

IN THE SEYCHELLES COURT OF APPEAL

[Coram: A.Fernando (J.A),M. Twomey (J.A), B. Renaud (J.A)]

Criminal Appeal SCA25 & 26/2015

(Appeal from Supreme Court Decision CR 20/2014)

Jean Francois Adrienne

1st Appellant

Terence Servina

2nd Appellant

Versus

The Republic

Respondent

Heard: 01 August 2017

Counsel: Mr. N. Gabriel for the Appellants

Mr. A. Subramaniam for the Respondent

Delivered: 11 August 2017

JUDGMENT

A.Fernando (J.A)

1. The Appellants appeal against their convictions of trafficking in 47,435.1 grams of Cannabis (Herbal Material) and conspiracy to commit the said offence and the sentences of life imprisonment imposed on each of them for each of the two offences.

Charges:

2. The Appellants were charged before the Supreme Court as follows:

“Count 1

Statement of offence

Trafficking in a controlled drug contrary to section 5 of the misuse of drugs act read with section 2 of the said misuse of drugs act further read with section 26(1) (a) of the same act read with section 23 of the penal code and punishable under section 29 of the misuse of drug act read with the second schedule of the misuse of drugs act.

Particulars of offence

Jean Francois Adrienne and Terence Robin Servina on a date during the month of February 2014 to the month of March 2014 at Anse Boileau, Mahe with common intention was found to be trafficking in a controlled drug by selling, giving, administering, transporting, sending delivering or distributing or offer to sell, give, administer transport, send, deliver or distribute or to do or offer to do an act preparatory to or for the purposes to sell, give, administer, transport, sent deliver or distribute in a controlled drug namely in 47,435.1 grams of cannabis (Herbal materials).

In the Alternative to Count 1

Count 2

Statement of offence

Aiding and abetting another person to commit the offence of Trafficking in a controlled drug contrary to section 27(a) of the misuse of drugs act read with section 2 of the said act and punishable under section 29 of the misuse of drugs act read with the second schedule of the said act.

Particulars of offence

Terence Robin Servina on a date during the month of February 2014 to the month of March 2014 at Anse Boileau, Mahe aided and abetted another person namely Jean Francois Adrienne to commit the offence of trafficking in a controlled drug namely in 47,435.1 grams of cannabis (Herbal materials) by selling, giving, administering, transporting, sending, delivering or to offer to sell, give, administer, transport, send, deliver or distribute or to do or offer to do an act preparatory to or for the purposes to sell, give, administer, transport, sent deliver or to do or offer to do any act preparatory to or for the purposes of selling, giving, administering, transporting, sending, delivering or distributing.

Count 3

Statement of offence

Conspiracy to commit the offence of Trafficking in a Controlled drug contrary to section 28(a) of the misuse of drugs act read with section 5 of the misuse of drugs act and punishable under section 29 of the misuse of drug act read with the second schedule of the same act.

Particulars of offence

Jean Francois Adrienne Agreed with another person namely Terence Robin Servina on a date during the month of February 2014 to the month of March 2014 that a course of conduct shall be pursued which, if pursued will necessary amount to or involve the commission of an offence under this act namely the offence of Trafficking in a controlled drug namely in 47,435.1 grams of cannabis (Herbal materials).” (verbatim)

3. The Appellants after trial had been convicted of counts 1 and 3. No pronouncement has been made in respect of count 2 by the learned Trial Judge, which was in the alternative to count 1. The facts of this case, in our view, clearly establish offences under counts 2 and 3.
4. At the very outset we wish to state that in view of the facts of this case as outlined below, that charging the Appellants in count 1 on the basis of common intention set out in section 23 of the Penal Code and thus their conviction under count 1 is misconceived. This had been stated by this Court on several earlier occasions, where the facts of those cases were similar to this case.

Section 23 of the Penal Code states: *“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence”*. (emphasis added)

Section 23 applies in cases when an offence different to what the two or more persons originally formed a common intention to prosecute is committed. For instance when two or more persons form a common intention to commit robbery and in the prosecution of such robbery a murder is committed each of them is deemed to have committed murder if the commission of murder was a probable consequence of the prosecution of robbery. The facts in this case do not show that an offence different to what the two Appellants formed a common intention to prosecute was committed. Count 3 shows that what the Appellants formed a common intention to prosecute or conspired to commit was the offence of trafficking in cannabis material and count 2 shows, what they in fact committed was also the offence of trafficking in cannabis material.

5. In our view the conviction of the Appellants on the established facts of this case should therefore have been, as stated earlier, under counts 2 and 3 and not count 1.

The relevant provision in section 27(a) of the Misuse of Drugs Act states:

“A person who aids,abets, counsels, incites or procures another person to commit an offence under this Act;... is guilty of an offence and liable to the punishment provided for the offence and he may be charged with committing the offence.”(verbatim)

The said section 27(a) of the Misuse of Drugs Act is similar to section 22 of the Penal Code which states:

“When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and be guilty of the offence, and may be charged with actually committing it, that is to say-

(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence;

(d)...

(emphasis added)

It is clear from the evidence that both the Appellants did acts which constituted the offence of trafficking as stated at section 27(a) of the Misuse of Drugs Act and section 22 (a) of the Penal Code or that the 2nd Appellant aided and abetted the 1st Appellant to commit the offence of trafficking as stated at section 27(a) of the Misuse of Drugs Act and section 22 (c) of the Penal Code.

