

IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CO25/2016

[2018] SCSC 45

THE REPUBLIC

versus

EMAM BAKHSH TARANI

HATTAM MOTHASHIMINA

HOSEYN BAZDAR

Accused

Heard: 16 October and 31 October 2017
Counsel: Mr. David Esparon, Principal State Counsel for the Republic
Mr. Clifford Andre Attorney at Law for all the accused
Delivered: 23 January 2018

JUDGMENT

Burhan J

[1] The three accused in this case Emam Bakhsh Tarani, Hattam Mothashimina and Hoseyn Bazdar were charged as per amended charge as follows:

Count 1

Importation of a controlled drug contrary to section 3 of the Misuse of Drugs Act read with Section 26(1)(a) of the said Act and read with Section 23 of the Penal Code and punishable under Section 29 read with Second Schedule of the said Act.

Particulars of offence are that Emam Bakhsh Tarani, Hattam Mothashimina and Hoseyn Bazdar on the 16th April 2016 in the Seychelles Territorial water imported into Seychelles a Controlled Drug namely Diamorphine (Heroin) having net weight of 97945.1 grams with a heroin content of 65211.4 grams of heroin (Diamorphine) into Seychelles.

Count 2

Trafficking in a controlled drugs contrary to Section 5 read with Section 14 (1) (c) (ii) and 26(1)(a) of the Misuse of Drugs Act and further read with Section 15 (3) of the Misuse of Drugs Act and punishable under Section 29 of the Misuse of Drugs Act, read with Second Schedule of the same Act.

Particulars of offence are that Emam Bakhsh Tarani, Hattam Mothashimina and Hoseyn Bazdar on the 16th April 2016 in the Seychelles territorial waters was trafficking in a Controlled Drug by virtue of having found in possession of substance having net weight of 97945.1 grams of heroin (diamorphine) and having total heroin content of 65211.4 grams with the knowledge and consent of one another which gives rise to the rebuttable presumption of having possessed the said Controlled Drug for the purpose of trafficking.

Count 3

Importation of a controlled drug contrary to section 3 of the Misuse of Drugs Act read with Section 26 (1) (a) of the said Act and read with Section 23 of the Penal Code and punishable under Section 29 read with the Second Schedule of the said Act.

Particulars of offence are that, Emam Bakhsh Tarani, Hattam Mothashimina and Hoseyn Bazdar on the 16th April 2016 in the Seychelles territorial waters imported into Seychelles a Controlled Drug namely 784.6 grams of opium.

Count 4

Trafficking in a controlled drug contrary Section 5 of the Misuse of Drugs Act read with Section 14(1) (a) (i) and 26(1) (a) of the Misuse of Drugs Act and further read with Section 15 (3) of the Misuse of Drugs Act and punishable under Section 29 of the Misuse of Drugs Act read with the Second Schedule of the said Act.

Particulars of offence are that, Emam Bakhsh Tarani, Hattam Mothashimina and Hoseyn Bazdar on the 16th April 2016 in the Seychelles territorial water was trafficking in a Controlled Drug by virtue of having found in possession of 784.6grams of opium with the knowledge and consent of one another which gives rise to the rebuttable presumption of having possessed the said Controlled Drug for the purpose of trafficking

- [2] The aforementioned three accused denied the charges and trial proceeded against all three accused. It is to be noted the name of the 1st accused was amended as per the proceedings dated 4th April 2017 at 1.45 p.m. page 12.

EVIDENCE OF THE PROSECUTION

- [3] The prosecution opened its case by calling witness Major Tom Jacques Esticot an officer with 36 years experience in the Coast Guard. He stated he was briefed on the 15th of April 2016 of a suspected vessel bringing substance into Seychelles Territorial waters. A picture of the suspected vessel was shown at the briefing. On instructions received from Lt Colonel Benoiton the Operational Officer, he prepared Patrol Boat Constance also referred to as PS Constance by certain witnesses and left the same day around 3.p.m. On board he had a boarding team from TAZAR (a commando unit of the army) and the NDEA (National Drug Enforcement Agency) and a crew of 23 personnel. Around 10 and 11p.m, they had spotted the vessel on the radar and Surveillance Operational Parameter, about 40 nautical miles from them and kept it under observation for some time and maintained a distance of 7 nautical miles from the suspect vessel. On the 16th of April, they observed the boat was 4 nautical miles from Bird Island in Seychelles territorial waters. They had proceeded to intercept the vessel. Major Estico had called the vessel on

radio but they had not answered. He had used his hand to signal them to stop but they had not. He had accelerated his boat and made it cross the front of the other vessel 3 to 4 times but the suspect vessel had kept on going. He had instructed his gunner to fire 3 rounds of warning shots into the sea. Then the vessel had stopped and the crew had gone to the front of the vessel.

- [4] The suspect vessel was then boarded by officers from the NDEA and TAZAR. At the time of boarding, the vessel was 4 nautical miles from Bird Island. Thereafter, he was informed by Corporal Cesar that some substance suspected to be controlled drug had been found on the vessel and he had radioed back and informed Mahe and was requested to escort the said vessel and its crew back to Victoria.
- [5] The prosecution called several witnesses to testify about the boarding of the suspect vessel identified subsequently by witnesses as Payam Al Mansur (hereinafter referred to as PAM) and to establish the fact that controlled drugs were found on it. Corporal Cesar, a Corporal in the Coast Guard Unit corroborated the evidence of Major Estico in regards to the detection of the vessel PAM, its interception and boarding. He referred to NDEA Agents Payet and Ragain as officers of the NDEA who were part of the boarding team. After the boarding team had boarded, he also received orders to board. He had boarded around 8 a.m. and around 9.35 a.m, substance was found which was in packets. The first lot were found in a compartment in the kitchen and was found by Agent Ragain. Around 10 a.m, two agents from the NDEA, Padayachy and Payet and a crew member went down to the engine compartment. They retrieved gunny bags and packets containing substance. Inside the gunny bags were also packets with substance. The search continued till 5.30 in the afternoon and thereafter Corporal Cesar was ordered to take command of the vessel PAM and bring it to Mahe. They had arrived in Mahe about 5 minutes past midnight on the 17th of April 2016. The vessel arrested was identified as Payam Al Mansur. He gave the co-ordinates of the position of the vessel PAM at the time it was arrested.
- [6] The evidence of Mr. Jemy Bouzin the Government Analyst and his report, indicate he had received 12 sealed evidence bags on 20th April 2016, and been requested by request letter P15 to analyse the contents. His final report was produced and marked as Exhibit

