

IN THE SUPREME COURT OF SEYCHELLES

REPUBLIC

VS

LIVETTE ASSARY

Criminal side no: 19 of 2009

Ms. S. Aglae for the Republic

Mrs. Amesbury for the Accused

JUDGMENT

M. Burhan, J

The accused in this case Livette Assary has been charged as follows;

Count 1

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

The particulars of the offence is that Livette Assary on or about

the 6th of May 2009 agreed with other persons namely Nelson Larue or another person known to the prosecution as “Tony” that a course of conduct shall be pursued, will necessary involve the commission of an offence by them under under the Misuse of Drugs Act, namely the offence of importation of 148.5 grams of Heroin (Diamorphine).

Count 2

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

The particulars of the offence is that Livette Assary on or about the 6th of May 2009 agreed with other persons namely Nelson Larue or another person known to the prosecution as “Tony”, that a course of conduct shall be pursued, will necessarily involve the commission of an offence by them under the Misuse of Drugs Act, namely the offence of trafficking in 148.5 grams of Heroin (Diamorphine).

The accused was earlier formally charged with two other accused namely Nelson Larue and Freddy Nibourette. Thereafter charges were withdrawn by the prosecution against Nelson Larue who was subsequently called as a prosecution witness in terms of section 61A Of the Criminal Procedure Code Cap 133 as amended by Act No 4 of 2007. During the trial, the prosecution withdrew charges against the 2nd accused Freddy Nibourette as well, resulting in him being discharged too. The case thereafter proceeded against the accused Livette Assary only.

The Evidence of the Prosecution

The prosecution opened their case with the evidence of Government Analyst Dr. Jakaria who stated under oath, that he had received the exhibits from this case from Sergeant Seeward and had analysed the light brown powder found inside the 3 sachets which were inside a HP Laser-jet 12A printer cartridge. His conclusion was that all three sachets contained powder which was illicit Heroin. The purity was 33% and the total weight was 148.5 grams. His report confirming his findings was marked as P2. Thereafter he had placed the exhibits in an envelope, sealed it and handed it back to Sergeant Seeward. The sealed envelope was identified by witness and he identified in open court the exhibits inside, as those tendered to him for analysis. During cross examination of this witness, learned counsel for the accused, highlighted the difference in weight of the controlled drug stated in the charge sheet and affidavit and the analyst's evidence and report. Learned counsel for the prosecution thereafter with the consent of court, amended the quantity of controlled drug mentioned in the charge sheet.

The main witness called by the prosecution Mr. Nelson Larue, testified to the fact that prior to his involvement in this case, he was a driver/messenger employed at SIBA (Seychelles International Business Authority). He stated that, he was arrested in connection with this case and had given two statements to the police whilst in their custody. He further stated, he had known persons by the names of Wayne and Tony and had known them personally. He had thereafter on their

instructions, prior to the incident in this case, delivered a parcel to the aforementioned Wayne, which was kept on his table at his workplace and which was addressed to his boss Mr. Steve Fanny, Director SIBA. The parcel had arrived in the Seychelles and had been delivered through Fed Ex. He stated he was aware this parcel which he delivered to Wayne, contained Heroin as it was opened before him. He had been given one portion of the contents of that parcel to sell and keep the money and another portion of the contents of the parcel was given to him by Wayne, with instructions to sell it and give the proceeds back to Wayne. Witness stated he had done so. He had had a balance of Rs 15,000 which he had on the instructions of Wayne, handed over to the accused Livette Assary. He had on instructions of Tony thereafter given a sum of Rs 25,000 to the accused Livette Assary and had been instructed by phone that another consignment would come and he could get his money back. Livette Assary had thereafter told him when he gets the other parcel (relevant to this case) to give it straight to her (Vide page 9 of the proceedings of 13th August 2009 1.45pm). She had stated to him that when he delivers the parcel, another person whom they could trust would be with her. Witness stated thereafter, he had been informed the said parcel was already in Seychelles. This parcel too like the earlier parcel had been addressed to his boss Mr. Steve Fanny. The next Monday he had received a call from Mr. Fanny's secretary who had told him there was a paper to collect for Mr. Steve Fanny at Fed Ex office. He had collected the paper from Fed Ex and had taken it to the office. Mr. Steve Fanny had checked the paper and said he was not aware that anything was coming from Fed Ex. Witness had accompanied Mr. Steve Fanny to the Fed Ex office, left him there and returned back.

On Tuesday, the next day, witness had received the papers and money from the company, to pay for clearance of the said parcel.

