

**IN THE SUPREME COURT OF SEYCHELLES**

**Criminal Side: CO63/2010**

**[2017] SCSC**

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**THE REPUBLIC**

Versus

**SONY PROSPER**

First Accused

**SONY DINE**

Second Accused

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Heard:

Counsel: Mr. Hemanth Kumar M. for the Republic

Mr. Elvis Chetty for First Accused

Mr. Nichol Gabriel for Second Accused

Delivered: 27 July 2017

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**JUDGMENT**

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**F. ROBINSON, J**

[1] **THE BACKGROUND FACTS**

[2] First and Second Accused persons have pleaded not guilty separately to the charge that at Mont Plaisir, Anse Royale, Mahe, on 25 September, 2010, with common intention, were found in possession of controlled drug namely 395.8 grams of cannabis herbal material which gives rise to the rebuttable presumption of having possessed the said controlled drug for the purposes of trafficking contrary to section 5 read with section 14 (d) and section 26 (1) (a) of the Misuse of Drugs Act CAP 133 and the Second Schedule referred thereto in the said Act.

[3] In the alternative to the said charge, Second Accused person have pleaded not guilty separately to the charge that on 25 September 2010 with common intention aided and abetted First Accused person to give administer transport send deliver or distribute 395.8 grams of cannabis herbal material contrary to section 27 (a) read with section 2 and section 5 and section 26 (1) (a) of the Misuse of Drugs Act CAP 133 read with section 23 of the Penal Code and punishable under section 29 (1) of the Misuse of Drugs Act CAP 133 and the Second Schedule referred thereto in the said Act.

[4] The prosecution adduced evidence by calling four witnesses, namely, (1) Mrs Kanchanjari Meghjee (hereinafter "*Mrs. Meghjee*"); (2) agent Kenneth Joseph (hereinafter "*Agent Joseph*"); (3) an Assistant Superintendent of Police - Winsley Francoise (hereinafter "*ASP Francoise*"); and Lance Corporal Berard Hoareau (hereinafter "*Lance Corporal Hoareau*").

[5] After the close of the prosecution case, learned counsel for Second Accused person made a submission of no case to answer on behalf of Second Accused person. The court ruled that the prosecution have made out a case sufficiently to require Second Accused person to make a defence; and that there was a case to answer by Second Accused person. The court also ruled that First Accused person had a case to answer.

[6] First Accused person elected to remain silent. Second Accused person elected to make a statement from the dock. Neither First Accused person nor Second Accused person called any witnesses or other evidence.

[7] **THE EVIDENCE IN THE CASE**

[8] *The evidence of Mrs. Meghee.* Mrs. Meghjee, the Forensic Government Analyst, testified that on 5 October, 2010, at 8 50 a.m., Agent Joseph gave her a sealed brown envelope, bearing CB number 294 and a letter of request in relation to this case. Mrs. Meghjee explained the analyses that she carried out. On physical examination, the brown envelope contained a red plastic, in which was found brown khaki paper rolled in tape revealing cling film containing herbal material upon removing the tape and brown khaki paper. The weight of the cannabis herbal material was 395.8 grams.

After removing a sample of the herbal material exhibit for chemical analysis, the sealed exhibits were kept locked in a locker. Other than Mrs. Meghjee, no one had access to the locker. On chemical analysis, the herbal material exhibit was found to be cannabis. The Forensic Science Laboratory report (hereinafter referred to as the "*FSL report*"), of Mrs. Meghjee, is before the court as exhibit P1. On 5 October, 2010, Mrs. Meghjee returned the sealed exhibits to Agent Joseph.

[9] Mrs. Meghjee identified, in open court, the clear exhibit evidence bag containing the brown envelope. Next, Mrs. Meghjee cut open the clear exhibit evidence bag and removed a sealed brown envelope, which brown envelope she identified and cut open. Next, Mrs. Meghjee identified the contents of the brown envelope, namely, the red plastic bag containing brown khaki paper rolled in tape, revealing cling film containing cannabis herbal material upon removing the cellotape and brown khaki paper. The opened clear exhibit evidence bag is before the court as exhibit P2. The opened brown envelop is before the court as exhibit P3. The red plastic bag is before the court as exhibit P4. The brown khaki paper together with the cellotape are before the court as exhibit P5. The cling film is before the court as exhibit P6. The cannabis herbal material is before the court as exhibit P7. Mrs. Meghjee related that the herbal material exhibit contained in the above mentioned exhibits was that brought to her for analyses, analysed by her, and reported to be cannabis.