P1. He had received the exhibits and after verifying contents had analysed the exhibits and then resealed them and given them back to Agent Robert Padayachy. He described in detail the analysis conducted by him. The 1st evidence bag was produced and marked as Exhibit P2. It contained 5 items in total. The 1st item consisted of a white and pink plastic marked as Exhibit P2 (a) wrapping a piece of black plastic marked as Exhibit P2(b), which contained a clear plastic marked as Exhibit P2 (c) and enclosed a lump of solid dark substance with a weight of 756.5 grams marked as Exhibit P2 (d). The substance tested positive for opium. The 2nd item consisted of a clear plastic sachet marked as Exhibit P2 (e), wrapped with 2 yellow elastic bands marked as Exhibit P2 (g) and containing a piece of brown paper marked as Exhibit P2 (f). This item contained light green powder with a net weight of 107.2 grams marked as Exhibit P2 (h), which tested negative for opiates, cocaine, cannabis and amphetamine-type substances. The 3rd item consisted of a clear plastic sachet with a yellow stripe marked as Exhibit P2 (i), wrapped with a pink elastic band marked as P2 (j) and containing some dark green powder with a net weight of 21.8 grams marked as Exhibit P2 (k), which tested negative for opiates, cocaine, cannabis and amphetamine-type substances. The 4th item consisted of a clear plastic sachet marked as Exhibit P2 (l)), which was wrapped with a brown elastic band marked as Exhibit P2 (m)), and contained dark green powder with a net weight of 1.3 grams marked as Exhibit P2 (n). The substance tested negative for opiates, cocaine, cannabis and amphetamine-type substances. The final item contained a piece of white plastic marked as Exhibit P2 (o)) wrapping a solid lump of dark substance with a net weight of 28.1 grams marked as Exhibit P2 (p). The substance tested positive for opium.

- [7] The 2nd sealed evidence bag was produced and marked as Exhibit P3. It contained 15 packets consisting of yellow tape, which was wrapping clear plastic, which in turn was covering a white cloth bag with a bluish logo, which was wrapping more clear plastic, which finally enclosed light brown powder with a net weight of 14,788.2 grams. The substance tested positive for heroin. These packets and their contents were marked as Exhibit P3 (1) to (15).
- [8] The 3rd sealed evidence bag was produced and marked as Exhibit P4. It contained 15 packets consisting of yellow tape, which was wrapping clear plastic, which in turn was

covering a white cloth bag, which was wrapping more clear plastic, which finally enclosed light brown powder with a net weight of 14,997.6 grams. The substance tested positive for illicit heroin. These packets and their contents were marked as Exhibit P4 (1) to (15).

[9] The 4th sealed evidence bag was produced and marked as Exhibit P5. It contained 15 packets consisting of yellow tape, which was wrapping clear plastic, which in turn was covering a white cloth bag with a bluish imprint, which was wrapping more clear plastic, which finally enclosed light brown powder with a net weight of 15,086.7 grams. The substance tested positive for heroin. These packets and their contents were marked as Exhibits P5 (1) to (15).

[10] The 5th sealed evidence bag was produced and marked as Exhibit P6. It contained 5 packets in total. Two packets were made of yellow tape, clear plastic, white cloth bag with blue imprints, and more clear plastic which contained light brown substance with a net weight of 215.5grams marked as Exhibits P6 (1) and (2)). The 3rd packet comprised of black tape wrapping, yellow tape wrappings, clear plastic, a white cloth bag, and more plastic wrapping which enclosed light brown powder with a net weight of 891.2 grams marked as Exhibit P6 (3). The 4th packet contained black tape wrapped in a piece of clear plastic, which wrapped yellow tape, which in turn covered a clear plastic sachet and a white cloth bag, which encased more clear plastic, which finally contained light brown powder with a net weight of 873.1 grams marked as Exhibit P6 (4). The final packet contained black tape, plastic, yellow tape wrappings, clear plastic sachets and a white cloth bag, which enclosed light brown powder with a net weight of 938.9 grams marked as Exhibit P6 (5). The substance in all 5 packets tested positive for illicit heroin.

[11] The 6th sealed evidence bag was produced and marked as Exhibit P7. It contained a green bag marked as Exhibit P7 (a) holding 15 plastic packets, each containing brownish powder with a net weight of 13,816.4 grams wrapped in clear plastic and a white cloth bag with blue imprints. These packets and their contents were marked as Exhibits P7 (1) to (15). The substance in all packets tested positive for heroin.