He had done so about 3.00pm and had taken the parcel back to office. As he had alighted from his vehicle, he had been arrested by police officers and he and the parcel were taken to the New Port office of the NDEA (National Drug Enforcement Authority). He had told the police officers he presumed the parcel contained Heroin and had been sent by one Tony. An officer had opened the parcel in his presence and found the plastic bags containing the powder. He had told them he was delivering the parcel to another and had agreed to cooperate with them. Thereafter he and the parcel had been detained and he had made a call in the presence of the police officers to Livette Assary. He had informed her that he had collected the parcel and that he would be delivering the parcel to her and for her to ask the other person to come over tomorrow. She had said it is not safe to talk on the phone and to meet her in town the next day and talk the matter over (vide page 12 of the proceedings of 13th August 2009 1.45pm). The next day he phoned her but she had not answered but she had called back and arranged a meeting at the Stadium car park. Finally they had agreed to meet at the Independence House car park. She had come in her bus and he had got down from his vehicle and got into her bus. He had stated he had the parcel and agreed to deliver it to her at her house at Anse Aux Pins, when he got his lunch break that day. After leaving the car park he had gone back to the NDEA office. He had received another call from the accused who had stated she would be home around 1.30pm as she was going to Beau Vallon.

Thereafter the police had handed the parcel back to him for delivery (controlled delivery) to the accused. Whilst on the way to Anse Aux Pins, he had phoned the accused. She had said she was on the way home from the airport. When he arrived at Anse Aux Pins he saw the accused bus parked inside her house. He had stopped his car in front of her gate disembarked opened the gate and driven in. He had disembarked with the parcel in his

hand and the accused had come and guided him in the house. He had thereafter gone into the house while the accused had locked the gate. She returned and guided him into a room and had seated him on a chair. Around 2 minutes later she had come back with the Mr. Freddy Nibourette. Witness had removed the parcel and had placed it on the table and as they were opening the parcel, there was a knock on the door and on the accused opening the door, 3 to 4 persons came in and identified themselves as police officers. When the police arrived, the accused had told the police officers that the parcel belongs to her and contains a cartridge which she had asked Mr. Larue to buy for her from town. The police officers had thereafter opened the parcel in her presence and shown the three plastics containing the powder. Witness identified P4, the carton box P5, the black plastic and the printer cartridge as P6 and P7 a, b and c, the three plastic packets containing the Heroin powder.

Another witness called by the prosecution Sergeant Seeward of the NDEA (National Drug Enforcement Authority), testified that on the 5th of May 2009, while he was on duty with Inspector Francois and Brian Nicette, around 3.00pm at the cargo terminal at the airport, they had observed Nelson Larue coming from the cargo terminal with a box in his hand and getting into his car which was parked in the airport and drive towards town on the highway road. When Mr. Nelson Larue had reached Animal Food Factory, he had turned and proceeded towards the Coast Guard. He had then driven into the SIBA building and parked his vehicle in the car park. He had thereafter alighted from the car with the box in his hand. They had approached him and identified themselves as police officers and asked him to accompany them to the NDEA office. Witness had taken charge of the box. Nelson Larue on being questioned by them at the NDEA office had

stated there was a cartridge inside which contained what he suspected to be drugs. Witness had opened the box in the presence of Mr. Nelson Larue and had noticed there was a black plastic bag which he cut open, finding the cartridge inside. He noticed a piece of carbon paper round the cover. He had removed the cover and the carbon paper and then discovered the three plastic packets with powder inside. Mr. Larue had accepted it was drugs and that he was going to deliver it later on. He further stated he had the phone number of the person to whom it was to be delivered to and said he was going to contact that person the same night. He thereafter had taken the call with the speaker switched on in the presence of the NDEA officers. A woman's voice had answered and he had said "he had already collected that thing" and asked when he could come to deliver it. The voice had replied not to talk about it now but to do so the next day. Thereafter witness had taken over the exhibit and locked it away. Mr. Larue had thereafter voluntarily agreed to assist the NDEA. On the next day i.e. 6th of May around 1.00pm witness had received instructions from the Inspector to bring back the cartridge box and hand it back to Mr. Larue. Witness stated all items were intact inside the box, when he handed it back to Mr. Larue who got in contact with the person to deliver the parcel. Mr. Larue had gone in his office uniform and car to deliver the parcel while witness, Inspector Francoise and Agent Nicette followed behind in their vehicle. Mr. Larue had been alone in his vehicle. They had driven South and on reaching Anse Aux Pins police station, Mr. Larue had turned and driven inside the gate of a house. The police officers who were observing had seen a lady who was identified as the accused Livette Assary come and talk to him at the door. They had not heard anything what was said as they were not within hearing distance. Then Mr. Larue and the lady had walked into the house. After some time the lady came outside and closed the gate and went back inside the house and

closed the door. Witness together with the other officers had thereafter gone up to the gate and noted it was padlocked. They had taken a cutter and cut the padlock. They had thereafter entered the house and entered a room which was a bedroom and which had a bed and a table with two persons sitting at the table. The two men were identified as Mr. Larue and the Mr. Freddy Nibourette (the earlier 2nd accused). The accused was standing at the entrance to the room and on the table inside the bedroom was the black plastic bag with the cartridge inside and witness further stated there was another empty chair at the table. The cartridge had been removed from the box. Witness had asked to whom the cartridge was for and the accused had replied it was hers and that she had told Nelson to buy it. She had also told them the printer was being repaired and told them the name of the place which witness says he could not recall. Thereafter the police had opened the cartridge in the presence of all 3 persons and showed them the contents and placed them under arrest. They had found money in the hand bag of the accused which witness produced in court totaling 2000 US dollars 60 Euros and 3000 Seychelles Rupees. Witness had taken the exhibits and sealed it in an envelope and kept it in his possession and thereafter brought it together with the request form to the Government Analyst Dr Jakaria. Dr. Jakaria had after analysis, sealed the exhibits and returned it back to him.

