

IN THE SUPREME COURT OF SEYCHELLES

CriminalSide: CO20/2016

[2017] SCSC 8

THE REPUBLIC

versus

RANDOLPH RANDY JOUBERT

Accused

Heard: 21st, 23rd, 24th June, 23rd, to 26th August, 8th, 13th, 23rd & 29th September, 3rd
& 6th October & 17th November 2016

Counsel: Mr. Thatchett, Assistant Principal State Counsel for the Republic
Mr. A. Subramaniam, Assistant Principal State Counsel for the Republic
Mr. C. Andre for the accused

Delivered: 13 January 2017

JUDGMENT

Vidot J

[1] The Accused Randolph Randy Joubert stands charged with the following offences as per the Formal Charge;

Count 1

Statement of Offence

Trafficking in a controlled drug, namely diamorphine (heroin), contrary to Section 2 read with Section 5 of the Misuse of Drugs Act, Cap 133 and further read with Section 26(1) (a) of the Misuse of Drugs Act and punishable under Section 29(1) read with the Second Schedule of the Misuse of Drugs Act, Cap 133

Statement of Offence

Randolph Randy Joubert of Caryole Estate, on the 24th June 2014, at Caryole Estate , Mahe delivered to a person known to the Republic, namely Fabio Soopramanian of Caryole Estate, Mahe, a controlled drug namely a substance having a total net weight of 509.7 with a purity of 39% and having a total content of 195.4 grams of heroin.

Count 2

Statement of Offence

Conspiracy to commit the offence of Trafficking in a controlled drug contrary to Section 28(a) read with Section 5 and 26(1)(a) of the Misuse of Drugs Act and punishable under Section 28 read with Section 29 of the Misuse of Drugs Act, read with the Second Schedule of the same Act.

Particulars of Offence

Randolph Randy Joubert of Caryole Estate, Mahe, on the 24th June 2014 at Caryole Estate, Mahe, conspired with the persons known to the Republic namely Fabio Soopramanian of Caryole Estate and Wallace Reine of Caryole Estate, Mahe, by agreeing with one another to pursue a course of conduct, that if pursued would amount to or involve in the commission of the offence of Trafficking in a controlled drug, namely a substance having a total net weight of 509.7 with a purity of 39% and having a total content of 195.4 grams of heroin.

[2] A synopsis of the Prosecution's case is that on 25th June 2014, NDEA agents under the command of Agent Brendan Burke had proceeded to Caryole Estate, Anse-Aux-Pins and had mounted surveillance of the home of one Fabio Soopramanian (referred hereafter as

“Fabio”) . At some point the agents observed Fabio hand over a glass jar to one Wallace Reine (hereafter referred to as “Wallace”) and the latter thereafter hid the jar among some rocks in the bushes opposite . The agents thereafter approached the house and thereat they met with Fabio, his brother, Dario Soopramanian and his wife Stephe Soopramanian. The Accused was also present at the house. The agents informed Fabio that they wanted to conduct a search of the house for controlled drug. This was done with the consent and in the presence of Fabio’s mother who had been brought to the house. At the house a sum of SR43,000/- was confiscated. The agents also seized a DVR recorder. After a search was conducted outside and in particular amongst the rocks and bushes the agents discovered a “Melody” powdered milk tin wrapped in cling film. The tin was retrieved and when it was opened, it was found to contain a brown taped evelope and therein there was some substance which was later examined by Mr. Jimmy Bouzin, government analyst. The brown substance weighed 509.7 grams with a purity of 39% and having a total content of 195.4 grams of heroin. The search on the exterior of the house was conducted in the presence of Fabio and Wallace. Thereafter, the recordings were extracted from the DVR recorder and it was observed that on 24th June 2014 the Accused had come to Fabio’s house and had delivered to him a “Melody” powdered milk tin, (hereafter “the milk tin”), similar to the one that was seized and produced as exhibit. This in essence was evidence of the investigating officer, Johnny Malvina.