Grounds of Appeal:

6. The Appellants have raised the following grounds of appeal against conviction in his Memorandum of Appeal:

- a) “The Learned Judge erred in fact and in law in convicting the appellant on insufficient evidence.
- b) The learned Judge erred in law and in fact failing to give sufficient or any consideration to the evidence of prosecution witnesses upon cross examination by the defence.
- c) The Learned Judge misdirected himself in making a finding that the Appellant had knowledge of the drugs at the farm at AnseBoileau whereas there is no evidence, direct or circumstantial to suggest as much.
- d) The learned Judge erred in law and in fact failing to uphold the circumstances of the Appellant stated in mitigation to be special and therefore awarding life sentence.
- e) The learned Judge erred in making a finding that the single print found on one of the bags containing drugs was proof beyond reasonable doubt that the drugs belonged to the Appellant.” (verbatim)

7. The Appellant has raised the following grounds of appeal against Sentence in his Memorandum of Appeal:

- a) “The three life sentences imprisonment imposed by the learned trial Judge is manifestly harsh, excessive and wrong in principle.
- b) The learned trial Judge failed to consider the fact that the Misuse of Drugs Act does not specify whether life sentence stipulated therein was a minimum mandatory or a maximum.” (verbatim)

8. Counsel for the Appellant had modified his grounds of appeal against conviction and sentence stated in his Notice and Memorandum of Appeal dated 30th January 2017; when he filed his Amended Memorandum of Appeal and Skeleton Heads of Arguments dated 10th July 2017, in the following manner:

Amended Grounds of Appeal against Conviction:

- a) “The Learned Judge erred in fact and in law in convicting the appellant on insufficient and uncorroborated evidence.
- b) The learned Judge erred in law and in fact failing to give sufficient or any consideration to the evidence of prosecution witnesses upon cross examination by the defence.
- c) The Learned Judge misdirected himself in making a finding that the first Appellant had knowledge of the drugs at the farm at AnseBoileau whereas there is no evidence, direct or circumstantial to suggest as much.
- d) This is a new ground after removing the earlier ground set out in the Notice and Memorandum of Appeal – The learned Judge erred in law and in fact in placing too much emphasis on the evidence of one witness namely Leonard Crea especially as this witness had been contradicted in cross examination.
- e) The learned Judge erred in making a finding that the single print found on one of the bags containing drugs was proof beyond reasonable doubt that the drugs belonged to the first Appellant.” (verbatim) (the underlined parts are the additions made to the original grounds of appeal in the Memorandum of Appeal)

Amended Grounds of Appeal against Sentence:

“The learned Judge erred in law and in fact in failing to uphold the circumstances of the first Appellant stated in mitigation to be special and therefore awarding a life sentence.” (verbatim) This is a new ground brought in through the Amended Memorandum of Appeal and the Skeleton Heads of Arguments as ground (c).

Facts in Brief:

The learned Trial Judge has succinctly summarised the evidence of this case which we shall refer to in brief.

9. The main witness for the prosecution had been Leonard Crea, an accomplice to the crime. According to him he had started working for the 1st Appellant, in the 1st Appellant’s farm at Anse Boileau in January 2014. In February 2014 the 1st Appellant had told him that “there is something for us to do”. Thereafter around two weeks later in the month of February 2014 around 3.30 a.m when he was sleeping at his grandmother’s place at Anse

Royale the 1st Appellant had come in a pick-up to his place. The 2nd Appellant and one Roddy were with him. They asked him to come with them and he had got in and sat at the back of the pick-up. He stated the owner of the pick-up was the 2nd Appellant and he was driving it, while the 1st Appellant was in the front passenger seat with him. Roddy who was at the back of the pick-up had told him that they were going to collect drugs. They had gone up to Beoliere and stopped near an old building. The place where they stopped the pick-up was in disorder and he was aware there was a hotel at that place previously. There were two other persons there, whom he did not know, to meet them. They had all got down from the vehicle and gone down between some prune trees and rubbish. Then they had made a human chain and had started to pull some gunny bags. The 1st and the 2nd Appellants formed part of the chain. He had not seen what was in the gunny bags but could smell herbal material like cannabis. The bags had been loaded into the back of the pick-up. Thereafter they had gone to the farm of the 1st Appellant.

10. On arrival at the farm they had carried the bags that were in the pick-up to the farm house. Since they had seen some workers arriving they had carried the bags for about 100 meters further up to a place higher than the farm. The footpath was strewn with rocks and was steep and they had to climb the hill. They had to do about two to three trips to carry the bags. Crea had denied that he was lying to implicate the accused as he had signed the form in regards to his release and insisted that he was speaking the truth. The 1st Appellant had helped them in carrying the bags. The 2nd Appellant had brought some barrels from the house of the 1st Appellant and he had been instructed by the 1st Appellant to put the gunny bags into the barrels. Crea had to cut open one barrel while the others were open. The barrels were blue in colour. The 1st Appellant had asked them to carry the barrels and place them between some rocks. He stated that the gunny bags had herbal material while the other bags had contents which were square in shape with blue covers and brown celotape on them. He stated that there were blue and red plastic bags into which the herbal material was put from the gunny bags by him and the Appellants. The gunny bags and the plastic bags were carried and put into the barrels that were placed between the rocks on the orders of the 1st Appellant. While carrying the barrels he became aware that they contained cannabis. Thereafter they had covered everything with a blue tarpaulin. He had received Rs.300 for his work. Two days later he had been asked by the 1st Appellant to go and check on the barrels and their contents, which he had done.
11. Crea had identified the items in the photographs shown to him and the exhibits in open court as the barrels which he had placed between the rocks away from the farm house of the 1st Appellant. He had also identified the gunny bags, the red and blue plastic bags, which had been used to store the herbal material inside the barrels as the ones he had handled. He had also identified in court the herbal materials which were shown to him as being similar to the ones that were in the gunny bags and plastic bags.