Witness too identified the request form P1 the report P2 in open court. He further identified the exhibits taken into custody by him as carton box P4, black plastic bag P5, cartridge P6 and the 3 plastic bags containing the brown powder identified as Heroin, as P7 a, b and c. He further identified the evidence envelope as P8 and the money taken into custody was produced through this witness as P9.

Witness agent Annie William of the NDEA stated she was placed on surveillance on the 6th of May around 10.15 am at the car park opposite Independence House and observed a white Sirion enter the car park and park behind a white bus in which a lady who she identified as Livette Assary was sitting in the front driver's seat. Mr. Nelson Larue had alighted from his white car and had entered the bus and sat in the front passenger seat and spoken to the lady. Mr. Larue had spoken to her for about 10 to 15 minutes and then left in his vehicle. She stated she had not heard what they were speaking about. She said she was unaware that the meeting was for the purpose of handing over the baby clothes the accused had stitched for the wife of Mr. Larue who had had a baby on the 6th of May.

Witness Kenny Albert testified that he worked with Air Seychelles Courier Service Fed Ex for the past 3 to 4 years. He had noticed a box addressed to Mr. Steve Fanny c/o SIBA and that there was a difference in the airway bill and the invoice, as on the airway bill was written toner while on the invoice was written CD. He had been instructed to call the telephone number written on the box and on the following Monday had spoken to a man who identified himself as Mr. Steve Fanny. He had told them that he would send his driver to collect the parcel and to keep the parcel along with the other documents in their office. Around 11.35 a.m a man had come saying he had come to pick up a document for Mr. Steve Fanny. He had signed on the airway bill and put his name in capitals, the date and time. The airway bill was marked as P10. Witness stated the person took the pending slip and invoice and went away. Thereafter around 1.30 pm Mr. Steve Fanny came to the office having in his hand the pending

slip and the invoice and stated that he had received this from his driver but had not ordered anything from Uganda. Witness had explained to Mr. Fanny about the call he had made and about the person who had stated he was Steve Fanny and informed him that he was sending his driver. Mr. Fanny had thereafter attempted to check who the owner of the telephone number given on the airway bill was with Cable and Wireless but had been informed as it was a prepaid number no records were being maintained. He further stated that the person who sends the parcel, has to fill both the invoice and the airway bill. According to the airway bill the senders name was not clear but the companies name was Las Vegas Logistics Kampala Uganda. Tel No 0712533664. The person to whom it was sent and was to receive it was Mr. Steve Fanny Tel No 248512992. Both documents were sent with the parcel. He stated that if the airway bill is addressed to Mr. Fanny then the invoice should also be addressed to him. According to witness the discrepancy between the airway bill and the invoice was only in respect of the item toner and CD he did not recall any other discrepancies.

Mr. Steve Fanny, the Managing Director of SIBA testified that he received a call from his secretary stating that someone by the name of Mr Hoareau from Fed Ex had called stating there was a parcel addressed to this organization that had to be collected. His secretary had sent his driver to collect the documents and thereafter his accountant had seen something strange as one document stated the parcel contained CD's while another yellow paper stated it was toner. As they always ordered their toner from Singapore and not Uganda from where the parcel had come and as he could not recall the name of the person who had sent it, he had gone to Fed Ex personally. He gathered from the conversation with the officers of Fed Ex that when they phoned the telephone number on the documentation that somebody had

posed of as himself. This had aroused his suspicions and thereafter he had called Mr. Govinden the Attorney General and informed him of everything and had been directed to Mr. Winsley Francoise of the NDEA. The NDEA had thereafter given instructions to him to ask Mr. Nelson Larue to collect the parcel himself.

He categorically stated that he read the invoice and it was addressed to Mr. Steve Fanny (vide pg 31 of the proceedings of 17th November 2009. 9 am). He stated that as hundreds of mail would arrive for SIBA, he could not check and collect all, so his driver Mr. Nelson Larue was assigned to perform that duty. They had only one driver/messenger at SIBA. He denied the telephone number 512992 was his.

