IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CO51/2013

[2017] SCSC 366

THE REPUBLIC

versus

HANSEL LESPERANCE & ORS
Accused

Heard: 24 October 2016 - 4 February 2017

Counsel: Mr. Esparon, for the Republic
Mr. Chetty for the 1st Accused
Mr. Gabriel for the 2nd Accused
Mr. Camille for the 3rd Accused
Mrs. Amesbury for the 4th Accused
Mrs. Domingue for the 5th Accused

Delivered: 17 March 2017

JUDGMENT

Akiiki-Kiiza J

[A] INTRODUCTORY REMARKS

The five accused persons are charged in various combinations in five counts.

In the first counts, A1 (Hansel Lesperance) and A2 (Darrel Victor) are charged with Robbery with violence *Contra Section 280 and 23 of the Penal Code and punishable under Section 281 of the same Code*. It is alleged that, both accused persons and another not before the Court, (Medley Belmont) on the 19th August 2013 at Quatre Bornes, Takamaka with common intention robbed a

briefcase valued at SR 900/- the property of Barclays Bank, and at or immediately before or after the time of the said robbery used actual violence namely the use of tear gas.

In the second count, A3 (Ruth Rosette), A4 (Martin Celeste), and A2 (Darrel Victor)are said to have aided and abetted A1 (Hansel Lesperance) and one Medley Belmont, to commit a felony namely the offence of Robbery with violence *Contra Section 280 and 22 (c) of the Penal Code, which is punishable under Section 280 of the same Code*.

In the third count, all the 5 accused person are charged with conspiracy to commit a felony, namely the offence of robbery with violence *Contra Section 381 read with Section 280 of the Penal Code and punishable under Section 381 read with Section 280 of the Penal Code and punishable under Section 381 of the Penal Code.*
It is alleged in that count that the 5 accused persons and one Medley Belmont not before the Court, on the 19th August 2013 at Quatre Bornes, Takamaka, agreed with one another to commit a felony of robbery with violence, namely that of a briefcase valued at SR900/- the property of Barclays Bank.

The Fourth count, is stealing by a servant *Contra Section 260 of Penal Code read with Section 266 of the same Code along with Section 23 of the same code and punishable under Section 266 of the same code*. It is alleged that A3, A4 and A5 on the 19th of August 2013, at Quatre Bornes, Takamaka, whilst being employees of Barclays Bank, with common intention stole a sum of SR 3,298, 000/- belonging to the said Barclays Bank.

The 5th and last count is conspiracy, wherein all the 5 accused persons are charged with conspiracy to commit a felony namely stealing *Contra Section 281 read with Section 260 if the Penal Code and punishable under Section 381 of the same Code*. It is alleged that all the 5 accused persons together with one, Medley Belmont (not before the Court) on the 19th August 2013, at Quatre Borne, Takamaka agreed with one another to commit a felony of Stealing *Contra Section 260 of the Penal Code and punishable under Section 381 of the same Code.* It is alleged that all the 5 accused persons together with one, Medley Belmont (not before the Court) on the 19th August 2013, at Quatre Bornes, Takamaka agreed with one another to commit a felony of stealing a sum of SR 3, 298,000/- the property of Barclays Bank.

All the accused persons pleaded not guilty and the case went to a full trial.

The prosecution called a total of 25 witnesses, and as for the defence A1, A2 and A4 chose to remain silent and say nothing in their defence and A3 and A5 made dock statements. They both denied the allegations from the prosecution and denied ever committing any of the offences they are charged with.

All the five accused persons informed the Court through their counsel that they had no witnesses to call.

B. THE BURDEN OF PROOF.

In Common Law Jurisdictions, since the famous English Case of **WOOLMINGTON V/S D. P.P [1935] AC 462**, it is the law that in most criminal cases, the burden of proof is on the prosecution to prove the case against an accused person. The accused has no duty to prove himself or herself innocent.

This case was cited with approval by the Seychelles Court of Appeal in the case of **SULLIVAN V/S AG SCA No 25/12 [2014] SCCA 29. See also R VS OSMAN [2011] SLR 344.**

C. THE STANDARD OF PROOF

The standard of proof in Criminal matters is high. It is beyond a reasonable doubt. This standard will only be met if the evidence against an accused is so strong so as to leave only a remote possibility in the accused's favour which can be dismissed with the sentence *'of course it is possible but not in the least probable'* (See **LORD DENNING, in the case of MILLER VS MINISTER OF PENSIONS [1947] 2 ALL. ER 372.**

In other words, if there is a reasonable doubt as to the guilt of the accused person, such doubt must be resolved in favour of the accused person. An accused person should be convicted only on the strength of the evidence adduced against him but not based on weaknesses in his defence. Mere suspicion alone, however strong it might be, is not evidence and hence cannot be relied upon by the Court to convict. (See an **East African Court of Appeal Case of OKETHI OKALE VS R [1965 EA 555)**

D. THE ELEMENTS OF THE OFFENCES

1ST COUNT- Robbery With Violence

Section 280 of the Penal Code defines robbery as follows:

> *" 280. Any person who steals anything and, at or immediately before or immediately after the time of Stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to it being stolen or retained, is guilty of the felony termed 'robbery'. "*

To my mind the elements to be proved beyond reasonable doubt by the Prosecution are as follows:

i. There must have been theft.
ii. That theft must have been accompanied by violence either during, before or after the theft.
iii. The accused person must be the one, or was among the people who committed the robbery.

From the facts of the case, especially from the evidence of PW5 and PW7, the money stole during the robbery had been put in black briefcases, which belonged to Barclays Bank. Apparently one of these briefcases was stolen with the money at Takamaka on the 19/08/13. To this end, this element, in my view has been proved beyond reasonable doubt.

As to the violence accompanying the stealing of the briefcase, it was the evidence of the PW7 and PW10, who were at Takamaka during the robbery as security guard and driver of the van, respectively, that the robber had taken the briefcase containing the money from the H1 bank van respectively that the robber had spread tear gas on PW7, before fleeing with the briefcase containing the money. In the circumstances, therefore, the element of violence has been proved beyond reasonable doubt by the Prosecution.

