

IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CO22/2016

[2018] SCSC 476

THE REPUBLIC

versus

FRANCIS ERNESTA

Fist Accused

BRIAN MOTHE

Second Accused

KEVIN QUATRE

Third Accused

DANNY SULTAN

Fourth Accused

Heard: 09/08/16, 10/08/16, 12/09/16, 16/09/16, 24/10/16, 21/11/16, 25/11/16, 02/12/16, 09/12/16, 19/01/17, 27/01/17, 30/01/17, 30/01/17, 13/02/17, 03/03/17 08/06/17, 09/06/17, 05/07/17, 17/07/17, 29/08/17, 30/08/17, 05/09/17, 25/09/17 and 27/10/17, 06/02/18, 13/02/18.

Counsel: Mr. Chinasammy Jayaraj, Principal State Counsel for the Republic
Mr. Clifford Andre Attorney at Law for all the accused persons

Delivered: 24 May 2018

JUDGMENT

Burhan J

[1] The aforementioned accused persons have been charged as per amended charge sheet dated 30th August 2017 as follows:

Count 1

Trafficking in a controlled drug contrary to Section 5 read with Section 2 and further read with Section 26(1) (a) of the Misuse of Drugs Act {Cap} 133 as last amended by Act No 3 of 2014, read with Section 22 (a) of the Penal Code and punishable under Section 29 (1) read with Section 29 (1) read with Second Schedule of the same Misuse of Drugs Act.

Particular of offence are that, Francis Phillip Ernesta of Perseverance, 61 years old, Brian Mothe of St. Louis, 43 years old and Kevin Gerard Quatre of La Louise and Danny Sultan 43 year old make of Les Mamelles on the 26th March 2016 at Praslin, actually did the act of trafficking in a controlled drug namely a substance in the net total weight of 746.9grams containing 477.66 grams of Heroin (Diamorphine) by transporting, giving, sending, distributing or delivering or to do or offer to do any act preparatory to or for purposes of selling, giving, transporting, sending, distributing the said substance in the net total weight of 746.9 grams containing 477.66grams of Heroin (diamorphine).

Count 2

Conspiracy to commit the offence of trafficking in a controlled drug contrary to Section 28(a) read with 5 and further read with 26(1) (a) of the Misuse of Drugs Act {Cap} and punishable under Section 28 read with Section 29 and read with Second Schedule to the Misuse of Drugs Act.

Particulars of offence are that, Francis Phillip Ernesta of Perseverance, 61 year old, Brian Mothe of St. Louis, 43 year old and Kevin Gerard Quatre of La Louise, and Danny Sultan, 43 year old male of Les Mamelles on or around the 26th March 2016 agreed with one another to pursue a course of conduct, that if pursued, would necessarily amount to or involve in the commission of an offence, namely the offence of trafficking of a

controlled drug namely a substance in the net total weight of 747.9 grams of Heroin (Diamorphine) containing 477.66grams of Heroin (diamorphine).

Count 3

Importation of a controlled drug contrary to Section 3 of the Misuse of Drugs Act (Cap 133) and read with 26 (1) (a) read with Section 22(a) of the Penal Code and punishable under Section 29 (1) read with Second Schedule of the Misuse of Drugs Act.

Particulars of offence are that, Francis Phillip Ernesta of Perseverance, 61 year old, Brian Mothe of St. Louis, 43 year old and Kevin Gerard Quatre of La Louise, and Danny Sultan, 43 year old male of Les Mamelles on or around the 26th March 2016, in the Seychelles territorial waters actually did the act of importation into Seychelles a controlled drug, namely, a substance in the net total weight of 746.9 grams containing 477.66 grams of Heroin (Diamorphine).

Count 4

Conspiracy to import of a controlled drug contrary to Section 28(1)(a) of Misuse of Drugs Act (Cap 133) read with Section 3 of the Misuse of Drugs Act (Cap 133) and punishable under Section 29 (1) read with Second Schedule of the Misuse of Drugs Act.

Particulars of offence are that, Francis Phillip Ernesta of Perseverance, 61 year old, Brian Mothe of St. Louis, 43 year old, and Kevin Gerard Quatre of La Louise and Danny Sultan, 43 year old male of Les Mamelles on or around the 26th March 2016 agreed with one another to pursue a conduct, that if pursued, would necessarily amount to or involve in the commission of an offence, namely importation of a controlled drug in the Seychelles territorial waters, namely, a substance in the net total weight of 746.9 grams containing 477.66 of heroin (diamorphine)

[2] All four accused denied the charges and trial proceeded against the accused.