Assistant Superintendent of Police Mr. Winslow Francoise gave evidence that Mr. Steve Fanny had contacted him by telephone in respect of a suspicious parcel that had arrived at Fed Ex. His evidence also gives details in respect of Mr. Larue being detected collecting the parcel containing Heroin from the airport. He further stated that at the NDEA office Mr. Larue, had agreed to cooperate with the investigation and had had a telephone conversation on speaker with a lady in respect of the parcel in their presence. He also testified and gave details of the controlled delivery and the arrest of the accused. He stated that one Wayne Jeffrey was also interviewed but was not involved in this particular case. According to his investigations it was Tony Durand who was living abroad who was shipping the consignment of drugs to Seychelles. He further stated that during his investigation, they had they had met Brigitte Durand who was also living in the house of Livette Assary. He admitted

she was suffering from cancer and had informed them she was married to the son of Livette Assary, Richard Assary. Witness further stated under cross examination that Brigitte Durand had informed them Tony Durand was her brother. He stated that all the money taken from Brigitte Durand during the detection was returned back to her. He admitted although he had mentioned in his affidavit the weight of the drugs was 160 grams which was an approximate value, the correct weight was obtained from the laboratory. He denied the drug was substituted with a pink powder during the detection. They had not put an officer in Mr. Larue's vehicle as he was expected to come alone. He stated the drugs were given back to Mr. Larue prior to the controlled delivery. His evidence corroborates the evidence of Mr. Larue and Sergeant Seeward in respect of the controlled delivery and the arrest of the accused He further stated that Brigitte was not in the room with the others when they entered. He too stated that the accused Livette Assary had stated the cartridge was hers and she had asked Nelson to buy it. He further stated that dogs with dog handlers were brought in to search the house but nothing else was found. The accused were arrested and the drugs were handed over to Sergeant Seeward.

Thereafter the prosecution closed its case.

The Evidence of the Defence

The accused in defence, gave evidence under oath and admitted that she lives at Anse Aux Pins and that she was a seamstress who was self employed. She further stated she had a video shop and had run a take-away. She stated she had ended her video rental business in April 2009 and had advertised to sell her stock of 400 videos. Freddy Nibourette had come to see what she had to offer as he wanted to start a similar business in Praslin. Her licence for the video rental shop was marked as D2. She stated

she knew Mr. Nelson Larue as he was a client as she was making baby clothes for him as his wife was expecting a baby. She admitted agreeing to meet and meeting Mr. Larue at the car park on the day mentioned opposite independence house and stated she had a business conversation regarding the baby clothes with him. She had stated she had not bought the baby clothes with her as she does not do "half delivery" and that he would have to come to her house at Anse Aux Pins to collect it. She had called him when she was near the airport and informed him that she was on her way home. He had stated he would be there. She stated that when Nelson arrived, the door and gate were open as she had just arrived from town. She denied that the door was closed or that the gate was padlocked. Nelson came in while she was talking to Brigitte and she had said "hi Nelson" and did not have time to say anything else because the house was suddenly full of men. She said there was about twenty of them. She further stated that Winsley Francois, Seeward and an Irishman by the name of Neil were present. The Irishman had taken the package which was under Nelson's arm and had asked Nelson "what is this". She stated he then pulled from the box a small cartridge and a small plastic roll like an ice-pop containing a pinkish red powder. She stated what was produced in court was not shown to her at her house. She had been asked by Neil what was Cocaine doing in her house. She could not reply as she was in shock. He had said she has to say it is hers otherwise she would get 15 years imprisonment. She had finally replied, it was not hers and that she knew nothing about it. She stated he had thereafter left the house and further stated that there was only one dog "a small beautiful puffy dog" which was present. They had searched the house with her permission and Mr. Francois had emptied her bag on the floor. She admitted that the money was found in her bag. They had taken her computer, her CD pouch with instructions inside and another CPU unit. The "Nation" paper which she had placed her advert in respect of the CD's

was marked as D3. She further stated that she knew Mr. Nelson Larue and the whole family. She stated Brigitte Durand was her daughter in law married to her son and that Brigitte was sick with cancer. She admitted that Nelson called and said that Tony Durand wanted him to give money to Brigitte. The money Nelson brought she stated was from Tony to his sister Brigitte who was terminally ill. Thereafter she was arrested and taken to the NDEA office at New Port. She denied that she was expecting DVD's from Uganda as she usually got them from Malaysia. She stated that no package was delivered to her by Nelson on the 5th of May or at the car park. She stated she was not expecting any package from Nelson and that Nelson's evidence that she was dealing with drugs was a lie. She stated Nelson never spoke to her about a package and denied the suggestions of counsel for the prosecution in regard to her involvement in the importation of the controlled drug. She stated her rights were not explained to her at the time she was arrested and she was not allowed to speak to her lawyer.

The accused called Jerry Cution a carpenter and mason who worked regularly for the accused Livette Assary. He stated on the day of the detection when he arrived at her place, he saw police officers. He further testified that no gate or door was broken and that the door was not barricaded with car seats which he stated were in the bus. Under cross examination he admitted he was not employed by her but had stayed at her house for a long time. He admitted he was not present when the police arrived as he had gone to get his food and when he left Mrs Assary was not present but when he returned she had arrived. Thereafter the defence called Marcel Naiken a dog handler attached to the NDEA and another dog handler Daniel Delcy called by the defence gave detail evidence in respect of

how dogs were trained to detect drugs. Mr. Delcy stated on that day he had been accompanied by Jeffrey Celestin and had come in their own transport to the house of Livette Assary. They were instructed by ASP Francoise to get the dog to search the house for drugs. Witness stated nothing was found. It is apparent that there were no notes kept by him of the search conducted that day. From his evidence officers Francoise and Seeward were outside the house during the search. Yet another dog handler Jeffrey Celestine called by the defence corroborated his evidence. Thereafter the defence moved to recall witness Nelson Larue. The court by its ruling dated 1st March 2010 declined the application. Thereafter counsel for the accused closed her case and both counsel tendered submissions.