I now turn to the alleged participation of A1 and A2 in the stealing of the briefcase.
It appears there was no eye witness account of implicating A1 or A2, as no one had told Court that they saw them rob or steal the briefcase from the van.

What the prosecution appears to be relying upon is circumstantial evidence and *Section 23 of the Penal Code.*

Circumstantial Evidence

Although circumstantial evidence could be the best evidence, it is trite law that such evidence must be narrowly examined because such evidence may be fabricated to cast suspicion on another. Consequently, before inferring the guilt of an accused person from circumstantial evidence , it is necessary to be sure that there are no any other co-existing circumstances which would weaken or destroy that inference , (See case of **TEPER VS R [1952] AC 489. In the case R V/S KIPKERING ARAP KOSKE and ANOTHER, [1949] 16 E. A. C. A 135, where the East African Court of Appeal** held as follows:-

> ***" For a conviction to be based on circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilty"***

The above state of the law was more or less upheld by the Seychelles Court of Appeal in the case of **SOPHA VS REPUBLIC [2012] SLR 296** , where his Lordship **Fernando JA**, expounded the law on this topic in Seychelles and he quoted from *Sarkar on Evidence* (*15th Ed. Reprint of 2014) at P66-68*).

His Lordship listed 8 points for the Court to consider. The first 2 in my view is more or less what the **East African Court of Appeal in KIPKENING ARAP KOSTE and TEPER** cases have stated. However, *Sarkar on Evidence* as quoted by SCA in **Sopha Case** above, added the following:-

> ***"3. That the circumstances from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be closely connected with the fact sought to be inferred thereof.***
>
> ***4. where circumstances are susceptible of two equally possible inferences, the inference favouring the accused rather than the prosecution should be accepted.***

5.There must be a chain of evidence so far complete as not to leave reasonable ground for a conclusion therefrom consistent with the innocence of the accused, and the chain must be such human probability the act must have been done by the accused.

6. where a series of circumstances are dependent on one another they should be read as one integrated whole and not considered separately otherwise the very concept of proof of circumstantial evidence would be defeated.

7. circumstances of strong suspicion with more conclusive evidence are not sufficient to justify a conviction, even though the party offers no explanation to them.

8. if combined effect of all the proved facts taken together is conclusive in establishing guilt of the accused, conviction would be justified even though any one or more of those facts by itself is not decisive"

Common Intention - Section 23 of the Penal Code.

Apart from the circumstantial evidence the prosecution seeks to reply also on *Section 23 of the Penal Code.*

This Section however, sets out only the principle of criminal liability but does not in itself create any offence,

Section 23 enacts 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 a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence"

The above Section brings into play the element of **knowledge** that is knowledge on the part of the perpetrators as to the probable consequences of the prosecution of the offence they originally set out to commit. In such circumstances, therefore, proof of the requisite intention on the part of the perpetrators, need not be proved but proof of knowledge would suffice.

In the case of **JEAN PAUL KOLINDO & GARY PAYET SCA 4/2010** their Lordships of the SCA stated as follows:

> ***"The law in Seychelles is that it suffices to show that a secondary act took place as a probable consequence of the agreed first act intended. In this jurisdiction, we do not need to look for the intention of the perpetrators to carry out the secondary act. All that is necessary is that the Secondary act took place as a probable consequence of the first agreed act to which they had agreed upon"***

Further, in the case of **MOHAMMED HASSAN ALI AND 4 Ors VS REP, SCA Cr. Appl. 22/12, in her Judgement, TWOMEY, JA** (as she was then) stated as follows:

> ***" It is our view that Section 23 of the Penal Code enacts the third variety of a joint enterprise.....that is where there is a consequential act to the primary act. In the present case the accused persons were not being charged with a consequential act and so referred to Section 23 of the Penal Code would be inappropriate."***

In the case of **PATRICK SOPHA VS THE REPUBLIC SCA Cr. Appl 27/10**, his Lordship **Fernando, Ja**, had the following to say in *paragraph 23;*

> ***"23: Is the element of knowledge of probable consequences one of strict liability or part of mental element to be proved by the prosecution?***
> ***The wording in Section 23 'an offence is committed of such nature that its commission was a probable consequence of the prosecution of such purpose' excludes strict liability. The next issue to be determined is whether it is an objective test or subjective test that is called for under Section 23 (of the Penal Code) to determined knowledge of the probable consequences, namely of the other (second) offence, on the part of the perpetrators. Section 23 uses the words 'each of them is deemed have committed the offence'. The deeming provisions provides for an objective test ....."***

Let me now apply the Law regarding circumstantial evidence *and Section 23 of the Penal Code,* as explained hereinabove to the facts before us in respect of the accused persons charged with each count.

As for the alleged participation of A1 and A2 in the first count, it is alleged that both of them with one Medley Belmont,(since deceased) on the 19th August 2013, robbed a briefcase valued at SR900/- the property of Barclays Bank.

A1- Hansel Lesperance

The evidence adduced by the prosecution tending to implicate A1 is allegedly from PW11. He told Court that he rented a car Registration No 20958, which was used by one Medley Belmont to steal the briefcase. This is supported by PW7, PW10 and PW4. It was prosecution's case that, because A1 picked Medley Belmont, who had robbed the briefcase containing the money, he had participated in the robbery by virtue of *Section 23 of the Penal Code.*

In his repudiated statement made under caution, A1 stated that, he had hired the vehicle Registration S20958 from PW11 on the 10/8/13 for two days, and that on the 19/8/13, at about 9.30 he received a call from a male voice who told him to go to Point Aux Sel from where he met Medley Belmont who told him to go to Takamaka and wait for him at a certain shop. It was 11.30. That 15 minutes later he saw Medley waving at him whom he recognised as a person he had known for 10 years and had gone to the same school with, that he had a big black bag which was like a trolley bag. That he entered the car with the bag. That Medley told him to drop him at Baptista, where they met another car, which Medley entered. That A2 was also in that other car. Then he drove off. That he later met them after his arrest. That for him he was working as a *taxi pirat* and that Medley was going to pay him for his services. He denied making any plan with Medley or A2.