Summary of the Evidence of the Prosecution

- [3] Witness Donn Zaaiman Dupreez an Operations Officer and Chief Pilot Instructor for the Seychelles Airforce stated, he was instructed during the period 24th and 25th of March 2016, to provide a surveillance flight to track down and monitor a suspicious vessel that was heading towards Seychelles. He was the mission commander and Lieutenant Uzice was the co-pilot, Lieutenant Commander Amith Kumar navigator and system operator and Corporal Tamboo operator. It is apparent from his evidence it was a planned operation, being done on the instructions of the Operational Officer Lieutenant Colonel Leslie Benoiton. On the 24th of March 2016, they had located the vessel which was being shadowed by a warship HMAS Darwin. He stated the vessel was not flying a flag. They were able to keep the vessel under observation from a height of 10,000 feet with their sophisticated equipment. He described the vessel and identified the vessel from photograph 1, a photograph of the vessel Canapone. They had passed their information of the whereabouts of the vessel to other coast guard vessels participating in the operation. Subsequently, the suspicious vessel was boarded by officers of the coastguard and NDEA (National Drug and Enforcement Agency) who were aboard Patrol Ships (PS) Constance and Hermes who identified the suspicious vessel as the Canapone.
- [4] In his evidence Witness Dupreez gave the co-ordinates of the suspicious vessel Canapone and stated it was heading towards Mahe. They had flown several missions lasting two to three hours and on the 25th of March 2016 on getting information that a fast moving speed boat also referred to as a scarab was approaching the suspicious vessel, they had got airborne again and had observed the high speed vessel going at a speed of 20 knots, closing in on the suspicious vessel which was 60 miles from Mahe. They had observed the scarab approach the vessel, do a U turn and come up behind the vessel and come close to it, a distance of less than half a meter. The vessels were next to each other in such a manner for five minutes and then the scarab had left the vessel and come in the direction of Praslin and La Digue. They had passed the information to PS Constance which homed in on the suspicious vessel. They had tracked the speed boat which went towards La Digue then changed course and went towards the East coast of Praslin. They had observed through thermal imagery, the high speed boat going to Anse Boudin and a person alight from the said boat and meeting someone on land. They had informed Patrol

Ship Hermes about the whereabouts of the scarab but the PS Hermes was unable to intercept the speed boat, as it developed engine trouble.

- [5] Witness further identified the photographs and identified the vessel in photograph 1 showing the vessel Canapone as the suspicious vessel and the vessel in photograph 7 and 10 as the high speed boat with 3 outboard motors, as the vessels he had kept under observation during the operation. Witness Lance Corporal Terrence Tamboo, corroborated his version in regard to the tracking of the vessel Canapone and its rendezvous with the speed boat. He had been the Camera operator aboard the plane who had been taking the photographs.
- [6] Officer Bethew attached to the SSCRB (Scientific Support and Crime Record Bureau) stated he had on the 30th of March 2016, on the instructions of agent Payet, taken photographs of a blue boat, coloured blue and yellow named Canapone which was docked at the coast guard jetty. He had also photographed another boat blue and white with the name of Ocean wave. He produced several photographs of the vessels as P1 (1 to 30). Photographs P1 (1 to 6), he identified as photographs pertaining to the vessel Canapone while P7 to 11 showed the vessel Ocean wave.
- [7] Major Tom Estico stated he was the Captain and Commanding officer of the coastguard vessel Patrol Ship Constance. He had been patrolling the seas and on the 24th of March 2016, he had been near St. Anne when he received instructions to patrol the East coast of Fregate from Lieutenant Colonel Benoiton. He described how the Coast guard and NDEA agents had intercepted the Canapone and boarded it. After the boarding team had boarded, they had brought the vessel alongside and he had identified the Captain of the suspicious vessel as Ernesta. He identified the vessel from the photograph. He stated the vessel was intercepted 24 nautical miles from Fregate Island and not 75000 nautical miles or 24000 nautical miles from Fregate. He stated that was an error in the statement and should read as 75 and 24 nautical miles. Corporal Ronnie Rigodon an officer of 16 years experience in the coast guard, confirmed the fact that they had spotted a boat the Canapone on the radar which was 24 nautical miles from the North East of Fregate and on sighting it, they had called on their PA system for the boat to stop but it had not. He had got orders to board the vessel and his team had approached the vessel on a Zodiac

and he had seen two persons aboard the suspicious vessel who they had ordered to go in front of the vessel. They had informed the two persons they were from the coast guard and were given permission to board the vessel. The two persons aboard the vessel were Francis Ernesta and Brian Mothe who informed him that the name of the vessel was Canapone. They had informed him their boat was on a trial run and were testing the boat and had left Mahe in the morning. Witness further stated they had searched the vessel and found nothing suspicious but there were some empty gunny bags and the smell of fibre glass. Thereafter around 1.00 a.m. NDEA officers from PS Hermes had boarded the vessel Canapone while he was on it. He had handed over all the items, the portable GPS, mobile phones, chart and radio to the NDEA officers Agent Payet and Agent Samir Ghislain. He handed over Canapone to the NDEA agents and boarded the Constance. He identified the 1st accused in the dock as Francis Ernesta and the 2nd accused as Brian Mothe and the vessel Canapone in Photograph 1.