Analysis of the Evidence

Having thus carefully considered the evidence before court, it is clear considering the evidence and the suggestions made during the cross examination of the witnesses that the accused denies any involvement in the importation or trafficking of the controlled drug in this case namely 148.5 grams of Heroin (Diamorphine).

Learned counsel cross examined witnesses at length in respect of the special treatment meted out to witness Mr. Larue who was formerly an accused in this case. It is clear that Mr. Larue's evidence should be treated as that of an accomplice as he admits his involvement in the importation of the said controlled drug. He stated that he was accompanied by officers of the NDEA for his safety as he expected a threat not from the accused but from her relations. It is clear that his evidence was vital for the prosecution to establish their case and it is understandable that considering the nature of the case, involving controlled drugs,

that it was necessary that suitable protection be given for such a witness on his way to and from court. Witness categorically denies the defence suggestion he was given a pardon by the police as they wanted him to implicate the accused Livette Assary. In fact the evidence of the prosecution or defence does not show any motive or reason for the officer's of the NDEA to specially implicate or target Livette Assary who it appears was unknown to them. Furthermore the witness categorically states he was given his liberty not to implicate Livette Assary but to tell the truth and proceeds with his evidence, candidly showing his involvement in both importations.

The defence further suggested that the said parcel was intended for Mr. Steve Fanny and attempted to show a connection between him and witness Larue by insinuating that Mr. Steve Fanny's girlfriend was Mr. Larue's sister. The evidence however clearly shows that even though the parcel was addressed to Mr. Steve Fanny, it was Mr. Steve Fanny himself who suspected something was wrong as he was not expecting a parcel containing toner from Uganda and had personally gone over to Fed Ex to check it out and on seeing that someone had posed of as him, on a mobile telephone number which was not his, he had immediately got in touch with the Attorney General and thereafter on instructions, with the officers of the NDEA. The defence contention that the parcel was in fact for Mr. Steve Fanny therefore bears no merit at all.

The defence further contended that despite two opportunities being available for the Mr. Larue to deliver the parcel to the accused Livette Assary, he had not done so showing that the parcel was never intended for the accused. The first opportunity was after he had collected the parcel at the airport, he had not delivered it to the accused who was living close to the airport, but taken the parcel back to his office (SIBA). The defence contended that this shows the parcel was never intended for the

accused Livette Assary. Witness stated on very more than one occasion, that why he did so was because he was under instructions from the company to collect the parcel and come. Had he gone back empty handed it is clear immediate queries would have been made in respect of where the parcel was as his evidence shows, he was sent to the airport on Tuesday with specific instructions from the company to collect the parcel. He therefore was compelled to take the parcel back to the company. It is clear from his evidence given earlier, once the parcel was brought back to SIBA, it would be once again given to him which was the usual procedure, for it to be delivered to the addressee Mr. Steve Fanny and it was at this stage that he would keep the parcel without delivering it to the addressee, as he had done with the earlier parcel. This fact is corroborated by Steve Fanny's evidence, when he says he did not receive the first consignment parcel which was also addressed to him and cleared by Mr. Larue.

The defence further contended, that the reason the accused met Mr. Larue at the car park was to discuss about the baby clothes which she being a seamstress had stitched for the baby, which was born to Mr. Larue and furthermore even though once again Mr. Larue was free to deliver the parcel, he had not done so showing the parcel was not intended for the accused Livette Assary. It is clear that one does not have to specially meet and discuss matters regarding baby clothes, when such matters could have been discussed over the telephone. In fact the accused in her evidence admits that they were in touch on the phone (vide page 7 of proceedings of 23rd November 2009 9.00 a.m). According to her own evidence there was no mention of baby clothes in the telephone conversation but only a mention about her whereabouts, yet she chooses to wait for him at the car park

till he arrives. At the same time she admits that she did not receive any payment nor did she make any delivery of the baby clothes at the car park (Vide page 41 of the proceedings of 23rd November 2009 9.00 a.m) so to accept her explanation that the Mr. Larue and she discussed baby clothes for a period of 10 to 15 minutes in a car park is farfetched and an explanation difficult to accept. Further unlike at the airport where Mr. Larue was free to do as he pleased after collecting the parcel, at the car park, Mr. Larue was acting in concert with the officers of the NDEA and taking into consideration the conversation Mr. Larue says he had with the accused, it is apparent the NDEA did not intend to perform the controlled delivery in the car park but later at the house of the accused. It is clear that it is for this reason that Mr. Larue could not hand over the parcel to the accused at the car park as he was not free to do so as suggested by counsel.