12. Under cross-examination Crea had stated that when he got into the pick-up in the early hours of the morning he had not asked the 1st Appellant why he had come. Crea had remembered that the 1st Appellant had earlier told him that he needed his help and therefore when he saw the 1st Appellant that morning he had presumed it was for this reason he had come to pick him up. He stated he used a mobile phone but had lost it and was not having one on the day the 1st and 2nd Appellants came to his grandmother's house to pick him up. He had said that when he was getting into the pick-up the 1st Appellant had told him that he had been calling him on his mobile and that he was "giving balls".
13. Agent Naiken of the NDEA, was one of the officers who carried out the search and seizure of the drugs at Anse Boileau in the farm belonging to the 1st Appellant, along with agent N. Franchette and four other officers. On arrival at the farm they had searched the whole area of the farm but had not found anything illegal. It is after they had climbed up on the hill side of the farm and continued their search they had come across a place where they noticed a blue tarpaulin. On moving it aside he had noticed three blue barrels, which with the help of the other agents he had removed from that place and brought outside. He stated that in opening the barrels he had observed herbal materials that were placed in red and blue plastic bags. They had also come across another barrel a little further away from that place. That too contained herbal material wrapped in blue plastic bags and brown tape. Naiken had identified the barrels and the other items through photographs that were produced in court. Naiken had said that in opening the plastic bags he found that they contained herbal materials which he had taken possession of. Thereafter a request had been made to analyze the herbal material and to fingerprint the items seized from the farm.
14. Agent N. Franchette had corroborated the evidence of agent Naiken in regard to the search conducted on the farm and the finding of the place containing the three barrels in which were gunny bags and plastics containing herbal materials suspected to be cannabis. He had also corroborated Naiken's evidence pertaining to the finding of the fourth barrel concealed in the boulders a small distance away from that place.
15. The Government Analyst Mr. J. Bouzin who had analyzed the herbal material had testified in court about his analysis, his conclusion that the herbal material was cannabis, and that the total weight of the cannabis was 47,435.1 grams. There is no challenge to the expertise of Mr. Bouzin, the method of his analysis, his conclusion or the chain of evidence.
16. ASP Y Leon, from the Scientific Support and Crimes Record Bureau and a Fingerprint Expert had stated that he had carried out an examination of the plastic bags that were sent to him for examination and found on one of those plastic bags a print which on comparison was found to be identical to the left palm print of the 1st Appellant. There

had been 10 points of similarities. He had said that it was difficult for him to get fingerprints from the gunny bags and the barrels.

17. Agent T Dixie had stated that he had taken the fingerprints from the 1st Appellant. He had asked for his permission and since the 1st Appellant did not object and cooperated, he had proceeded to obtain his fingerprints. Dixie had said that he did not force the 1st Appellant to give his finger prints. He had informed the 1st Appellant that the finger prints were taken for comparison. In cross-examination Dixie had admitted that he had not informed the 1st Appellant of his right to refuse to give the fingerprint.
18. At the close of the prosecution case, both Appellants on being called for a defence had opted to make dock statements. The 1st Appellant in his dock statement had stated as follows:

“I know Leonard (*Leonard, the main witness for the prosecution*) as a person who does casual work. I never know where Leonard lives. I had his mobile number; whenever I have casual work to do on the farm I call him. My farm is at Anse Boileau and I live at Anse Royale. Leonard has never stepped foot at my house at Anse Royale. I have never done any drug transactions with Leonard because I did have his phone number and whenever I needed him to do casual work I called him on his cell phone. When I did the fingerprint test, Dixie never told me anything or any result about my rights. He told me that I was obliged to give any fingerprints and many times he took fingerprints from me. That is all.” (verbatim)

It is to be noted that when Dixie was being cross-examined by Counsel for the Defence it had not been put to him that Dixie had told the 1st Appellant that the 1st Appellant ‘was obliged’ to give his finger prints as averred by the 1st Appellant in his dock statement, nor had Dixie been challenged when he said that he had ‘informed the 1st Appellant that the finger prints were taken for comparison’, contrary to what the 1st Appellant’s dock statement that “When I did the fingerprint test, Dixie never told me anything or any result about my rights”.

The 2nd Appellant in his dock statement had stated as follows:

“I have been accused by Mr. Leonard Crea that I had come to his home and called him for me to go and do the cannabis transactions. I want the court to know that I have never been to Mr. Crea’s house. I do not even know his house where it is and I have not been in any drug transactions with Mr. Crea not even to go to Barbarons like Mr. Crea said not even at Anse Boileau like Mr. Crea said. I know John Francois as a close friend and he had never made me do any illegal things not even any drug transactions like Mr. Crea stated and accused us of doing. That is all.” (verbatim)

The 1st and the 2nd Appellants have not given any possible reason for Crea to falsely implicate them when giving their dock statements.