[3] Mr. Jemmy Bouzin, expert drug analyst confirmed that he had carried out examination on exhibit P12B (the powdery substance) at the request of Agent Brendon Burke of the NDEA. The exhibit was received by him from Agent Malvina. The examination was carried out on 26th June 2014. He stated that he examined a brown substance which he identified in court, weighing 509.7 grams with a purity of 39% and having a total heroin content of 195.4 grams. He explained the methods used to carry out the analysis. First he carried out a physical examination followed by a chemical analysis which has 2 stages; (1) the preliminary test and (2) the confirmatory test known as thin layer chromatography. The accuracy of his analysis and findings could not be successful challenged by the defence and therefore accepted as evidence before court. I confirm that the court accept without reservation that exhibit P12B to be controlled drugs, namely heroin.

- [4] NDEA Agent Pierre Servina deponed that he had been involved in the operation. He had been instructed by Agent Brendan Burke to proceed to the scene to take part in the search of the premises of Fabio and in particular the area in the bush where Agent Burke had earlier observed Wallace hide a glass jar with some contents suspected to be controlled drugs. Acting on instructions from Agent Burke, he had searched amongst the bushes and rocks and hidden in between some boulders he had found the milk tin between the crevice of 2 rocks. He had called Agent Burke before retrieving it. He had been told to be careful and to preserve it for fingerprint examination. After retrieving it, he had brought it up to the road where he had opened the tin by prying the lid with his penknife. He described the milk tin as being red and yellow, wrapped in clear plastic identified as cling film. Inside he found a brown taped packet wrapped in cling film. He never opened the brown packet to reveal the contents. He had showed the tin and contents to Agents Burke and Malvina who both deponed that when that was done they saw the brown taped envelope. Fabio refutes averments by Pierre Servina and denies that the tin was opened in his presence. The Accused was not confronted with the tin milk and its contents. Thereafter, on the opposite side of the road a glass jar containing a smaller “white box” and a razor blade was retrieved. Wallace also denies that the contents of the milk were ever shown to him. This contradicts Pierre Servina’s and Johnny Malvina’s testimonies. Agent Servina’s evidence presented some discrepancies when viewed against the video footages. In particular I note that when he started the search in the bush Agents Jaffa, Banane and Andy Servina were not present as he had alleged.
- [5] Agent Brendon Burke was the agent in charge of the operation carried out on 25th June 2014 at Fabio’s house. He had mounted surveillance some 70 to 80 meters amongst boulders and bushes from Fabio’s house. He was with Agent Yvon Leggaie. He had observed through binoculars Fabio giving a jar containing controlled drugs to Wallace and the latter had hidden the same amongst the rocks and bushes at a spot not far from the observation point. He had been present on 25th June 2014 at Fabio’s house when the searches were being conducted.
- [6] Mr. Fabio Soopramanian testified that on 24th June 2014 he was at home when he received a phone call from the accused who told him that he had something that he wanted him to look after. He did not ask Randolph Joubert what it was that needed

looking after but he agreed. He had known the accused for many years and the accused used to come to his place. The accused arrived at his house some 5 minutes later that day and they had cracked jokes and the accused is alleged to have said that he had something he wanted Fabio to look after for him and he was supposed to collect later the same day. Mr. Soopramanian never queried what it was.

[7] Fabio further testified that after some pleasantries with the accused, he had gone to his vehicle and brought in a “Melody” milk tin (exhibit P9) which the accused gave to him. He then went to fetch a “Mauritius Duty Free clear plastic and some cling film to wrap the milk tin in. He had taken the milk tin and placed it in the duty free bag and thereafter, the Accused had come in and told him that the contents should too be wrapped up. Together with the accused they had wrapped up the contents which he did not see what it was though he suspected it to be heroin because of the smell. He stated that it smelt of vinegar. Thereafter, he had called his cousin, Wallace and instructed him to bury the milk tin away from the house. He had tried to look for a spade but without success and Wallace had gone with the tin which he had placed in a carton box to hide it. Thereafter, the accused had left.

