

SUPREME COURT OF SEYCHELLES

Reportable

[2019] SCSC 353

CR 28/2018

Republic

(rep. by Hermanth Kumar)

and

Harry Moise Dupres

(rep. by Joel Camille)

Accused

Neutral Citation: *R v Dupres* (Cr 28/2018) [2019] SCSC (7 May 2019).

Before: Twomey CJ

Summary: conspiracy to commit the offence of importation of a controlled drug –
elements of the offence to be proven - conviction

Heard: 16 October 2018 – 15 April 2019

Delivered: 7 May 2019

ORDER

The accused is convicted of the offence of importation of a controlled drug.

JUDGMENT

TWOMEY CJ

The charge

- [1] The accused, Harry Dupres, had been charged with two other persons, namely one Eric Dijoux, a Malagasy national and one Roy Bailey, a Seychellois, on several charges relating to an incident at Seychelles International Airport in which they were all arrested and charged. Eric Dijoux pleaded guilty to the offence of importation of the drug whereas Roy Bailey accepted a conditional offer made by the Attorney General under section 61A of the Criminal Procedure Code to turn state witness with regard to the case involving the accused in return for the charges against him with respect to the incident being withdrawn.
- [2] The accused was then charged with the following offence:

Statement of Offence

Conspiracy to commit the offence of importation of a controlled drug namely heroin contrary to section 16 (a) of the Misuse of Drugs Act 2016 read with and punishable under section 5 of the Misuse of Drugs Act 2016 to the penalty specified in the Second Schedule referred thereto in the said Act

Particulars of Offence

Harry Moise Dupres of Majoie, Mahé on or around 20 April 2018 agreed with another person namely Roy Joseph Bailey of Mont Buxton, Mahé that a course of conduct should be pursued which, if pursued, would necessarily amount to or involve the commission of an offence by them under the Misuse of Drugs Act in committing the offence of importation of a controlled drug namely heroin into Seychelles.

- [3] He pleaded not guilty and the trial proceeded. Seven witnesses were called by the Prosecution at the end of which the accused made a submission of no case to answer which was dismissed by the Court. The accused then testified but called no witnesses.

Evidence of the Prosecution

Testimony of Egbert Payet

- [4] Egbert Payet, an Exhibit Store Keeper and Investigator with the Anti-Narcotics Bureau (ANB) for the past four years stated that on 20 April 2018 at 2215 hours he received from ANB Officer Sam Laflute evidence bags containing sealed evidence envelopes. He was

told that the envelopes contained exhibits seized from one Eric Dijoux. He placed these envelopes in the ANB Exhibit Store and brought them to Ms. Julia Volcère for analysis at the Forensic Science Laboratory on 25 April 2018.

[5] After their analysis he took possession of the exhibits and certificate of analysis from Ms. Volcère on 3 May 2018 and replaced them in the ANB Exhibit store. They were the same envelopes placed in evidence bags and certificate of analysis he brought to court and which were exhibited.

[6] In one of the exhibit bags were two envelopes. He unsealed the evidence bag and envelopes in court to reveal two packets made of brown tape in which was a beige substance and another inside of which was white plastic wrapped with cling film in which there was a dark substance.

[7] He also exhibited another sealed evidence bag he had received from Officer Laflute in which was a Malagasy passport in the name of Eric Dijoux together with a boarding slip taken from the Mr. Dijoux with the name of Roy Bailey, a phone number and the address “Mont Buxton” written on it. He further exhibited a length of white bandage which he stated was taken from Mr. Didoux, and two decoy exhibits. A red and black rucksack was also exhibited and the court informed that this was taken from Roy Bailey’s sister’s house at Anse Aux Pins. They contained a shirt and a pair of jeans which the police dog had indicated contained the presence of controlled drugs.

[8] Finally, under cross examination he produced a statement by Mr. Dijoux made under caution on 20th April 2018 in which Mr. Dijoux stated that he had obtained the drugs from one Abdul, an African living in Madagascar and that Mr. Bailey was his brother in law.

Testimony of Sam Laflute

[9] Mr. Laflute is an officer with the ANB and has worked with them for about four and half years. He was stationed at the airport on 20 April 2018 and arrested Mr. Dijoux after a body search had been carried out on him and two packets taken. He had been handed Mr. Dijoux’s passport and a boarding slip belonging to Mr. Roy Bailey by the Immigration

Officers and a piece of cling film containing a dark substance taken from Mr. Dijoux by a Customs Officer.