- [12] The 7th sealed evidence bag was produced and marked as Exhibit P8. It comprised of a multi-coloured gunny bag marked as Exhibit P8 (a), which contained 9 plastic packets coloured yellow and white, each containing brownish powder with a net weight of 8,992.0 grams, wrapped in clear plastic, a white cloth bag with imprints thereon, and more clear plastic. These packets and their contents were marked as Exhibits P8 (1) to (9). The substance in all packets tested positive for heroin.
- [13] The 8th sealed evidence bag was produced and marked as Exhibit P9. It comprised of a dirty multi-coloured gunny bag marked as Exhibit P9 (a), which contained 10 plastic packets coloured yellow and white, each containing brownish powder with a net weight of 10,017.8 grams, wrapped in clear plastic, a white cloth bag, and more clear plastic. These packets and their contents were marked as Exhibits P9 (1) to (10). The substance in all packets tested positive for heroin.
- [14] The 9th sealed evidence bag was produced and marked as Exhibit P10. It comprised of a dirty white gunny bag marked as Exhibit P10 (a), which contained 13 packets coloured yellow and white, each containing brownish powder with a net weight of 12,999.7 grams, wrapped in clear plastic, a white cloth bag, and more clear plastic. These packets and their contents were marked as Exhibits P10 (1) to (13). The substance in all packets tested positive for heroin.
- [15] The 10th sealed evidence bag was produced and marked as Exhibit P11. It contained 7 packets. The 1st packet comprised of a red plastic bag with black imprints, containing light brown powder with a net weight of 70.8 grams marked as Exhibit P11 (1). The 2nd packet consisted of a piece of white plastic with a blue and green design thereon, enclosing light brown powder with a net weight of 144.2 grams marked as Exhibit P11 (2). The 3rd and 4th packets comprised of a piece of black plastic wrapping light brown powder marked as Exhibit P11 (3) and (4). The substance contained in these items had a net weight of 211.2 grams. The 5th packet consisted of a piece of clear plastic, which contained light brown powder with a net weight of 30.1 grams marked as Exhibit P11 (5). The 6th packet consisted of a piece of clear plastic, which contained brownish powder with a net weight of 57.8 grams marked as Exhibit P11 (6). The 7th packet contained a

piece of blue plastic, which enclosed light brown powder with a net weight of 0.3 grams marked as Exhibit P11 (7). The substance in all packets tested positive for heroin.

- [16] The 11th sealed evidence bag was produced and marked as Exhibit P12. It comprised of white plastic, containing brownish powder with a net weight of 974.2 grams wrapped in clear plastic, a white cloth bag with blue imprints, and more clear plastic marked as Exhibit P12 (1). The substance tested positive for heroin.
- [17] The 12th sealed evidence bag was produced and marked as Exhibit P13. It contained a clear plastic container with a white cap, enclosing light brown powder with a net weight of 39.4 grams marked as Exhibit P13 (1). The substance tested positive for heroin.
- [18] The Government Analyst stated that in total according to his analysis, he had identified 784.6 grams of Opium and a net total weight of 97, 945.1 grams of illicit heroin having an average heroin content of 65,211.4 grams of heroin. His report P1 confirmed this fact.
- [19] Mr. Ralph Agathine attached to the Scientific Support and Crime Records Bureau stated that he had photographed the exhibits in this case. He produced the photographs taken of all the exhibits as P14 (photos 1 to 268). He identified in open Court the packages of controlled drugs he had photographed which had already been produced by the Government Analyst to Court as exhibits in the case. He explained each photograph taken in relation to the exhibits and identified the exhibit as well in open Court. He stated certain packets were perforated and identified them in Court.
- [20] NDEA agent Hussain Jaffar stated he was an NDEA officer and on the 17th of April 2016, he had conducted a search on the vessel PAM with other NDEA agents and sniffer dogs commencing around 7.00 a.m. when it was docked at port Victoria. The three accused were present. He had conducted the search in the anchor cabin and retrieved and found two black plastics, a white plastic with and red plastic which contained brown granule powder. He had thereafter found a cigarette box inside of which was a clear plastic and blue plastic containing brown substance. He also observed a white plastic among the net in the cargo hall inside of which was a brownish substance. He observed during his search that although he gave instructions to the 2nd accused to do certain

things, he did not comply but would instruct a member of the crew to do so. He had also found a white plastic container with a cap on it containing brownish substance suspected to be controlled drugs in a blue bag in the galley behind the engine room. He had taken the exhibits placed them in evidence bags and sealed them and kept them in his possession. He identified the exhibits taken into custody by him from the vessel as exhibits P11 (1) to (7), P12 (1) and P13 (1). He identified the vessel shown in P14 photo 237 and 238 as the vessel on which the said items were found. He also identified the places from where the exhibits were retrieved, from the photographs.

- [21] NDEA Agent Mr. Padayachy, described the detection and boarding of the vessel PAM. He stated he was aboard Coast Guard vessel PS Andromanche which came on the scene after the PS Constance had intercepted the PAM. He described the search and the fact that after packets containing controlled drugs had been found in the kitchen of the vessel the 3rd accused Hoseyn Bazdar had raised his hand and pointed towards the engine. They had gone down and the 3rd accused had gone through a hole in the engine room and come out with 3 gunny bags and a dark green bag. The 1st gunny bag contained 13 packets, the 2nd, 10 packets and the 3rd gunny bag contained 9 packets and the dark green bag contained 15 packets. He had taken possession of the said exhibits. He identified the places where the controlled drugs were found from the photographs of the vessel. Thereafter the vessel crew and exhibits were brought to Mahe under escort and agent Tania had instructed agent Surendra to inform the Captain, the 1st accused who understood Hindi, the fact they were arrested for trafficking and importation of controlled drugs and their rights and caution were read out and the Captain was asked to repeat it to the other crew members.
- [22] The exhibits taken into custody by agent Ragain were also given to him and he also received the exhibits taken into custody by agent Jaffar and had thereafter handed all the exhibits for safe keeping to agent Seeward. On the 20th of April he and agent Seeward had sealed all the exhibits into 12 plastic bags bearing CB number 415/16 and he and agent Seeward had handed over the 12 sealed evidence bags to Mr. Bouzin the analyst at 2.20 pm on the 20th of April 2016. He too had gone with SI Seeward and Mr. Bouzin had verified the exhibits in their presence. On the 13th of May 2016 at 10 a.m. he had gone to

collect the exhibits from Mr. Bouzin and the certificate of analysis P1. The analyst had placed the exhibits back in the respective evidence bags and resealed them. He had thereafter collected the exhibits from agent Malvina who was in charge of the exhibit room and brought them to Court and handed the exhibits in open Court to Mr. Bouzin with the seals placed by Mr. Bouzin the Government Analyst intact who affirmed in open Court the seals placed by him were intact.