[8] On the next day after he had woken up he had called the accused to come and collect the tin as it should have been collected on the 24th June 2014, the same day it was delivered to him. After the accused arrived they had talked but there had been no instructions by him to retrieve the tin from where it was hidden. However, NDEA agents had arrived a while later at his house and advised him that they were going to search his home. The search was conducted by Agents Malvina, and assisted by 2 other agents. The NDEA also conducted searches amongst the bushes opposite his house.

[9] As a result of the searches, the milk tin and glass jar were found amongst the bushes and inside his house the agents seized some cash and the Napco DVR. He was arrested together with Wallace.

[10] At the heart of this case are video footages captured on surveillance cameras installed at Fabio’s home. The footages were stored in a DVR recorder (exhibit P13). The DVR was seized on 25th June 2014 by Agent Johnny Malvina when search was conducted at Mr. Soopramanian’s home. Dane Leggaie had been instructed by Agent Burke to upload all

videos which were then transferred onto a pendrive (exhibit P20). Mr. Leggaie explained that the DVR will store recordings for a period of 10 days at one go but will automatically delete older footages after the lapse of a 10 day period. However, the pertinent days relevant to the case were 24th and 25th June 2014. Throughout the trial the court spent many days reviewing the videos.

- [11] Mr. Steven Gerard, an independent security consultant was called to give evidence. He confirmed that he was requested by the NDEA to examine the DVR and he reassured court that the same had not been tampered with at the time of his examination. This corroborates evidence of Dane Leggaie in that respect. He admitted under cross examination that he made a mistake in recording the serial number of the DVR in his report which was admitted as exhibit D6. I have no doubt in my mind that this was a mere typing mistake. The mistake was merely the entry of the number 2 rather than 3 in the serial number sequence. He admitted that he did “not really” view the footage on the DVR as his job was merely to ensure “everything was all in its place.”
- [12] Wallace Reine too was called as a witness for the prosecution. Wallace had been arrested together with Fabio who is his cousin after the search had been conducted by NDEA on 25th June 2014. He had been at Fabio’s residence on the 24th June 2014 when the accused had arrived thereat. He had been doing some mechanical work on a vehicle outside. At some point Fabio had called him. He had been instructed by Fabio to hide the milk tin. He had assisted in finding the carton in which the milk tin was placed and he had thereafter under instructions gone to hide the tin amongst the bushes opposite Fabio’s house. The latter had initially wanted him to dig a hole to bury the tin but since no spade was found that could not be done.
- [13] From the thrust of questions put forward by the defence in cross-examination, it is clear that the Accused’s position is that he did not deliver any drugs to Fabio. It is admitted that Randolph Joubert delivered the milk tin to Fabio on 24th June 2014, but the tin was empty and that he had brought it at the request of the latter. The Accused had no discussions with Fabio in regards to the drugs, though admittedly as shown on the video recordings he had assisted Fabio by holding the cling film to allow the latter to wrap up

the tin. There was also no agreement to constitute any conspiracy the second charge, as per Charge sheet.

[14] In his defence the Accused elected to make a dock statement. He stated that on the 24th June 2014, he had gone to drop off his children at school when he received a call from Fabio. The latter had asked him if he had a tin to bring over for him. He had responded in the affirmative and he was asked to bring a medium sized tin, which he later did during mid-morning. He had arrived at Fabio's house and after some small talk, the latter asked for the tin which he had forgotten in his vehicle. He went to get it therefrom and brought to Fabio and left on the floor and then went out to talk to workers outside. He returned to the varandah where he saw Fabio wrapping up the tin and he had assisted Fabio to do so. Fabio had then called Wallace and instructed him to go and hide the tin, which the latter did.

[15] The next day he had come back at the house in order to have a haircut that was to be done by someone going by the name of "Arab". In fact from the video footages that man (Arab) was seen at the premises. Whilst he was there the NDEA agents had come and indicated that they were to conduct a search. He had stayed around until he was asked by Niall Scully the reason for his presence at Fabio's house. He had explained the reason and Niall Scully had then asked him to leave, which he did.