- [10] When he questioned Mr. Dijoux about the boarding slip he was told that Mr. Bailey was his brother in law. He took Mr. Dijoux to the ANB office at the airport and conducted a body search on him. He was asked to remove his t-shirt and shoes. He was wearing two pairs of boxer shorts under which were bandages around his waist. When the bandages were removed, two brown packets were retrieved. These were seized and were handed to Officer Egbert Payet for safe keeping. He then sought permission for a controlled delivery of the drugs.

Testimony of Yvon Legaie

- [11] Yvon Legaie is the ANB Officer in charge of Border Control. He was on duty on 20th April 2018 and prepared decoy exhibits in order to conduct a controlled delivery with Mr. Dijoux's participation. The delivery was not successful. He also conducted a search at Mr. Bailey's sister's home in Anse Aux Pins assisted by other ANB officers and sniffer dogs. In the living room, the dogs indicated the presence of controlled drugs in two pieces of clothing, namely a shirt and a pair of jeans. Mr. Bailey immediately told them that he had, like the Malagasy national, also brought into Seychelles two packets of drugs hidden on his body under his clothes and that he had given them to the accused outside the airport.
- [12] On 5th May he also arrested Mr. Dupres who was at the airport intending to travel back to Madagascar.

Testimony of Sandy Marie

- [13] Mr. Sandy Marie is a dog handler with the ANB officer and has worked in that capacity for the past five years. He assisted Agent Legaie at a scene at Anse aux Pins at 9.45 pm on 21 April 2019. He allowed the dog to go everywhere in the house. After going through the bedrooms the dogs proceeded to the living room where they gave a positive indication for drugs in respect of some clothing items, namely a white shirt and blue jeans. The house in which the search was conducted was where Roy Bailey was living.

Testimony of Lester Solin

[14] Mr. Lester Solin has been working for the ANB for about nine years and was the investigating officer in the present case. He received assistance from the Immigration Department, the Civil Aviation Authority and Air Seychelles while investigating the case.

[15] He was given the travel history and passport details of Eric Dijoux, Roy Bailey and Harry Dupres which he exhibited. He also requested the closed-circuit television (CCTV) footage of the airport from the Civil Aviation Authority dated 21st April from 1830 to 2000 hours.

Testimony of Dean Legaie

[16] Dean Legaie has been working for the ANB for six years assisting with evidence collection but specialises in IT related work. In relation to the present case he retrieved the CCTV footage from the international airport at Pointe Larue of the 20th April 2018. These were saved in different folders on a pen drive and exhibited. One of the folders of the video footage showed the arrival area for passengers and all three persons involved in the incident on 20th April are seen on the footage as they enter the immigration area at around 6.35 p.m.

[17] Another folder shows the area around the zebra crossing outside the airport. The accused is seen standing there, interacting and passing a white object to a gentleman by the name of Tofic. At 7.15 pm, Mr. Bailey is seen approaching Mr. Dupres and Tofic loads two bags into the car. The car is seen moving and Mr. Bailey is seen standing behind two pillars. He is then seen removing a bandage from his waist. He stated that Tofic is related to Mr. Bailey.

Testimony of Roy Bailey (accomplice turned state witness)

[18] Mr. Roy Bailey aged 53 years stated that he lived with his mother at Mont Buxton. He went to Madagascar on holiday in or around the years 2010 or 2011 and then frequently for other holidays. In 2015 he tried his hand at the gold business there. He had met a girl at Diego called Helen and they had married in Mauritius. They had since split up. He returned to Seychelles. On 12th January 2018 he returned to Madagascar as he was interested in the precious stone business. He came across the accused at Antananarivo

(Tana) Airport; he had not seen him for over twenty years. The accused gave him his phone number and he then travelled on to Majunga.

[19] He subsequently phoned the accused from Majunga and asked him if he knew anyone in the precious stone business. The accused said he did and that he would introduce him to that person on his return to Tana.

[20] He travelled to Tana and stayed in a hotel from where the accused came to pick him up. At the accused's house he was introduced to Mr. Dijoux. He returned to Seychelles in February 2018. Mr. Dijoux had promised him that when he obtained the stones he would send him the money for it. Mr. Dijoux obtained the stones and payment was made to him by transfer through Western Union. The plan was to sell the precious stones in Sri Lanka. He travelled back to Madagascar in March and met Mr. Dijoux in Tana and then he travelled on to Majunga.

[21] They subsequently travelled together to Sri Lanka but were not able to sell the stones. They returned to Tana and stayed at the accused's home where he had been invited. He thought that Mr. Dijoux was related to the accused's wife. He lived with the accused until his return to Seychelles on 20 April.