[23] Witness proceeded to identify the exhibits P2 (1) to (5) in open Court as exhibits received from Agent Ragain on the 17th of April 2016. He further identified exhibits P3 (1) to (15) as exhibits he had received from agent Ragain and stated one of the packets had been opened to verify the contents. He similarly identified exhibits P4 (1) to (15) and P5 (1) to (15) and P6 (1) to (5) in open Court as the exhibits received from agent Ragain. He stated that all these exhibits were placed in the respective evidence bags and sealed and given to the analyst who verified the contents on receipt in their presence and after analyzing same had resealed the respective evidence bags and handed it back to them with the contents. Agent Padayachy further identified the exhibits taken into custody by him in open Court as P7 (1) to (15), P8 (1) to (9), P9 (1) to (10) and P10 (1) to (13) including the contents and wrappings in open Court. Inside, they observed a substance which they suspected to be heroin. He also identified the exhibits handed over to him by Agent Jaffar as P11 (1) to (7), P12 (1) and P13 (1). All these exhibits and contents and wrappings were placed in their respect evidence bags P7, P8, P9, P10, P11, P12, and P13 sealed and taken to the government analyst for analysis who had opened the evidence bags in front of them verified the said exhibits and after analysis resealed each exhibit bag and returned them with the respective contents therein.

[24] The next witness Agent Errol Ragain's evidence corroborated the evidence of the other witnesses in respect of the detection, interception and boarding of the vessel Payam Al Mansur. He described the items taken into custody by him during his search of the vessel which had commenced at 8.00 a.m. from the wheelhouse. He had seized black and green substance from the wheel house and described the wrappings they were in, He had also seized 5 Nokia mobile phones, 1 Samsung, 19 SIM cards 2 memory cards, 2 adaptors, 1satellite phone, 2 chargers and a pendrive. Around 9.35 a.m. he had found substance

suspected to be controlled drugs in the kitchen under a gas burner. He stated in all there were 50 packets which contained a powdery substance with a light brown colour that he suspected to be controlled drugs. He had kept all these exhibits in his possession. At the time he found the controlled drugs the Captain of the vessel had accompanied them. He had information that agent Padayachy too had found more controlled drugs in the engine room in 4 bags. He identified exhibits P2 (1) to (5), P3 (1) to (15), P4 (1) to (15), P5 (1) to (15) and P6 (1) to (5) and the packing and contents herein as the exhibits he had found in the kitchen under the burner on board the PAM. Agent Seeward too gave evidence corroborating the sealing of the evidence bags containing the respective exhibits and the handing over of the bags and contents for analysis to the Government Analyst. He also stated that at the time of handing over the Government analyst verified each and every exhibit. He referred to in detail how he had assisted Agent Padaychy to seal the said exhibits.

24/11/16
[25] The prosecution produced the statement under caution of the 1st accused Emam Bakhsh Tarani, the Captain of the vessel given on the 28th of April 2016 recorded at 14.32 hrs through agent Labiche, after it was declared admissible after a voire dire as the 1st accused retracted the statement on the basis it was not obtained voluntarily. Interpreter Japhet Eichel gave evidence that he had translated the statement given by the 1st accused from the Farsi language to English and written it down. The defence also repudiated the statement on the basis that the statement was not written in the language of the 1st accused in Farsi. Even though he had signed it, there was no certification after the signature nor was there any signature of any NDEA agent on it. It was further repudiated on the basis the Farsi translation had been done on another date including the signature of agent Labiche and the certification.

[26] Agent Labiche gave evidence further stating that he participated in the briefing in respect of the information that a suspected foreign vessel was entering Seychelles territorial waters on the 15th of April 2016. He too corroborated the evidence given in respect of the detection, apprehending, boarding and search of the suspected vessel PAM and the finding of the controlled drugs aboard the vessel. Mr. Jaffar was recalled by the prosecution with the consent of Court and he produced the identity of the 1st accused as

P17 which is a certificate given to the 1st accused certifying that the 1st accused has been found duly qualified in accordance with the provisions of code of practice for training, examinations and certification for fishing vessel personnel, to perform duties of a co-skipper on a fishing vessel. Though challenged at the time of producing it, subsequently the 1st accused admitted the authenticity and correctness of this document. Thereafter the prosecution closed its case.

- [27] A submission of no case to answer was made which was rejected by ruling dated 12th May 2017 and a defence was called from all three accused.

EVIDENCE OF THE DEFENCE

- [28] On the 3rd of July 2017, the 1st accused Emam Bakhsh Tarani in defence, gave evidence under oath. He stated that he was 35 years of age and his profession was a job on the sea. He admitted that P17 was his own document. He further stated that one Mr. Hadji Malik had wanted him to undertake a voyage to Tanzania to bring fish and asked him to go look for crew members to accompany him on the voyage. He had gone and checked the ship fuel, oil and whether everything was in order for the trip and begun to recruit the crew. It had taken him two weeks to get the ship in order and the crew ready. He further stated that Hadji Malik lived in the same town as him and he was looking for a Captain to take the vessel, he had also introduced him to the 2nd accused, his son and stated that he would have his company on the journey. Mr. Hadji Malik had fixed his salary at 3000 US dollars and for each of the crew members 1000 US dollars. He stated that the 2nd accused had accompanied to purchase items for the voyage and prepare the ship for the voyage.
- [29] He further stated he was not informed that he was to transport drugs in the vessel but Hadji Malik had provided about 1 kilogram of drugs for the use of the members of the crew if needed. He stated that the radar was not working and they had used GPS to monitor but that too was defective and they had no intention to enter Seychelles waters. He admitted they had seen a small island with trees. He had thought they were in international waters but the navy vessel had approached, stopped them and boarded them. They had found the drugs kept for their consumption and beaten them and started

searching the vessel. He admitted that the boarding officers had found controlled drugs on their vessel and had thereafter arrested all of them.

