribute, deliver or sell to Sounadin. These acts also fall under the preparatory stage for trafficking. Dodin was facilitating a trafficker knowingly. I disagree with Mr. Hoareau's submission that 'acts preparatory' would only include packaging before sale but not acts such as transportation. The court also rejects Dodin's assertion that he never saw the woman (Osawo) but was only arrested as soon as he entered the hotel car park.

I am convinced beyond a reasonable doubt that Dodin was not an innocent transporter of a woman with drugs but an active participant and facilitator in the whole transaction. He was aware of what was going on exactly – the trafficking of illicit drugs – and had come in to play his role of executing instructions to receive, transport and deliver a trafficker (with the drugs) from the hotel to Sounadin's home. That is why he needed such assurances of whether she had the drugs

before taking Ms. Osawo to Sounadin. He was an actual doer and a guilty agent acting under the orders of an absent person at the time. His degree of participation is irrelevant. He is found guilty for aiding and abetting the trafficking of a controlled drug as charged in count two (2).

There is no sufficient evidence to sustain the first count.

Mervin Arnephy (A2)

Mervin Arnephy was also in the car being driven by Freminot (A3). He sat at the back with Ms. Osawo. It will be recalled that when Ms. Osawo hesitated to enter the car Freminot told her ***“no, don’t worry about these people, just enter the car, they are okay, they are with me”***. This was in the presence of Mervin and Arrisol. Given the prevailing circumstances and in the context of later participation, these words did not only mean but were also a clear indication that each one of the three occupants of the car had knowledge of the drug transaction (trafficking) that was going on involving Ms. Osawo. Mervin was not an innocent bystander but also an active participant whose presence gave willful encouragement to the others who were physically handling the package. There is even no evidence to suggest any surprises on his side or that he was only in the car for an evening ride as he seemed to be well informed of the purpose of their trip to the Manresa hotel area. Neither can it be said that he was there involuntarily or accidentally. His further knowledge of the mission is exhibited when, as stated by Ms. Osawo, he asks her on getting into the car ***“what happened, why did it take you so long to clear from the airport and get to the hotel, what took you so long to get in touch with us?”*** There is good cause for one to wonder why Mervin would get concerned about and pay much attention to Ms. Osawo’s taking long to clear through the airport. Of course to a

person loaded with illicit drugs making it through the airport security check points is something very crucial if not a matter of life and death to the trafficker and high risk to the entire transaction. Mervin, together with others, was expecting Ms. Osawo to come with drugs on the Kenya airways flight that afternoon and his presence in the car that went to pick her was for the purpose of receiving that consignment and or assisting and transporting Osawo to sell or distribute the said drugs. Osawo knew nobody in Seychelles and was being taken around in the car together with the drugs by all the three occupants of the car.

Mervin too remained silent for his defence but called and relied on the evidence of the only one defence witness, Mr. Ronie Alice, as did Freminot (A3) and Arrisol (A5). I have already evaluated the evidence of the said witness and assessed his credibility as well. That evidence also basically tends to point to the existence of a decoy and further suggests that the white baby-powder-looking stuff got poured in the silver car when Arrisol was attempting to throw it away. Again the court has already dealt with this version of the story and rejected it for a number of reasons indicated above. That evidence therefore cannot in any way offer any credible or meaningful defence to the accused. This court has not even the slightest doubt that Mervin had full knowledge of Ms. Osawo's drug trafficking activities, held informed discussions about the subject while in the car thereby actively participating and giving support to the other perpetrators. Although the act was done by the hands of Ms. Osawo and Arrisol under the instructions of Freminot, Mervin was present and close enough at hand ready to afford help. This is evidenced by his participation in the pertinent questioning of Osawo. Further, given the size of the package it could not be expected that each of the participants had to physically touch the drug. It suffices if each contributes in a different way to the criminal act. The evidence is overwhelming to convince the court beyond a reasonable doubt that Mervin is guilty as charged on count four

(4).

I find no sufficient evidence on count three (3).