From the evidence from both sides, there is no direct evidence implicating A1 to the crime. On the other hand does the circumstances described by the prosecution witnesses and from A1's statement under caution (exhibit PE37), point exclusively to A1 as the likely person who had stolen the briefcase? In my Judgment, it does not. Alternatively then, can he be held responsible under *Section 23 of the Penal Code*? Did Medley and A1, have a meeting of the mind, that is to go and rob the bank, and as a consequence, thereof the stealing of the briefcase also resulted?

As pointed out by the SCA in the case of **JEAN PAUL KILINDO** Cited above, has the prosecution proved beyond reasonable doubt that the secondary act (stealing of the briefcase) took place, as probable consequences of the agreed first act of committing any other offence?
In my Judgment, it has not been proved beyond reasonable doubt that when A1 got a phone call to meet with Medley, he knew that they were going to commit and offence. The mere fact that telephone calls were made between various players including A1, Medley and A2 or any of the person does not irresistibly show that they were talking about committing any offence or participating in it at all. A1 in his admitted statement under caution, says for him he was working as a *taxi pirat*. There is no concrete evidence before the Court showing that the parties involved were planning to rob the bank or commit any other crime.

In the premises, therefore, I find that the prosecution has not proved beyond reasonable doubt that A1 committed the offence of stealing in the 1st count. He is accordingly acquitted of the same.

A2- Darrel Victor

As for A2, it is the prosecution case that, he is implicated because he was engaged in telephone conversations with A1, and Medley Belmont at around 11.30 hours. That there were calls involving telephone numbers 256303, which belonged to A1, 253295 and telephone 2546683 belonging to A2. The prosecution concludes that these calls involving A1 and A2 were enough to implicate A2 in the robbing of the briefcase at Takamaka. Apart from that, there is no any other admissible evidence against A2 on record.
It must be noted that there is no evidence on record to show what was the subject matter of the conversations between the persons who rang and the persons who received these calls.
Secondly, there is no evidence to prove beyond reasonable doubt the persons who were using these sets included A2. He is only mentioned by A1 in his statement under caution, but this is inadmissible against him. The contents of a statement under caution is admissible only against its maker and not a co-accused person.
A2 was never seen at Takamaka Barclays Bank Branch by any prosecution witness. A2 chose to keep quiet and say nothing in his defence, which the law allows him to do.

All in all, I find that the prosecution has failed to prove the 1st count regarding the robbery of a briefcase belonging to Barclays Bank beyond a reasonable doubt, and I accordingly acquit A2 on that count.

2ND COUNT

In the second count, the charge is aiding and abetting another to commit a felony namely the offence of robbery with *violence Contra Section 280 with Section 22 (c) of the Penal Code* and punishable under *Section 281 of the same code.*

The particulars thereof are that A3 (Ruth Rosette) and A4 (Martin Celeste) on the 19th August 2013 aided and abetted A1 and A2 along with Medley Belmont to commit a felony namely the offence of Robbery with violence.

In the case of **Dominique Dugasse & 2 ors Vs the Republic, SCA Cr. Appl 25,26 & 30/2010**, His Lordships **Fernando, JA**, had the following to say in *paragraph 23* regarding the charge of Aiding and abetting:-

> ***"23. One becomes liable on the basis of aiding and abetting in the commission of a crime when the offence is established and where there is a principal offender. The "****actus****" of the offence of aiding the Commission of an offence involves any type of assistance given prior to, or at the time of the commission of the offence.....***
> ***The important element being that there must be a connection between the assistance and the commission of the offence and should have helped the principal to carry out the offence.....Abetting involves, inciting, instigating or encouraging the commission of an offence.***
> ***-The "****mansrea****" for both aiding and abetting is that the secondary party should have intended to do the act of assistance or encouragement or could have foreseen the commission of the offence as a real possibility and should have intended or believed that such act will assist or encourage....."***

What we have in this case is that the principals are A1 and A2, which A4 and A5 are supposed to have aided and abetted in robbing a black briefcase belong to Barclays bank, which is a subject matter of the 1st count. As already held, I was not satisfied beyond reasonable doubt that the

prosecution had proved the 1st count beyond a reasonable doubt and I acquitted both A1 and A2. This means that the offense of robbery has not been established as both A1 and A2 as principals were acquitted.

In any case, the evidence which the prosecution is seeking to rely on is about the various telephone conversations or calls pointed out by the telephone experts from Cable & Wireless (PW24) as well as from Airtel Company, as well as the SMS's sent from cell phones registered to or belonging to the accused persons. These experts told Court that they cannot know who exactly rang at any particular time or what was said during these telephone conversations. This also goes to the SMS's sent on the phones. Hence there is no proof that at the relevant times pointed out by the prosecution, it was A3 and A4 talking or sending SMS's.

It is the law that mere suspicion, however, strong it might be, cannot be a basis for a Court to convict an accused person. There must be cogent and admissible evidence to rely on to convict such an accused person. Such evidence is lacking here.
All in all, I find that the prosecution has failed to connect A3 and A4 to the crime in the second count. I accordingly acquit them.

3RD COUNT

In the 3rd count, all the five accused persons are charged with conspiracy to commit a felony namely the offence of robbery *Contra Section 381 with Section 280 of the Penal Code and punishable under Section 381 of the same code*. It is alleged that, the 5 accused persons, along with one Medley Belmont, (since deceased)on the 19th of August 2013 at Quatre Bornes, Takamaka, Mahe, agreed with one another to commit the offence of robbery with violence of a Briefcase valued at AR 900/- belonging to the Barclays Bank, Mahe.

I will attempt to set out the law regarding that offence of conspiracy.
There are 2 leading cases decided by the Seychelles Court of Appeal which throw some light on what constitutes the offence of Conspiracy.