[30] In cross examination, he admitted they had left Iran from Konarak to proceed to Tanzania and that Hadji Malik was the owner of the vessel and the father of the 2nd accused. As the 2nd accused was the son of the owner of the vessel, he had to accept the request that he was to accompany them on the voyage. He stated the 2nd accused had accompanied him to purchase things for the voyage. The 1st accused further admitted he knew his responsibilities as Captain of the vessel. He also stated he knew his responsibilities as he was responsible for the crew, he was in command of the ship and was also in charge of the cargo that was on board the vessel. He had not known that there were drugs hidden in the vessel. He was only aware of the 1 kg that was brought on board the vessel for consumption by the crew when they were tired. He stated that they had not stopped for the hand waving of the persons on board the navy vessel as this was not an international sign but admitted they had stopped when the navy vessel had started firing. He stated had he had knowledge of the drugs on board the vessel, he would have dropped them over board when they saw the navy vessel lights earlier. He admitted, he was qualified as a Captain but this was his first journey. He admitted seeing an island but thought they were in international waters en route from Iran to Tanzania and was unaware they were in Seychelles waters. He stated that Mr. Hadji Malik had not given him any drugs to hide on board the vessel. He further stated that at the time he gave the statement marked P16 (c), he could not understand what the translator meant when he said “you could be quiet and there was no reference to an advocate made to him. Under cross examination he admitted he was told “you can remain silent” and was also told “you have you can bring your advocate” when his statement was being recorded.

[31] The 2nd accused too gave evidence under oath. He stated his name was Hattam Mothashimina and he was 20 years old. He admitted under oath that his father had asked him to go to Tanzania to bring fish on the said vessel. After the journey had started about five hours later, his father had called him and told him he had hidden drugs on the vessel. He had been told not to tell the other members of the crew and this information was for his knowledge only. He stated that prior to leaving, his in law (brother in law) had helped

in doing the purchases for the journey and the Captain was present. He stated his father was a Muslim and had 3 wives and 24 children. He had been warned not to tell the Captain or the crew about it and if the Captain got to know he would turn the boat back and if that would happen he would kill him. He further stated that Emam Bakhsh the Captain of the vessel was in charge. He admitted that during the voyage, the vessel was stopped and about 25 persons boarded the vessel. They had started beating the crew members so he had volunteered to show them where the controlled drug was. He had told the 3rd accused there were some drugs hidden in that part of the vessel and for him to give it to them. He stated he had co-operated by telling them where the controlled drug was. Until he told the 3rd accused where the controlled drug was, the 3rd accused had not known anything about it. Thereafter they were all arrested and brought to Seychelles. He stated they were not informed of their rights. Their advocate had come to meet them. He stated that a blackish drug was given by his father to the Captain for the consumption of the crew. He said it was not Opium or Heroin but a light drug which is not prohibited in Iran and was of medicinal use. It was mainly taken to keep a person active and prevent him from dozing off. He stated he had not thrown the drugs overboard for fear that his father would take his life and as he was married and twenty years old, he did not want to die. He stated, he could not lie to his father that the navy boarded the vessel and threw the drugs overboard as they would give a receipt with their seal if they did so but admitted he was not sure of this fact.

- [32] He further stated he had gone down to the engine room with the 3rd accused to show where the controlled drug was, as his eyes had been sprayed and they were burning he had taken the 3rd accused down to assist him. He admitted that their GPS was malfunctioning and they did not know they were in Seychelles waters until they were boarded by the Navy and Coastguard.
- [33] The 3rd accused Hoseyn Bazdar stated under oath, he was a seaman who did the job of an engineer on a vessel. He had met the Captain who had asked him to join the crew and he had got involved in checking out the engine and changing the oil and preparing the ship for the voyage ahead. He was called and asked to join the ship when it was due to leave. It was the Captain who had recruited him and he was informed the purpose of the trip

was to go to Tanzania to bring fish. He too stated that a vessel had directed a light on them and after circling them had fired shots and then they had stopped their vessel. Persons from the other vessel had boarded their vessel and seen the kilogram of drug that they had kept for consumption and begun to harass and beat them and ask them where the drugs on the vessel were. One of the navy officers had wanted to speak to him and called out to him and he had to go towards the engine room where they were. When he was at the entrance to the engine room Hattam the 2nd accused, had told him that as his eyes had been sprayed and were burning and he had difficulty seeing and asked him to help in getting some things to give them. Hattam had said there is something kept in a certain place and he had opened the location and found the drug inside. He stated he was ignorant of the fact it was hidden there. It was wrapped in plastic and only after the officers of the NDEA had opened it, he had known it was controlled drugs. After finding the controlled drugs the NDEA officers had beaten them and taken them away and brought them to Seychelles and later they had met their lawyer. He stated their rights were not read to them.

- [34] Under cross examination, he stated he lived in a town called Rusda which was a 100 kilometres from the town of Konarak. He stated he had been looking for a job near the port area when he met the Captain who had asked him to be the mechanic on the vessel. He said he could not repair an engine but could maintain it. His job on board the vessel was to be in charge of the engine and make sure it was in order and running condition. He stated he had checked the engine twice prior to leaving. He had spent about 1 to 2 hours each time on the ship. Sometimes he would stay with the Captain overnight as the Captain lived only 10 kilometers from where the vessel was anchored. He admitted the black substance was drugs but not opium and was used for headaches in Iran. The crew used it for stamina to work better. He stated that he had put his hand up when the NDEA agents were present as they had asked for the mechanic. He denied raising his hand as his conscience was playing on him. He denied he had raised his hand to show where the controlled drugs were. He denied seeing the drugs as they were loaded on board, he denied seeing the drugs while he was working in the engine room. He further denied he was present when the drugs were being loaded onto the boat Payam Al Mansur. He stated he was unaware that controlled drugs were found in the kitchen area. He further stated he

would only go to the kitchen to eat his food only, when the food was ready would they go to collect it. He admitted he was paid 1500 US dollars for the trip. He stated he did not know the owner of the vessel but was introduced by the Captain to the 2nd accused as the owner's son.