Appeal against Conviction:

19. As stated earlier at paragraphs 4 and 5 the conviction of the Appellants in respect of count 1 was misconceived. Under the jurisdiction of this Court set out in article 120(3) of the Constitution and the powers of this Court under rule 31(1) of the Court of Appeal Rules 2005, we record a conviction under count 2. **Article 120(3) of the Constitution** states: *“The Court of Appeal shall, when exercising its appellate jurisdiction, have all the authority, jurisdiction and power of the court from which the appeal is brought...”*. **Rule 31(1) of the Court of Appeal Rules 2005** states: *“Appeals to the Court shall be by way of re-hearing and the Court shall have all the powers of the Supreme Court together with full discretionary powers to receive further evidence by oral examination in Court, by affidavit or by deposition taken before an examiner or commissioner.”*(emphasis added)
20. Elaborating on grounds (a), (b) and (d) against conviction, all that the Appellants had stated in their Skeleton Heads of Arguments is that “sufficient consideration has not been given to the cross-examination of Prosecution witnesses” and “too much emphasis had been placed on the evidence in chief of Leonard Crea”, the main witness for the prosecution. Our attention was not drawn as to why the Appellants contend that there was insufficient evidence to convict the Appellants or to any item of evidence in the cross-examination of Prosecution witnesses, the learned Trial Judge had failed to take into consideration. Lengthy and pointless cross-examination as we find from the record of the proceedings of the trial below means nothing, unless the cross-examiner has elicited something which puts the prosecution case in doubt or succeeded in putting the credibility of the witnesses in doubt.
21. It had also been averred in the Heads of Arguments that Crea is an accomplice, and that Crea had lied in his examination-in-chief. One such lie had been that according to Crea, he had not questioned the Appellants as to where they were taking him, when he was picked up by the two Appellants from his grandmother’s house in the early hours of the morning of the day the drugs were transported; and that he had found that out only when he got into the pick-up, from one who was at the back of the pick-up. Again the Appellants have alleged that the Appellants would not have simply come to pick up Crea in the early hours of the morning without having contacted him on the mobile phone, and that Crea had lied about not having a mobile phone with him that day, having earlier said that he did at certain times have mobile phones, which got lost or damaged. We find it frivolous for the Appellant to argue before us that these are matters on which the witness should have been discredited when they are baseless suggestions made without any evidence to contradict the evidence of Crea and show that he had in fact been untruthful. Crea had been an employee of the 1st Appellant and it was not for him to question the 1st Appellant especially when the 1st Appellant had told him sometime back that there was

work to be done. The fact that the 1st Appellant had tried to contact Crea by phone that morning, before he came to pick him up, and failed; is borne out by Crea's evidence that when he was getting into the pick-up, the 1st Appellant had told him that he had been calling him on his mobile and that he was "giving balls".

Warning pertaining to Corroboration of Accomplice Evidence:

22. In the Skeleton Heads of Arguments, Counsel for the Appellants has argued that, there was no corroboration of the evidence of Leonard Crea, who was a self-confessed accomplice, and that the Court should have warned itself of the danger of relying on uncorroborated evidence of an accomplice. He had not raised it as a specific ground of appeal in his Amended Memorandum of Appeal. It had been the Appellant's argument "otherwise this evidence will have no weight whatsoever and has to be disregarded by the Court." It is the Appellant's contention that the learned trial Judge had wrongly in his judgment, relied on the Seychelles Court of Appeal case of Raymond Lucas VS The Republic SCA 17 of 2009 which only applied to cases involving sexual offences. In that case, as referred to by the Appellant in the Skeleton Heads of Arguments, this Court said: "*We therefore hold that it is not obligatory on the courts to give warning in cases involving sexual offences and we leave it at the discretion of judges to look for corroboration when there is an evidential basis for it as stated earlier.*" This statement has been quoted in full by the Learned Trial Judge at paragraph 37 of his judgment. However the learned Trail Judge had also made reference to the case of Dominique Dugasse & Ors VS the Republic SCA 25, 26, and 30 at paragraph 35 of his judgment and gone on to state at paragraph 36: "It is settled law in the Seychelles following the above mentioned two cases (*reference here is to the cases of Lucas and Dugasse cases*) 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".
23. An accomplice is a person who has voluntarily participated in the commission of the crime, whereas a prosecutrix in a rape case is a victim and not an offender. The case of an accomplice, therefore, materially differs from that of a prosecutrix in a rape case and we do agree for this reason that the evidence of both undoubtedly cannot be placed on the same footing. However we find that despite the reference in the judgment to the case of Raymond Lucas the Learned Trial Judge had said at paragraph 41 of his judgment: "Considering all these facts and even having considered the corroboration warning on the facts set out above, this court is of the view that the evidence of the accomplice Leonard Crea is acceptable to court as I am satisfied beyond reasonable doubt the accomplice was telling the truth." (verbatim)