[10] In cross examination, learned counsel for First and Second Accused persons did not seriously challenged the evidence of Mrs. Meghjee. The findings of cannabis, by Mrs. Meghjee, were unchallenged

[11] *The evidence of Agent Joseph.* Agent Joseph related that on 25 September, 2010, he worked in the National Drugs Enforcement Agency (*hereinafter "the NDEA"*). On 25 September, 2010, at around 3 p.m., Agent Joseph was on mobile patrol, at Anse Royale, in the company of colleagues, namely, Lance Corporal Hoareau (the team leader), Ricky Charles and Masandra Botsoie. Lance Corporal Hoareau informed Agent Joseph that a "*drug transaction [was] taking place around in an alley, in the alley that goes to Jean Francois Adrienne*", (proceedings of 25 January, 2016, at 9 a.m., p 10 of 25). Agent Joseph was told to conduct surveillance of the transaction.

Agent Joseph was stationed "a little bit up the alley leading to Jean Francois Adrienne", (proceedings of 25 January, 2016, at 9 a.m., p 10 of 25). At about 6 p.m., Agent Joseph observed Second Accused person just inside the entrance to an alley leading to one Jean Francois Adrienne. Second Accused person could not see who was observing him because he was facing the opposite direction facing the sea. After that a taxi entered the alley leading to the house of Jean Francois Adrienne, which Second Accused person, standing near the road, followed.

[12] The taxi was then seen coming out of the alley with Second Accused person sitting on the front passenger seat. Second Accused person was the same man who had been observed in the alley following the taxi. The taxi turned onto the road and headed towards the sea, and shortly afterwards it stopped. First Accused person emerged from the bush with a plastic in his hand and got in the taxi. There was communication between Agent Joseph and Lance Corporal Hoareau, at the scene. As the NDEA jeep was coming up the road towards Mont Plaisir, the taxi performed a U-turn, where there use to be a "coconut factory", in order to proceed uphill on the Mont Plaisir road. The NDEA vehicle, following the taxi, sounded its horn to get the taxi to stop. Agent Joseph stepped onto the road, in front of the approaching taxi, displayed his badge, drew his pistol and pointed it at the driver in an attempt to get the taxi to stop. The taxi came to a stop close to Agent Joseph. First and Second Accused persons were in the taxi. First Accused person was sitting on the rear seat of the taxi. Agent Joseph saw First Accused person throwing a red plastic out of the window of the taxi. First and Second Accused persons and the taxi driver were told to get out of the taxi. Agent Joseph picked up the plastic, which had landed in the gutter. Agent Joseph opened the red plastic revealing khaki paper formed in a small square. He cut open the khaki paper formed in a small square, revealing a clear plastic film containing controlled drugs suspected to be cannabis. Agent Joseph showed all the exhibits to First and Second Accused persons and his colleagues present at the scene. First and Second Accused persons were arrested, cautioned and their constitutional rights read to them. Then they all returned to the NDEA base. The exhibits were kept in Agent Joseph's possession.

[13] On 5 October, 2010, he delivered the exhibits in a brown envelope bearing CB number 294/2010 together with three letters of request, signed by ASP Francoise, to Mrs. Meghjee, of the Forensic Science Laboratory, Mont Fleuri, for analyses of the

herbal material. On 5 October, 2010, in the afternoon, Agent Joseph collected, from Mrs. Meghjee, the exhibits, which he [Agent Joseph] had given to Mrs. Meghjee on 5 October, 2010, and the FSL report. Mrs. Meghjee had placed the exhibits in a clear police evidence bag, which she had sealed. Agent Joseph identified exhibit P1 as the same FSL report that was handed to him, by Mrs. Meghjee, on 5 October, 2010. Agent Joseph identified exhibit P3 as the same brown envelope that he had given to Mrs. Meghjee. Agent Joseph subsequently identified exhibits P4, P5, P6 and P7 as the same exhibits seized by him and shown to First and Second Accused persons and his colleagues at the scene. He also identified exhibit P2 as the same clear evidence bag that Mrs. Meghjee had placed the exhibits in after having analysed the herbal material.