[8] Captain Hans Radegonde stated he was the commanding officer of the coast guard vessel PS Hermes. On the 23rd of March 2016, he was informed of an operation to be performed and he prepared his vessel. On his vessel he had officers from TAZAR a special unit and NDEA personnel on board. When they were in the vicinity of Ile Au Recif when they were ordered to intercept a small speed boat which was travelling at 21 to 26 knots. He tried to cross its path but his vessel was only capable of going at 15 knots. He had received the information around 17.00 hrs. The Seychelles airforce pilots were also passing on information to him regarding the speed boat. He was informed by them that the speed boat had gone to Anse Boudin area. They too had gone to the area around 7.00 p.m and launched a small boat and searched for two hours but could not find anything. Thereafter, they had gone to where the PS Constance was and the team of NDEA agents aboard the Hermes had boarded the vessel Canapone to investigate it.

[9] Lieutenant Colonel Benoiton stated he was attached to the naval branch of the Seychelles coast guard. He had received information of a trans-shipment of narcotics and illegal activity of a vessel and had a briefing both with NDEA and coast guard command officers in respect of same. Two patrol ships Constance and Hermes had participated in the operation and the Seychelles airforce too had helped to locate the suspect vessel and pass on information to him and the patrol ships participating in the operation. He too

corroborated the version of the earlier witnesses in regard to the detection, surveillance and boarding of the vessel Canapone, its meeting with the fast moving speed boat referred to as a scarab and the failure of the patrol ship Hermes to intercept it. He too had seen the vessel Canapone and the scarab subsequently, after they had been taken into custody. It is clear from his evidence too that the 1st detection of Canapone was when it was 75 nautical miles from Fregate heading towards the Seychelles. Lieutenant Commander Amith Kumar too gave evidence corroborating the evidence of the aforementioned witnesses and stated he was the qualified navigation instructor training radar operators, surveillance operators and navigators in the Seychelles air force and was part of the airforce team that participated in the said operation. He too identified the vessel Canapone and the scarab from the photographs shown to him as the vessels detected by them and the vessels under their surveillance during their operation. On being recalled, he testified as to how the images were captured by the cameras and radar from the infra-red sensor, aboard the plane and whatever the screen captured was placed on a pen drive or DVD. These were thereafter printed. The photographs identified by him were produced as exhibit P4 (1 to 26). He identified them as pictures taken by the aircraft equipment, during the sorties carried out in regard to the detection in this case. Thereafter he described and identified the photographs.

- [10] Deputy Superintendent of Prisons Mr. Samir Ghislain stated he was attached to the NDEA in the month of March 2016 and participated in the said operation and was aboard the Patrol Ship Hermes on the said date. The other NDEA agents present on board were agents Payet, Madeleine, Clarisse, Zelia and agent Ragain. He too stated that they had attempted on orders to intercept the speed boat or fast moving boat but were unable to and their vessel Hermes had developed engine problems as both engines had failed. Two other boats were called in to assist, an army speed boat and an NDEA speed boat but were unable to intercept it. After their engines were repaired, they had gone to where the PS Constance had intercepted the suspicious vessel, the Canapone. They had arrive at 00.05 hrs at the location which was near Fregate and he and other NDEA agents had boarded the Canapone. At that stage officers of the coast guard were on board under the command of Ronnie Rigodon. He identified Mr. Francis Ernesta the 1st accused, as the person who introduced himself as the Captain of the vessel Canapone and Mr. Mothe the

2nd accused who was his employee. The NDEA agents had taken over the exhibits and control of the boat from the officers of the coast guard and had arrested both Ernesta and Mothe on suspicion that they were transporting controlled drugs and cautioned them and informed them of their constitutional rights. Both Mr. Ernesta and Mr. Mothe had stated that the vessel had been taken out to sea to test the engine. The agents too had done a search on the vessel Canapone but no controlled drug was found. They had then instructed Mr. Ernesta to head to Mahe. Mr. Ernesta had been steering the Canapone when he heard agent Payet shout to Mr. Ernesta “what are you doing” and he noticed that the boat was being steered onto the reef at Fregate Island and Mr. Ernesta had said “today we will know who is able to swim and who will drown”. Agent Payet had struggled with him to steer the boat away from the reef and he too had to help agent Payet by restraining Mr. Ernesta and then agent Payet had taken control and steered the boat towards the Constance and away from the reef. Thereafter, Mr. Ernesta had been given the steering as he had pleaded with them as there was a noise in the engine. He had steered the boat but the agents remained in the wheel house. They had reached Ile Perseverance around 4.35 a.m.

[11] While he was on deck, agent Ragain had approached him and told him Mr. Mothe wanted to speak to him. Mr. Mothe had wanted protection and had told him he would be killed by a guy named Danny, if he talked. He had reminded him of the caution and Mr. Mothe had told him that Danny had come along with them and he and Ernesta had taken drugs from Indians in a multi-colored boat. A blue and white speed boat had come when they were at sea and two persons had been on the speed boat and Danny had gone with them and taken all the drugs with him.