Martin Arrisol (A5)

From the foregoing, it is clear that Arrisol was the man in the co-driver's seat of the silver car. In addition to this evidence it was stated that when Ms. Osawo got into the car she was instructed by Freminot to hand over the package (drugs) to Arrisol, which was done. Further, Ms. Osawo testified that on sensing the police approaching Freminot asked Arrisol to throw the package through the window. This evidence finds corroboration in the testimony of Inspector Francoise who saw the package being thrown out of the co-driver's window, and immediately stopped to pick it. This particular aspect exhibiting Arrisol's active and effective participation in this crime was not all that disputed but instead confirmed when defence counsel Mr. Hoareau submitted that the white powder which got poured in the front part of the car, especially on the dashboard, as testified by Ronnie Alice, was baby powder (and not drugs) which splashed while Arrisol was attempting to throw it away through the window. This submission together with that of Freminot who stated that when the bag was given to Arrisol he panicked and threw it away, contradicts the suggestion made by Mr. Hoareau to Ms. Osawo during cross-examination that she was the one who threw the package out of the window when the police stopped them. But why was Arrisol throwing away the package unless he knew that it was drugs?

It will be remembered that Arrisol made no defence, and like Mervin he relied on the evidence of Ronnie Alice which has previously been analysed and found to be of no consequence to the defence case. This evidence leaves no doubt

whatsoever in my mind that Arrisol was not only present in the car but also fully, willfully and knowingly participated in this criminal act. **See R Vs Borthwick (1979) 1 Doug. 207.** He was actively assisting in the crime of aiding and abetting the trafficking of a controlled drug (count 4) for which I now find proved against him beyond a reasonable doubt.

There is no sufficient evidence to incriminate him on the third count.

Christopher Freminot (A3)

The evidence adduced already places Freminot together with Ms. Osawo in the car at the Manresa hotel area and beyond. Actually Freminot himself does not deny this evidence and the fact that in that car there was also Mervin and Arrisol. However, he denies the prosecution's evidence that he had come to the Manresa hotel area driving from the side of town (Victoria). I am unable to agree with his version of the story as advanced in the testimony since there is ample and cogent evidence clearly indicating where Freminot's car came from, where it stopped to pick Ms. Osawo and where it made a 'u' turn from to return to Victoria.

Ms. Osawo and Inspector Francoise testified that after communicating on phone with Tony (Freminot) Ms. Osawo was instructed to wait for the silver car at the bus stop opposite the Manresa hotel. Because it was dark, Ms. Osawo instead stood at the La Gogue road junction right opposite the Manresa hotel and not, as stated by Freminot, at the bus stop that is located on the same side of the hotel about 100 meters away. Unknown to Freminot the officers were expecting his car, had already taken positions around the whole area and closely monitored Ms. Osawo. For instance, Nichol Fanchette (PW7) was hiding in the bushes at the La Gogue road junction just about five (5) meters away from where the car stopped

for Ms. Osawo to get in. It is in the same junction that it turned and sped off back to town. Inspector Francoise and Brian Nicette (PW6) who were hiding on the other side of the road at the hotel and the road leading to SACOS flats respectively corroborated this evidence.

All these witnesses also confirmed that they did not only have a close but also clear and unobstructed view of how and where the car stopped, Ms. Osawo speaking to its driver before getting in through the rear right door, and how many people were in it. This evidence stands unchallenged and the whole picture was even made clearer when the court visited the *locus in quo*. Therefore it cannot be that Freminot was driving from the north via North East Pointe towards Victoria and gave Ms. Osawo, who was crying and allegedly standing at the bus stop a lift to the airport. That is false. This court is satisfied that Ms. Osawo had communicated with Freminot several times on phone prior to coming for her and by that time the purpose of their meeting was clear – to pick the drugs which Ms. Osawo had come with. Freminot actively and willingly coordinated and participated in the commission of this offence. He knew that Ms. Osawo was trafficking in illicit drugs and since it was her first time in Seychelles Freminot went on to offer guidance, transport and facilitation for her to transfer, deliver and distribute the said drugs. Freminot was in charge of the silver car S 1615 which he had at the time hired from 'IDEAL' car hire owned by Pauline Cedric (PW12). **See** car hire contract PE16. It was held in **National Coal Board Vs Gamble (1959) 1 QB 11** that;

“A person who supplies the instrument for a crime or anything essential to its commission aids in the commission of it; and if he does so knowingly and with intent to aid, he abets it as well and is therefore guilty of aiding and abetting”.