[14] Agent Joseph was cross-examined by Mr. Chetty for First Accused person. Agent Joseph confirmed his evidence in chief and added that he did not know where the jeep was parked; that the taxi drove away from where he was conducting surveillance; that subsequently, he saw the taxi make a U-turn where there used to be a "*coconut factory*"; that the taxi drove in his direction, followed by the NDEA jeep sounding its horn to get it to stop; and that he (Agent Joseph) drew his pistol and pointed it at the taxi in an attempt to get the taxi to stop. Mr. Chetty put to Agent Joseph that the NDEA jeep did not follow the taxi; that he had told them to get out of the taxi; that he had searched them; that other members of his team had come on scene five minutes later; and that he could not have seen First Accused person throwing anything out of the window because it was dark. Agent Joseph denied the suggestions put to him and confirmed that he saw First Accused person throwing a red plastic out of the window of the taxi.

[15] Agent Joseph was cross examined by Mr. Gabriel for Second Accused person. Agent Joseph stated that on 25 September, 2010, around 6 p.m., he hid in the bush to keep watch. His colleagues were not in the bush. From where he was standing he could observe what was happening on both sides of the road and in the area where a "*coconut factory*" used to be. Agent Joseph did not see Second Accused person with a plastic bag nor did he see Second Accused person throwing anything out of the car.

- [16] *The evidence of ASP Francoise.* ASP Francoise, in charge of the West Region (then agent in the NDEA) was on duty on 5 October, 2010. He prepared letters of requests in relation to this case, which is before the court as exhibit P8. The evidence of ASP Francoise was not challenged.
- [17] *The evidence of Lance Corporal Hoareau.* Lance Corporal Hoareau related that on 25 September, 2010, he worked with the Police Force and was attached to the NDEA. On 25 September, 2010, at around 3 p.m., Lance Corporal Hoareau was on mobile patrol, at Anse Royale, in the company of colleagues, namely, Agent Joseph, Ricky Charles and Masandra Botsoie.
- [18] Lance Corporal Hoareau received information that a drug transaction was taking place at Mont Plaisir at one Jean Francois Adrienne. Around 6 p.m., he instructed Agent Joseph to position himself in the bush from where he could observe the lane leading to one Jean Francois Adrienne and both sides of the road. Upon leaving Agent Joseph, he drove the jeep down Mont Plaisir road, where he parked between the "*University of Seychelles*" and the "*youth hostel*". He confirmed that there was telephone communication between Agent Joseph and he [Lance Corporal Hoareau], at the scene. After communicating with Agent Joseph he saw the car coming in his direction. He instructed the driver of the NDEA jeep to drive towards the approaching car. The taxi driver made a U-turn in order to proceed uphill on the Mont Plaisir road. The NDEA jeep following the taxi was driven with the headlights on high beam. He saw Agent Joseph coming out of the bush; his right hand was holding his pistol and his left hand was directing the car to stop. The vehicle came to a stop and so did the NDEA jeep. Lance Corporal Hoareau and his colleagues alighted from the NDEA jeep and proceeded to the car. At that point he saw a red plastic bag coming out of the left window of the rear of the vehicle and landed on the ground. There were three people in the taxi. Second Accused person was sitting on the front passenger seat. First Accused person was sitting on the rear passenger seat. They removed everyone from the vehicle and restrained them. Agent Joseph picked up the plastic which had landed on the ground and brought it to First and Second Accused persons, the taxi driver and his colleagues, including he [Lance Corporal Hoareau].

