

**IN THE SUPREME COURT OF SEYCHELLES**

**REPUBLIC**

**VS**

**NELSON PAYET**

**DOMINIQUE DUGASSE**

**CHRISTOPHER DUNIENVILLE**

Criminal Side No: 20 of 2009

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Ms. B. Confait along with Mr. D. Esparon

Principal State Counsel for the Republic

Mr. F. Elizabeth for the 1<sup>st</sup> and 2<sup>nd</sup> Accused

Mr. B. Hoareau and Mr. J. Camille for the 3<sup>rd</sup> Accused

**JUDGMENT**

**Burhan J,**

[1] The three accused in this case stand charged as follows;-

Count 1

Statement of offence

Aiding and abetting the trafficking of a controlled drug contrary to section 27(a) as read with section 5 and 26(1) (a) of the Misuse of Drugs Act (Cap 133) and punishable under section 29 of the Misuse of Drugs Act and the second schedule referred therein as read with section 23 of the Penal Code.

The particulars of the offence are that Nelson Payet, Dominique Dugasse and Christopher Dunienville on or about the 30<sup>th</sup> May 2009, with common intention aided and abetted Ernestine Isaacs to traffick in a controlled drug namely 536.1 grams of powder containing mono acetyl morphine which is an ester of morphine being a controlled drug.

[2] Count 2 in the Alternative to Count 1

Statement of the offence

Aiding and abetting the trafficking of a controlled drug contrary to section 27(a) as read with section 5 and 26(1) (a) of the Misuse of Drugs Act (Cap 133) and punishable under section 29 of the Misuse of Drugs Act and the second schedule referred therein as read with section 23 of the Penal Code.

The particulars of the offence are that Nelson Payet, Dominique Dugasse and Christopher Dunienville on or about the 30<sup>th</sup> May 2009, with common intention aided and abetted Ernestine Isaacs to traffick in a controlled drug namely 536.1 grams of powder containing mono acetyl morphine which is an ester of morphine being a controlled drug by selling, giving, transporting, sending, delivering or distributing, or offering to do any such acts.

[3] Count 3

Statement of offence

Conspiracy to commit the offence of importation of a controlled drug contrary to section 28(b) read with section 26(1) (a) of the Misuse of Drugs Act and punishable under the section 28 and 29 of the Misuse of Drugs Act and the second schedule referred therein.

The particulars of the offence are that Nelson Payet, Dominique Dugasse and Christopher Dunieville on or about 30<sup>th</sup> May 2009 agreed with one another and with another person namely, Ernestine Isaacs, that a course of conduct shall be pursued which, if pursued, will necessarily involve the commission of an offence by them under the Misuse of Drugs Act, namely the offence of importation of 536.1 grams of powder containing mono acetyl morphine which is an ester of morphine being a controlled drug.

[4] Count 4 in Alternative to Count 3

Statement of offence

Conspiracy to commit the offence of trafficking in a controlled drug contrary to section 28(b) as read with section 5, section 2 and section 26(1) (a) of the Misuse of Drugs Act and punishable under the section 28 and 29 of the Misuse of Drugs Act and the second schedule referred therein.

The particulars of the offence are that Nelson Payet, Dominique Dugasse and Christopher Dunieville on or about the 30<sup>th</sup> May 2009 agreed with one another and with another person namely, Ernestine Isaacs, that a course of conduct shall be pursued which, if pursued, will necessarily involve the commission of an offence by them under the Misuse of Drugs Act, namely

the offence of trafficking of 536.1 grams of powder containing mono acetyl morphine which is an ester of morphine being a controlled drug by selling, giving, transporting, sending, delivering or distributing, or offering to do any such acts.

All three accused denied the aforementioned charges and trial against the accused commenced on the 20<sup>th</sup> of August 2009.