[22] At some, point while he was living there, the accused informed him that someone was coming from Seychelles to buy drugs to bring back to Seychelles. He offered to talk to the man to arrange for Mr. Bailey to carry the drugs into Seychelles for SR100, 000. He was subsequently told that the man (a Mr. Bonté) had agreed. On the 20 April, he went to the accused's room and two packets containing the drugs were strapped around his waist by the accused aided by Mr. Dijoux and Mr. Bonté. Mr. Dijoux also had had some drugs strapped onto him by a bandage. He then wore three sets of boxers and his jeans over the drugs.

[23] The accused, Mr. Dijoux and himself travelled to the airport in a taxi and Mr. Bonté travelled there in another car and met them. They had no trouble getting through the airport in Madagascar. In Seychelles he saw that Mr. Dijoux was having some problem

with immigration and went to assist him; he gave his phone number and address and left him with the Immigration Officials.

[24] He had arranged to be met by his nephew Tufic. Harry and he waited outside for Mr. Dijoux. He removed the drugs packets from around his waist and put in inside the car and threw the bandage on the wall nearby. Eventually they got tired of waiting and Tufic drove them to Anse Aux Pins. Inside the car he removed the two packets from under the seat where he had left them and gave them to the accused. At some point at Anse Aux Pins a person phoned the accused. The accused told him that the person was meeting him and he got out of the car with the two packets of drugs. Mr. Bailey stated that he stayed at his sister's place. Later that evening the ANB officers came search the house with dogs. One of the dogs smelled the heroin on his trousers. He told the officer that Bonté had placed the drug on him and that he had given it to the accused.

[25] Under cross examination he admitted that he had not told the police that he had met the accused at the airport in Madagascar in January 2018. He maintained, however, that he had in fact met him. He denied that Mr. Dijoux was his brother in law but stated that when he was at the accused's house he met a girl with whom he had some sort of relationship and that she who was related to Mr. Dijoux and also to the accused's wife. He also stated that in March when he returned to Madagascar, the accused was in Seychelles but he nevertheless had been invited by the accused to stay at his house.

Testimony of Julia Volcère

[26] Julia Volcère is a Forensic Analyst at the Scientific Support and Crime Records Bureau. She analysed the drugs seized from Mr. Dijoux and stated that one of the substances coloured beige had a total net weight of 386.4 grams and it was heroin of a purity of 57% and content of 163.24 grams. The second substance was similar weighing in total net weight 643.6 grams. It was also heroin with a purity of 61% amounting to a heroin content of 392.59 grams. There was also a third item which was a dark substance with a net weight of 2.6 grams which she confirmed was cannabis resin.

Evidence of the Defence

- [27] The accused testified that he had lived in Madagascar for about eighteen to nineteen years. His wife was a Malagasy national and they had a son and a daughter. He returned to Seychelles in February 2018 using a *laissez-passer* for the purposes of obtaining a new passport for himself and for his children as his mother was elderly and unwell and he wanted his children to meet her.
- [28] He was able to obtain a passport for himself but needed to return to Madagascar to obtain his children's signatures for their passports. He subsequently returned to Seychelles with their signed application forms and ran into a different problem relating to the size of his daughter's photograph. He told the Immigration Officer that he couldn't afford to go back and forth and they said they would send on the passport once he had met the requirements.
- [29] As to his trade in Madagascar he stated that he was in the charcoal and salted fish business. He knew Roy Bailey as they both used to live at Mont Buxton when they were children. He said that the last time he had met him was at the airport when he returned to Seychelles. He was at the airport waiting for someone to pick him up when he saw a man waving at him. He introduced himself as someone from Mr. Bailey's family and asked whether he had seen Mr. Bailey inside the airport to which he replied in the negative. He then saw Mr. Bailey coming out. He got into the car and then got out and asked him how he was. Afterwards Mr. Bailey's family member drove off and he was asked to wait and he would be given a lift to Mont Buxton. They walked to the bus stop and got into Mr. Bailey's relative's car. On their way he was told that they would first go to Anse Aux Pins to have something to eat and then he would be dropped at Mont Buxton.
- [30] He did not want to go to Anse aux Pins and asked them to drop him near a shop and he would try and get another lift. He got out and took a "pirate" taxi to Majoie where his sister lived. He rested over the weekend and the week after he started the procedures for the children's passports.
- [31] He denied meeting Mr. Bailey at Madagacar and suggesting to him to bring drugs into Seychelles. He denied that Mr. Bailey had stayed at his house in Madagascar for about

three weeks. He had been in Seychelles at that time and would not have left his family alone with Mr. Bailey. Likewise he had never met Mr. Dijoux before. He saw him for the first time in the Remand Centre at Bois de Rose. He had not been there when drugs were strapped onto Mr Bailey nor were drugs handed to him at the airport by Mr. Bailey.