24. It has also been the complaint of the Appellant that the learned Trial Judge had made two contradictory statements by stating on the one hand that there exists no evidential basis for a need to look for corroboration and therefore he proceeded to accept the evidence of the witness; and on the other hand; that certain material aspects of the evidence of the accomplice points to the guilt of the Appellants in fact do stand corroborated and that the learned Trial Judge had given a list of evidence adduced to show corroboration. To start with we see no contradiction in the two statements. All that the learned Trial Judge had said was that despite there being no evidential basis for a need to look for corroboration, that certain material aspects of the evidence of the accomplice, in fact do stand corroborated, as listed by him. One such was the finger print of the 1st Appellant being identified on one of the plastic bags containing the drugs. The learned Trial Judge had explained at paragraph 39 of his judgment the reason for his statement that there exists no evidential basis for a need to look for corroboration by stating: “Though cross examined on a lengthy basis no material contradictions were forthcoming. The specific details and description and sequence of events of transporting the controlled drug from a place near Beoliere to the farm of the 1st accused as described in paragraph 11,12,15 and 16 herein, is uncontradictory in nature and considering the vivid details given by him in the view of this court this is not a made up story as suggested by learned counsel for the defence. Therefore I am satisfied that the accomplice has not sought to tell untruths either to “save his skin” or as he had a grudge to settle with both the accused. Further this Court is satisfied that even though subject to intense cross examination he was not shown to be unreliable or having deliberately lied. It appears that despite giving evidence of an incident after a period of time the evidence of the accomplice was clear and comprehensive in respect of each and every transaction he had with the accused. Thus, as held in the aforementioned cases there exists no evidential basis for the need to look for corroboration. I therefore proceed to accept his evidence.” It is totally improper for Counsel to quote from the judgment out of context and we warn Counsel that such practices should not be continued.
25. We note that the learned Counsel has sneaked in this specific ground of the failure of the Court to warn itself of the danger of relying on uncorroborated evidence of an accomplice, in his Skeleton Heads; without having formally raised it as a ground of appeal against conviction, even in his Amended Memorandum of Appeal. We warn Counsel that this is improper, but we have decided to deal with it since this is an appeal in a criminal case.
26. It is correct that in the case of Raymond Lucas this Court did not consider the question of the need to corroboration of ‘accomplice’ evidence. Raymond Lucas involved the sexual assault of a 13 year old girl. This court stated in the Raymond Lucas case that the corroboration warning in cases of sexual assault of women is viewed by many as misogynistic in conception. Citing Russel CJ in the case of Conoway VS The State, 156

S.E. 664, 666 (Ga.1931) this Court said that the corroboration warning (*in sexual offence cases*) was “*expounded in a remote age when women were considered but little more than a chattel, and presumed, unless she was corroborated, to have been willing to engage in sexual intercourse almost upon suggestion.*” We said that it perpetuates an archaic and unjustified stereotype of women and his highly insulting because it is based on “*the folkloric assumption that women are by nature peculiarly prone to malice and mendacity and particularly adept at concealing it.*” We held in Raymond Lucas that “*To say that every complainant in a sexual offence case is less worthy of belief than another witness is an affront to their dignity and violates the right to equal protection of the law without discrimination guaranteed under article 27(1) of the Constitution.*”

27. Seychelles has followed the common law rule of practice, which had crystallized into a rule of law, and adopted by the UK courts for many years that it is obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of a person when that person is an alleged accomplice of the accused. This practice of warning the Jury arose in the 18th century that, while they might legally convict on the basis of the testimony of an accomplice, it would be dangerous to do so unless the testimony was supported or corroborated by other unimpeachable evidence. This warning was for many years a matter for the discretion of the Trial Judge but in 1916, the English Court of Criminal Appeal in the case of **R VS Baskerville [1916]2 KB 658**, declared that the practice had become virtually equivalent to a rule of law. In **Davis VS DPP [1954]1 AER 507 (H.L)** it was held that where the Judge fails to warn the jury in accordance with this rule, the conviction will be quashed even if there was ample corroboration of the evidence of the accomplice, unless the appellate court could apply the proviso to section 4(1) of the Criminal Appeal Act, 1907.
28. In the UK however, the requirement that it is obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of an alleged accomplice has now been abrogated by **section 32 of the Criminal Justice and Public Order Act of 1994**. Although we are not bound by the UK laws enacted after 1962, in view of the provisions of section 12 of our Evidence Act, the need has arisen to look into this practice again although it had been dealt with in brief by this Court, in the case of **Dominique Dugasse & others VS The Republic [SCA 25, 26 & 30 of 2010]**.
29. The rationale put forward to look for corroboration of accomplice evidence is because an accomplice is a self- confessed criminal, is morally guilty and that he may have a purpose of his own to serve, or may want to exaggerate or invent the accused’s role in the crime in order to shield himself or minimise his own culpability. The argument that an accomplice is a self- confessed criminal and is morally guilty can be discarded as courts accept the testimony of other criminals without requiring a warning as to their credibility. There is no requirement in law, for a Trial Judge to ‘warn’ the Jury with respect to

testimony of other witnesses with disreputable and untrustworthy backgrounds or other items of weak evidence. Also the moral guilt of an accomplice may vary with the nature of the crime involved and the law makes no distinction as regards the types of offending. 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*”. Credibility, however, is matter of obscure variety and it is impossible and anachronistic to always conclude that an accomplice’s story must always be distrusted because of a promise of immunity. Certainly some accomplices may attempt to minimize their involvement in the crime but where an accomplice, openly acknowledges his participation, the question arises whether there is a need for a warning. Thus the rationale put forward to look for corroboration of accomplice evidence has its flaws similar to the rationale put forward to look for corroboration in sexual offences as we pointed out in the Raymond Lucas case.