### **The Evidence of the Prosecution**

- [5] The main prosecution witness Ernestine Isaacs a former accused in the case, testified that she was from Cape Town, South Africa and had met a person through a friend called Joe in South Africa who had asked her if she was willing to transport a quantity of drugs to another country for payment of a sum of 20,000 to 30.000 Rand. On the 29<sup>th</sup> of May 2009 she had gone with the person who had been introduced to her by Joe, to the Johannesburg International Airport and the person had given her a plane ticket, some money namely 100 US dollars, 100 Euros and Rs 300 and a pair of boots, with instructions that she should always wear her boots and pass through customs and never remove it as it contained drugs.. She had thereafter boarded the plane to Seychelles.
- [6] She had arrived in Seychelles on the 30<sup>th</sup> of May 2009 at 6.45 a.m. and had been stopped by customs, questioned and searched. Her boots had been taken for scanning as it had been noted by the officers that one sole was thicker than the other. She was informed that the scan had revealed that there was something inside the boot. Thereafter in her presence the boots had been

cut open and 6 packets were found, 3 inside each boot containing a powder. Witness identified in open court, exhibits P4 to P9 as the 6 packets containing a powder found in her boots. She had thereafter been taken to a police station. She informed the agents of the NDEA (National Drug Enforcement Agency) that she had been instructed that on arrival in Seychelles, she was to purchase a SIM card and contact Joe in South Africa on number 27761917455.

- [7] The officers had thereafter bought her a SIM card bearing number 592874 and asked her to make the call to South Africa to Joe which she did over the speaker with the agents of the NDEA listening in. She had informed the person at the other end everything was okay and she had been delayed as she had been driving around looking for a SIM card. Thereafter a number from Seychelles had called her back a few minutes later. The number given was 517742. A male voice at the other end had said he was aware she had problems at the airport. She had said everything was okay and she was on her way to the hotel. Thereafter the NDEA agents after giving her instructions had got a taxi down and sent her to the hotel "Le Surmer." The same number had called her around 1.00 pm and asked her if everything was okay and said they will be contacting her in two hours time. She had missed answering the next call which had come around 3.00 pm and had called back. She was told to wear her boots and that she was to take a taxi to where the caller was waiting. Around 3.00 pm another call had come and she was told a car was waiting for her outside. She had gone down and got in the passenger seat of the vehicle which she identified as the vehicle shown in photographs P10m and P10n.

[8] Witness identified the driver of the taxi as the 1<sup>st</sup> accused and thereafter he had driven her to a place where the 2<sup>nd</sup> and the 3<sup>rd</sup> accused had got into the vehicle after emerging from the surrounding bushes. She had handed over the boots to the 3<sup>rd</sup> accused who was seated behind her and the driver had taken out some money from the front compartment of the car and had given it to one of the persons in the back. The 3<sup>rd</sup> accused had got down from the vehicle and come next to her side and told her the money he was giving her was for the hotel. She stated he had given her one 500 Euro note and two 100 Euro notes. The 2<sup>nd</sup> accused too had given her money 4 SR 500 notes. She stated she had seen the 3<sup>rd</sup> accused before at the Etwatwa restaurant in Johannesburg airport about half an hour before boarding her flight. Both accused had got of the vehicle and gone in the direction of the sea. After that the driver of the vehicle had made a U turn and driven back with her but was stopped by the agents of the NDEA. Witness also identified photographs showing the road she was driven to that day and the place where the accused emerged from the bushes and got into the vehicle. She had handed over the money given to her by the 2<sup>nd</sup> and 3<sup>rd</sup> accused to the agents of the NDEA.

[9] Under cross examination she denied Joe was a fictitious character. She admitted she travelled with friends to many countries but denied she carried drugs. She denied it was her boyfriend who planned the whole transaction. She stated that when she received her boots back from the police they were sewn and she did not see what was inside. She stated when she got into the taxi she saw the face of the 1<sup>st</sup> accused. She stated she trusted Joe as she had known him for a long time. She had not asked the name of the person who had come with her to the airport in South Africa. She stated he was a friend of Joe who she trusted. She denied being a member of any drug gang.

[10] Witness Brigitte Valentine a customs officer gave evidence that she was on duty at the Seychelles International airport on the 30<sup>th</sup> of May 2009 at 5.00 am. She was placed at the green channel at the arrival terminal and had seen Ernestine Isaacs who had arrived on South African flight, Air Seychelles HM060. She had questioned her as she had only one hand luggage. She had handed her to Dorine Bristol who had conducted a search on her luggage. Witness Dorine Bristol stated she questioned Ernestine Isaacs and was not satisfied with her answers, as she had come to Seychelles with only one piece of luggage, not known the name of her friends she was going to stay with in Seychelles and had insufficient funds and therefore handed her over to her supervisor Mrs. Genila Valentine.