[16] This Court cannot attached great weight to that dock statement from the accused, as such statement is in law not considered to be evidence.

[17] The Defence also called one Nichol Payadachy as witness. Mr Padayachy was an inmate at Montage Posee Prison from 2011 to 2016 and whilst in prison shared a cell with Fabio during the period 2015 to 2016 when Fabio was removed and detained at the NDEA Headquarters. He recounted that during the period he shared the cell, one morning at 4am or 4.30am the NDEA woke them up and searched the cell whereby substance that was either heroin or cannabis was discovered. He alleges that the substance belonged to Fabio. He was charged together with Fabio in Supreme Court case CR30/2006 in relation to the drug seized in the cell. He recounted that whilst in prison Fabio told him about the incident of the 24th and 25th June 2014 that happened at his home. It is alleged that Fabio told him that the drugs seized by the NDEA was his and that he had asked the accused to

bring a tin over to his house and that he deals in drugs and that he still has some drugs hidden under ground.

[18] When considering the evidence of Fabio Soopramanian and Wallace Reine, I bear in mind that they could be considered as accomplice to the offences with which the accused is charged. I shall explore below at greater length the weight to be attached to and the manner in which evidence of an accomplice should be treated.

[19] I remain cautious that the accomplices had struck deals as evidenced by exhibits D4 and D5 whereby offers were made in agreements (Exhinitis D4 and D5) pursuant with section 61A (1) of the Criminal Procedure Code (CPC) for them to give evidence in this present case. In fact, the conditional agreements made between the Attorney General's Chambers and Fabio Soopramanian and Wallace Reine earned the former a change in the charges levelled against him in case CR30 2014 and charges were withdrawn against the latter. In fact Agent Burke gave evidence to the fact that no charges were registered against the accused despite having the video footages of the surveillance cameras only because they needed to have corroboration of these footages. Therefore, the conditional agreements signed with the 2 afore-named accomplices, according to the prosecution provided them with sufficient corroboration to charge the accused. The accomplices were made prosecution witnesses pursuant to section 61A(2) of the CPC. I also bear in mind that as per testimony from Fabio, the NDEA had approached him on several occasions and made queries as to whether the accused was involved in any criminal activity, particularly drug related activities. Fabio confirmed that the NDEA had asked him to assist them to place the accused behind bars. Be that as it may, this court recognises that sections 61A (1) and 61A (2) permits the use of accomplices to give evidence against another accomplice.

[20] An accomplice is a competent witness and as Sankar's Law of Evidence, 16th Edition, Vol.II, 2008, provides that a conviction cannot be rendered illegal merely because it is based on uncorroborated evidence of the accomplice. In the present case, it was felt that the video footages would provide sufficient corroboration for the testimonies of the accomplices. Sankar (supra) further provides that uncorroborated evidence of an accomplice though admissible, experience teaches us that an accomplice being always an infamous person, it is extremely unsafe unless materially corroborated. In considering the

testimonies of the accomplices I have to seriously evaluate whether the video footages provide sufficient corroboration. I also bear in mind pronouncement by Lord Abinger CB in **R v Farler 8c & PP106** as follows;

“the danger is that when a man is fixed and knows that his own guilt is detected, he purchases his immunity by falsely accusing others”.

I bear in mind here that pursuant to the agreements reached by the accomplices with the Attorney General’s office, Fabio was offered an amendment to his charge to a lesser offence and Wallace earned a withdrawal of the charge against him.

[21] The Court also notes that the accused was not charged in the same case as Fabio and Wallace. Fabio and Wallace were charged in Supreme Court case; CR3 of 2014. However, the circumstances arising from that case are based on the same facts as this present case and I believe that Fabio and Wallace could safely be considered as accomplices.