The first one is the case of **DOMINIQUE DUGASSE & 2 ORS VS THE REPUBLIC SCA Cr. Appl 25, 26, and 30/10**, their Lordships, as per **Fenando JA**, had the following to say in paragraph 25 of their Judgment:-

> ***"25. The essence of Conspiracy is the agreement when two or more agree to carry their criminal scheme into effect, the very plot is the criminal act itself. Nothing needed to be done in the persuit of the agreement; repentance, lack of opportunity and failure are all immaterial. Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused done in pursuance of an apparent criminal purpose is common between them....***
> ***Overt acts which are proved against some defendants may be looked at as against all of them. Vide Archbold 2012- Paragraph 33-14.....***
> ***As far as*** *'mensrea'* ***of the offence is concerned, it needs to be established that the accused when he entered into the agreement, he intended to play some part in the agreed course of conduct in furtherance of the criminal purpose which the agreed course of conduct was intended to achieve. ....***
> ***.....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' "*

In the more recent case of **JOHN SIFFLORE VS THE REPUBLIC SCA Cr. 15/11,** their Lordship, per **MSoffe Ja,** had the following to say, in paragraph 18:-

> ***"18. As stated in Halsbury's Laws (5th Edition) at Paragraph 73, the offence of Conspiracy is committed where two or more persons agree to pursue a course of conduct which if carried out in accordance with their intentions, will necessarily amount to or involve the commission of an offence by one or more of the conspirators , or would do so but for the existence of facts which render the commission of the offence impossible.***

19: The Conspiracy <u>arises</u> and the offence is c<u>ommitted</u> as soon as the a<u>greement</u> is made; and the offence continues to be committed so long as the combination of the performance or by abandonment or frustration or however it may be.

20: The** 'actus reus' **in a Conspiracy is therefore the agreement for the execution of the unlawful conduct, not the execution of it. It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place, it is necessary to show the meeting of the minds, a* **'consensus adidem'** *to effect an unlawful act.....

21:.....

23. The main elements of Conspiracy are <u>a Specific intent, an agreement with another person to engage in a crime</u> to be performed. An unlawful agreement is a an element of a criminal conspiracy"

The next question for my determination is whether the prosecution in this case has proved beyond reasonable doubt that the accused person's had a specific intent and had agreed with each other to rob the brief case belonging to Barclays Bank?.

As already seen from the two decisions by the Seychelles Court of Appeal, the *'actus rea'*, in conspiracy is the agreement for the execution of an unlawful conduct but not the actual execution of that unlawful conduct (see **<u>JOHN SIFFLORE VS REPUBLIC</u>** above).

In other words, there must be a meeting of the mind between the conspirators so as to commit the unlawful act, that is to rob the briefcase belonging to Barclays Bank. (see the particulars of the offence in the third count).

As for the *'mens rea'*, it is the intention to carry out the crime that Constitutes the necessary *'mens rea'* . (**<u>Lord Bridge in Anderson 1986, AC. 27 H.L and Lord Griffins in Yip Chiu (heng Vs R 99 Cr. App. R 406 by Privy Council)</u>**.

Let us now examined the evidence in respect of each accused person.

<u>A1</u>: According to Mr. Esparon, A1 is implicated in the Conspiracy because he had received calls from Barclays Bank Vault from A2 around or during the time of the robbery; that he had also

rented a getaway car and that from the way Medley Belmont was dressed, A1 knew he was a thief.

In his admitted statement under caution A1 stated that he was a taxi pirate and on the material day, he had received a call from Medley Belmont to go to Takamaka and wait for him. He saw Medley with a big bag and he entered with it in the car he was driving and they drove off to Baptista. Then Medley entered another vehicle driven by A2 and he drove off. He said for him he was on duty as a taxi pirate. Does these facts prove beyond reasonable doubt that, when Medley told him to go to Takamaka and wait for him, they had agreed to go and rob the briefcase?

Do these facts prove that A1 had the intention to participate in the robbery of the briefcase? I do not think so. There is no evidence to show that the telephone calls between Medley and A1 regarded the robbery at Takamaka. It is only suspicion which in law, as stated earlier in the Judgment does not amount to evidence for the Court to convict an accused person.

All in all, I find that there is no evidence for the Court to convict A1 on the third count. He is accordingly acquitted of the same.

A2: As for A2, has the prosecution proved beyond reasonable doubt that there was a meeting of the mind between himself and Medley Belmont, who appear to have masterminded the robbery of the money and the briefcase at Takamaka? Is there evidence to prove knowledge on A2's part and intention to commit the robbery at Takamaka?

Mr. Esparon appears to suggest that the phone calls made between A1, A2 and Medley Belmont, meant that they were discussing about committing the robbery and agreed to do so. But there is no tangible evidence to this effect on the record. It is again merely suspicion. A2 never gave evidence at the trial and his statement under caution was not admitted in evidence. Hence we do not know his side of the story. The prosecution has still to prove the meeting of the mind, as the *'actus rea'* and the intention to commit the robbery as the *'mens rea'*. This proof must be beyond reasonable doubt. This evidence is lacking on the record. I accordingly acquit A2 on the third count.

A3: Mr. Esparon contends that the behaviour of A3 while at Takamaka, when she opened the door of the bank van which enables the robber to grab the briefcase containing money coupled

with the various telephone conversations she had had before the robbery involving the co-accused persons, showed that she had agreed to commit the crime and had the intention to commit it. On the other hand, Mr. Camille who appeared for A3 submitted to the effect that, the statement sought to be relied upon by the prosecution is not a confession as she did not admit committing any offence as such. That A3 had opened the door of the van at Takamaka because there was a loud bang from outside and she wanted to find out but the robber broke in and took the money in the bring case.

To him, there was no evidence from the prosecution to prove beyond reasonable doubt that there was the "*actus* and *mens"* as there is no evidence of an agreement or that she had discussed with A4 or that they had intended to commit robbery of the briefcase.

As stated earlier on, there is definitely strong suspicion against the accused persons including A3, but suspicion is not evidence. I find that the 3rd count has not been satisfactorily proved against A3. I accordingly acquit her of the same.

A4: There is no direct evidence linking A4 to the stealing of the briefcase at Takamaka. There is no evidence to show that A4 had agreed with his co-accused to commit the robbery of the briefcase. It appears the only evidence connecting him to the robbery is his statement under caution (exhibit PE38) - but even in this statement, he does not admit the offense or show that he knew about the robbery of the briefcase at Takamaka. In the premise, therefore, I find that the prosecution had not proved the 3rd count against A4 beyond a reasonable doubt. I accordingly acquit him of the same.

A5: For A5, he was never at Takamaka where the briefcase containing the money was stolen from. There is no direct evidence to show that he and A4, A3 together with Medley Belmont, the mastermind of the robbery had talked about.