Another contention of learned counsel for the accused was that as the statement of all the witnesses were given to witness Mr. Larue when he was an accused, he was aware of what the other witnesses would say in evidence and therefore he would be able to prepare his evidence accordingly. However learned counsel should be aware that Mr. Larue had already given statements to the police in respect of this incident. Learned counsel is entitled by law to copies of the said statements which were given by witness to the police and the record shows such statements have been handed over to counsel. If any attempt was made by Mr. Larue to change his evidence to suite that of others, it would be extremely easy for learned counsel to illuminate such a fact in her cross examination of Mr. Larue, as she would be armed with the statements given by him and could contradict him in respect of any attempted changes. Therefore it cannot be said that any prejudice has been caused to the accused as a result of the witness's statements being served on Mr. Larue when he was an accused.

Learned counsel for the accused also contended that as the airway bill mentioned that the item was toner and as the invoice mentioned it was CD's it was possible that there was a mix up in the parcels which were intended for the accused. However it is clear when one considers the evidence of the Fed Ex officer and Steve Fanny that there was no discrepancy in the names of the parties in both documents. Further the accused herself has stated she was not expecting any DVDs from Uganda the country where the parcel originated (Vide page 24 of the proceedings of 23rd November 2009 9.00 am). Therefore learned counsel's contention that the invoice containing DVD may have been intended for the accused Livette Assary bears no merit, as the discrepancy in the documentation was in respect of the contents and not the names and further, the accused herself states in her evidence, she did not expect or import DVD's from Uganda but did so from Malaysia.

Another ground urged by learned counsel for the accused which was borne out in her cross examination was that flour (then subsequently changed to pink powder) was substituted in place of the three packets of Heroin powder at the time of the controlled delivery. This was categorically denied by the prosecution. The defence counsel in order to establish same, while cross examining witness Nelson Larue, mentioned that he himself had stated so, to an inmate while being detained in the Takamaka Police station. Witness Larue denied making such a statement. She further stated that the said conversation had been taped. However no "tapes" or any "inmate" was produced to contradict the denial of Mr. Larue on this issue. Further learned counsel called several of the dog handlers who visited the scene, to show that the dog had sniffed around and not found

any drugs. However the evidence shows the dog handlers entered the house with the accused only. All the other officers were outside the house, including Mr. Seeward who had taken possession of the cartridge containing the drugs, at the conclusion of the controlled delivery.

When one considers the shortcomings in the entries in the investigation diary pointed out by learned counsel the error in respect of the name of the accused lawyer, the entry stating that the accused were arrested for possession of controlled drug and no reference being made to importation or trafficking are not serious errors to show that the investigation officer's evidence should be rejected. The fact that there was no entry regarding the statement of Mr. Nelson Larue, does not indicate he did not give a statement as the statements of Mr. Larue containing the date and time it was made were given to learned counsel for the defence as borne out in the cross examination of the witness. The date and time the statements were given were not disproved during the lengthy cross examination of witness Mr. Larue.

Learned counsel also filed an affidavit from Mr. Kiran Shah on behalf of the accused stating that he had obtained instructions from Barclays Bank to recover a sum of Rs 466,000 from Bala's Private Medical & Surgical Clinic (Pty) Ltd. This debt had been secured by a charge registered against the Title S1162 for a sum of Rs 500,000 which was executed by Livette Assary as charger in favour of Barclays Bank. Livette Assary had been the guarantor and as Dr Bala Gurunathan had left Seychelles was liable for the said debt. Thereafter the Supreme Court authorised Livette Assary (as executor to succession of the late Kisner Assary) to sell titles S6437 and S6438 to the Pentecostal Assembly. Accordingly Mr. Shah had drawn up the deed of

transfer in respect of Title S 6438. The first instalment of Rs 600,000 was used to settle the Barclays bank debt and cancel the charge on Title S1162. A breakdown of how the second instalment of Rs 500,000 was also spent was set out. It is clear that this affidavit has no bearing on the charges levied against the accused in this case nor does it seek to contradict the facts with regard to importation or trafficking of a controlled drug as set out by the prosecution.

Learned counsel for the accused has stated in her submissions, that the amendments made to the charge sheet on the 12th of August 2009 in this case has not given adequate time for the accused to prepare her defence. The law permits the prosecution to amend the charge which was permitted by court and Mr. Larue who subsequently became a prosecution witness was discharged on that date. Judging by learned counsel's submission on that date, she was clearly aware that Mr. Larue would be subsequently called as a witness on that day itself. Mr. Larue's evidence was taken on the 13th of August 2009 and not on the same date the amendments were made. Learned counsel has not at any stage during this period, informed court that she required an adjournment as there was inadequate time to prepare her defence. Even after the formal witnesses Dr. Jakaria and Sergeant Seeward had given their evidence in chief on that day, no adjournment was sought on the grounds of inadequacy of time to prepare a defence, to have the cross examination of these witnesses adjourned. Her grounds of objection to a fair trial were mainly based on the fact that Mr. Larue had as an accused, access to the statements of all the witnesses which would be prejudicial for her accused, a matter already dealt with in this judgment. On the day Mr. Larue was called, having commenced her cross examination learned counsel has moved court that the

case be adjourned “till tomorrow” (vide page 37 of 13th August 2009 1.45pm) which request court has very graciously granted. Therefore learned counsel cannot seek to now complain of inadequacy of time to prepare defence when her own request has been to grant time “till tomorrow.” On the next day, she has objected to the authenticity and the handwriting of a document served on her but has not complained of a lack of time to prepare a defence. Her contention that the accused had inadequate time to prepare her defence therefore is belated and an afterthought and therefore bears no merit. This court has already in its ruling dated 1st March 2010 given reasons for refusing to recall witness Mr. Larue. It is to be noted that the grounds urged by learned counsel in her written submissions dated 5th February 2010 to recall witness Mr. Larue were not based on inadequacy of time to prepare a defence.