- [19] The red plastic contained khaki paper wrapped in cello tape. Using a pen knife, Agent Joseph cut a piece of the packet. The packet contained dry herbal material wrapped in clear plastic, which they suspected to be controlled drug. First and Second Accused persons were arrested, cautioned and their constitutional rights read to them. First and Second Accused persons were brought to the NDEA Station. Agent Joseph kept the exhibits in his possession.
- [20] Lance Corporal Hoareau identified in open court the red plastic bag, the brown khaki paper and cello tape, the clear plastic and the herbal material and indicated that they are the same exhibits seized by Agent Joseph on 25 September, 2010, at Mont Plaisir, at the material time.
- [21] The evidence of Lance Corporal Hoareau was not seriously challenged by First Accused person, through learned counsel. Lance Corporal Hoareau confirmed his evidence in chief. He added that the NDEA jeep was driven with the headlights on high beam because it was about 6 30 p.m.; that although it was getting dark there was sufficient light. Further, Mr. Chetty put to Lance Corporal Hoareau that the NDEA jeep did not follow the taxi, but had later arrived on scene. Lance Corporal Hoareau denied the suggestion of Mr. Chetty. He stated that the NDEA jeep closely followed the taxi at high speed. At the suggestion of Mr. Chetty that being police officers they could have indicated to the driver to pull his vehicle over, Lance Corporal Hoareau stated that the taxi made a U-turn in a lay-by and drove uphill on the Mont Plaisir road. He saw Agent Joseph coming from the bush; drawing his pistol and pointing it at the car and lifting his left hand indicating the driver to stop the car.
- [22] Lance Corporal Hoareau was cross-examined by Mr. Gabriel on behalf of Second Accused person. He confirmed his evidence in chief. He added that the NDEA jeep was parked on the road; and that he was in the said jeep in the company of colleagues, namely, Massandra and Ricky. He did not suddenly see a taxi; Agent Joseph informed him that the taxi was coming in his direction. He also confirmed that Second Accused person was seating on the front passenger seat and First Accused person was seating on the rear passenger seat. Second Accused person had no drugs on him. He stated that the drug was found on the ground on the left side of the car. The drug was in a red plastic and the khaki paper was intact.

[23] **The evidence of the First and Second Accused persons**

[24] The First Accused person exercised his right to remain silent. The court warns itself that the right to silence is a constitutional right afforded to First Accused person and no adverse inference should be drawn from the exercise of the right.

[25] The Second Accused person exercised his right to make an unsworn statement from the dock. The statement of the Second Accused person from the dock is not sworn evidence which can be cross-examined, but nevertheless the court may attach to it such weight as it thinks fit, and that it should take it into consideration in deciding whether the prosecution have made out their case: Anthony David Frost & George Talbot Hale (1964) 48 Cr.App.R 284 at page 291.

[26] The Second Accused person stated the following from the dock:

*"My name is Sonny, my second name is Antoine, my third name is Jean and my surname is Dine. On that day 25<sup>th</sup> of September 2010 I was at my place, sometimes I will do small jobs because I do not always get jobs on the fishing boat. And sometimes I worked at the farm at Anse Boileau and I then I brought vegetables to where Amusement Centre is opposite. On the day I had not taken money from the person, I was doing mechanical work on a pickup which I expected to gain money from. Around 5 I called the owner of the pickup to bring some money for me, he told me that the cheque will be cashed, on Wednesday that I will get. As it was the weekend I had no cash in hand and I have a family. I called the guy at Anse Royale for whom I do farm work and also take his vegetables to the Market, I asked him if I could get the money for which I had worked for the week before. He told me yes come do not take too long because he was supposed to go. I quickly put on my clothes, I live at La Louise at Basin Bleu, I went via Les Mamelles as the road is closer. Upon coming down I met the man next to me (witness points to the man next to him) which is Mr William.*

*As I was in a hurry and not to take long, before approaching him I shouted out to him "Maxime can you drop me off at Anse Royale?" He told me yes but do not be too long. Because he had another trip to do at Anse Boileau. From where I was he asked me to come down to the road and he told me to hurry. Suddenly Mr Prosper a man I know had heard me upon asking the driver, quickly he asked me if he could get a ride and he would pay the driver because he was going towards Anse Royale as well. From there I told him that he would have to pay half of the fare, he stated yes. I told him I was going to the car, he came got in the*



car, I was in the front seat. We left in the direction of Anse Royale where Polytechnic is, I showed the driver where I would stop, he stopped. Tonio got out of the car, we went through the alley where sometime people would pass through to go to the basin. I left to my friend, he told me that he was waiting for me all this time and there he gave me the cash. I went back we had spoken for about 5-10 minutes. Upon finishing our conversation and having been given the money I went back to where the car had dropped me off I saw Tonio from where the car had dropped us. I asked him "Tonio where is the driver?" he told me that the driver had gone to get a lemonade and that he was coming back.