- [35] In defence, learned counsel with the consent of Court recalled Major Estico in accordance with a ruling given by Court. Witness stated that learned counsel for the defence Mr. Andre had watched the footage relevant to the case in his presence on Patrol Boat Constance as the footage could not be copied from the system. He admitted the AV technology that had recorded the footage did not have date and time indicated on the footage. Witness stated that the date and time could be obtained from the log book. The first time he spotted the vessel, the vessel had been in the EEZ of Seychelles. He stated that the typing of 400 nautical miles on the statement was an error. He further stated that the island in the background of the footage was Ile Aux Vaches, Bird Island, and the boat was arrested 4 nautical miles from Bird Island. He clarified the fact that as the video technology was of an old system it did not have time and date. He further stated that being a navigator, he knew his position and had brought a copy of his log book which recorded the position every hour. He also stated he had GPS, a disk which was a plotter and radar, therefore he could tell the co-ordinates of each movement and the position their vessel was in.
- [36] Thereafter the defence called one Rodney Marcus Labiche, Public Relations officer who stated he knew many languages which included English, French, Arabic and Urdu. He had met the accused when they were arrested at the old Coast Guard headquarters. He had helped in the interpretation when the crew was produced in the Magistrates' Court.
- [37] Mr. Wilton Ernesta, a Master Mariner, testified on behalf of the defence and gave evidence of his expertise and experience as a Mariner. He too participated in the viewing of the video footage recorded by Patrol Boat Constance at the inspection from which certain of the footage shown at the inspection was recorded by use of mobile phone in the presence of all parties, for the benefit of the defence and produced by the defence as D2 and D 3, to be shown to their expert witness, Mr. Ernesta in Court. On reviewing the

footage taken by mobile phone produced by defence as D2, he stated there were no dates and time recorded and no position recorded. He stated that the suspect vessel (PAM) at recording time 00.44, could be seen flying a flag which he could not identify. At 1.08 and 2.07 he stated he identified an island in the background. At 2.2, he stated the suspect vessel was side by side with the vessel taking the video footage (PS Constance) and at 2.29 the Constance was in front of the other vessel. He further stated looking at video D3 produced by the defence that he could not tell the position of the vessel from the videos. He stated he could not identify the island in the background and it looked like a coralline island.

[38] The defence produced another video which was unfamiliar to Court which showed open sea for 0.09 seconds which to Court seemed to be an extract from one of the other videos. Mr. Ernesta stated that 400 NM would be international waters and 4000 NM would be in the middle of the ocean. He said the right of innocent passage included the right of a vessel to transit through one's territorial waters. He admitted he could not identify the flag and could not say if it was a piece of cloth. He admitted that the distance from the island to the vessel with the camera (Constance) could even be less than the 15 NM. The defence thereafter closed its case.

[39] Both parties thereafter made submissions. I have considered the evidence led by prosecution and the defence and proceed to analyse the evidence as follows.

ANALYSIS OF EVIDENCE

[40] I will first deal with the evidence regarding the 3rd accused Hoseyn Bazdar the mechanic on board PAM. The 3rd accused in his evidence under oath, admits he was working as a mechanic on the vessel identified as Payam Al Mansur at the time it was boarded by the officers of the Coast Guard and TAZAR and agents of the NDEA. He admitted the boarding party found controlled drugs aboard the vessel hidden in a hole in the engine room. It is the evidence of prosecution witness Agent Padayachy that it was the 3rd accused who raised his hand and had voluntarily taken them down into the engine room

and shown them the hidden controlled drug. The 3rd accused admits he did show the controlled drug but it was on the request of the 2nd accused Hattam who had asked him to assist him in showing the drugs hidden in the engine room, as the 2nd accused found it difficult to do so, as his eyes were burning as they had been exposed to the spray used by the boarding agents. The evidence of the 2nd accused Hattam given under oath supports his version. The 3rd accused stated he was only the mechanic and did not know the owner of the vessel who was the person who had placed the controlled drug on the vessel and it is apparent from his evidence that he hardly knew the 2nd accused (the son of the owner of the vessel), prior to departure of the vessel. There is no evidence before Court to show the 3rd accused was around the whole time the ship was being loaded and prepared for the voyage, unlike in the case of the 1st and 2nd accused who admit they were the ones who prepared the ship for the voyage and were in the company of each other. The prosecution evidence is that the 3rd accused was aware of the drugs being in the engine room, as it was found in close proximity to where he worked. However, it is to be borne in mind, as the 3rd accused was a crew member, unlike the 1st accused who was the Captain and the 2nd accused who was the son of the owner, there is very little he could have done in the middle of the ocean after the vessel set sail to remedy the situation.

[41] In such a situation, the 3rd accused did the next best thing possible and that was at the time of detection when the opportunity presented itself, he brought it to the notice of the authorities concerned voluntarily and co-operated with them in the finding of the concealed controlled drugs. Further, he would have been acting on the orders of the Captain and therefore could not be blamed for not stopping the vessel when the Coast Guard signalled him to do so. I note that though subject to lengthy cross examination the evidence of the 3rd accused under oath was not subject to any material contradictions. It is clear even if he did have knowledge of the controlled drug being on board the vessel, he had very little or no control over it. In the case of **R v Marengo [2004] SLR 116**, it was held a person has in possession whatever is to their own knowledge, physically in their custody or under their physical control. The controlled drugs in this instant case was not physically in the custody of the 3rd accused. The prosecution has failed to prove it was under his physical control. I would give him the benefit of doubt in respect of his guilty knowledge and physical control of the controlled drugs set out in the charges against him

and proceed to acquit the 3rd accused Hoseyn Bazdar of all the charges framed against him.