Further, the accused admits that money was received from Tony Durand through Mr. Larue (vide page 21 of the proceedings of 23rd November 2009 9.00am) but states, the money was given by Tony for his sister Brigitte Durand who was terminally ill. This further establishes the fact that the “Tony” referred to by Mr. Larue in his evidence was Mr. Tony Durand. The prosecution evidence clearly shows that it was Mr. Tony Durand who was instrumental in sending both parcels into Seychelles. The defence admits in their submission (at page3) there is ample evidence of same. Further it is not denied and in fact admitted that Brigitte Durand is married to the son of Mrs Livette Assary. Thus it cannot be said that the Tony Durand who according to the prosecution was instrumental in sending the drugs had absolutely no connection or relationship with the accused. It is clear on their own admission, that he was sending money to his sister Brigitte who was ill and was married to the accused Livette Assary’s son.

Even though the accused testified to the fact that she had not acted suspiciously that day when the controlled delivery was affected and denied padlocking the gate or barricading the door, her only witness who corroborates the fact the gate was not locked Mr. Cution was not present at the time but came very much later, therefore his evidence on this fact cannot be accepted. Further her suspicious behavior as described by Mr. Larue at the time he entered her premises is corroborated by the police officers who were watching on. Thus it cannot be said that Mr. Larue had fabricated his evidence and falsely implicated the accused in order to free himself, as a large part of his testimony stands corroborated by the evidence of the police officers in this case.

For the aforementioned reasons the defence of the accused and the grounds urged by learned counsel on behalf of the accused are rejected.

Corroboration of the Evidence of the Accomplice.

When one considers the evidence of the prosecution, it is clear the prosecution has relied heavily on the evidence of witness Mr. Nelson Larue who formerly was an accused in this case and subsequently discharged by court, as charges were withdrawn by the prosecution, prior to the trial commencing. Considering the evidence given by him, it is clear his evidence should be considered as that of an accomplice and considering the nature and the seriousness of the charges framed against the accused, requires corroboration before being acted upon. This court does not agree with the defence contention that Mr. Nelson Larue's evidence should be considered to be the evidence of a co-accused as he had been formerly charged. Although he may have

been charged, subsequently the prosecution withdrew the charges against him and he was discharged, at which stage he immediately ceases to be an accused or a co-accused. Therefore this court will proceed to consider his evidence as that of an accomplice and not that of a co-accused. The evidence of Mr. Larue stands corroborated in many aspects. The fact that there was an earlier parcel containing Heroin sent by Tony in the name of Mr. Fanny is corroborated by the evidence of the officer of the Fed Ex, Mr. Steve Fanny and by the evidence of the police officers who conducted the investigation. Mr. Larue's evidence that he collected the said parcel from the airport, pertaining to this case which came from Uganda is corroborated by the evidence of the agents of the NDEA and the officers of Fed Ex. His evidence that the parcel contained Heroin is corroborated by the evidence of the police officers who testified and by the evidence of the Government Analyst Dr. Jakaria. The facts of his arrest and his telephone conversation whilst cooperating with the NDEA with a lady (who Mr. Larue states was the accused Livette Assary) regarding delivery of the parcel to which the lady had replied was not safe to be discussed on the phone, was monitored by agents of the NDEA and stands corroborated by the evidence of the officers of the NDEA called by the prosecution. The evidence of Mr. Larue that during this conversation with the accused, it was the accused who wanted to arrange a meeting in town and not him is corroborated by the evidence of ASP Winslow Francoise who was listening to the conversation which was on speaker (Vide page 46 of the proceedings of 17th November 2009 at 9.00am). Further the fact that whilst he was cooperating with the officers of the NDEA, he met the accused at the car park is also corroborated by the evidence of NDEA officers and such a meeting is not denied by the accused herself. Although the details of the conversation Mr. Larue had with accused Livette Assary in the car park has not

been monitored, soon thereafter the fact that the controlled delivery took place, gives credence to Mr. Larue's evidence that he had agreed with her at the car park to deliver the parcel to her at her house during his lunch hour. The entire evidence of the controlled delivery given by Mr. Nelson Larue stands corroborated by the evidence of the officers of the NDEA. His evidence that while inside with Freddy Nibourette and the accused he took the parcel from the box and kept it on the table is corroborated by the evidence of the NDEA officers who stated, when they entered the room Freddy Nibourette was seated at the table with Mr. Larue and the accused was also inside the room and the parcel had been removed from the box and was on the table. His evidence that the accused had stated the parcel was hers, is corroborated by the officers of the NDEA who were present inside the room at that time. Witness Larue's evidence that only three of them were in the room with the drugs when the police officers arrived is corroborated by the evidence of the police officers and ASP Winslow Francoise's evidence shows that the only other occupant of the house Brigitte Durand was in another room.