During that time I saw Tonio standing with a red plastic bag, I did not know what was inside. I immediately went towards the direction of the main road as Maxime had gone to get a lemonade. And Tonio also came from behind, I stood next to the road and Tonio also stood next to the road but a bit closed to where the river was. From there Maxime was hurrying to come and take us, he did not see from the roadside upon signalling him because he was looking straight and immediately he entered the small alley. And I immediately came out from where I was and followed him to where he had gone. And during that time he was turning the car around, he told me not to delay him because he had a trip to do at Anse Boileau. He asked me where Tonio was and I stated that Tonio was next to the road. And we went back together he stopped and took Tonio, during the time that Tonio was getting in the car I heard him say he stated that "somebody had come next to me from the bushes". And neither myself nor the driver replied to this, during that time the driver had taken the turn to turn the car around from where Golden eggs to go up towards Mont Plaisir to get the trip that he had at Anse Boileau.

Immediately upon turning the car around and to take the road up suddenly from where Tonio had been standing, someone came out with an object which looked like a pistol and something that look like a light. The first thing he stated was "stop the vehicle it is the NDEA Agent" and all of a sudden the driver stopped. And the Officer came out, immediately handcuffed me, and handcuffed all of us. Excuse me the very moment the Officer stated stop the vehicle, the third thing he stated was that there was somebody at the back of the car who had thrown out a plastic. He stated this twice that somebody has thrown a plastic bag which was around the same time that he handcuffed us. And he went in search towards the direction at which the plastic had been thrown. Immediately I saw him come back with a red plastic bag. And stated to his other Officer friend and told him to check in front of the bonnet there is a penknife, immediately Hoareau brought the penknife. It was a distance from where I am standing in the dock to where the Prosecutor is sitting.

*And yes it was in an area that had a lamp post, I could notice from the penknife from where he was cutting open the bag. From where he was cutting I could notice an object, from the distance the light was not enough for me to quite recognise but I could hear. I could hear the Officer stating that it was Cannabis inside, immediately they took us and placed us in the vehicle. Upon arriving at the NDEA Station the Police Officers stated to me that I was being arrested and I stated that I had nothing with me in the vehicle, I had not thrown out anything. He told me yes but they would not make any decisions, they would detain us in a cell. And on the Monday we would go before Court and the Judge will decide, and upon going to Court that Monday we started being remanded."*

[27] **SUBMISSION AND DISCUSSION**

[28] The court considers count 1 against First and Second Accused persons. The court sets out the principle relating to the concept of possession as it should apply to this case. *DPP v Brooks (1974) AC 862* states the following—

*"in the ordinary use of the word 'possession' one has in his possession whatever is, to one's own knowledge, physically in one's custody or under one's physical control."*

[29] Three ingredients are required to be proven, by the prosecution, before an offence is made out under count 1 —

- (i) the item must be in the physical custody or control of the accused;
- (ii) the accused must know, or at least could reasonably have known, of the existence of the item : see *Lewis (1988) 87 Cr.App.R. 270*; and
- (iii) the item must be controlled drug.

[30] As regards the cannabis herbal material there was no challenge to its analyses. The court is also satisfied that the chain of evidence regarding the production of the exhibits had been maintained

[31] In light of ingredients (i) and (ii) above, which heavily overlap, the court examines the following situation:

***Whether First and Second Accused persons have the joint custody of the cannabis herbal material or exercise control over it. In light of the evidence, the court considers whether Second Accused person knew about the existence of the cannabis herbal material and has custody or control of it.***