[22] Fabio was considered as the principal witness in this case. I assert without hesitation that I hold serious reservation in respect to the truthfulness of his evidence. I paid overwhelming attention to his demeanour whilst he testified in court. I noted over the several days he was before court, he gradually became more confident and at the end of his testimony, his credibility and the veracity of his depositions became tainted with a sense of serious unreliability. At the start of his testimony especially when being cross-examined he alleged he could not remember what Agent Burke discussed with him on 25th June 2014. The video footages showed him having long conversations with Agent Burke that day. The next day he came and started being selective in saying that Agent Burke was playing mind games and only asked that he shows the NDEA where he had hidden the drugs but he could not remember any other issues of the conversations. Other instances where Fabio blatantly lie to the court include the time when on 25th June 2014 his sister-in-law, removed some cash and handed over to him. Despite being confronted with the video footage showing the same, he initially stated he could not tell what was being handed to him and subsequently stated it was a newspaper. Fabio also tried to fool the court when he was seen on video suspiciously taking something from the table and dropping on the floor upon the arrival of the NDEA at his house, by saying he did not

notice that and that he did not know what it was. There are many other instances of Fabio being deceitful even when confronted with video footages. He was deliberately selective with his recollection of the facts. At the end of the day, his action rendered his evidence tenuous and unreliable save for those parts that are corroborated by the videos. Unfortunately the videos had no audio recordings.

[23] At the crux of the first count of trafficking by way of delivery, are the video recordings of the 24th June 2014. When I consider the evidence of Fabio and Wallace and view exhibits 20B and 20C (the video footages) it is clear that the accused had come to Fabio's house on the 24th June 2014. Wallace too was present at the premises. The accused had arrived thereat, met at the van by Fabio where they talked and thereafter he had gotten out of the van and went with Fabio under the varandah where they continued to talk. . The latter states that it was just "normal talk" meaning nothing of particular significance. After a while the accused had gone out of the varandah and went to get a "melody" milk tin which he placed on the floor of the varandah. Thereafter, the accused had gone outside to where some people were seen working on a vehicle. Fabio had immediately proceeded to the interior of the house and returned with a roll of cling film and a clear plastic bag, produced as exhibit P8. Fabio proceeded to pick up the milk tin and for a short while, went at the back of the varandah, out the security camera view. When he returned he proceeded to wrap up the milk tin, first in P8 and thereafter in cling film. The accused had returned to the varandah and talked to Fabio. The milk tin was unwrapped and the contents wrapped in cling film and thereafter Fabio had proceeded to rewrap the tin in cling film. Fabio had called Wallace who was working outside and proceeded to place the wrapped milk tin in a carton box and handed over to the latter who went away with it and according to Wallace's evidence, had been instructed by Fabio to go and hide it and he had complied with the instruction.

[24] In order to establish the charge, the burden was on the prosecution to satisfy court beyond reasonable doubt that when the accused delivered the milk tin at Fabio's house, it already contained the drugs (heroin) marked as exhibit P12B. This presupposes that the accused had possession of the milk tin and its contents, if any. Furthermore, that if the milk tin contained controlled drugs, that the accused had knowledge, control and possession of the drugs. It was held in **R v Albert (1997) SLR 271** that in considering a charge of drug

trafficking, once it is established that the accused has both possession of the controlled drug and knowledge of that possession, circumstantial evidence may be admitted from which a reasonable inference that the possession of controlled drug was for the purpose of trafficking”. I have no doubt as per the report (exhibit P15) of forensic expert, Mr. J. Bouzin that the contents of the milk tin that was discovered and seized by the NDEA on 25th June 2014 were controlled drugs. There is no dispute whatsoever that the accused did deliver a “Melody” milk tin at Fabio’s house. There is no dispute that when exhibit P9 (milk tin) was found, it contained the prohibited drugs (exhibit P12B). The defence at several instances in cross-examinations seemed to have suggested that it could not be concluded with certainty that the tin that was produced was actually the tin that was delivered by the accused. Both Fabio and Wallace had agreed with the defence that it could not be said with 100% certainty that it was the same tin that they were sure it was. I am satisfied that the exhibit P10 is the same milk tin that the accused delivered at Fabio’s house on 24th June 2014. However, I note from the video footages that the accused had a firm grip over the tin when he brought it inside the varandah and was somewhat surprised that his fingerprint was not lifted from the tin. It was only the prints of Fabio that were lifted from the cling film.