Even though learned counsel for the defence has shown court that witness Mr. Larue is facing a charge of stealing in a separate case before the Supreme Court, as the evidence of Mr. Larue stands corroborated on material issues pertaining to the charges framed against the accused in this case, this court will proceed to accept the evidence given by him.

The Law and Final Conclusion

When considering the charges framed against the accused, the term Conspiracy has been defined in section 28 the Misuse of Drugs Act and reads as follows;

“A person who agrees with another or persons that a course of conduct shall be pursued which if pursued-

(a) will necessarily amount to or involve the commission of an offence under this Act by one or more parties to the agreement.

(b) would necessarily amount to or involve the commission of an offence under this Act by one or more of the parties to the agreement but for the existence of facts which renders the commission of the offence impossible,

is guilty of the offence and liable to the punishment provided for the offence.”

The definition the prosecution seeks to rely on in this case is section 28(a) of the Misuse of Drugs Act. Conspiracy consists of an agreement of two or more to do an unlawful act. Thus according to the particulars of the offence the prosecution in this case has to establish that there was an agreement between the accused and Mr. Nelson Larue or one “Tony” to pursue a course of conduct to commit the unlawful act, which in this case was importation and trafficking in a controlled drug namely Heroin.

The term import has been defined in the Interpretation Ordinance Cap103.

“Import” means to bring or cause to be brought into Seychelles.

In 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.”

It is clear when one considers the evidence of witness Mr. Larue that the accused Livette Assary had told him when he gets the other parcel (relevant to this case and according to the evidence of Mr. Larue sent by Tony Durand)to give it straight to her (Vide page 9 of the proceedings of 13th August 2009 1.45pm). She had stated to him that when he delivers the parcel, another person whom they could trust would be with her. The evidence of Mr. Larue as corroborated by the officers of the NDEA show that at the time of the controlled delivery there was present another person by the name of Freddy Nibourette. His evidence shows the agreement he had entered into with Tony Durand too in respect of the importation of the said parcel. The evidence of Mr. Larue that whilst Mr. Larue was at the NDEA he did phone the accused, the fact that he did go to meet the accused Livette Assary in the car park at Independence House to arrange the time of delivery of the parcel containing the controlled drug and did in fact finally deliver the parcel to the accused at her house, clearly show that there was an agreement between the accused and the Mr. Larue to follow a course of conduct to import and traffick in the said drug.

The evidence of Mr. Kenny Albert of the Fed Ex shows that the parcel containing the controlled drug was brought into Seychelles from Uganda. The evidence of Mr. Larue shows that the accused had wanted the said parcel to be delivered to her straight away which in fact was eventually done at her own house. This clearly shows that even though the parcel was addressed to Mr. Steve Fanny, the accused was to be the recipient of the said parcel containing the controlled drug in Seychelles showing her implication in the importation of the said drug. Mr. Larue evidence shows that he had agreed to deliver the

parcel to her and his participation in the act was to “spirit away” the parcel which was addressed to his boss Mr. Steve Fanny.

The crime of conspiracy requires an agreement between two or more persons to commit an unlawful act; it is the intention to carry out the crime that constitutes the necessary mens rea for the offence.

It is clear from the above facts that there was an agreement between two or more persons to commit the unlawful act of importation of a controlled drug and both had the intention of carrying it out and did in fact in this instant case carry it out. Therefore, this court is satisfied for the aforementioned reasons that the prosecution has proved beyond reasonable doubt the intention to carry out the crime that constitutes the necessary mens rea and the course of conduct resulting in the unlawful act of importation of a controlled drug by the accused in agreement with Mr. Larue. The agreement reached with Tony Durand too in this regard, is set out clearly in the evidence of Mr. Larue and corroborated by the evidence of ASP Winslow Francoise. The fact that the said parcel contained 148.5 grams of Heroin and the chain of evidence with regard to the exhibit is established by the evidence of Sergeant Seeward and Dr. Jakaria the Government Analyst. Considering the quantity involved it is clear that one could presume that the said importation of the controlled drug was for the purposes of trafficking. The accused has failed to rebut the said presumption. There are no material contradictions in the evidence given by the prosecution witnesses which in fact stands corroborated and thus acceptable to court.

Therefore for the aforementioned reasons, on consideration of the prosecution evidence in its entirety, this court is satisfied that the prosecution has proved all the necessary ingredients of the

two charges against the accused beyond reasonable

doubt. This court therefore finds the accused Livette Assary, guilty on counts one and two and proceeds to convict her on both counts.

M. BURHAN
JUDGE

Dated this 1st day of July 2010.