What we have is speculation about telephone conversations but there is no record of what was said and/or by whom. I accordingly acquit A5 on the 3rd count.

4TH COUNT

The 4th count is preferred against A3, A4 and A5. They are charged with stealing by servant *Contrary to Section 260 read with section 266 of the Penal Code and under Section 23 of the Penal Code.*

The particulars thereof are that, the three accused persons and one Medley Belmont (now deceased) on the 19th August 2013 at Quatre Bornes, Takamaka, Mahe, agreed with one another to commit a felony namely the offence of Stealing a sum of SR3, 298, 000/- which belonged to Barclays Bank, Mahe.

The element of the offence of Stealing by servant appears as follows:-

i. There must be theft.
ii. The theft was committed by a servant/employee of the complainant.
iii. The property stolen belonged to the employer.
iv. The accused person is responsible for the theft.

A3- Ruth Rosette: There is evidence from Mrs. Sally Gopal, the Security Manager with Barclays Bank, that, A3, A4 and A5 were employees of the same bank she works for (Barclays bank). That A3 was a banking officer dealing with transporting cash. This is confirmed by PW13, Mr. Joseph Michel who stated that A3 was dealing with money put in ATM's. A3 herself in the admitted statement under caution acknowledge that she had worked for Barclays Bank for 6 years, and at the material time she worked as a custodian with the duty of filling up ATM machines with cash, and that she was on duty on the material day. This is confirmed by PW13 who told Court that he had issued A3 with money which she signed for as per Exhibit PE7.
Both PW13 and PW20 impressed me as truthful witnesses in this regard and I find that A3 has been proved to be an employee of Barclays Bank, who were the owners of the stolen money.

As to whether there was theft of the money, almost all of the prosecution witnesses testified to this effect. These include PW1 who is a Police Officer, PW22, PW13 and many others, who told the Court that a lot of money (SR3, 298, 000/-) belonging to Barclays Bank was stolen on the 19th August 2013. This money was from ATM's at Market Street, Beau Vallon and Takamaka branches. There is no any other evidence before me to contradict this evidence. I accordingly find that this element of theft has also been proved by the prosecution beyond reasonable doubt. The same evidence also proved that, the money belonged to Barclays Bank as it had been got

from ATM's machines and according to PW2, Mrs. Gopal Sally the money had Barclays Bank tags on it.

The next issue was for my determination is the alleged participation of A3 the Stealing of the money from her employers Barclays Bank.

It is not in dispute that, A3, was among the 4 people in a bank van which had money at Takamaka Barclays Bank branch on the 19/8/13. She was with A4, PW7 and PW10, when the money got robbed. It is the prosecution case that the circumstances surrounding the stealing of the briefcase containing the money at Takamaka on the 19/8/13 coupled with what had happened a few days before the robbery involving with the telephone calls between the 3 accused persons, and one Medley, in addition to her statement made under caution (exhibit PE40), showed that all of them had a common intention to steal from the bank.

There is evidence from PW7, Mr. Antat, that, while guarding the van, A3 was seated inside the van and when the robber came, he banged on the door and A3 opened it from inside and then the thief grabbed the briefcase containing the money and fled. According to PW7, PW10, PW20 and PW22, the van containing money is not supposed to be opened by the people responsible for the money or for that matter leave the van for any reason. There is also evidence from A3's admitted statement under caution that earlier on she had seen A4 take the money which she knew belonged to her employer, out of the official briefcase and put it in a backpack and then went out of the van with it when they reached Providence Branch. That he later returned to the van without the money.

A3 gave a dock statement during the trial and denied taking part in the robbery or it its planning or conspiracy to steal the bank's money. She stated that what was stated in her first statement was never presented to the Court.

I have carefully considered the entire evidence on record regarding the 4th count. I have also critically analyzed demeanors of the prosecution witnesses especially PW7, PW10 and PW22 and that of A3 during giving her dock statement. The 4th count is based on *Section 23 of the Penal Code.* This section requires proof of an agreement to carry out an illegal first act and that while implementing this agreement, a second or secondary offense is also committed (See the case of **Patrick Sofa Vs Republic SCA 27/10 - Paragraph 22**) and Mohammed **Hassan Ali & Ors Vs Rep. SCA 22/12 Twomey JA**).

In this case, there is no proof of the original offence which A3 and her colleagues had set out to commit but ended up also committing theft of their employer's money amounting to the sum of SR3, 298, 000/-.

What the prosecution has proved is that A3 had been on duty on the 19/8/13 and had collected money from ATM's belonging to Barclays bank, but there is no evidence to prove beyond reasonable doubt that she was the person who had stolen the money from the van at Takamaka. In the circumstances, therefore, I find that the prosecution has failed to prove the 4th count against A3 beyond a reasonable doubt and I accordingly acquit her of the same.

A4- Martin Celeste: A4 was with A3 at Takamaka when the money was robbed. According to PW7 and PW10, they had left Victoria for Takamaka Barclays Bank Branch via Providence. That A4 had left the van ostensively to go and buy something for PW7 and it was during that absence that the theft took place. Before this, they had left the ATM machine at Beau Vallon and Market place branches where both A3 and A4 had removed the money from the respective ATM machines. That A4 had 2 briefcases where they normally put the money and he had put them in the van. However on the way, A4 said they should stop at Providence Branch so as to pick some rolls of receipts. Then A4 entered the bank branch at Providence and later came back in the van, and they left for Takamaka.

That while at Takamaka, A4 and A3 went into the ATM facility and then, A4 came out of the ATM and went to the shop for about 3 to 4 minutes and returned with lemonade and went back to the ATM machine. Then both A3 and A4 returned to the van with two briefcases. Then soon thereafter A4 went out of the van but that A3 remained inside the van which was under lock. This was the second time A4 was going to the shop. PW10 told Court that going out of the van while transporting money was against Barclays Bank Policy. PW7 went further and said that while waiting for A4 to come back, a man came from the direction of the shops and had some cover like a t-shirt around his head. That this man came to the van and put his hand on PW7's mouth and tilted his head backwards and he sprayed tear gas in his face. They struggled but the attacker managed to run away with the briefcase containing the money. That they tried to chase the intruder but both him and PW10 were weak due to the tear gas sprayed on their faces and they could not catch him. That later A3 told him that the briefcase the thief had stolen contained

a lot of money. When A4 returned he was told what had happened and the matter thereafter was reported to the Police.