[12] Thereafter witness stated they had arrived in Mahe and docked at 4.35 a.m and both accused were transferred to the ex-coast guard and Mr. Mothe had elected to give a statement. The statement was produced as an exhibit P2 after a voire dire declared it admissible as evidence. Witness proceeded to identify the Canapone from the photographs and its interior. The prosecution next called witness Egbert Payet and after another voire dire a further statement given by Mr. Mothe was produced as exhibit P3. In addition, Mr. Egbert Payet gave evidence that he had brought two witnesses Xavier and Jeannia Pool who had identified the blue and white boat they had seen at Anse Boudin in

Praslin with Danny Sultan and another man. Witness Marcus Payet another agent attached to the NDEA stated he had witnessed the taking of the statement P2. He too had been on the boarding party at the time they boarded the Canapone and he corroborated the evidence of witness Ghislain in respect of the boarding of the vessel Canapone, the search, the attempt of the 1st accused to ram the Canapone on the reef at Fregate island, the fact that they arrived in Mahe around 4.00 a.m, and the fact that no controlled drugs were found on the said boat.

[13] The next witness, Michael Hissan stated his father owned a speed boat a scarab which he identified from photograph 7. He referred to the 4th accused Kevin Quatre as a childhood friend and stated that Kevin normally did the maintenance work on his boat. He stated the 25th of March 2016 was Good Friday and he and his girl-friend had planned to go to Trois Frere Mountain. Kevin had called him and asked him if he was free to test the engine of the boat, as they had planned to test the boat as earlier he had done some repairs on it. After finishing his hike, he had called Kevin and told him he was free and they had met at Eden Island where the boat was moored. They had met up and taken the boat for a test run to Fregate Island and as they left and were on the way to Fregate Island they had developed engine trouble. They had stopped to check it out when Kevin had received a call on his cell phone and he told him that some friends had phoned and informed him they too had engine problems and had wanted his assistance. Kevin had asked him if they could go and assist his friends and either fix their engine or give them some tools. At that time they were near Fregate Island. Witness had agreed to help out, so they had deviated from Fregate and gone behind La Digue Island and having passed some boats continued until they had come to a boat that was going slowly. Kevin had informed him it was the boat and he approached the boat, did one round the back of the boat and gone close to it about a metre. When he was alongside, a Rasta man from the other boat threw a rope onto his boat and jumped onto it.

[14] Thereafter the crew of the other boat asked if they will throw over bags and he had asked Kevin what bags and Kevin had told him not to be scared. Everything will be okay. Witness stated there were two persons on the other boat. Thereafter bags were loaded on his boat. They were white gunny bags, around 10 in number. He stated after that he had departed and navigated towards La Digue Island which was the only visible island and

the time was around 4 or 5 in the afternoon. When they were heading towards it, Kevin got a call and he was asked to divert to Praslin Island. Witness had gone towards Praslin and in the direction of Curieuse Island when Kevin had asked him to go to the beach. He had gone close to the beach 6 to 7 metres where it was shallow and stopped. Kevin and the Rasta man had unloaded the bags. After unloading the bags Kevin and the Rasta man had left. He had gone a distance from the beach and stopped his boat as he was in a state of shock at what happened and had noticed Raffles hotel was close by. Then he had gone straight to Eden Island and moored his boat and gone home. He stated the beach was in the vicinity of Raffles Hotel. Thereafter he was arrested by the NDEA and he had given a statement. He had signed a document at the AG's office and was released. He identified the Canapone from the photographs as the boat from which the gunny bags were unloaded onto his boat. He identified the speed boat or scarab in photo 7 as his boat he had used that day. He stated he was shocked that day to know his friend Kevin was involved in the drug business and he had not seen the contents of the gunny bags. He could not identify the Rasta man but the bearded person aboard the vessel he identified as the 1st accused but was not 100% sure he stated.

- [15] The next witness called by the prosecution Mr. Jemmy Bouzin, the Government Analyst, stated he had received a request letter from agent Evan Seeward and exhibits for analysis from Agent Alexander Moumou. He had received the exhibits in a sealed and intact state. He produced his report and findings dated 1st April 2016. The analyst report was marked as exhibit P5. He described the exhibits received as a small brown envelope marked A exhibit P6, containing a clear plastic P6 (a) enclosing some powder and granules which were produced P6 (b). He had found the weight of brownish substance to be 6.69 grams. The test confirmed the substance was identified to be heroin with a purity of 59%. The second exhibit was a large sealed envelope marked B exhibit P7, containing a melody milk tin P8 which contained a torn yellow plastic bag, torn clear plastic sachet enclosing a white and blue cloth bag, containing a torn clear plastic sachet and clear plastic sachet enclosing some brownish granules and powder marked P8 (a) to (f) respectively. The granule and powder P8 (f) weighed 740.20 grams. The powder and granules tested positive for heroin with a purity of 64 %. The exhibits in both A and B gave a total heroin weight of 746.9 grams. After analysis he had resealed the exhibits and handed the

exhibits back to agent Moumou on the 4th of April 2016 and at the time he received the exhibits to give evidence in court, he stated his seals were intact.