30. The question we wish to determine in this case is should we continue to have a special rule for accomplice evidence, that a Court should warn itself of the dangers of acting on uncorroborated evidence of an accomplice?
31. In the Canadian Supreme Court case of **Vetrovec VS The Queen [1982] 1 SCR 811**, it was said “*None of the arguments put forward to look for corroboration of accomplice evidence can justify an invariable rule regarding all accomplices. All that can be said is that the testimony of some accomplices may be untrustworthy. But this can be said of many other categories of witnesses. There is nothing inherent in the evidence of an accomplice which automatically renders him untrustworthy. To construct a universal rule singling out accomplices, then, is to fasten upon this branch of law of evidence a blind and empty formalism. Rather than attempt to pigeon-hole a witness into a category and then recite a ritualistic incantation, the Trial Judge might better direct his mind to the facts of the case, and thoroughly examine all the factors which might impair the worth of a particular witness. If, in his judgment, the credit of the witness is such that the jury should be cautioned, then he may instruct accordingly. If on the other hand, he believes the witness to be trustworthy, then, regardless of whether the witness is technically an ‘accomplice’ no warning is necessary.*”
32. What was originally followed by the English courts before the decision in Baskerville; was a common sense approach as set out in the case of **William Davidson and Richard Tidd for High Treason (1820), 33 How. St. Tr. 1338** where the Jury were instructed to look to the circumstances, to see whether there are such a number of important facts confirmed as to give them reason to be persuaded that the accomplice’s story is correct so that they could safely act upon it. This common sense approach to the matter was eventually discarded, however, in favour of the more technical view of Lord Reading in

Baskerville, where corroboration became a certain sort of evidence, namely, evidence "which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it". After Baskerville, courts began to frame the issue in terms of whether the corroborative evidence conformed to Lord Reading's definition, and ignored the real issue, whether there was evidence that bolstered the credibility of the accomplice. Thus it became necessary for the Trial Judge to define for the jury the legal meaning of corroboration, whether there is any evidence which may be corroborative, according to that definition, and to specify for the jury those items of evidence which, in his opinion, may be corroborative. The result was what was originally a simple, common sense proposition; namely whether an accomplice's testimony should be viewed with caution, became transformed into a difficult and highly technical area of law. As the study paper of the **Law Reform Commission of Canada Evidence II. Corroboration**, duly observed an "enormous superstructure ... has been erected on the original basic proposition that the evidence of some witnesses should be approached with caution".

33. The fact that corroborative evidence must implicate the accused as propounded by Lord Reading in the Baskerville case, discarding the common sense approach, appears to have taken the requirement too far. The reason for requiring corroboration is because an accomplice may have a reason to lie. Thus all that is necessary is some evidence to show that the accomplice is speaking the truth. Evidence which implicates the accused does indeed serve to accomplish that purpose but it cannot be said that this is the only sort of evidence which will accredit the accomplice. Whatever that can restore trust in an accomplice restores it as a whole; by whatever means, that trust is restored. It does not matter whether the efficient circumstance related to the accused's identity or to any other matter. The important thing is, not how the trust is restored, but whether it is restored.

34. A return to the earlier common law approach, the earlier "common sense" approach, is to be found in the Canadian case of **Warkentin et al. v. The Queen, 1976 CanLII 190 (SCC)**, where **Mr. Justice de Grandpré** spoke of corroboration in these terms: "*Corroboration is not a word of art. It is a matter of common sense. In recent years, this Court has repeatedly refused to give a narrow legalistic reading of that word and to impose upon trial judges artificial restraints in their instructions to juries or to themselves.*" This return to the earlier "common sense" approach is to be found in the UK decisions in the cases of **Director of Public Prosecutions v. Hester, [1972] 3 All E.R. 1056**, and **Director of Public Prosecutions v. Kilbourne [1973] 1 All E.R. 440 (H.L.)**, which preceded the **Criminal Justice and Public Order Act of 1994**. In these cases it was said that the word "corroboration" had no special technical meaning; by itself it meant no more than evidence tending to confirm other evidence.

35. Credibility of witnesses and the weight of evidence is ultimately a matter for the trier of fact. In this case the trier of fact was a Judge with many years of experience. In **R Vs Makanjuola 1995 1 WLR 1348 and R Vs Easton 1995 2 Cr. App. R. 469 CA** it was argued on behalf of the appellants that the judge should in his discretion have given the full corroboration warning notwithstanding the abolition of the requirement by the **Criminal Justice and Public Order Act of 1994**, on the basis that the underlying rationale of the common law rules could not disappear overnight. That argument was roundly dismissed by the court on the basis that any attempt to reimpose the “straightjacket” of the old common law rules was to be deprecated. It was held, however, that the judge does have a discretion to warn the jury if he thinks it necessary.

36. **Lord Taylor C.J.** giving the judgment of the court in **Makanjuola**, said that they had been invited to give guidance as to the circumstances in which, as a matter of discretion, a judge, in summing up, ought to urge caution in regard to particular witnesses and the terms in which that should be done. His Lordship said:

“The circumstances and evidence in criminal cases are infinitely variable and it is impossible to categorise how a judge should deal with them. But it is clear that to carry on giving ‘discretionary’ warnings generally and in the same terms as were previously obligatory would be contrary to the policy and purpose of the 1994 Act. Whether as a matter of discretion, a judge should give any warning and if so its strength and terms must depend upon the content and manner of the witness’s evidence, the circumstances of the case and the issues raised. The judge will often consider that no special warning is required at all. Where, however, the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness’s evidence. We stress that the observations are merely illustrative of some, not all, of the judges may take into account in measuring where a witness stands in the scale of reliability and what response they should make at the level in their directions to the jury. We also stress that judges are not required to conform to any formula and this court will also 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”.

