

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2020] SCCA
SCA CR 17/2019
(Appeal from CR 28/2018)

Harry Moise Dupres
(rep. by Mr. Joel Camille)

Appellant

and

The Republic
(rep. by Mr. Hemanth Kumar)

Respondent

Neutral Citation: *Dupres v R* (SCA CR 17/2019) [2020] SCCA – 18 December 2020
Before: Fernando, President, Robinson JA and Tibatemwa-Ekirikubinza JA
Summary: The Appellant was convicted on the basis of the evidence of an accomplice for conspiracy to import heroin into Seychelles.
Heard: 2 December 2020
Delivered: 18 December 2020

ORDER

Appeal allowed. Conviction and sentence quashed and Appellant acquitted.

JUDGMENT

FERNANDO, PRESIDENT

The Prosecution Case before the Trial Court:

1. The Appellant along with E. J. Dijoux and Roy J. Bailey were charged under the same indictment for importation of drugs into the Seychelles. The charge levelled against the Appellant was conspiracy to import heroin as stated at paragraph 2 below. As set out in the judgment of the learned Trial Judge “E. J. Dijoux, a Malagasy national pleaded guilty to the offence of importation of the drug whereas

R. 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regard to the case involving the appellant in return for the charges against him with respect to the incident being withdrawn.” The Appellant was then charged as set out below:

Charge:

2. 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 Ma Joie of Mahe on or around 20th April 2018 agreed with another person namely Roy Joseph Bailey of Mont Buxton, Mahe that a course of conduct shall be pursued which, if pursued, will 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.

The Appeal:

3. The Appellant has appealed against his conviction for conspiracy to import heroin and the sentence of 10 years imposed on him on his conviction.

Grounds of Appeal:

4. “1. The Learned trial judge erred in law and on the facts in convicting the Appellant of the offence of conspiracy to import a controlled drug as alleged in Count 3 of the charge, in that the evidence did not support proof beyond reasonable doubt of an agreement between the Appellant and accomplice-turn-state witness Roy Bailey, or otherwise.

2. The Learned trial judge erred in law and on the facts in concluding, largely and/or wholly, that there was an agreement between the Appellant and accomplice-turn-state witness, Roy Bailey on the basis of what Roy Bailey had stated to prosecution witness Agent Yvon Leggaie, in that the same piece of evidence, is hearsay evidence; has been objected to as being hearsay evidence by the Appellant and of which the Court has ruled to be inadmissible and he expunged from the records of trial.
3. The learned trial Judge erred in law and on the facts, in having failed to sufficiently and adequately address her mind on the law relating to her discretion not to admit the evidence of Roy Bailey as an accomplice and in relying on his evidence in support of the prosecution's case.
4. The learned trial judge erred in law and on the facts, in having failed to sufficiently and adequately address her mind to the explanations given by the Appellant, in his defence.
5. The sentences meted against the Appellant by the learned trial Judge is manifestly harsh and excessive and goes contrary to sentencing principles relating to the same offence charged."

The relevant Law:

Misuse of Drugs Act 2016:

6. Importation and Exportation

Section 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 specified in the Second Schedule”.

7. Conspiracy to commit offence

Section 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 punishment provided for the offence”.

8. **Interpretation and General Provisions Act**

Section 22 – “import, means to bring, or cause to be brought, into Seychelles”

9. **Jurisdiction under Penal Code:**

Extent of jurisdiction of courts:

Section 6 - “The jurisdiction of the courts of Seychelles for the purpose of this Code extends to every place within Seychelles and any place over which the Republic has jurisdiction”.

Offence committed partly within and partly beyond the jurisdiction:

Section 7 - “When an act which, if wholly done within the jurisdiction of the court, would be an offence against this Code, is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does or makes any part of such act may be tried and punished under this Code in the same manner as if such act had been done wholly within the jurisdiction”.

10. Jurisdiction under the Misuse of Drugs Act 5 of 2016:

Section 52(1) – “The courts of Seychelles shall have jurisdiction to try an offence under this Act when... (c) the offence was committed outside Seychelles – (i) by a citizen of Seychelles;” ...

Section 52(2) - “When an act which, if wholly done in Seychelles, would be an offence against this Act, is done partly within and partly beyond the jurisdiction, every person who is in Seychelles does or makes any part of such act may be tried and punished under this Act in the same manner as if such act had been done wholly within the jurisdiction”.

It is interesting to note that in relation to drug related crimes Seychelles courts have been given an extra-territorial jurisdiction. In other words, drug related crimes committed outside Seychelles by a citizen of Seychelles, as alleged in this case become triable by courts in Seychelles.