- [5] I also observed that Agents Burke and Servina testified that when the tin was opened they saw a brown taped envelope. They stated that the items inside the tin were not disturbed so as to preserve for finger printing. If that was so, they would not have seen the brown taped envelope (exhibit P11) because from the video and Fabio’s testimony, it was clear that the exhibit P11 had been placed in a white plastic before being placed in the tin. I further note that when the court conducted a locus in quo, Agent Servina showed the court the place where he retrieved the milk tin which was a crevice between 2 rocks in the bush. Wallace testified that the milk was retrieved from the exact spot he had hidden and according to him he hid the tin among the bushes. He made no mention at all that he placed it in the crevice between 2 rocks which presented difficulties in retrieving it therefrom. From the video footages, it took Wallace around 3 minutes to walk from Fabio’s house to the road opposite, hide the milk tin and come back. When the locus was conducted it took some 8 to 10 minutes from the road for Agent Servina to reach the spot where he found the tin. I have serious suspicion that Wallace could have taken such a

short time to hide the milk tin between the rocks. At that time Wallace was big and heavy and the NDEA agents informed us that on 25th June 2014, the area where the tin was discovered was denser with bushes. Following from the above, it begs the question whether the milk tin had been retrieved between the 24th June 2014 and 25th June 2014 when it was finally recovered by the NDEA.

[26] Fabio had stated that the accused had in the morning of 24th June 2014 called him and informed him that he had something that he wanted him to keep at his place. Fabio also stated that he never questioned as to what it was. He even testified that he never queried at any point what the alleged content of the milk tin was. He even stated that at that point he had stated that he would not be able to keep the tin at his house because the NDEA carries out searches at his house occasionally. I find this totally inconceivable. Fabio did not show any concern when on the 25th June 2014, he was witnessed on the video footages together with Wallace “sorting out” heroin which they both state was to be given to Fabio’s workers, who he testified are drug dependent. That activity was being conducted under the varandah in full view with the least apprehension. He would not have given such a response unless he had known that the item to be delivered to him was something illicit. I also find it suspect that after the accused had placed the tin on the floor Fabio immediately went inside the house to get the clear plastic and the cling film even before he went at the back where he alleges he had gone to open the tin and verify the content. Why did Fabio feel there was necessity to hide the milk for fear that should the NDEA conduct searches at his house they could have discovered the milk tin when he did not know nor ask what the content of the milk tin was?

[27] I also note that the tin was never opened within the view of the camera. I fail to see the reason why Fabio had to take the tin at the back of the varandah at a spot not captured by camera to have it opened. It would have made more sense for Fabio to have asked the accused what the content of the tin or the item that he wanted to leave him for safekeeping was. If as stated by Fabio that he opened the tin at the back and could smell vinegar and he assumed it was “substance”, which is heroin, why did he not call back the accused to confront him with the contents especially in light that he Fabio states that the NDEA conducted searches at his home occasionally? I have stated above that I have reservation to the veracity and credibility of the Fabio. Furthermore, if really he was

concerned and wanted the accused to pick up the tin the next day, he would have taken steps to at least request Wallace to go and retrieve the tin. The accused had spent over an hour at Fabio's house before the arrival of the NDEA and at no time he tried to get the accused to take away the milk tin. The argument that this was because the accused had arrived on a scooter does not find favour with this court. The scooter had a storage compartment under the seat. If really he wanted the drugs removed from his home he would have had it removed at the first opportunity. My view is that that was not done because of a possibility that the drugs belonged to Fabio personally.