- [42] The 1st accused Emam Baksh Tarani and the 2nd accused Hattam Mothashimina in their evidence given under oath have admitted the fact that officers did board their vessel. Both accused have admitted that controlled drugs were found on board hidden in the vessel PAM. Having considered the evidence of the Government Analyst Mr. Bouzin read together with the evidence of the detecting officers Agent Ragain, Agent Padayachy and agent Jaffar, I have no hesitation in accepting his evidence that the controlled drug found on board the Payam Al Mansur and analysed by him was heroin, weighing 97,945.1 grams and opium weighing 784.6 grams. The report of the Government Analyst further affirms same. When one considers the evidence of the aforementioned detecting officers together with the evidence of agent Seeward and the Government Analyst Mr. Bouzin, this Court is satisfied beyond reasonable doubt that all the controlled drugs analysed by the Government Analyst were those found on board the vessel PAM and there was no illegal tampering with the exhibits from the time of detection, taking into custody, analysis and production in Court. The detecting officers explain in their evidence that some of the packets were perforated by them to determine what the contents were. I find this evidence acceptable. I am therefore satisfied having considered the aforementioned evidence that the chain of custody of the exhibits have been established by the prosecution beyond reasonable doubt.
- [43] The defence of the 2nd accused Hattam Mothashimina as set out in his evidence under oath is that he was aware that the owner of the boat, his father, had placed the controlled drug on board the vessel, only when they were under sail and he was told not to tell the Captain as he would return back and if that happened, he would be killed. He was also afraid to throw the drugs overboard on being made aware of it because he feared he would be killed by his father. I find this defence unacceptable and this only establishes beyond reasonable doubt that he was fully aware the vessel had controlled drugs on it and was willingly transporting the said controlled drug in the vessel PAM. There was no immediate threat on board preventing him from unloading the illegal cargo. I therefore proceed to reject his defence.

[44] In respect of the 1st accused Learned Counsel for the defence strongly repudiated the statement under caution recorded from the 1st accused, on the grounds it was not in conformity with section 128 of the Criminal Procedure Code. He further drew the attention of Court that on the date the statement was given the 28th of April 2016, the interpreter had written the statement in English and thereafter, the 1st accused had signed it. It was produced as P 16 (a). He further drew the attention of Court to the fact there was no certification by any officer of the NDEA on it under the signature of the 1st accused. According to the evidence of the interpreter, he had taken this statement and later on the 29th of April 2016 translated it into Farsi and placed his signature and the officers of the NDEA had also placed their signature and certification on P16(c). I note that P 16 (a) contains no certification that the statement was read over and explained to the 1st accused nor does the signature of Agent Labiche appear anywhere on it, to show it was a statement recorded in the presence of the NDEA officers. I also note the signature of the 1st accused does not appear in the subsequently translated Farsi statement P 16 (c). In this background, I am inclined not to accept the contents of the statement P16 (a) as evidence in the case against the 1st accused.

[45] However, I note the 1st accused Emam Baksh Tarani admits document P17 produced by the prosecution showing he was qualified to be a skipper on a vessel. The 1st accused admitted he was the Captain of the vessel in his evidence under oath. He admits it was he who had recruited the crew. He admits he was instrumental in preparing the vessel and responsible for the cargo on board the vessel. The 2nd and 3rd accused in their evidence under oath refer to the 1st accused as the Captain of the vessel. He admitted that it was Hadji Malik who had wanted him to undertake the voyage. He further stated that Hadji Malik lived in the same town as him and he was looking for a Captain to take the vessel. He admitted Hadji Malik had also introduced him to the 2nd accused, his son and stated that he would have his company on the journey. He further stated Hadji Malik had provided about 1 kilogram of drugs for the use of the members of the crew if needed. He also admitted that he and the 2nd accused were together for some time in company with each other to purchase the cargo and prepare the vessel and recruit the crew for the voyage. However the 1st accused states, he was never aware that there were controlled drugs on the vessel.

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[46] At this stage it is pertinent to refer to the evidence of Major Estico and other detecting officers who state at the time the Coast Guard vessel PAM was detected they had made hand signals for the vessel to stop. Despite hand signals being made and the Coast Guard vessel cutting in front of the suspect vessel, the PAM had continued without stopping. It is to be borne in mind at that time, the vessel PAM was under the control of the 1st accused who was the Captain. Further the evidence indicates the vessel PAM under the control of the Captain the 1st accused, also maintained radio silence and could not be contacted even on the radio. This clearly indicates that the Captain had knowledge that the vessel contained controlled drugs and was making attempts to avoid communication and contact with the sighted Coast Guard vessel. It was only when the Coast Guard vessel fired warning shots did the suspect vessel PAM finally stop which is admitted by the three accused in their evidence under oath.

[47] The evidence of Major Estico and other officers on this issue is not denied by the defence as all three accused admit in their evidence under oath that the Coast Guard vessel made hand signals and cut in front of their vessel. Their reason for not stopping is that they had not recognised these signals as being orders to stop. I find this excuse somewhat lame and reject same. The failure of the vessel to stop and it maintaining radio silence, clearly indicates knowledge on the part of the Captain that there were controlled drugs on board and his attempt to avoid communication and contact with the Coast Guard vessel. It would be pertinent at this stage to also draw attention to section 17 of the Misuse of Drugs Act CAP 133 which reads as follows:

“Where a controlled drug is found in any vessel or aircraft arriving from any place outside Seychelles, it shall be presumed, until the contrary is proved, that the drug has been imported in the vessel or aircraft with the knowledge of the master or captain of the vessel or aircraft.”

[48] Having considered all the above factors, I am satisfied beyond reasonable doubt that the Captain was aware that there was controlled drugs aboard the vessel he was in charge of, namely the Payam Al Mansur and had the physical control of same.