[11] Mrs Genila Valentine too not being satisfied with her answers had ordered a body search. She had been with NDEA agent Cathline Bell. Agent Bell had noticed when examining the boots that one sole felt a bit thick and was not smooth. They had got the assistance of agents Robinson and Legai and screened the boots and she had given orders after further questioning Ernestine Isaacs, to cut open the boots. Agent Adelaide had cut the boot in the presence of others and had found 3 packets of light brown powder in the sole of each boot. She identified the packets of powder P4 to P9 in open court as those found in the boot. Thereafter she had informed her manager Mr. Didon and the NDEA had taken over the investigation.

[12] Agent Cathline Bell too testified and corroborated the evidence of this witness. Agent Yvonne Legai's evidence too corroborated the evidence of Genila Valentine and he too stated the packets of powder were found in the boots. He had taken the boots with the 6 packets of powder to the office of

the NDEA and handed it over to Agent Terrence Dixie. He too identified the packets containing powder P4 to P9 as the packets he handed over to agent Dixie. NDEA agent Jimmy Adelaide also confirmed and corroborated the evidence given by these witnesses in respect of discovering exhibits P4 to P9 in the pair of boots taken from Ernestine Isaacs.

[13] Agent Terrence Dixie testified to the fact that he received the said boots with the 6 packets of powder from agent Yvonne Legai and had kept it in his personal locker to which he only had access. He had taken the exhibit on the 1<sup>st</sup> of June 2009 to the Government Analyst Dr. Jakaria and handed it over to him. After analysis the exhibits had been returned to him on the 9<sup>th</sup> of June 2009 sealed in a white envelope. Witness identified the white envelope P2. He identified the evidence envelope he had used to place the packets of powder in prior to handing it over to Dr. Jakaria as P3. He identified the packets of powder handed over to him by agent Legai and which he gave for analysis to Dr. Jakaria in open court as exhibits P4 to P9. He stated he had kept the exhibit after analysis with him and brought it to court personally.

[14] Dr Abdul Cader Jakaria the Government Analyst giving evidence stated that he received the exhibits relevant to this case from Lance Corporal Terrence Dixie which was a brown powder in 6 plastic sachets. He described in detail the tests conducted on the brown powder found in each of the 6 plastic sachets and found it to be a “ crude preparation containing minute, very, very small amount of mono acetyly morphine which is an ester of morphine.” He further stated that morphine is classified under the Act as a Class A drug and as mono acetyly morphine is an ester of morphine that would also be classified as a Class A drug. He further explained that the “starting material”



in the manufacture of illicit drugs is opium which contains alkaloids most significant in amount being morphine from which heroin is produced. He further stated by chemical processing that is by adding another chemical, this morphine is converted to di acetylene morphine which is heroin. In the process when the conversion is not complete and is half way mono acetylene morphine is obtained. He stated that the exhibits were kept in his personal custody in his safe throughout and no one else had a key to the said safe. He further stated that he had placed the exhibits after analysis in a white envelope, sealed it and given it back to Terrence Dixie. He examined the white envelope and stated his seals were intact. Thereafter after opening the envelope in open court, he identified the 6 sachets containing the powder as those analysed by him and produced them in court.

[15] Witness Ronny Alcindor a Sub Inspector attached to the finger print office testified to the fact that he had at the request of Sergeant Seeward photographed the scene at the Providence Industrial Estate. He produced 14 photographs he had taken in an album marked P10, as photographs P10a to photographs P10n and described the picture in each photograph.

[16] The other witness called by the prosecution Sergeant Seeward testified to the fact that he was informed of the detection at the airport and he had questioned Ernestine Isaacs in the presence of Lance Corporal Tirant and agent Legai. She had informed him she had got instructions to buy a SIM card and call her contact in South Africa and then she would be given instructions what had to be done next. Sergeant Seeward had decided to go ahead with the plan and had bought her a SIM card. She had called the number in South Africa from the NDEA office and had placed her phone on

speaker mode. The agents had listened to the conversation. The person at the other end had said a local person would contact her. She had got a call from number 517742 soon after, however they could not put the call on speaker mode. He had heard Miss Isaacs say, everything is okay she is going to the hotel. Sergeant Seeward had taken the boots and substituted the 6 packets of powder detected at the airport with some other substance and handed over the boots back to her. He had told her to text him if any contact was made with her.