[28] The proposition by the defence that the drugs was placed in the tin by Fabio when took the milk tin at the back of the varandah is equally plausible. I have followed Fabio's testimony which I found to be seriously unsafe. I find that such proposition by the defence to be highly probable and meritorious. The prosecution did not satisfy this court beyond reasonable doubt that when the accused delivered the milk tin, it contained the controlled drug. I note that even after he placed the tin on the floor the accused shown no concern about it. Wallace also deponed that when called by Fabio and then instructed to hide the tin, the accused never took part in the conversation. In fact Learned Counsel for the accused asked Wallace; "Did Fabio tell you to go and hide this because Randolph wanted you guys to keep it for safe keeping?". He had responded "No". Therefore, based on the above I find that the prosecution failed to satisfy this court beyond reasonable doubt that the milk tin contained the controlled drug at the time Randolph delivered it at Fabio's house. Therefore the first count has not been established and I find the accused not guilty and acquit him of that count.

[29] The second count is that of conspiracy to traffic in controlled drugs. To constitute conspiracy, there must be an agreement between 2 or more persons to do an unlawful act, or to do an unlawful act by unlawful means. Unless 2 or more persons are found to have combined to commit the offence there can be no conviction; see **R v Pillay (1993) SLR 48** and **R v Moumou (No.2) SSC 2/1999**. Archbold (Criminal Pleading Evidence & Practice) 2012 (33-5, p 2916) provides that "the essence of conspiracy is the agreement" and that nothing needs to done in pursuit of the agreement: repentance, lack of opportunity and failure are all immaterial. In **Mwaji v R [1957] AC 126**, it was also held that conspiracy cannot exist without an agreement.

[30] To establish conspiracy, the agreement must be proved in the usual way or by proving circumstances from which the jury may presume it. Archbold (supra) states that mens rea is an essential element of conspiracy only in that there must be an intention to be a party to an agreement to do an unlawful act. In **R v Anderson [1986] AC 27 HL**, Lord Bridge had this to say;

“But, beyond the mere fact of an 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 some criminal purpose which the agreed course of conduct was intended to achieve. Nothing less will suffice, nothing more is required.

[31] In **Yip Chiu-Cheung v R (1994) Cr App R 406**, Lord Griffiths said;

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

[32] As per Count 2 of the Charge Sheet, the Accused is alleged to have conspired with Fabio Soopramanian and Wallance Reine to commit the offence of trafficking in controlled drug. It has been established in **Dugasse v R [2013] SLR 67** and **Lucas v R, SCA 17/09** that in dealing with evidence of an accomplice, there is no requirement for a corroboration warning as above mentioned. In fact in **Lucas v R** (supra), which deals with sexual offence a corroboration warning was not necessary, but that it is at the discretion of the court to look for corroboration when an evidential basis exists for so doing. The same position was adopted in **Dugasse v R** (supra) which dealt with importation of drugs

[33] From the video footages and Wallace’s testimony it is abundantly clear, without the shadow of a doubt that there was no conspiracy between the accused and Wallace. When the accused is seen holding the cling film roll to allow Fabio to wrap the tin, Wallace was not present. He only came after the tin had been wrapped and Fabio had called him and thereafter instructed him to hide the same. As per his testimony, when he responded to Fabio’s call, he did not engage in any conversation with the accused. The accused had not

talked to him and Fabio had not indicated that neither the tin nor its contents belonged to Randolph Joubert. There is no evidence that there was any agreement amounting to a conspiracy between the accused and Wallace. If anything, it can be safely concluded that there was a conspiracy between Fabio and Wallace. From his behaviour of finding a carton box to place the tin before going to hide it, and having a conversation as to how the tin should be hidden, it was clear that Wallace would have been aware of what was in the tin. He was caught on camera sorting out heroin with Fabio. He was also the one who went to hide the jar containing drugs amongst the bush. I have no doubt that this was an activity that he had engaged in previously.