[16] Agent Moumou gave evidence that on the 28th of March 2016, he was working on Praslin with agent Matombe, agent Philoe and agent Joubert, when he received a call for assistance to do a house search at Anse Boudin from agent Naiken. They had gone to the house of Delores Mounac the mother of Jeannia Pool who had asked her daughter Jeannia to show them where the controlled drugs were hidden. Jeannia had taken them to a side of the house where there were dry leaves and showed them the melody milk tin. He had opened the Melody milk tin in the presence of other officers and Jeannia Pool and found the exhibits referred to above, Jeannia was arrested and her rights read out to her. Jeannia had subsequently informed them it was her brother Xavier who had brought home the controlled drugs. Xavier Pool her brother was arrested and brought to the NDEA office. Xavier had told them he had seen the gunny bags been unloaded from a blue and white boat by one Danny and kept on the shore. After Danny had gone Xavier and his friend Ryan had approached the gunny bags and found packets inside. Each had taken one and opening the packets found they contained heroin. The controlled drugs recovered were given by witness agent Moumou to the Government Analyst for analysis and collected by him thereafter. He identified the exhibits P7 to P8 as those recovered by them that day and the analyst report P5. Agent Naiken stated on the 28th of March 2016, they had detected Delores Mounac in the possession of a quantity of heroin and on questioning her she had stated she had received the drug from her daughter Jeannia Pool. Jeannia Pool had then showed them the controlled drugs hidden among the dry leaves by the side of her mother's house which he too identified as P8 and contents. He further identified P6 and contents as the controlled drug that was thrown away by Delores Mounac. Evan Seward gave evidence in respect of the chain of custody of the exhibits and identified his letter of request as P9. Agent Curtis Matombe corroborated the evidence of agents Moumou and Naiken.

[17] Witness Xavier Pool from Anse Boudin stated on the 25th of March 2016, he was with his sister and mother at the Anse Boudin church and was looking towards the sea, when he saw a blue and white boat with two men on the boat and one off the boat on the shore. He identified the 4th accused as Danny Sultan as the one on the shore, unloading and carrying

the gunny bags taken from the boat to the upper area near the Takamaka trees. He had not identified those on the boat. He stated he knew Danny Sultan as he lived at Anse Boudin for a long time and was known as Danny Boy. The unloading and transfer of the gunny bags took about 15 minutes. He noticed Danny stayed back and the boat went away. After that he himself had gone away. He had met a friend called Ryan Accouche also referred to as "Kayou". Both had gone to the sea side after they had seen Danny Sultan go elsewhere back to the gunny bags and noticed one of the gunny bags were open and contained packets of similar nature. He and Ryan had taken a packet and gone to his grandmother's house and opened the packet with his sister and noticed it was heroin. They knew it was heroin as they used it. Ryan had taken one packet while he had sold his packet to a lady. Next day morning, he had gone back to the beach and seen Danny Sultan and Chang Leng taking the gunny bags in a vehicle. He stated after he was arrested, he was taken to the Attorney General's office and an agreement was made to remove the charges against him and he agreed he would tell the truth. Witness identified the blue and white boat he had seen that day as the boat in photograph 7. He identified P8 contents as the controlled drug and packaging he had taken from the gunny bag.

[18] Witness Jeannia Pool, corroborated the evidence of her brother Xavier regarding the unloading of gunny bags from a blue and white boat by the 4th accused Danny Sultan, when they were near the Anse Boudin church. She stated the time was around 6.00 p.m. She corroborated the fact that Ryan and her brother Xavier had brought a packet each around midnight home and on opening it, they had found it to be heroin. She stated she had been given a little from each packet and she had used it and therefore knew it was heroin. She corroborated the fact that she had on the instructions of her mother, retrieved one of the packets of heroin that Ryan Accouche had hidden and given it to Agent Moumou, thereby corroborating his evidence. She stated that one of the packets were with Ryan and the other packet was with Xavier. She identified the package and contents heroin P8 (a) to (f) in open court. She had identified the blue and white boat when it was under the custody of the NDEA at Eden Island and also identified it from the photographs.

[19] Her mother Delores Mounac too gave evidence that Jeannia and Xavier Pool had informed her they had seen Danny Sultan unloading gunny bags. She too had taken the

heroin given to her by one Kayou. It is apparent from the evidence of Xavier Pool that Ryan Acccouche was also known as Kayou. She had been arrested by the NDEA for being in possession of it. She too corroborated the evidence of Jeannia, Moumou and Naiken in how the packet of heroin was retrieved in her mother's house. Agent Laurencine gave evidence that both Xavier Pool and Jeannia Pool had identified the boat Ocean wave, in the custody of the NDEA as the blue and white boat they had seen on the 25th of March 2016 at Anse Boudin, from which according to their evidence gunny bags containing heroin were unloaded by the 4th accused Danny Sultan.

[20] Witness Johny Malvinna gave evidence in respect of recording a statement under caution from the 1st accused Francis Ernesta on the 26th of March 2016 at 11.30 a.m which ended at 12.40 p.m. He stated that he had recorded another statement at 15.30 hrs which ended at 16.14 hrs. Both statements were witnessed by agent Egbert Payet. Both statements were admitted as evidence after a voire dire was held in respect of their voluntariness. Learned counsel also objected to the admission of the statement on the grounds that it was a photocopy .Court by its order dated 20th September 2017, gave permission for the photo copies of the statements to be marked. Thereafter the statements under caution given by Mr. Ernesta were produced as exhibits P10 and P11 and the English translations as P10 (a) and P11 (a). The statements given by the 1st accused, were also repudiated in that the 1st accused stated he had never given a statement. The signatures of Mr. Ernesta the 1st accused on the statement were also challenged.