Prosecution Case in Brief:

11. It was the Prosecution case that the Appellant, a Seychellois, who lives with his family in Madagascar had conspired with R. J. Bailey, a Seychellois resident in Seychelles to import heroin into Seychelles on the promise of payment of SR 100,000 to Bailey. The entire conspiracy according to the prosecution evidence had been hatched in Madagascar and all acts pertaining to the planning of and leading to the importation of heroin had been done in Madagascar.

Prosecution Evidence in Brief:

12. PW 7, Roy Bailey, the main witness of the Prosecution and an accomplice, testifying under a pardon given by the Attorney-General had stated that he was an electrician by profession. He had stated that he was in the habit of going to

Madagascar on holiday since 2010. In 2015 he had tried to engage in business pertaining to gold but realized that it did not work for him. Thereafter in January 2018, he had gone to Madagascar to try his hand at gem business. On arrival at the airport in Antananarivo he had met the Appellant. He had met the Appellant prior to that about 20 years ago when the Appellant and him were living at Mount Buxton. They had spoken to each other and the Appellant had given PW 7 his Madagascar phone number. Later in the month of February the Appellant had picked him up from the hotel he was staying and taken him to the Appellant's house in Antananarivo. The Appellant had then introduced PW 7 to Eric Dijoux, as PW 7 had asked the Appellant to introduce him to someone involved in gem business. Eric Dijoux was the first accused in this case who had pleaded guilty. Eric was at the Appellant's house when PW 7 first met him and they discussed about the way they could do business. At the end of February, PW 7 had returned to Seychelles and gone back to Madagascar in the month of March. In mid-March, Eric and PW 7 had gone to Sri Lanka to explore possibilities of doing gem business there, but had not been successful. They had then returned to Madagascar and stayed at the Appellant's house, as the Appellant had told PW 7 that he could stay at his house when he comes to Madagascar. Eric too had stayed in the Appellant's house. The Appellant had gone to Seychelles and his wife and two children were there. PW 7 had stayed in Madagascar until his arrival in Seychelles on the 20th of April 2018. When the Appellant returned to Antananarivo, PW 7 had told him that he had failed in his venture of gem business and lost money. It was then that the Appellant had said, that someone was coming from Seychelles to take drugs to Seychelles and proposed that PW 7, should take drugs to Seychelles and that he would be paid SR 100,000. After a few days, namely on the 20th of April 2018, PW 7 had gone to the room of the Appellant where the drugs were wrapped round the belly of PW 7 and Eric by a person called Bonte, whom PW 7 did not know personally, but knew that he was a Seychellois. The Appellant had been in the room watching Bonte. Two

packets, one big and the other small were wrapped around his belly. The same amount was wrapped around the belly of Eric. Thereafter the Appellant, Eric, Bonte and PW 7 had gone to the airport at Antananarivo and boarded the plane to Seychelles. On arrival in Seychelles, PW 7 had to assist Eric who had some difficulty at the Immigration counter in regard to where Eric was going to stay. PW 7 had given his details to the Immigration and said Eric will be staying with him. Thereafter PW 7 had exited from the airport and had not encountered any difficulties at the customs. On coming out of the airport PW 7 had met the Appellant at the zebra crossing. Tuffic, the nephew of PW 7 had come to pick him up. The Appellant and PW 7 had not tried to find out what had happened to Eric. After he got in to the car of Tuffic, PW 7 had removed the drugs and placed it in Tuffic's car. Thereafter he had got out of the car and Tuffic had said he was going to the shop and to phone him when they were ready to go. PW 7 had thrown the bandage that was wrapped around his belly to conceal the drugs, near the wall outside the airport. PW 7 had identified in the video footage played in Court, the Appellant on the zebra crossing, and standing near Tuffic's car. Thereafter the Appellant and PW 7 had gone to the carpark as the Appellant had wanted to urinate. Later he had called Tuffic and when he arrived, the Appellant, PW 7 and Tuffic had gone to Anse Aux Pins towards the house of PW 7's sister. When PW 7 got into the car he had given the two packets of drugs to the Appellant. Arriving near the house of the sister of PW 7, the Appellant had got out from the car with the two packets of drugs saying that someone is coming to pick him up. The next day officers from the ANB had arrived, done a search of the house of the sister of PW 7 and removed a trouser of PW 7.