This is exactly what Freminot did. He also directed Ms. Osawo to hand over the package to Arrisol and later on after detecting the police asked Arrisol to get rid of it through the window thereby exhibiting his command and control not only over the other people in the car but also the drugs. Freminot and Mervin were concerned and asked Ms. Osawo about the delay in clearing with the airport authorities. It was a concerted effort, though in different ways and degree, by the three occupants of the car to assist, facilitate, aid and abet the trafficking of illicit drugs by Ms. Osawo.

As against Freminot I find proved beyond a reasonable doubt only count 3 and not count 4.

Helm Sounadin(A4)

Evidence has been led to the effect that Sounadin sent Dodin to pick Osawo from the Manresa hotel and convey her at his residence in Anse Royale. This is beyond the region of dispute. What was disputed is the evidence that Sounadin was arrested in the small house on his property while receiving the package of drugs from Osawo. Indeed after arresting Dodin he led the officers to Sounadin's home. Sounadin was expecting them, and as testified by Osawo and Inspector Francoise, he had already spoken to Osawo on phone several times. On branching off the main road into the drive way leading to the house, Osawo and Marcel Naiken (PW5) stated that they found a white man waiting in the said drive way with a torch which he used to direct them on where to park the car. Dodin was the one driving at the time while Naiken lay back in the rear seat. It will be recalled that it was dark yet the windows of that car were tinted and as such the white man never noticed the presence of agent Naiken in the car. Naiken also

stated that the man with the torch seemed to be in a rush and told Dodin in creole to hurry up and take the woman to the small house. The white man led Dodin and Osawo to a small house. That on reaching inside the small house the white man introduced himself to Osawo as Jim, asked her for his package and in the process of handing it over to Jim, whose hands had already been stretched out and receiving the package, the officers led by Inspector Francoise burst in and arrested Jim (Sounadin).

In refuting this evidence Sounadin related in the police statement (PE9) that soon after the Kenyan woman arrived at his home the police came, searched his place and latter arrested him. But in his dock statement he told court that when Dodin arrived with Osawo two foreigners whom he identified using the light from his torch approached and started questioning him as Naiken pressed the barrel of his gun on his back. That Inspector Francoise arrested him after the search in the main house. As for Dodin who was also at the scene he stated that on arrival Naiken jumped at Sounadin and when a dog charged at him he returned to the car. Then a group of foreign men came and arrested Sounadin before going to search the house. Sounadin also stated that nobody went into the little house as alleged. During cross-examination however it was suggested to Inspector Francoise, Marcel Naiken, Nichol Fanchette and Brian Nicette that immediately they arrived at Sounadin's home they pounced on him outside the house and effected his arrest. The witnesses denied this assertion. I find the said versions of Dodin and Sounadin's stories not only contradictory as indicated above but also false. Instead I believe the prosecution's evidence as being true and well corroborated though with a few inconsequential inconsistencies which are permissible and yet have already been explained hereinabove. One would wonder why the officers would first go to search the house before arresting Sounadin when the drugs were in Ms. Osawo's possession with whom they had

come from the hotel. Sounadin's arrest was dependent on his receiving of the drugs. Inspector Francoise, Brian Nicette and Nichol Fanchette corroborated Osawo's evidence with regard to the giving and receiving of the parcel while in the small house. Although with some difficulty Osawo described the little house and some of the things she saw therein like the tortoise shell, chairs, a wooden unit with drawers etc... which items were also seen by the other witnesses as well as the court during its visit to the scene.