[21] Thereafter, a no case to answer submission was made and court by its Ruling dated 16th November 2017, rejected the no case to answer application and called for a defence.

Summary of the Defence Case:

[22] In defence, the 1st, 2nd and 3rd accused chose their right to remain silent. It is to be borne in mind that no adverse inference should be drawn from same. The 4th accused gave evidence under oath. He stated he was a casual labourer at Hunt Deltel, a painter and a cook and a landscaper. On the 26th of March 2016, he had been at home at Les Mamelles and had done some work in the house and gone to see friends like he usually did. He denied he was with the 1st 2nd or 3rd accused. He denied he had conspired to import any controlled drug with anyone. He denied seeing Xavier Pool on the said day. He stated on

the 25th of March 2016, in the evening he was at his niece's house. Under cross examination he admitted he had been arrested in Ile Aux Cerf. He admitted he had lived in Praslin in 1994. He denied he knew Xavier Pool and stated he had only seen him in court. He denied the suggestions made by learned counsel for the prosecution that he was in a scarab or that he had carried gunny bags on the beach.

[23] The other witness called by the defence was Ryan Accouche who stated that he knew Danny Sultan when he was in Praslin several years back. He stated he had not seen him in Praslin on the 25th, 26th of March 2016 and had not seen him for some time. Nor had he met Jeannia Pool. He denied being in possession of any drugs. Under cross examination he admitted he lived on Praslin and was on Praslin that day. He admitted he knew Xavier Pool and Jeannia Pool. He denied however he was with them on the 25th or 26th of March 2016. He denied he was lying. He denied he had tasted any heroin with the Pools.

[24] Jean Claude Adeline testified to the fact that he was a security officer at Carana Beach. Earlier he had been at Palm tree beach hotel and was an SPDF officer in the coast guard for a period of 12 years. He stated "if he was not mistaken" Danny was at home on the 25th and 26th. He stated on the 25th of March 2016, when he came home at 6.00 nobody was at home. On his way home from work that day, he had seen Danny talking to a lady. He said at sleeping time 25th March 2016 night, Danny was at home. He admitted Danny was his cousin and stated Danny still stayed with him. Angela Japhet stated that Danny Sultan was her uncle and he lived in Les Mamelles with his cousin Wellington Adeline. She too lived in Les Mamelles. The house where they lived was further up to where she lived. She stated on the 25th of March 2016, she had gone to her uncle's house to collect some pawpaw and some local bred leaves. She had seen her uncle in the garden. Thereafter her uncle Danny had come to her home around 7.15 p.m. On the 26th of March 2016, she had gone again to the house where her uncle lives around 5.30 p.m and come back at 9.00 p.m. Under cross examination she stated her uncle works in a Tuna vessel and on the other days, he is at home, growing things. She denied she was lying in respect of her uncle's whereabouts on the 25th and 26th of March 2016. The next witness Andy Cesar stated he was a casual labourer at Hunt Deltel. He stated he was living with his wife at Les Mammelles. His wife was Angela Japhet. He stated when he arrived home on

the 26th of March 2016, around 7.30 p.m, he had met Danny at his cousins. He admitted he had not seen him on the 25th of March 2016.

[25] Thereafter the defence closed its case and both learned counsel tendered submissions. I have as set out above considered the evidence before court and the submissions of the prosecution and defence.

Analysis of the Evidence and Verdict

[26] When one considers the defence in this case the first ground of learned counsel for the defence raised in his submissions and documents produced is that as no controlled drug was found on board the Canapone, the prosecution has been unable to prove the charges against the 1st 2nd and 3rd accused. This Court is in agreement with the defence contention that at the time of boarding and detection by the officers of the NDEA and coast guard, no controlled drug was found aboard the Canapone which was skippered by the 1st accused who was assisted by the 2nd accused. But this evidence must not be taken in isolation and one must consider the evidence in this case in its entirety and in doing so, this Court is inclined to disagree with the contention of learned counsel for the accused that the prosecution has failed to prove any of the charges against the four accused.

[27] The next contention of the defence is that although there is evidence to show both vessels got close to each other, there is no evidence to indicate that any controlled drug was unloaded from the Canapone to the speed boat or scarab referred to by the prosecution. The defence further contends that the evidence of Michael Hissen should be discarded as he is an accomplice and his evidence is not corroborated. This Court is of the view that the evidence of Michael Hissen was corroborated by the evidence of several witnesses namely the airforce officers who stated the scarab drew alongside the Canapone. His evidence on the route taken by the speedboat thereafter was corroborated by the airforce officers and officers of the coast guard, the unloading of the gunny bags from the scarab also witnessed by Xavier Pool and his sister Jeannia Pool who further identify the speedboat or scarab as the Oceanwave which witness Hissen admits he used for the operation. Further the evidence of Hissan that a Rasta man unloaded the gunny bags from his speed boat, is also witnessed by Xavier Pool and Jeannia Pool who go further by identifying the Rasta man as Danny Sultan the 4th accused. In any event it is the view of

this Court that the evidence of witness Hissen though subject to lengthy cross examination withstood the rigours of cross examination as no material contradictions or omissions were noted. I therefore refer to the case of **Dominique Dugasse & Ors v Republic SCA Cr 25, 26 and 30/20** and hold that on consideration of the sworn testimony given by witness Michael Hissen, I see no reason to look for corroboration even though in actual fact it exists, as I am satisfied even though he is an accomplice, his evidence even if it stands on its own, is acceptable to Court and there is no basis or shortcomings in his evidence to look for corroboration.