A4 never testified at the trial and that is his Constitutional right. The question is has the prosecution satisfactorily connected A4 to the robbery at Takamaka?
The prosecution is relying on *Section 23 of Penal Code* to connect him to the crime. Has it proved beyond reasonable doubt that a secondary act took place as a probable consequence of the agreed earlier illegal act? (See the case of **Jean Paul Killindo & Gary Payet SCA 4/10**) .
On our facts, which is the first act the accused person had agreed or intended to commit which had resulted in the stealing of the money? (See **Jean Paul Killindo & Gary Payet** case above)
From the evidence on record, there is no proof that the theft of SR3, 298, 000/- on the 4th count, was a secondary act resulting from an earlier first act which the accused person had set out to do.

In my considered view, therefore the 4th count has not been proved beyond reasonable doubt against A4, as no role has been proved that he played under *Section 23 of the Penal Code*. He is accordingly acquitted of the same.

A5- Channel Quatre: A5 was a Barclays Bank Branch Manager at Providence. The case against him is that he participated in the stealing of his employee's money. Their main thrust of the prosecution case against him is that a lot of money belonging to his employers had been found in his custody, that is, in his office at Providence and also at this residence.

According to Police Officer Rennick Lespoire (PW9), while on duty, he was assigned the duty to go to the home of A5 in respect of the robbery which had taken place at Takamaka earlier on the 19/08/2013. That they found A5 at home and after informing him that he was a suspect in that incident. That A5 invited them to enter his house. PW9 was with Sergeant Marengo and PC Charlotte. That A5 told them that he would bring back the money. He led them to his bedroom from where they saw lots of money on the ground. That the money was in notes of SR100 and SR500 denominations. That this money was under a small cabinet in A5's room. PW9 put the money in the backpack (exhibit PE5) found in the room and he informed A5 that he was going to be arrested. He read him his Constitutional Rights and they took him to CID officers, along with

the money. Then the lady from the Barclays Bank (PW20) came and counted the money and it was found to be SR 2, 089,500/-.

PW9 told Court further that the money was in packets with Barclays Bank seals on them.

According to PW20, Mrs. Sally Gopal, she had been called to the CID offices where she found A5. That there was a lot of money on the floor together with a bag and she was asked to count the money. She found it to be SR 2, 098500/-. That the counting was in the presence of other prosecution witnesses including PW1. However, she said that she had established from A3 and A4 plus other members of the staff that that sum of money was not all the money which was missing from Barclays Bank coffers, as it excluded what has been stolen at Takamaka. That when he asked A5 whether that was all the money, A5 had at first kept quiet but upon further asking him, he told them the other money was at Providence Branch and that they proceeded to get it. That they were with PW15 and Inspector Marie. That when they reached A5's office at Providence they opened the door and A5 led them to the back of the Bank premises to his office and told them that, the money was in a small cabinet. Upon opening the cabinet, they found a small box containing money. That this money had Barclays Bank tags on it, which showed that the money had come straight from the Bank Vault. The cash recovered was counted and it was found to be SR 1,200, 000/-. PW1 in the meantime had recorded the first and the last numbers on the bank notes from each bundle and money was put in the Barclays Bank seal bag and it was transferred to the Central Bank for safekeeping. This money was eventually exhibited in evidence. The witness told Court further that, the money recovered from A5's house and office totalled SR3, 298 400/-.

A5 statement under Caution was admitted in evidence as exhibits PE39. In that statement A5, among other things, had talked about what had happened on the 19/8/2013. He stated that on that day he had received some money in a back pack from A4. That he took the bag full of money to his home and put the rest in his office. That, later on, Police came to search his house and he showed them where the money was. It was in his bedroom under his drawer. That they took this money to the CID offices along with him. That he told them that the balance of the money was at his office at Providence, and he took them there and he showed them the second bag containing

the balance of the money. Then the Police took pictures (photographs). That the money was in a small box in a small cabinet. That all the money was taken to CID office.
At the trial A5 gave a statement from the dock denying committing any of the give counts, he is charged with.

I have carefully considered all the evidence regarding A5 in respect of the 4th count. I have also critically analysed the demeanours of the prosecution witness especially that of PW20 (Mrs. Gopal) and PW9 (Mr. Rennick Lespoire) and that of the A5 himself while making his dock statement. Both PW9 and especially PW20 impressed me as truthful and reliable witnesses.
On the other hand, A5 impressed me negatively as a liar bent on an attempt to pre-empt the consequences of his actions.

Having said that, the evidence from the prosecution regards basically what the witnesses had found at the home and office of A5. It appears, however, that there is no evidence directly implicating to have taken part in the actual stealing of the money from any of the ATM machines. What appears to be the evidence tending to connect him to these crimes is from the statement under caution of his co-accused persons, which cannot be relied upon by the Court to convict A5. These statements would only affect the makers but not A5 as a co-accused person.

Can A5 be implicated under the provision of *Section 23 of the Penal code* that he had a common intention with the rest of his co-accused persons to steal his employer's money? Unfortunately, this cannot be so for the reasons I gave while considering the evidence against A3 and A4, as there is no proof from the prosecution showing a meeting of the mind of A3, A4, and A5 that they steal their employee's money. Hence in my considered view, the charge in the 4th count cannot stand against A5, as well.