[32] From where he was hiding, Agent Joseph observed Second Accused person just inside the entrance to an alley leading to one Jean Francois Adrienne. A taxi entered the alley, which Second Accused person, standing near the road followed. Agent Joseph saw the taxi coming out of the alley with Second Accused person sitting on the front passenger seat. The taxi turned onto the road and headed towards the sea and shortly afterwards it stopped. Agent Joseph saw First Accused person emerged from the bush with a red plastic bag in his hand and got in the taxi. In light of the evidence of Agent Joseph, First Accused person, seated on the rear passenger seat, threw a red plastic bag out of the rear window of the taxi. Lance Corporal Hoareau stated that he saw a red plastic bag coming out of the left window of the rear of the vehicle and landed on the ground. The position of First Accused person is that Agent Joseph could not have seen what he [First Accused person] was holding in his hand, from where he was situated in the bush, because there was insufficient light and the bush would have obstructed his view. Further, First Accused person stated that with everything that was happening, Agent Joseph could not have seen First Accused person throwing a red plastic bag out of the taxi. The position of second Accused person is that he had no knowledge about the existence of the cannabis herbal material and did not have joint custody or control of it.

[33] The court has considered the evidence in light of the submissions of counsel. The court observed the position on a visit of the locus in quo and was satisfied that Agent Joseph would have had an unobstructed view of First Accused person as he emerged from the bush and the red plastic bag that he [First Accused person] was holding in his hand. There is no reason to doubt the evidence of Agent Joseph that although it was after 6 p.m., there was sufficient light permitting him to have a good view of First Accused person and the red plastic bag that he was holding in his hand; and that he saw First Accused person throwing a red plastic bag out of the rear window of the taxi. The court accepts the evidence of Agent Joseph on the possession and

knowledge on the part of First Accused person. The prosecution have proven beyond reasonable doubt that the cannabis herbal material was in the possession of First Accused person with complete knowledge of it. Hence First Accused person is presumed to have had the controlled drug in his possession for the purpose of trafficking. The court finds First Accused person guilty of the offence of trafficking as charged on count 1 and convicts First Accused person.

[34] As regards Second Accused person, there is no evidence from which knowledge can be inferred. In light of the evidence it is clear that the prosecution have not proven beyond reasonable doubt that Second Accused person knew about the existence of the cannabis herbal material contained in the red plastic and, therefore, Second Accused person cannot be said to have been in joint possession of the cannabis herbal material for the purpose of trafficking. The court acquits Second Accused person on count 1.

[35] The court considers count 2 against Second Accused person (alternative to count 1). In the case of *Dugasse v Republic* 2013 SLR 67, Fernando J, delivering the judgment of the Court of Appeal of Seychelles, with Domah and Twomey JJ concurring, considered the ingredients of aiding and abetting under section 27 (a) of the Misuse of Drugs Act:

*[29] 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 reus 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 assistance rendered need not be the sine qua non or the sole cause for the offence. The fact that the principal could have carried out the offence without the assistance is not an issue. It is also not necessary to prove that the assistance was sought or the principal offender was aware of the assistance. 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. However the principal offender may be free from criminal liability or the prosecution may not be able prosecute him/her as his/her identity is not known or the prosecution may decide not to prosecute him/her and call him/her as a witness for the prosecution. Often the distinction between the principal offender and secondary offender/s is so misty that the law treats all the persons as having individually committed the*

*offence and provides for charging them with committing the offence. Abetting involves inciting, instigating or encouraging the commission of an offence. Any form of encouragement suffices and it does not matter if the principal had already decided to commit the offence or that the encouragement was ignored by the principal. There is an essential difference between aiding and abetting, namely encouragement unlike aiding must have come to the attention of the principal, although it may have been ignored. The mens rea 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. The secondary party thus should have had knowledge as to the essential elements of the type of offence committed although knowledge of the precise crime intended to be committed by the principal is not necessary.*

[36] The court has examined the evidence in this case namely that of Agents Joseph and Lance Corporal Hoareau and is satisfied that a case of aiding and abetting in the trafficking of a controlled drug against Second Accused person has not been made out by the prosecution. The prosecution have not proven any assistance given by Second Accused person prior to the commission of the offence or at the time of the commission of the offence. It is not clear to the court beyond a reasonable doubt whether Second Accused person has helped First Accused person to commit the offence or had encouraged First Accused person to commit the offence. The court acquits Second Accused person on count 2.

Signed, dated and delivered at Ile du Port on 27 July 2017

Fiona Robinson  
Judge of Supreme Court