[32] He was not well off and he was assisted by his sister in Seychelles occasionally. He produced a number of copies of bank transfers made to his family members on various days. He had never been involved with any drug transactions.

[33] In cross examination when asked the age of his wife he could not remember but said she in her 40's. He also stated that he was waiting with Mr. Bailey at the airport as Mr. Bailey's relative had to ferry a lot of Seychellois who had arrived from Madagascar after attending a wedding there.

[34] Closing submissions from Counsel for the accused has not been forthcoming. Submissions from Prosecution Counsel was received by the court on 17 April 2019. I take these submissions into consideration when analysing the evidence and the law applicable to this case.

The Law

[35] The accused has been charged with the offence of conspiracy to import controlled drugs. In this regard, the relevant provisions of the law in the Misuse of Drugs Act 2016 state:

“(5) a person who imports or exports a controlled drug in contravention of this Act commits an offence and is liable on conviction to the penalty in the Second Schedule...

*(16) A person who agrees with another person or persons that a course of conduct shall be pursued which, if pursued
(a) will necessarily amount to or involve the commission of an offence under this Act by one or more of the parties to the Agreement...*

commits an offence and is liable to the punishment provided for the offence.”
(Emphasis added)

[36] It is noted that the maximum penalty for the importation or exportation of a Class A drug is life imprisonment and/or a fine of SR 1 million.

[37] As can be seen from the provisions above, the essential ingredient of the offence of conspiracy is an agreement between persons to do an unlawful act. In this case, the unlawful act would be to import heroin into Seychelles. In *Celestine v R* [2015] SCCA 33 (28 August 2015), Msoffe JA explained the offence of conspiracy as follows:

“Halsbury’s Laws (5th Edn) para 73 describes that the offence of conspiracy is committed where two or more persons agree to pursue a course of conduct which, if carried out in accordance with their intentions, will necessarily amount to or involve the commission of an offence by one or more of the conspirators, or would do so but for the existence of facts which render the commission of the offence impossible.

[15] The conspiracy arises and the offence is committed as soon as the agreement is made; and the offence continues to be committed so long as the combination persists, that is until the conspiratorial agreement is terminated by completion of its performance or by abandonment or frustration or however it may be. The actus reus in a conspiracy is therefore the agreement for the execution of the unlawful conduct, not the execution of it. It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose.

[16] The central feature of a conspiracy is that the parties agree on a course of conduct that will necessarily amount to or involve the commission of an offence by one or more of the conspirators.

[17] Thus, a mere association of two or more persons will not constitute a criminal conspiracy. The main elements of conspiracy are a specific intent, an agreement with another person to engage in a crime to be performed, and the commission of an overt act by one of the conspirators in furtherance of the conspiracy.

[18] Archbold: 33-8-33-14 spells out circumstances from which one might presume an apparent criminal purpose between conspirators. Furthermore, R v Taylor [2002] Crim. L. R 205 at page 37 states that what must be proved is that the accused knew the course of conduct agreed upon. The accused must agree to

a course of conduct which involves an act or omission by at least one of them which is prohibited by the law.”

[38] It is therefore the plan or the plot itself between two or more persons to do something prohibited by law that is the criminal act in the offence of conspiracy. This is emphasised by Fernando JA in *Dugasse & Ors v R* [2013] SLR (Vol. 1) 67, parag. 32-34 and Msoffe JA in *Assary v R* (SCA CR No.18 of 2010) [2012] SCCA 33. That plan must be a consensus or a meeting of mind by the two parties to do the same thing.

[39] Both the *mens rea* and the *actus reus* of the offence of conspiracy are contained in the agreement by the parties to the crime. In *Ernesta & Ors v R* [2016] SCSC 277 (13 April 2016), an appeal from the Magistrate’s Court in relation to a detention order under section 101 of the Criminal Procedure Code for the offence of conspiracy, the court said:

“In regard to the intention (mens rea) in the offence of Conspiracy, I would draw attention to the case of R v Anderson [1986] 2AC 27, at para E (followed in the case of Republic v Livette Assary SC (Criminal Side) 19 of 2009) where Lord Bridge held as follows: "But beyond the mere fact of agreement, the necessary mens rea of the crime, in my opinion, established if, and only if, it is shown that the accused, when he entered into the agreement, intended to play some part in the agreed course of conduct in furtherance of the criminal purpose which agreed course of conduct was intended to achieve. Nothing less; nothing more is required".