[17] Thereafter she had gone to the hotel and the NDEA agents had been outside on the road. She had texted him again and said that number 517742 had called and said he was calling in two hours time. Again she had phoned him and said the same number had phoned and a person had informed her a taxi was coming to collect her. She had texted again and stated that she was wearing her boots. Thereafter Sergeant Seward had seen a blue Toyota 4 door Sedan bearing license number S1685. She had got into the car in the front passenger seat. He had recognized the 1<sup>st</sup> accused as the driver dressed in a yellow shirt. They had followed the taxi which had been driven fast and they had kept a distance behind.

[18] At Providance the vehicle had turned into the industrial zone. They had lost sight of the vehicle they were following. They drove towards the shipyard and saw the vehicle they were following come out of a side road where there were lots of Casurina trees. They had stopped the vehicle. When both alighted he noticed that Ernestine Isaacs was not wearing her boots. The 1<sup>st</sup> accused had said he had taken the lady to the other side. The phone in his hand began to ring and Sergeant Seward had noted the number was 583204.

He had told that the number belonged to one Dugasse. Ernestine Isaacs had told him she had given the boots to two persons who had come to the car and both persons had given her money. She had given the money to him one 500 Euro note, Two 100 Euro notes and four 500 SR notes. He produced the said notes as exhibits in the case and the phone used by the 1<sup>st</sup> accused as well.

[19] Thereafter he had interviewed the 1<sup>st</sup> accused and recorded his statement. After a *voire dire* in respect of the voluntariness of the said statement, by ruling dated 24<sup>th</sup> November 2009 the statement of the 1<sup>st</sup> accused was declared admissible as evidence, as it had been proved beyond reasonable doubt that the statement had been obtained voluntarily. The statement was marked as P13. Lance Corporal Tirant further corroborated the evidence of Sergeant Seeward.

[20] Documents P14 and P15 produced by the prosecution show that the 3<sup>rd</sup> accused and witness Ernestine Isaacs arrived together to Seychelles on flight HM060 on the 30<sup>th</sup> of May 2009. The other witness called by the prosecution was Mr. Doffay from Cable and Wireless He produced the phone records of telephones 583204, 592874 and 517742. Thereafter the prosecution after leading the evidence of witness Superintendent Cedras closed their case.

### **The Evidence of the Defence**

[21] All three accused in defence gave unsworn statements from the dock.

The defence of the 1<sup>st</sup> accused is basically that he was asked to transport the lady and that was all he did. It is to be noted that the first accused in his

statement from the dock admits he drove a fat lady to Gondwana in Providence. He admits putting his hand in the lower compartment and taking money from the compartment. He admits been stopped by the police officers. He admits in his statement that questions were asked about the “shoes”. He admitted he wished to cooperate so he gave a statement.

[22] The defence of the second accused too is that his boat was used only for transport purposes that day. He admits he was instrumental in hiring a taxi to pick up a lady from Anse Etoile. He admits he got into the taxi but states it was to pay the taxi fare.

[23] The third accused admitted he was on the same flight from South Africa witness Isaacs had come on. He stated he thereafter flew to Praslin. He denied he knew the 2<sup>nd</sup> accused or the 1<sup>st</sup> accused. He further stated that the witness Isaacs who recognised him said he had no identifying marks like tattoos on him. He proceeded to show in open court the tattoos in both hands and stated if it was he who was present, she would have definitely seen and identified the tattoos on his arms.

Thereafter the defence closed its case and both parties made submissions.