[49] It is a contention of the defence that the vessel PAM was arrested on international waters far away from the Seychelles and this is supported by the fact^{1.1.2017} in the statements given by Major Estico he has mentioned 400 Nautical miles and 4000 Nautical Miles. The defence further contended in their submissions that one could not rely on the evidence of Major Estico as it was contradictory in nature and the expert called by the defence Mr. Ernesta had identified the island as a coralline island. Firstly, it is my view that the evidence of Mr. Estico was not contradictory in nature and the evidence of Mr. Ernesta called by the defence was unsure in that he could not identify the island shown to him on the recording²³⁻⁰¹⁻²⁰¹⁸ but it looked like a coralline island. In this respect Mr. Estico would have been in a better position to identify the island as he was physically present at the scene of interception and had his instrument readings before him.

[50] Major Estico has clearly stated the 400 Nautical miles and 4000 nautical miles were errors made in the writing of the statement. His evidence and that of Corporal Cesar is that the vessel was arrested close to Bird Island within the territorial waters of Seychelles. The three accused too admit they had strayed from their course as their GPS was malfunctioning and their radar was not working, they could not tell where they were at the time the Coast Guard vessel intercepted them. The 1st accused admitted they had seen a small island with trees. He had thought they were in international waters but the coast guard vessel had approached stopped them and boarded them. Unlike them, the Coast Guard was relying on their instruments and radar and according to the evidence of Major Estico were plotting their course in their logbook as well. Corporal Cesar of the Coast Guard gives the exact co-ordinates where the vessel was intercepted and in cross examination it was observed he had mentioned same in his contemporaneous statement given by him. Further the time taken for both vessels Constance and PAM to reach Mahe just after midnight, after leaving the point of interception after 5.30 p.m, does not indicate the PAM was intercepted 400 or 4000 nautical miles away from Seychelles. I see no reason to disbelieve the evidence of the prosecution in this regard and am satisfied the vessel was arrested within the territorial waters of Seychelles.

[51] The next contention of learned Counsel was that the vessel PAM was exercising its right of innocent passage and therefore the case could not proceed against the accused. The

right of innocent passage was never denied by the officers of the Coast Guard but the Coast Guard does have the right to board and search suspected vessels within the territorial waters of the Seychelles and if illegal and controlled drugs are found aboard the vessel, ^{they} have a right to apprehend the vessel and crew. In this regard, I draw attention to Article 27 (d) of UNCLOS (United Nations Convention on the Law of the Sea) which grants a coastal State permission to exercise its criminal jurisdiction, if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances on vessels passing their territorial sea.

- [52] I also note the defence made allegations of being assaulted by the NDEA officers when they boarded the vessel PAM. This was denied by each and every agent who deponed. There is no medical evidence to support any evidence of assault, I therefore see no merit in this allegation. I also note that learned counsel has mentioned that the rights of the accused were not read out to them. Considering the language problem in this case, the NDEA officers in my view have done the best under the prevailing circumstances, to explain the rights of the accused to them at the beginning by using Urdu interpreters and then bringing Farsi interpreters from abroad. The officers cannot be faulted in this regard.
- [53] For all the aforementioned reasons I proceed to accept the evidence of the prosecution against the 1st and 2nd accused in this case and reject their defence.
- [54] I observe according to Count 1, the three accused have been charged with importation of a controlled drug heroin having a net weight of 97,945.1 grams with a heroin content of 65,211.4 grams of heroin and 784.6 grams of opium. The Misuse of Drugs Act CAP 133 does not define “import”. It was held in the case of **R v Dubignon [1998] SLR 52** “In Seychelles in the absence of any definition, the word “import” must be taken in the broader sense of “to bring” or “cause to be brought” by air or sea.”
- [55] For the reasons set out above, I am satisfied beyond reasonable doubt that the evidence led by the prosecution, clearly establishes that the 1st and 2nd accused were importing into the Seychelles by sea, aboard vessel PAM, the controlled drugs referred to in the said charges. Having considered the evidence of the prosecution in its entirety, I am also satisfied beyond reasonable doubt that the prosecution has proven the joint liability of

both the 1st and 2nd accused as envisaged under section 22 (a) of the Penal Code in respect of the importation and trafficking of the said controlled drugs.

[56] Section 14 of the Misuse of Drugs Act reads as follows:

A person who is proved or presumed to have had in his possession more than –

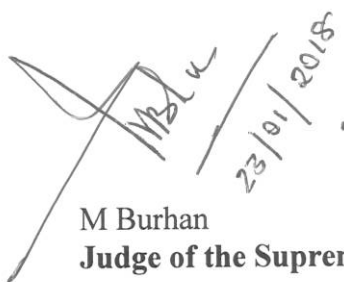
- a) 100 grammes of opium;*
- b) 3 grammes of morphine contained in a controlled drug;*
- c) 2 grammes of diamorphine (heroin) contained in a controlled drug; or*
- d) 25 grammes of cannabis or cannabis resin,*

shall, until he proves the contrary, be presumed to have had the controlled drug in his possession for the purpose of trafficking in the controlled drug contrary to Section 5.

[57] I am also satisfied for the aforementioned reasons that the prosecution has proved beyond reasonable doubt that the control drugs referred to in the charge sheet were in the physical control and thus the possession of both the 1st and 2nd accused and they had knowledge that the said controlled drugs were aboard the vessel PAM. The quantity of controlled drug heroin is well over 2 grams and the quantity of opium is well over 100 grams which attracts the rebuttable presumption of Trafficking. Both accused have failed to rebut the said presumption.

[58] I am therefore satisfied that the prosecution has proved beyond reasonable doubt all the elements contained in the charges in Counts 1, 2, 3 and 4 against the 1st accused and 2nd accused. I proceed to find the 1st and 2nd accused guilty on the charges contained in Counts 1 to 4 and proceed to convict them of same.

Signed, dated and delivered at Ile du Port on 23 January 2018

Handwritten signature and date in black ink. The signature is stylized and appears to be 'M Burhan'. The date is written as '23/01/2018'.

M Burhan
Judge of the Supreme Court