13. The evidence of PW 7 is to the effect that he had been to Madagascar on 7 earlier occasions between the period 2016 and April 2018, namely on 18 May 2016, 3rd August 2016, 11 December 2016, 17 may 2017, 11 August 2017, January 2018 and March 2018. There was no evidence forthcoming from PW 7 as to how and

when the SR 100,000 that the Appellant had promised to pay him for the importation was to be collected. It is strange that PW 7 had taken the risk to import drugs into Seychelles and suffering the consequences if detected, merely on the promise made to him by the Appellant whom he had met by chance, in Madagascar after 20 years. It is equally strange that PW 7 who risked bringing the drugs to Seychelles strapped to his waist simply handed them to the Appellant who was not resident in Seychelles, without querying when he would be paid the SR 100,000. PW 7 had admitted that in both the statements he had made to the police he had not mentioned about meeting the Appellant on his arrival at the airport in Antananarivo in January 2018. PW 7 had also tried to say under cross-examination that the Appellant was at the airport in Antananarivo with Eric when he went there in March 2018, but admitted that he had not said that in his examination-in-chief or in his statement. When questioned that the Appellant would not have given permission for PW 7, to stay at his place with the Appellant's wife and children, when the Appellant was in Seychelles; PW 7 contradicting his testimony in examination-in-chief, had said that the Appellant's wife had gone to Seychelles with the Appellant. PW 7 had also said that he never spoke to the so called Bonte, the person who is alleged to have come from Seychelles to Madagascar to take drugs to Seychelles, although he had seen him on several occasions in the house of the Appellant. PW 7 had admitted that when he was first confronted by officers of the ANB at his sister's house at Anse Aux Pins he had not told the ANB officers that the drugs belonged to the Appellant nor that it was the Appellant who had made arrangements to bring the drugs to Seychelles, but said he had told the ANB officers they were for Bonte, whose name he did not know.

14. There is no dispute as regards the facts that Eric J. Dijoux was arrested with heroin at the Point Larue Airport on the 20th of April 2018, that Dijoux, PW 7 and the Appellant had arrived in Seychelles on the same flight on the 20th of

April, that the Appellant is seen in the video footage near the zebra crossing outside the airport.

Defence

15. Appellant, testifying before the Court had stated that he had been living in Madagascar for about 18 to 19 years and was married to a Malagasy wife and had a son and a daughter by her. He had come to Seychelles to obtain a Seychelles passport for himself as his earlier one had expired and also get a passport for his children. His mother was old and ailing and the Appellant wanted his children to see his mother before she passed away. He had come to Seychelles on a “laisse passer”, the document had been marked and produced by the defence. Although he managed to get a passport for himself, he did not succeed in getting passports for his children as the necessary documents for the issuance of passports were not in order. He therefore had to go back and return to Seychelles but once again there was a problem with the papers. The Appellant had marked and produced the documentation that he had brought along with him to obtain passports for his children. The Appellant had said that he was doing charcoal business and selling salted fish. The Appellant had said that he had known PW 7 Roy Bailey as a child when they both lived at Mount Buxton, but had not met PW 7 thereafter until the Appellant came to Seychelles for the second time in respect of the passports for his children. He had met PW 7 at the Point Larue airport. When he was waiting to go to Majoie a relative of PW 7 had arrived by car to pick up PW 7. PW 7 had then offered him to give a lift to Mount Buxton but told him he needs to go to Anse Aux Pins first. Therefore, somewhere at Anse Aux Pins the Appellant had got himself dropped off and taken a pirate taxi to go to his sister’s house in Majoie. The Appellant had categorically denied the charge against him and all that PW 7 had said in his evidence. He had denied that he knew Eric, the accused who pleaded guilty and the so-called Bonte. On

being told about the video footage the Appellant had said that he did stand and speak to PW 7 as depicted in the video footage. The Appellant had said that at times his sister helped him financially when his charcoal business was not doing well and by way of proof had marked and produced transfers made to his account in Madagascar by his sister. He had categorically denied that he had conspired with PW 7 to bring drugs into Seychelles.

Under cross-examination the Appellant had said that he was 53 years old and his wife was around 40 years.

Basis for the conviction by the learned Trial Judge:

16. The learned Trial Judge had stated that she believed the evidence of PW 7 as cogent and credible and that the Appellant's evidence was an "incredible narrative which belies the obvious and the clear evidence to the contrary in this case." The learned Trial Judge at paragraph 43 of her judgment had said "It is highly credible that the incentive for Mr. Bailey (*PW 7*) 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. Dijoux he had agreed to bring in the two packets of drugs for the accused." The learned Trial Judge had erred when she had stated that PW 7 had agreed to bring the drugs for the accused, as this is not borne out by the evidence. In fact, as per the proceedings at page 96 of the Court of Appeal Brief, the evidence that had been expunged from the record had been to the effect, that the drugs were brought for Bonte. Although the learned Trial Judge had spoken of an incentive for PW 7 to conspire with the accused for the importation of the drugs, she has not spoken of an incentive for the Appellant to conspire with PW 7 for the importation of the drugs, which was the fundamental question in this case. The learned Trial Judge had also stated at paragraph 44 of her judgment: "It cannot be coincidental that he (*Appellant*) is seen on the CCTV video 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." I am of the view that seeing the Appellant with Mr. Dijoux and Mr. Bailey in the arrival hall cannot be taken as an item of evidence against the Appellant, for all passengers arriving in Seychelles from a flight have to mingle with others who arrive from flights, until they leave the airport. In fact, the defence may well argue that had the Appellant, PW 7 and Mr. Dijoux, been connected by purpose they would make every effort to distance themselves from one another. Here again the learned Trial Judge had made use of an item of evidence that is against Mr. Bailey, as against the Appellant, in making the last statement quoted earlier from paragraph 44 of her judgment, namely, "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 incorrect for the learned Trial Judge to have determined that the Appellant's evidence about Mr. Tuffic waving at him in the car park and introducing himself "is clearly concocted", merely because it is not visible in the CCTV video footage. It is not every movement that is caught up on a CCTV video footage for it depends on the way the camera is directed. There is no evidence that the Appellant "proceeded to wait for Mr. Dijoux with Mr. Bailey" outside the arrival hall, as the learned Trial Judge had stated at paragraph 45 of her judgment. Had the learned Trial Judge not erred in respect of the matters referred to above, I am of the view that she could not have convicted the Appellant.

17. The learned Trial Judge had, in determining that the Appellant's credibility is "severely dented", based herself on his inability to state the exact age of his wife, although he had said she was around 40 years. There was no contrary evidence placed as regards the age of the Appellant's wife. According to the learned Trial

Judge the Appellant's "denial of the familial relationships between his wife and Mr. Dijoux" is incredible. There was no contrary evidence placed before the Court to contradict the Appellant on this matter.

18. PW 7 as stated at paragraph 12 above, had admitted that when he was first confronted by officers of the ANB at his sister's house at Anse Aux Pins he had not told the ANB officers that the drugs belonged to the Appellant and that it was the Appellant who had made arrangements to bring the drugs to Seychelles, but had said they were for Bonte, whose name he did not know. It is indeed strange that the Appellant had come up with the proposal to import drugs into Seychelles to PW 7, and is alleged to have conspired with him, only when PW 7 had told him about his failed gem business in Sri Lanka in April 2018. According to PW 7 he had met the Appellant on his arrival at the Antananarivo airport in January 2018 and when Appellant picked him from the hotel PW 7 was staying in February 2018, and took him to the Appellant's house where he introduced PW 7 to Eric Dijoux as a partner with whom PW 7 could do gem business.

19. When the inferences drawn by the learned Trial Judge is dispelled as being flawed and erroneous, what is left is the testimony of PW 7. I am of the view that the contradictions and omissions referred to in the evidence of PW 7 are very material and could not have been ignored by Court, especially when the entire prosecution case rested on the evidence of PW 7 who is an accomplice, and whose evidence is in fact very dubious. In my view a court cannot complement the doubts and fill in the gaps of the prosecution case by seeking to pick holes in the evidence of the Appellant. That will be contrary to the concepts of the burden of proof and the standard of proof the prosecution is expected to maintain. It is only when the trial judge is satisfied that the prosecution has proved its case beyond a reasonable doubt that the defence case should be looked

at. If on an assessment of the defence evidence the trial judge accepts the defence version fully, then the accused has to be acquitted. If the trial judge takes the view that the defence has proved its case on a balance of probabilities and thereby created a doubt as to the prosecution case, then too, the accused must be acquitted. It is only where the trial judge dismisses the defence case in its entirety and accepts that the prosecution has proved its case beyond a reasonable doubt that the accused can be convicted. I am of the view that the learned Trial Judge has failed to appreciate this in convicting the Appellant.

20. To me, the evidence in this case shows that PW 7 is the one involved in the importation along with Eric Dijoux and Bonte, and he found an easy scapegoat in the Appellant. It is he who had been to Madagascar on seven occasions between the period 2015 and January 2018; namely on 18 May 2016, 3rd August 2016, 11 December 2016, 17 May 2017, 11 August 2017, January 2018 and March 2018. It is he who tried to do gem business with the convict Eric Dijoux, going to Sri Lanka and failing in such venture, it is he who was in financial difficulties during this period and alleged that he went to the house of the Appellant in Madagascar, where the drugs were strapped around his waist, it is he who brought drugs strapped on to his waist when he arrived in Seychelles, it is he who went to the assistance of Eric Dijoux who was later caught red-handed with the drugs at the Seychelles International airport and it is he who had arranged with his nephew Tuffic to come and pick him at the airport. According to the evidence of PW 7, the Appellant had not tried to find out what had become of Eric Dijoux, in getting out of the airport. PW 7 had failed in trying his hand at gold and gem business. Thus, it is PW 7 who had everything to gain by obtaining his liberation by implicating the Appellant to the crime of importation, as the evidence against PW 7 was much more than what was placed before the Court, against the Appellant. The evidence against the Appellant was that of PW 7, the Appellant having been seen in the zebra crossing at the airport and the