Having said that however, I find that there is sufficient evidence to prove that A5 had received the money which was found in his possession at his home and also at his office at Providence, with knowledge that the same had been feloniously obtained and/or stolen. First of all, the huge amount of money, which according to PW20 had Barclays Bank tags/logos still on them, which indicates that the money had come straight from the bank vaults was found in his house and

office. He tried to hide part of it in the cabinet and the balance in his bedroom. This is not a behavior of an innocent man. In his statement under caution he stated as follows:

> *"I saw the bag of money. I thought to myself that I have to remove the bag of money so that I would not be in trouble although I knew I will be in trouble I went to pick my bag pack were I took it to the store. I removed the money in Martin's' bag pack and I placed in my bag pack and I put the rest in a box and put it in my office"*

Although the interpretation from Creole into English might have been somewhat faulty, but the sum total of what A5 stated was that he was overwhelmed with the huge sum of money which Martin had brought to him, and he sensed trouble hence for him to hide it, in the store at his office, and in his room at home. This, in my Judgment, shows that A5 knew or should have known that the money he was keeping was not legally obtained by Martine, but nevertheless he decided to keep it. This knowledge on his part is shown in the conclusion of his statement under caution when he stated that;

> *".....I want to apologise that when the money was in my possession I did not report it"*

All in all, although I find that, the prosecution has failed to prove the charge of Stealing by a servant against A5 and I acquit him, I am however satisfied beyond reasonable doubt that the prosecution has proved beyond reasonable doubt the charge of receiving stolen property *Contra Section 30 9 (1) of the Penal Code. (See Section 164 (1) of the Criminal Procedure Code*). I accordingly find him guilty of the same, and I convict him accordingly.

5TH COUNT

In the 5th count, all the five accused persons are all charged with Conspiracy to commit a felony namely the offence of stealing *Contra Section 381 and 260 of the Penal Code and punishable under Section 381 of the same Code.* It is alleged that all them together with one Medley Belmont, now deceased, on the 19th of August 2013 at Takamaka agreed with one another to

commit a felony, namely the offence stealing a sum of SR 3, 298, 000/- which belonged to Barclays Bank, Mahe.

I have already explained what constitutes Conspiracy while I was considering the third count, especially while discussing the two Court of Appeal cases of **Dominique Dugasse and 2 others Vs The Rep SCA Cr. App. 25, 26 & 30/10** and in the case of **John Sifflore Vs Rep SCA 15/11.** In the Dugasse case, it was stated to the effect that:

> ***"...The crime of Conspiracy requires an agreement between 2 or more person to commit an unlawful act with an intention of carrying it out. It is the intention to carry out the crime that constitutes necessary 'mens rea' "***

In the case of **John Sifflore,** the SCA held that the *'Actus rea'* in the conspiracy is the agreement for the execution of the unlawful act or conduct, but not the actual execution of it. The prosecution must prove the meeting of the mind to effect the unlawful act.

I will now examine the evidence and see whether the prosecution has proved beyond a reasonable doubt both the '*actus'* and *'mens rea'* in respect of each accused person.

A1: Is there evidence from the prosecution to prove beyond reasonable doubt that, A1 had intended and had agreed with the person believe to be Medley Belmont, that they steal Barclays Bank money on the 19/8/13? As found out during the discussion of the prosecution evidence with regard to the 3rd Count, there is no cogent or sufficient evidence to show that when A1's car was hired to go to Takamaka, there was an intention and an agreement between A1 and the other accused persons to steal Barclays Bank money. It is only speculative. It is not clear what the parties had talked about on telephones apart from A1 being told to go to Takamaka. He was a taxi pirate, and he expected to be paid for his services. It is my considered view that, the prosecution has not sufficiently proved that, there was an intention and a meeting of the mind involving A1, to steal the Barclays Bank's money on the material day. I accordingly acquit him of the charge in the 5th count.

A2: Was there a meeting of the mind himself and Medley Belmont, to steal the money belonging to Barclays Bank? Was there evidence to prove that he had an intention to steal the money? The

prosecution sought to rely on the alleged telephone conversation between the parties. However as stated earlier, it has not been established beyond reasonable doubt as to the subject of those telephone conversations. A2 never testified and his statement under caution was not admitted in evidence. In the premises, I find that, the prosecution has failed to established the offence of Conspiracy against A2 as per the fifth count and I accordingly acquit him of the same.

A3: As for A3, she was an employee of Barclays Bank at the time as a custodian. She was dealing with cash at ATM machines. She was on duty on the material day and time when the money belonging to the bank was stolen. She had earlier on received money from the ATM's at Beau Vallon, Market Place and later from Takamaka. There is evidence from PW5, Mrs. Cheryl Lablache, who was a team leader of custodians at Barclays Bank, that she had handed a sum of SR 1, 850,000/- to A3 and A4 so that they replenish the ATM machines. Both A3 and A4 were bank custodians. They signed for the money as per exhibit PE4.

Further, according to PW7, a Security guard and PW10, the driver for the van transporting cash, A3 together with A4 withdraw the money from the ATM machines because they were going to work on. That they put the money in 2 black brief cases and these brief cases were put in the van. What PW7 and PW10 above is more or less corroborates A3's repudiated statement under caution (exhibit PE40). In her statement, A3 stated as follows;

> *" At around 11.00 hours I went to Beau Vallon, at Market Branch with my colleague Martin Celeste, we were in a service bus for (Sentinel) in the bus there was a driver and a Security , me , an Martin and we were sitting behind him. When we were on our way Martin told me, that everything is going to be okay. I did not say anything. After that Martin took both of the brief cases opened it, he opened the back pack and he fill up the bag with lots of 500 rupees. Then the brief case was empty then he closed both of the brief case and also the bag pack. When we arrived to Providence, Martin got out of the van with the bag of money and about 10 minutes later when he returned the bag of money was not with him, then he got in the bus and we went to Takamaka. I want to state that most time Martin have said that if one day we were attacked we could arrange it"*

Later on in her statement she talked of meeting with Medley Belmont and A4, just two days before the theft of the money. She concluded her statement in the following way;

> *" I regret what I have done. I did not expect that Medley will executive this plan. He never told me how he will share the money with me. "*

During the hearing of the case, A3, gave a dock statement whereby she denied the offence.

I have carefully and critically considered all the evidence on record from both sides. I find the prosecution witness were candid and truthful. On the other hand, A3 impressed me negatively as a person telling lies so as to escape liability. In my considered view, what A3, had stated in the statement under caution, especially towards the end, clearly showed that there was a well planned grand theft of Barclays Bank's money and she knew about it. She also talked about a plan which was executed by Medley. She quietly acquiesced in the plan to steal the money when she saw Martin remove the money from the official briefcase used to carry Bank's money and put it into an orange backpack which A4 left at Providence with A5. In my considered view all along she knew what was being done by Martin and she expected to be given share, though Martin did not tell her what she would be entitled to. This to me shows beyond reasonable doubt that she was part of Bank employees and others from outside who had agreed to steal her employer's money. I, therefore, dismiss her denial of responsibility as mere lies.