[40] In sum, the provisions of section 6 of the Misuse of Drugs Act (supra) make it clear that whilst the agreement between the parties is the first ingredient of the offence, the second ingredient is the course of conduct agreed by the parties.

Discussion

[41] In the present case both the elements of the agreement and the course of conduct are contested by the accused.

- [42] The prosecution evidence adduced in this case is that the accused agreed with Mr. Bailey to import drugs into Seychelles through the airport. The accused has denied this evidence. His testimony is to the effect that he was never involved in the conspiracy as alleged but that he merely met Mr. Bailey at the airport when he exited from the customs area.
- [43] On a consideration of the evidence I am satisfied beyond any doubt that the accused conspired with Mr. Bailey to import heroin into Seychelles. My finding is based on the accused's incredible narrative which belies the obvious and clear evidence to the contrary in this case. Mr. Bailey's evidence despite being a state witness was cogent and credible. I see no reason to disbelieve him. It is highly credible that the incentive for Mr. Bailey to conspire with the accused for the importation of the drugs was due to the fact that he had to make up for his loss of money in the precious stones venture. At the very first instance, when challenged by the police, Mr. Bailey told Agent Yvon Leggaie that together with Mr. Djoux he had agreed to bring in the two packets of drugs for the accused.
- [44] The CCTV footage corroborates this narrative. Mr. Bailey, Mr. Dijoux and the accused all arrived on the same plane. It cannot be coincidental that he is seen on the footage in the arrival hall together with Mr. Dijoux and Mr. Bailey. The connection of the accused to Mr. Bailey and Mr. Dijoux is corroborated by the fact that the latter went to Mr. Dijoux's help when he was being questioned by immigration officials. It is obvious that the three individuals were familiar with each other and connected by purpose.
- [45] Outside the arrival hall, the accused went to where Mr. Tofic was standing unaided by Mr. Bailey. His testimony that Mr. Tofic waved at him and introduced himself is not visible on the footage. This is clearly concocted. It is evident that he knew Mr. Tofic would be the person waiting to transport them. He then waited for Mr. Bailey precisely because the latter had drugs concealed on his body for him. He then proceeded to wait for Mr. Dijoux with Mr. Bailey. They are not the actions of someone who was not part of an agreed plan. His getting into the same car and proceeding in the opposite direction to his home is also evidence that this was done to retrieve the drugs and to decide what to do after Mr. Dijoux did not emerge from the airport. If he was eager to get home as he testified why did he wait for so long for these two individuals with whom according to

him he was only faintly acquainted and why did he take a lift with Mr. Bailey knowing that the car was not going to his village.

[46] The accused's credibility is also severely dented even by matters which did not require any concoction or evasive answers on his part. I find it incredible that he did not know the age of his wife to whom he had been married for eighteen years. Also incredible is his denial of the familial relationships between his wife and Mr. Dijoux. Further, his attempt to show that he was a very poor person making a living from selling salted fish and making charcoal does not explain how he obtained sufficient means to travel to Seychelles on several occasions and on one of those occasions with his wife. His passport details show that he had travelled to other countries apart from Seychelles namely Mauritius and Reunion. His attempts to show that his family in Seychelles was making regular remittances to support him is not made out by the documentary evidence he produced. They are small transfers of money to his children.

My findings

[47] In accordance with *Adrienne & Anor v R* (Criminal Appeal SCA25 & 26/2015) [2017] SCCA 25 (11 August 2017 and *Dugasse v R* (2013) SLR 67, although I can exercise my discretion with regard to relying on the accomplice evidence of Mr. Bailey to convict the accused, I have warned myself of the danger such a practice. However, I do not see any evidential basis for not relying on his evidence. In any case, I do not rely solely on the evidence of Mr. Bailey who I found to be truthful. His detailed evidence was not dented by cross examination and ties up the rest of the evidence in this case. There is, as I have already explained, supporting evidence on the CCTV footage and other circumstantial evidence to confirm the conspiracy between the accused and other persons to import drugs into Seychelles. I have no doubt in my mind that the accused is guilty of the offence with which he has been charged. He clearly conspired with Mr. Bailey to import the drugs into Seychelles.

[48] I therefore convict the accused as charged.

Signed, dated and delivered at Ile du Port on 7 May 2019.

Twomey CJ