[34] I now need to consider if there was any act of conspiracy between the accused and Fabio. As above stated in paragraph 28 in reference to Lord Bridge's position in **R v Anderson** (supra), beyond the mere agreement, it is necessary that the mens rea of the crime be established. It is the intention to carry out the crime that constitutes the mens rea. In **R v Pillay & Ors** (supra) it was held that the existence of conspiracy must be proved. It must be proved that the members of the conspiracy pursued the unlawful act in furtherance of a common design. Under cross-examination Fabio had confirmed that there was no conspiracy between him and the accused to traffic in controlled drugs. In short that was no agreement. If there is no agreement there is no necessity to look for the intention; for the mens rea.

[35] However, despite Fabio's assertion that there was no agreement between him and the accused, this court was invited by Learned Counsel for the prosecution to consider that an agreement could be implied from the action of the accused when he held the cling film roll to allow Fabio to wrap up the milk tin. The prosecutor has not adduced any other evidence to suggest, let alone to establish a conspiracy. In making such a submission the prosecution is inviting the court to find an agreement for conspiracy to traffic in controlled drugs through conduct. I agree with the prosecution that the conduct of a person can lead the court to infer the existence of a conspiracy. An agreement may be proved in the usual way or by proving the circumstances from which the jury may presume it; see **R v Murphy (1887) 8 C. & P 297**. Archbold (supra) provides that the existence of a conspiracy is generally a matter of inference deduced from the criminal acts of the parties accused. In **Churchill v Walton [1967] 2 AC 224** it was held that there

is a requirement that conspirators should agree that a course of conduct which involves an act or omission by at least one of them which is prohibited by criminal law, knowing or intending that any act or circumstances necessary for the commission of the offence shall or will exist at the time that that conduct which constitutes the offence is to take place and that the conspirators acted or failed to act in the prohibited way will do so with any additional element appropriate to the offence.

[36] Had the prosecution established without reasonable doubt that at the time accused delivered the milk tin, it contained the controlled drug and subsequently he is seen assisting the wrapping of the tin, this court would have without hesitation found the second count proved, despite Fabio averring that there was no conspiracy or any agreement between them. That is because the intention of the accused would have been crystal clear from his course of conduct.

[37] I have already ruled that there is a reasonable probability that the tin was delivered empty and that the controlled drug could have been placed therein by Fabio. I have also questioned whether there is a possibility that the tin could have been moved to the spot where it was discovered from where Wallace alleges he hid it on 24th June 2014. The evidence shows that Wallace's insistence regarding the tin being recovered at the spot he hid it is rather suspect. The reason for that has been explained above.

[38] Fabio's was unequivocal in his averment that there was no agreement between him and the accused and that he never discussed the content of the tin with him. If Fabio had placed the controlled drug in the tin himself, then the accused was devoid of knowledge of the contents of the tin. The prosecution has not satisfied this that if the proposition that Fabio placed the drugs in the tin that at least the accused had knowledge or mere suspicion that the content of the tin was indeed controlled drug. That would have satisfied the necessity of mens rea as provided for in **R v Anderson** (Supra) (paragraph 30 above).

[38] It is true that from the manner the tin and its contents were being wrapped by Fabio suggests that its contents would have been something illicit, not necessarily drugs. By merely holding the cling film roll to assist in the wrapping of the items does not establish beyond reasonable doubt that the accused had full or in the least reasonable knowledge or belief that the item was controlled drug and that irrespective of that knowledge or belief

the accused had every intention to continue with that course of conduct. In **R v Murphy** (supra) it was held that the agreement may be proved by circumstances that may be presumed. However, based on the 5 foregoing paragraphs, this court feels that it will be unsafe to rule that the fact that the accused assisted Fabio in wrapping the tin that he conspired with Fabio and Wallace to commit the offence of drug trafficking. The prosecution has not satisfied court beyond reasonable to the contrary. Therefore, I find the accused not guilty and acquit of the second count,

Signed, dated and delivered at Ile du Port on 13 January 2016

M Vidot
Judge of the Supreme Court