All in all, I find that the prosecution proved beyond reasonable doubt the offense of conspiracy in the 5th Count and I find A3 guilty of the same and is accordingly convicted.

A4- Martin Celeste: According to A4's repudiated statement he was also an employee of Barclays Bank for about five years as an ATM custodian. His work included putting money into ATM machines. That he usually got money from PW5, which PW5 corroborated in her testimony. Then this money was put in 2 black briefcases and they signed documents acknowledging the receipt of the money. That he usually works with A3. That they are usually accompanied by 2 Security men from Sentinel one of whom is a driver. That they use a Hyundai van or bus to transport the money.
All this is corroborated by PW5, PW7 and PW10 in their respective testimonies.

He also recounted what he did on the 19th August 2013, which is more or less what A3 had told Court earlier in her testimony. He however said nothing about A3's allegation that he had removed money from the brief cases and left it at Providence.

Otherwise what he stated regarding what had happened while at Takamaka, is what PW7 and PW10 had told Court. He elected not to testified during the trial, which of course he is entitled to do under the Constitution. What A3 and A5 had stated in their statements under caution implicating A4 is not allowed in law to be relied upon by the Court to convict him.
The telephone conversations he is said to have been engaged in with others, is not proof that they talked about stealing money belonging to his employees. This is only speculative and not evidence upon which a Court in a Criminal matter can rely on to convict.

All in all I find that, the prosecution has not satisfactorily proved the 5th Count against A4, and he is accordingly acquitted of the same.

A5- Channel Quatre

Before I consider the 5th count in respect of A5, I would like to consider a point raised during the submission of the learned counsel for A1, Mr. Chetty and supported by all his 4 colleagues for the defence. This was in regard to the question whether an accused person can be tried and convicted on two counts based on the same facts or act. Mr. Chetty and his colleagues were of a view that this cannot be done as it amounts to double jeopardy *Contrary to Section 21 of the Penal Code and Section 52 of the Interpretation and General Provisions Act.*
Article 19 (5) of the Constitution prohibits a person to be tried twice for the same offence, unless a superior Appellate Court orders says so.
This is generally referred to as the doctrine of "*autre fois convict and "autre fois acquit*".

The rationale for this rule is that, a person should not be put in peril twice for the same offense of offences for which he could have been tried at the previous trial. *Article 19 (5)* talks of an '*Offence'* but *Section 21 of Penal Code and 52 of the Interpretation and General Provisions Act* talks *of 'acts' or 'omissions*'.

My understanding of *Article 19 (5) of the Constitution* is that a person cannot be tried for the same offence twice e.g. you cannot be tried for stealing the same car twice.

On the other hand, *Section 21 of the Penal Code and Section 52* of the Interpretation and General Provisions Act, talks of "acts or omissions" that is the same set of facts which means that if a competent Court has already convicted or acquitted a person on the certain proven facts before it, such person cannot be convicted on the same set of facts again.

This appears to be the holding of the Court in the Mauritius case cited by Mr. Chetty of **CHUTTURBHOOJ VS R 1988 MR 146.** Where the appellant was convicted on 2 counts and he appealed. On appeal, an issue arose whether the act on which the 2 counts were based was the same act and if so whether that amounted to double jeopardy. The Court was interpreting similar provisions embodied in *Section 21* of Seychellois Penal Code and *Section 52 of the Seychelles Interpretation and General Provisions Act.*

In Mauritius *Article 10 (5) of the Constitution* is more or less in similar terms as our *Article 19 (5) of the Seychelles Constitution.*

However in Mauritius it appears the *Interpretation and General Clauses Ordinance 1958* was replaced by *1974 Interpretation and General Clauses Act* and the Mauritius Court held that the Legislature had thought it fit to offer further protection to the citizens of Mauritius by adding to the already existing guarantee of no double punishment for the same offence, the further guarantee of no double punishment for the same act.

However, in Seychelles it appears the position is different from that in Mauritius. In Seychelles, *Section 21 of the Penal Code* was enacted in 1955 and *the Interpretation and General Provisions Act* was passed in 1976. The Seychellois Constitution was promulgated in 1993/94. Which makes it a later enactment than both the *Penal Code* and the *Interpretation and General Provisions Act.*

The Constitution in Seychelles excluded "acts" and mentions offences only. Otherwise, if it was intended to include " acts" as well offences, it should have expressly said so. In any case, *Article 5 of the Seychelles Constitution* declares it to be Supreme law- Any other law which conflicts with it is void to null and void.

Therefore, the position in Seychelles appears to be slightly different from the one pertaining in Mauritius. Having said that, it means that, in Seychelles an accused person can be recharged on the same act or facts if such acts reveal a different offense.

Now turning to A5 with regard to the 5th Count of Conspiracy to steal his employees money, the main thrust of the prosecution evidence is from the Police Officers and the bank officials who went to A5's home and office from where they recovered a total sum of SR3, 289, 000/-.
The Prosecution is also relying on A5 statement under caution made to the Police Officers where he more or less confirms what the Police Officers and the bank officials who visited his home and office at Providence had told Court. A5 on his part denied the offence in his dock statement.
The question now is has the prosecution proved a meeting of the mind between him and his other colleagues to steal the bank's money? The prosecution appears to rely also on the alleged telephone conversations between the accused persons, but as I have already pointed out above, their telephone conversations are unreliable as it is not known what was talked about or who was involved on both ends of the calls. A5 statement does not admit any agreement between himself and Martin or Ruth to steal their employer's money.
It is my considered view, the prosecution has not proved the 5th count beyond reasonable doubt against A5. He has to be acquitted.

The end result of the case is as follows:
-A1, A2 and A4 have been acquitted on all counts.
-A3 has been convicted only on the 5th count but acquitted on the other counts.
A5 has been convicted of receiving stolen property *Contra Section 309 (1) Penal Code pursuant to Section 164 (1) (a) if Criminal Procedure Code*- but acquitted on the other counts.

Order accordingly.
Signed, dated and delivered at Ile du Port on 17/03/17

D Akiiki-Kiiza
Judge of the Supreme Court,