### **The Law**

[24] Section 27 (a) of the Misuse of Drugs Act Cap 133 reads as follow:-

*“A person who -*

a) *aids, abets, counsels, incites or procures another person to commit an offence under this Act is guilty of an offence and liable to the punishment provided for the offence and he may be charged with committing the offence.”*

[25] ***Archbold Pleading, Evidence and Practice in Criminal Cases 42<sup>nd</sup> edition at page 2307*** onwards states that aiders and abettors are those who are present at the commission of the offence, and aid and abet its commission. It requires the presence of the person such presence may be either actual or constructive, it requires participation in the act which may be direct or indirect participation and such participation should be the result of a concerted design to commit a specific offence. It is settled law that aiding and abetting is a separate and distinct offence and that a person may be convicted of abetting an offence even though the principal offender has been acquitted.

[26] Trafficking of a Controlled drug is set out in section 2 (a) of the Misuse Use of Drugs Act and means selling, giving, administering, transporting, sending, delivering or distributing of a controlled drug. Section 14 of the said Act refers to the rebuttable presumption of trafficking in relation to the quantity of a controlled drug found in the possession of a person.

[27] Section 23 of the Penal Code reads as follows:-

*“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such nature that its commission was*

*a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”*

[28] The established principles in regard to common intention are that it envisages a sharing of similar intention entertained by the accused persons. Common intention requires a common meeting of minds or a sharing of similar intention before the offence is committed. Common intention could be proved by showing the conduct of the two accused, that the two accused by reason of actually participating in the crime, some overt or obvious act, active presence, pre plan and preparation as well as immediate conduct after the offence was committed. Thus the preceding, prevailing and succeeding conduct of the accused could be analysed to determine whether they acted with common intention.

[29] It does not necessarily mean that the prosecution should always prove an express or pre arranged plan before the act. The arrangement may be tacit and common intention conceived immediately before it is executed or on the spur of the moment and even after the offence has commenced.

### **Corroboration of the Evidence of an Accomplice.**

[30] It is in evidence that witness Ernestine Isaacs was the person who had imported the drug into the Seychelles. She was formally an accused in the case. Thereafter charges were withdrawn by the prosecution and she was subsequently called as a prosecution witness in terms of section 61A of the Criminal Procedure Code (Cap 54) as amended by Act No 4 of 2007. Her evidence has to be therefore considered as that of an accomplice. It is an

established rule of law that it is dangerous to convict on the evidence of an accomplice unless it is corroborated. ***Archbold Pleading, Evidence and Practice in Criminal Cases (supra) 1143.***

- [31] When one looks for corroboration in respect of the evidence of witness Ernestine Isaacs, her evidence that she was detected attempting to bring in a quantity of controlled drug concealed in the boots she was wearing, is corroborated by the evidence of the customs officers and that of the NDEA agents who were on duty at the airport on the 30<sup>th</sup> of May 2009. The fact that she made a telephone call from her phone bearing number 592874 to her contact in South Africa is corroborated by the evidence of NDEA agent Seeward who was listening in on the speaker and by the telephone records produced marked P20. The conversation she had with the person in South Africa is corroborated by the evidence of NDEA agents who were listening in at the time. Her evidence that soon after her call to South Africa she received a call from the Seychelles number 517742 is corroborated by the phone records marked as P21.
- [32] Her evidence in respect of the calls received from number 517742 thereafter and the times she received the calls stand corroborated by the phone record marked P21. Her evidence that she was told that a vehicle would come to collect her and take her to the person she was to deliver the drug to, is corroborated by the fact that in fact a vehicle driven by the 1<sup>st</sup> accused did arrive and she boarded the said vehicle. This was being observed by the NDEA agents who were stationed outside the hotel and who she was keeping informed by texts from her mobile phone. Prior to boarding the said vehicle her evidence shows she had informed Agent Seeward that a vehicle

was coming to collect her and she had been asked by to wear her boots. All this evidence is corroborated by agent Seeward himself.