Appellant taking a lift in the car of the nephew of PW 7 along with PW 7. The material omissions and contradictions in the evidence of PW 7, referred to at paragraph 12 above, casts serious doubts as to the truthfulness and reliability of his evidence. His admission that when he was first confronted by officers of the ANB at his sister's house at Anse Aux Pins, he had not told the ANB officers that the drugs belonged to the Appellant or that it was the Appellant who had made arrangements to bring the drugs to Seychelles and that the drugs were in fact for one Bonte, cannot be ignored by a Court. PW 7 had not offered any explanation as to why he had not involved the Appellant in the conspiracy on this occasion. I am of the view that it is the evidence of PW 7 that is an "incredible narrative which belies the obvious and the clear evidence to the contrary in this case."

21. PW 7 had everything to gain by implicating the Appellant, for all charges against him had been withdrawn. His evidence therefore in the absence of other strong circumstantial evidence against the Appellant, had to be viewed with utmost caution, although there was no necessity for corroboration in view of the judgments of this Court in the cases of *Adrienne & Another V R* (Criminal Appeal SCA 25 & 26/2015) [2017] and *Dugasse V R* (2013) SLR 67. In the cases of ***Adrienne & Another V R (Criminal Appeal SCA 25 & 26/2015) [2017] and Dugasse V R (2013) SLR 67*** this Court stated that it is left to the discretion of the judge, to decide whether corroboration is necessary before accepting the evidence of an accomplice and should look for corroboration only when an evidential basis exists. In my view this was a case which had a strong evidential basis to look for corroboration. It cannot be ignored that PW 7 is very much involved in the importation according to his own evidence. On the issue that an accomplice may have a purpose of his own to serve, **Lord Adinger said in *R VS Farler (1837) 8 car. & P.106*** "*The danger is, that a when a man is*

fixed, and knows that his own guilt is detected, he purchases impunity by falsely accusing others”.

22. I am conscious that an appellate court should be slow to interfere with the exercise of discretion by a trial judge who has the advantage of assessing the manner of a witness's evidence as well as its content. However, in adopting **the guidance of Lord C.J in the case of Makanjuola, 1995 1 WLR 1348 Lord Taylor C.J.** I am of the view that the content and manner of the evidence of PW 7, and the circumstances of the case as set out in paragraphs above made it necessary for the Trial Judge to have urged caution and to look for some supporting material before acting on the evidence of PW 7. The failure of the learned Trial Judge to do so was fatal to the conviction.

23. I take this opportunity to state that when the Attorney-General uses his discretion to give a person a conditional offer that should be done fairly and judiciously as it could otherwise lead to abuse and discrimination among persons guilty of crimes. In this case PW 7, who imported drugs into the Seychelles and against whom all the evidence pointed to his guilt has got out scot-free, while the Appellant stands convicted on the bare evidence of PW 7, who had all reason to falsely implicate the Appellant. I could have understood if PW 7 was a foreigner, like Eric Dijoux who was used as a mule for the transportation of drugs by the Appellant. PW 7 was a Seychellois whose usual residence was in Seychelles, while the Appellant who though a Seychellois had married and settled down in Madagascar for the past 18 -19 years. In the case of **United States v. Bernal-Obeso, 989 F.2d 331, 333-34 (9th Cir. 1993)** it was said: *“A prosecutor who does not appreciate the perils of using rewarded criminals as witnesses risks compromising the truth-seeking mission of our criminal justice system”.*

24. It is also surprising why Eric Dijoux or Bonte were not called as witnesses for the prosecution.

25. I am of the view that in view of the many errors the learned Trial Judge had made in assessing the evidence of PW 7, and the manner she had approached the defence case, the conviction of the Appellant is unsafe.

26. I therefore allow the appeal upholding all the grounds of appeal, quash the conviction and sentence and make order acquitting the Appellant forthwith.

Signed, dated and delivered at Ile du Port on 18 December 2020.

Fernando, President

I concur

Robinson JA

I concur

Tibatemwa-Ekirikubinza JA