37. In the Preamble to our Constitution we have recognized the inherent dignity and the equal and inalienable rights of all members of the human family as the foundation for freedom and justice and declared to uphold the rule of law based on the recognition of the fundamental human rights and freedoms enshrined in the Constitution and on respect for the equality and dignity of human beings. Article 27 of the Constitution states:

“27(1) Every person has a right to equal protection of the law including the enjoyment of the rights and freedoms set out in this Charter without discrimination on any ground

except as is necessary in a democratic society.

(2) Clause (1) shall not preclude any law, programme or activity which has as its object the amelioration of the conditions of disadvantaged persons or groups.”

To say that every accomplice is less worthy of belief than another witness is an affront to their dignity and violates the right guaranteed under article 27(1) of the Constitution.

38. In the case of **Raymond Lucas v R SCA 17/09** this Court held, discarding the long adopted rule regarding the corroboration warning in cases involving sexual offences:

“... to think that we are bogged down with and have to blindly follow the English law of evidence as it stood on the 15th October, 1962, that is almost 50 years ago is an affront to our sovereignty as a Nation and retards our jurisprudential development. We have in adopting the 1993 Constitution solemnly declared our unswaying commitment to maintain Seychelles as an independent State politically and to safeguard its sovereignty. We have vested our legislative power which springs from the will of the people in our National Assembly. Therefore the principle enunciated in the Kim Koon judgment as regards the applicability of the English law of evidence in the Seychelles should be only if it is not otherwise inconsistent with the 1993 Constitution which provides for equal protection of the law and if considered relevant and keeping in line with the modern notions of the law of evidence acceptable in other democratic countries. Paragraph 2(1) of Schedule 7 of the 1993 Constitution should be given a fair and liberal meaning and the continuation in force of existing law should not be understood as making applicable to the Seychelles the English law of evidence which has now been abrogated. The requirement for the court to give the jury a warning about convicting an accused on the uncorroborated evidence of a victim in sexual offence cases was abrogated in England by section 32 of the Criminal Justice and Public Order Act of 1994, which came into force on February 3 1995.”

This statement in our view applies equally to cases involving accomplice evidence.

39. Thus it is clear that as per the English law of evidence presently, it is a matter for the judge’s discretion whether any corroboration warning is appropriate in respect of a complainant of a sexual offence case, a case involving accomplice evidence or in respect of any other witness in whatever type of case. In the case of **Singh v State of Punjab Crim App no 523–528/2009 (SC India)** the Supreme Court of India stated:

“The law on the issue can be summarized to the effect that the deposition of an accomplice in a crime who has not been made an accused/put on trial, can be relied upon, however, the evidence is required to be considered with care and caution. An accomplice who has not been put on trial is a competent witness as he depones in the court after taking oath and there is no prohibition in any law not to act upon his deposition without corroboration.”

40. There would need to be an evidential basis for suggesting that the evidence of the witness might be unreliable. Where some warning is required, it is for the judge to decide the strength and terms of the warning. An appellate court should be disinclined to interfere with the judge's exercise of his discretion save in a case where the exercise of discretion had been wholly unreasonable.
41. We reiterate what we said in the case of **Dominique Dugasse & others VS The Republic [SCA 25, 26 & 30 of 2010]**: *“We therefore hold that it is not obligatory on the courts to give a corroboration warning in cases involving accomplice evidence and we leave it at the discretion of judges to look for corroboration when there is an evidential basis for it...”*. We are satisfied with the approach adopted by the trial Judge in this case in dealing with the evidence of Leonard Crea.
42. We therefore have no hesitation in dismissing grounds (a), (b), and (d) of appeal against conviction for the reasons set out earlier.
43. As regards ground (c) of appeal against conviction; the learned Trial Judge has decided to believe and act on the evidence of witness whose evidence amply demonstrates that the 1st Appellant had knowledge of the drugs at the farm. In view of our finding that the learned Trial Judge cannot be faulted in this regard we dismiss this ground of appeal. There is no denial of the finding of the drugs in a place adjacent to the farm of the 1st Appellant at Anse Boileau and Counsel for the defence in his submissions had said: “Nobody is denying the fact that the 1st Appellant owns a farm at Anse Boileau”.

Non-compliance with the procedural requirements pertaining to taking of finger prints:

44. Ground (e) of appeal is to the effect: “The learned Judge erred in making a finding that the single print found on one of the bags containing drugs was proof beyond reasonable doubt that the drugs belonged to the first Appellant”. (emphasis added) This is clearly a challenge to the weight attached by the Trial Judge to this item of evidence in convicting the 1st Appellant. However in the Skeleton Heads of Arguments filed on behalf of the Appellant, Counsel for the Appellant had once again shifted his position, without leave of Court, and limited his argument to the fact that the finger print of the Appellant had not been lawfully taken by Dixie, the police officer who took his finger prints for purposes of comparison with the finger print found on one of the bags. He had not referred to this as a ground of appeal even in his Amended Memorandum of Appeal. It is his argument in the Skeleton Heads of Arguments, that the procedure laid down in section 30 B of the Criminal Procedure Code for taking of finger prints had not been followed, namely a formal written consent of the 1st Appellant and that of an officer of the rank of an Inspector of police for taking of the finger prints had not been obtained and that Dixie

had failed to inform the Appellant of his right to refuse to give finger prints. It is therefore his position that the failure to comply with the law and the procedure for the taking of finger prints renders the evidence faulty and should not have been admitted. This in our view should have been raised as a specific ground of appeal. We warn Counsel that this is improper to raise new grounds in the Skeleton Heads of Arguments, but we have decided to deal with it since this is an appeal in a criminal case.