[28] The next ground urged by learned counsel for the defence is that at the time Xavier Pool and Jeannia Pool were arrested, the 1st, 2nd and 3rd accused were in custody and had been produced in the Magistrates' Court and therefore could not have been in possession of the controlled drug produced in Court. The charges against the accused are based on importation and one does not have to be in physical possession of a controlled drug to prove importation or conspiracy to import **Clarisse v R (1982) SLR 75 and R v Francis Ernesta & Ors 2016 SCSC 277** and cases referred to therein.

[29] When one considers the alibi of the 4th accused, it is to be noted that all the witnesses called by him to establish his alibi were close relatives. Further, understandably witness Ryan Accouche denied any knowledge of being in possession of Class A controlled drugs or any involvement in any of the incidents referred to by witness Xavier Pool for fear of being prosecuted for same. One striking fact in respect of the alibi evidence is that no suggestion were ever made to witness Xavier Pool during his cross examination that Danny Sultan was at Les Mamelles in his house and not at Anse Boudin during the period 25th and 26 of March 2016. In this instant case the defence of alibi seems to be an afterthought as no such suggestions were made to the principal witness Xavier Pool who identified the 4th accused. I therefore proceed to reject the defence of all four accused.

[30] When one considers the evidence of witnesses from the Seychelles airforce namely Chief Pilot Instructor Dupreez, Lt Commander Amith Kumar and Corporal Tamboo, it is clear that the suspicious vessel subsequently identified as the Canapone by them from the photographs in albums P1 and P4, was initially detected by them from the air when it was about 75 nautical miles from the Fregate Island coming towards the Seychelles. By flying

several sorties they were able to keep the Canapone under surveillance and observed that a fast speed boat also referred to as a scarab on the 25th of March 2016 around 5.00 p.m. had come upto the Canapone and pulled up alongside it at a distance of about half a meter and then moved away towards La Digue and then Praslin. They observed the speed boat entering Anse Boudin and from the thermal imagery cameras observed a person get off the boat which corroborates the evidence of Xavier Pool. They were able to identify the speed boat or scarab in photograph 7 of P1 as the speed boat that they observed from the air with their sophisticated cameras and other infra-red and radar devices.

[31] The evidence of witness Michael Hissan is also crucial for the prosecution. He identifies the speed boat, scarab in photograph 7 of P1 as his father's speed boat. He states he had used the speed boat on the afternoon of the 25th of March 2016 around 5.00 p.m on the instructions of the 4th accused Kevin Quatre, to rendez-vous with the Canapone which he identified from photograph 1 of P1. According to his evidence around 10 gunny bags were unloaded from the vessel Canapone onto his speed boat and a Rasta man who he was unable to identify, also got onto his speed boat and he had unloaded the bags on the Praslin beach near Raffles and after the bags had been unloaded, the Rasta man and Kevin had disembarked from the boat and gone. The pilots aboard the airplane which was keeping the speed boat under surveillance had according to their evidence observed all this activity and identified the location where the bags were unloaded on shore, as Anse Boudin.

[32] Thereafter, the evidence of Xavier Pool and his sister Jeannia Pool indicate that they had been near the Anse Boudin beach on the 25th of March 2016 around 6.00 p.m. near the church and positively identified the 4th accused Danny Sultan, get down from a blue and white boat which they identified as the speed boat, scarab also referred to as Ocean wave in Photograph 7 of P1 and unload gunny bags. The gunny bags had been carried by him and stored in an upper area from the beach among the Takamaka trees and subsequently after Mr. Danny Sultan had gone, Xavier Pool had gone upto one of the gunny bags with a friend Ryan Accouche and each had taken a packet from within one of the gunny bags. On bringing it home, they had realized the packets contained Heroin. It is apparent from the evidence of his mother Delores Mounac that she had been arrested for being in possession of heroin which had been given to her by Kayou. This fact is corroborated by

the evidence of agents Naiken, Moumou and Matombe who recovered the packet of heroin which was hidden in the garden of their house. The said controlled drugs recovered by the NDEA were tendered for analysis and identified by the Government Analyst Jemmy Bouzin to be heroin. The controlled drugs were produced as P6 (a) and (b) and P8 (a) to (f) and the contents and the wrappings were identified by witness Xavier Pool as that taken from the gunny bags unloaded by the 4th accused Danny Sultan on the beach at Anse Boudin. Jeannia too identified the contents of P8 (a) to (f) as one of the heroin packets brought by Ryan Accouche and Xavier Pool.