[33] Her evidence that the 1<sup>st</sup> accused was driving the taxi is corroborated by the evidence of the NDEA agents who were stationed outside the hotel and who began to follow the vehicle as it proceeded at a speed towards Providance. Her evidence that she handed over the boots to the 3<sup>rd</sup> accused and received payment for same is corroborated by the fact that soon after she had done so and received the money the NDEA agents had stopped the vehicle and the boots had not been in the vehicle and witness Ernestine had handed over the money she describes she received from the 2<sup>nd</sup> and 3<sup>rd</sup> accused to the Agents of the NDEA which was produced as exhibits in the said case. It is clear that when she was searched at customs she did not possess such sums of money nor was such sums of money given to her by the agents of the NDEA prior to her meeting the accused. The fact that she did meet the 1<sup>st</sup>, 2<sup>nd</sup> and the 3<sup>rd</sup> accused during that particular time when the NDEA agents lost sight of her at Providance is not denied by the 1<sup>st</sup> and 2<sup>nd</sup> accused in their unsworn statements from the dock. In fact the 1<sup>st</sup> and 2<sup>nd</sup> accused, admit they were present. Therefore this court is satisfied that the material facts in the evidence of witness Ernestine Isaacs an accomplice stand corroborated and her evidence can be accepted by court.

### **Analysis of the Evidence and Conclusion**

[34] The three accused made statements from the dock. The value of a dock statement was considered in the case of *R. v. Campbell 69 Cr. App. R. 221* which held:



*“A statement from the dock is not, of course, evidence. It is, as many think – the fact that a defendant is still at liberty to make a statement of fact from the dock, invite a jury to consider his version of the facts without taking the oath and without subjecting himself to cross-examination – an anomalous historical survival from the days before the Criminal Evidence Act 1898 when a person could not give evidence on his own behalf. There it is anomaly or not; the courts have to grapple with it and a statement from the dock unsworn now seems to have taken on in current practice a somewhat shadowy character half-way in value and weight between unsworn evidence and mere hearsay. A jury cannot be told to disregard it altogether. They must be told to give it such weight as they think fit, but it can be properly pointed out to them that it cannot have the same value as sworn evidence which has been tested by cross-examination.”*

- [35] When one considers the evidence in this case as set out earlier the evidence of the principal prosecution witness Ernestine Isaacs stands corroborated by independent evidence and by documentary evidence. In fact several facts mentioned by her namely the fact that the 1<sup>st</sup> accused was the driver of the vehicle in which she was transported to deliver the said controlled drug is admitted by the 1<sup>st</sup> accused. The fact that they were physically present at the time the controlled delivery was made has been admitted by the 1<sup>st</sup> and 2<sup>nd</sup> accused in their unsworn statements from the dock. The evidence of the witness Ernestine Isaacs was fully tested by intense cross examination and firmly withstood all the rigors of cross examination as well. Her evidence clearly establishes the fact that the 2<sup>nd</sup> and 3<sup>rd</sup> accused were the recipients in

the delivery or distribution of the controlled drug and had paid cash for her efforts in delivering or distributing the controlled drug to them.

[36] The evidence of this witness establishes the presence of all three accused, their participation in the act of transport and delivery of the controlled drug and that such participation was the result of a concerted design to commit a specific offence namely the trafficking in controlled drug. When one considers the evidence of the prosecution the manner in which the vehicle with witness Isaacs inside went directly to a specific location without any instructions or payment been given by witness Isaacs and the stopping of the vehicle for the other two accused to emerge from the bushes and get into the said vehicle, all this evidence clearly illustrates a pre arranged plan between the three accused to meet up and take delivery of the controlled drug from Ernestine Isaacs.

[37] It is clear from the evidence that all three accused were unaware that the delivery was a controlled delivery being made by Ernestine Isaacs in collaboration with the officers of the NDEA. It was for this reason that repeated calls were being made giving details of how the delivery of the controlled drug stashed in the sole of the boots was to be made. The fact that cash was handed over to witness Ernestine at the point of delivery by the 2<sup>nd</sup> and the 3<sup>rd</sup> accused for the boots, clearly indicates that they were aware and had the knowledge of the contents of the boots being controlled drugs and were unaware that the officers of the NDEA had substituted same. Considering the entirety of the evidence before court it cannot by any stretch of imagination be said that the money paid by the accused was for the innocent purchase or delivery of a pair of boots.

[38] In the case of *National Coal Board v Gamble (1958) 3AER 203 at page 207 Devlin J held:-*

“..... aiding and abetting is a crime that requires proof of mens rea, that is to say, of intention to aid as well as knowledge of the circumstances and proof of the intent involves proof of a positive act of assistance voluntarily done.”