The evidence of Lindy Freminot further reinforces this position. She stated that she drove to Anse Royale in a jeep with Inspector Francoise, branched off the main road into a secondary road whereupon the Inspector stopped and together with other officers, Fanchette and Nicette started crouching in the bushes. Lindy remained in the car for about five to ten minutes before going to Sounadin's home where she found Osawo then seated on the verandah. It was after this that the two went to the toilet. You will remember that by this time everything had happened very fast. Accordingly, I reject Sounadin's evidence that Inspector Francoise drove his jeep right into the driveway and came out with foreigners who immediately arrested the accused. I am satisfied beyond doubt that the arrest took place in the small house before the search in the main house.

In his statement (PE9) Sounadin lists a number of items which were to be sent to him by one Sony from Nairobi through Osawo. He does not name the items in his testimony from the dock. However, he claimed that Sony is one of his business associates while the other associates have Arabic names which he now strangely does not remember. Osawo had earlier on referred to the same Sony of Nairobi as the man who came with the drugs in the company of one Mama Leila in her hotel room on the morning of 18th May, 2008. Osawo was truthful and I

believed her evidence further when she stated that she was not told the intended recipients of the drugs she carried nor their contacts. So it cannot be that she was to give cashew nuts, an accelerator cable and a bottle of whisky to Sounadin because first of all, she had none of these items and second, his business partner could not have sent him such expensive and illicit drugs without his knowledge well knowing the dangers involved unless he was aware that Sounadin is a drug dealer. Ms. Osawo's instructions received in the presence of Inspector Francoise were very clear thus "*give Jim 250 and Tony 250 and make sure that Jim does not know that the total was 500.*" How did then Jim know Ms. Osawo's telephone number? Actually Jim (Sounadin) was expecting drugs and not a duty free whisky. Besides, according to Sounadin's own statement he says Sony asked him to pick the things from the woman in Manresa hotel but he goes beyond this when he instead instructs Dodin to collect the Kenyan woman and convey her to his residence. Why? This, again, I am sure is one of the reasons why Dodin asked the woman to confirm whether she had come with the luggage (drugs). Further, Sounadin had no idea at all that the police was listening in on all his phone conversations with Osawo. By the way in all his statements Sounadin conveniently omitted talking about making calls to Osawo despite the fact that the phone with line number 578938 on which he communicated severally with Ms. Osawo was impounded in his house. He only stated that Sony told him to pick the things from the woman who was already booked in Manresa hotel.

The only logical conclusion I can draw here is that Sony and Sounadin were business partners dealing in drugs and not (or in addition to) diamond and gold. Further, I am satisfied beyond a reasonable doubt that Sounadin did not only arrange and coordinate with his Nairobi counterparts to send and import the said drug into Seychelles but he also organized and facilitated its delivery, distribution

and transfer on arrival into Seychelles by sending Dodin to go and transport Ms. Osawo from the hotel to his home well knowing what she was carrying. The telephone calls to and from Sony which Sounadin refers to were all part of criminal acts done in preparation for the importation.

Both counts 1 and 2 have been proved beyond a reasonable doubt against Sounadin.

In conclusion therefore, and after observing their demeanor, I find that unlike the defence witnesses all the prosecution witnesses were generally credible and coherent and the court believed their evidence. The court also hereby warns itself of the dangers of convicting an accused basing on an accomplice's evidence. I am therefore satisfied that the prosecution has proved its case against each of the accused persons beyond a reasonable doubt, they are accordingly found guilty and convicted as indicated herein below:

Leonel Dodin (A1)

Count I **Not guilty**

Count II **Guilty**

Mervin Arnephy (A2)

Count III **Not guilty**

Count IV **Guilty**

Christopher Freminot (A3)

Count III **Not guilty**

Count IV **Guilty**

Helm Sounadin (A4)

Count I **Guilty**

Count II **Guilty**

Martin Arrisol (A5)

Count III **Not guilty**

Count IV **Guilty**

D. GASWAGA

JUDGE

Dated this 27th day of July, 2009.