[33] It is to be borne in mind that Xavier Pool, identifies his packet as having three 5's on it. The packet produced in Court found in melody tin P8 which was the packet Ryan Accouche had, as identified by Jeannia Pool in her evidence also had three 5's on it, indicating the packets taken by both Ryan and Xavier from the same gunny bag were of very similar nature with similar marking. A fact also borne out clearly in the evidence of Jeannia Pool at Pg 64 of proceedings of 5th July 2017 at 10.30.am. On consideration of the aforementioned evidence of the prosecution, I am satisfied the chain of custody of exhibits has been proved beyond reasonable doubt and the exhibits have not been tampered with.

[34] When one considers the evidence of the airforce officers, coast guard officers, Major Estico, Radegonde and NDEA agents Samir Ghislain, Egbert and Marcus Payet, it is clear that the vessel Canapone had been kept under surveillance when it was 75 nautical miles from Fregate Island heading towards the Seychelles and taken into custody a few nautical miles from Fregate Island. All officers from the coast guard and the NDEA identify the 1st accused as the Captain of the vessel and the 2nd accused as his assistant aboard the vessel Canapone at the time of detection. From their evidence it is clear that the numerical figures written in their statements 75,000 nautical miles and 24,000 nautical miles were erroneous and should be 75 and 24 nautical miles respectively.

[35] Having thus considered the evidence of the prosecution, it is clear on taking into consideration the entirety of the evidence of the prosecution, that the controlled drug taken into custody from Delores Mounac and Jeannia Pool P6 contents and P8 contents, were part of a consignment that was brought into the Seychelles by the 1st 2nd and 4th

accused and was aboard the vessel Canapone skippered by the 1st accused. Importation means to bring or cause to be brought by air or sea **R v Dubignon (1998) SLR 52**. The 3rd accused Kevin Quatre was involved in the importation and trafficking and the conspiracy of the importation and trafficking of controlled drug by as he had assisted the transfer of this consignment of controlled drugs onto the speed boat Ocean wave and transported it ashore at Anse Boudin, where without the knowledge of the accused, Xavier Pool and Ryan Accouche were able to steal two packets from the said consignment. One such packet was retrieved by the officers of the NDEA and produced in Court as exhibits P6 (a) and (b) and P8 (a) to (f). When one considers the evidence of witness Michael Hissan, it is clear that on receiving a call he had been lured by Kevin Quatre into going to the Canapone and collecting the controlled drug. Further it was at the request of Kevin Quatre, did he take his speed boat to sea that day to check the engine. His evidence clearly indicates a pre-planned arrangement and agreement by the 1st, 2nd and 3rd and 4th accused to collect and transport and import the controlled drug into the Seychelles. It is also clear that when each entered into the agreement they 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 and in fact in this case did play their respective parts. Vide Lord Bridge in **R v Anderson [1986] AC 27**. Lord Griffiths in **Yip Chiu-Cheung v R (1994) 99 Cr App R 406** said:

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

The evidence also clearly indicates all the accused were jointly liable for the charges framed against them.

[36] For all the aforementioned reasons, I seen no reason to disbelieve the evidence of the prosecution. I proceed to accept same and am satisfied on consideration of the entirety of the evidence of the prosecution set out above that the prosecution has proved all the elements of all the charges in Counts 1 to 4 against all four accused persons, beyond reasonable doubt.

[37] In addition to all the aforementioned evidence, the prosecution further produced as P2 (a) and (b) and P3 (a) and (b) and P10 and P11, the statements under caution of the 2nd accused and the 1st accused respectively. I have already ruled that the said statements were voluntarily obtained. I observe that the statement given by 2nd accused Brian Mothe is of very little use to the prosecution. Further even if an accused decides to remain silent at the time of arrest and thereafter on his own accord voluntarily decides to give a statement, it would be improper for the police officers to refuse to record it as it could be beneficial and in the interest of the accused to record it especially when it is done voluntarily.

[38] Learned counsel for the defence also repudiated the statements under caution given by the 1st accused stating the signatures were not that of the 1st accused. However having considered the corroborated testimony of the prosecution witnesses Johnny Malvinna and Egbert Payet, in respect of the statement of the 1st accused and as the statement of the 1st accused contains many facts beyond the personal knowledge of both officers recording the statement, I am of the view that the statement P10 and P11 are authentic and were in actual fact given by the 1st accused and given voluntarily. I further hold that section 128 of the Criminal Procedure Code has no bearing on the statements under caution given by an accused which are governed by the Judges Rules. I also hold that though retracted the facts in the statements are corroborated by the evidence of the prosecution. I therefore am of the view that the said statements P10 and P11 further helps establish the case against the 1st accused beyond reasonable doubt.

[39] I therefore proceed to find the 1st 2nd 3rd and 4th accused guilty on all four charges contained in Counts 1 to 4 and proceed to convict them accordingly.

Signed, dated and delivered at Ile du Port on 24 May 2018

M Burhan
Judge of the Supreme Court