[39] The positive acts of the 1<sup>st</sup> accused in this case in voluntarily transporting the accomplice Ernestine Isaacs to the said location where the other two accused emerged from the bushes and boarded his vehicle, clearly shows the intention to aid and abet in the said trafficking of the controlled drug by all the accused. His removal of money from the front compartment and the handing over of the money to the other accused in the back seat of the vehicle clearly shows a positive act of assistance voluntarily done by him proving intent to aid and abet the said offence.

[40] In the case of *Republic v Wilby Robert Crim: Side 8 of 1991 Perera J* held the extent and degree of the abettor's activities and their proximity to the actual crime would determine the intention or knowledge in proving the charge of abetting.

[41] The payment of money by the 2<sup>nd</sup> and 3<sup>rd</sup> accused to the accomplice Ernestine Isaacs and the acceptance of the boots in which was believed by them to contain a controlled drug clearly indicate the intention of the 2<sup>nd</sup> and 3<sup>rd</sup> accused to aid and abet the trafficking of a controlled drug.

[42] With regard to the identity of the 3<sup>rd</sup> accused at the scene of delivery witness Isaac positively identifies him as after he had got down from the car, he had stood near the window of the front passenger seat where she was seated and had spoken to her. It is clear being in such close proximity to her and travelling in the same car it would have been possible for witness to have identified him. She further stated that this was not the first time she had seen him as she had seen him earlier at the restaurant at Johannesburg airport. It is apparent that by wearing glasses at the scene of delivery he was attempting to look different as such he would have also taken steps to conceal the obvious tattoo marks on his arms.

[43] For the aforementioned reasons this court is satisfied that the prosecution has successfully proved beyond reasonable doubt all the essential ingredients in the alternative count 2 in the charge sheet.

[44] With regard to the charge of Conspiracy to traffick in a controlled drug as set out in the alternative count 4, in the case of ***R v Anderson [1986] AC at page 39 para E, Lord Bridge stated;***

*“But beyond the mere fact of agreement, the necessary mens rea of the crime is, in my opinion, established if, and only if, it is shown that the accused, when he entered into the agreement, intended to play some part in the agreed course of conduct in furtherance of the criminal purpose which agreed course of conduct was intended to achieve. Nothing less will suffice; nothing more is required.”*

[45] When one considers the series of phone calls received by witness Ernestine Isaacs in regard to the delivery and the conversations between the caller and the called, it is clear that they agreed on a course of conduct which was in furtherance of a criminal purpose which was to eventually achieve the delivery of the controlled drug. It is also in evidence that the course of conduct agreed on the phone was pursued by the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> accused and resulted in the delivery of controlled drug to the 2<sup>nd</sup> and 3<sup>rd</sup> accused. It is to be noted that the substitution of the controlled drug by the officers of the NDEA does not in any way affect the case as for all purposes the evidence shows the accused were unaware of the substitution and controlled delivery and believed the boots contained the controlled drug.

[46] Further it is to be noted that the caller though not identifying himself had made all the arrangements necessary for witness Isaac to bring the boots containing the controlled drug and had agreed with her and given instructions to her that the vehicle would bring her to him for the delivery of the boots containing the controlled drug which actually in fact did happen.

[47] Furthermore the chain of evidence in respect of the exhibits taken into custody at the airport, analysed and produced in court has been established in detail by the prosecution. Dr. Jakaria evidence satisfies court beyond reasonable doubt that the 6 plastic sachets of powder found in the boot contained quantities of a controlled drug namely mono acetyly morphine an ester of morphine classified in the schedule as a Class A drug. It is to be noted that after the prosecution amended the charge an opportunity was given to the defence by court to recall any witness if necessary. The defence informed court it was not necessary to do so.

[48] For the aforementioned reasons when the evidence is taken in its entirety, this court is satisfied that the prosecution has succeeded in proving beyond reasonable doubt all the essential ingredients contained in the alternative charge 4 of the charge sheet.

[49] In the strength of the sworn corroborated evidence of the prosecution witnesses and for the reasons contained herein, this court is satisfied that the defence of all the accused as set out in their unsworn statements is self serving and bears no merit.

[50] Therefore this court proceeds to find the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused guilty on counts 2 and 4 and proceeds to convict them of same.

**M. BURHAN**

**JUDGE**

Dated this 01<sup>st</sup> day of December 2010