45. The relevant provisions of the **Criminal Procedure Code** in relation to the taking of samples is set out below:

“Interpretation

30A. (1) *In this section and sections 30B, 30C, 30D and 30E –*

“intimate sample” means –

- (a) a sample of blood, semen or other tissue fluid, urine or pubic hair;*
- (b) a dental impression;*
- (c) a swab taken from a person’s body orifice other than the mouth;*

“non-intimate sample” means –

- (a) a sample of hair, other than pubic hair;*
- (b) a sample taken from a nail or from under a nail;*
- (c) a swab taken from any part of a person’s body including the mouth but not from any other body orifice;*
- (d) saliva;*
- (e) finger-print, palm print, footprint or the impression of any part of a person’s body;*
- (f) the measurement of a person or any part of the body of a person;*

“sample” means an intimate or non-intimate sample;

Taking of sample from person in custody

30B. (1) *A sample shall not be taken from a person who is in the custody of the police or Superintendent of Prisons or has been remanded in custody by the court under this Code unless –*

- (a) the person consents in writing to the taking of the sample;*
- (b) the court, on an application, makes an order authorising the taking of the sample; or*
- (c) where the person has been convicted of a serious offence and the sample sought to be taken is the finger-print of the person –*

- (i) a police officer of at least the rank of inspector or the Superintendent of Prisons authorises the taking of the finger-print of the person; and*
- (ii) the finger-print is taken within 21 days of the conviction of the person.*

(2) A request for consent or application for the taking of a sample from a person shall not be made unless a police officer of at least the rank of inspector –

- (a) has reasonable ground for suspecting the involvement of the person in a serious offence and for believing that the sample will tend to confirm or disprove the person's involvement; and*
- (b) authorises the making of the request or application.*

(3) The authorisation of the police officer under subsections (1) and (2) shall be in writing or, if given orally, confirmed in writing as soon as possible after the giving of the authorisation.

(4) When seeking a person's consent to take a sample, a police officer shall first inform the person –

- (a) of the giving of the authorisation under subsection (2);*
- (b) of the grounds, including the nature of the offence in which it is suspected that the person has been involved, for giving it; and*
- (c) of the right of the person to refuse to give the sample.”*

46. As per the Criminal Procedure Code a sample shall not be taken from a person who is in the custody of the police or has been remanded on a court order; unless the person consents in writing to the taking of the sample. A request to obtain the consent to take a sample of a person has to be authorised by a police officer at least of the rank of inspector in writing. Thereafter, a police officer has to inform the person, that authorisation has been given to request the person's consent, the grounds upon which such authorisation has been given and of the right of the person to refuse to give the sample.
47. It is clear from the above provisions that the Criminal Procedure Code draws a distinction between intimate and non-intimate samples and a finger print is considered as non-intimate sample. Obtaining a non-intimate sample from a person in our view does not involve invasive methods as in obtaining an intimate sample. Although the procedure for taking of samples is couched in mandatory terms the Code does not state that any evidence obtained without complying with the procedure laid down therein would make the evidence illegal or improper and therefore inadmissible.
48. It had been the evidence of police officer Dixie that he requested from the 1st Appellant for his finger prints for purposes of comparison and that he took his finger prints as the 1st Appellant did not object. Dixie had stated that he did not force the 1st Appellant to give his prints and the 1st Appellant had not resisted in any way but cooperated. The Appellant

had there after signed a document which stated his name, his date of birth, his address the offence he was charged with and what had been taken was a true copy of his print. Dixie had admitted that he had not informed the 1st Appellant of his right to refuse to give a finger print. Dixie had not been questioned about the non-compliance with the provision pertaining to obtaining the written consent of the 1st Appellant for taking the finger print. The 1st Appellant in his dock statement had said “When I did the fingerprint test, Dixie never told me anything or any result about my rights. He told me that I was obliged to give any fingerprints...” It is to be noted as stated earlier, that when Dixie was being cross-examined by Counsel for the Defence it had not been put to him that Dixie had told the 1st Appellant that the 1st Appellant ‘was obliged’ to give his finger prints as averred by the 1st Appellant in his dock statement, nor had Dixie been challenged when he said that he had ‘informed the 1st Appellant that the finger prints were taken for comparison’, contrary to what the 1st Appellant’s dock statement. The Appellant had not challenged that the finger print taken by Dixie does not belong to him, the ‘expertise of ASP Leon’, who compared the finger print found on one of the plastic bags that contained the herbal material with those taken by Dixie from the 1st Appellant, and ASP Leon’s evidence that the finger print on the plastic bag was identical to ones taken by Dixie. The Appellant had not sought to give an explanation as to how his finger print came to be found on the plastic bag.

49. The learned Trial Judge in dealing with the issue of non-compliance with section 30B of the Criminal Procedure Code had said at paragraphs 42 to 43 as follows:

“[42] Learned counsel for the defence challenged the fingerprint evidence on the basis that it has been illegally obtained as agent Dixie had failed to warn the accused that he had had a right to refuse giving his fingerprints and therefore as a statutory provision had been not conformed to, the fingerprint evidence should be completely disregarded by court. It is the contention of the learned counsel for the prosecution that evidence even illegally obtained is admissible as evidence against the accused and relies on the cases of **R v Leatham 1861 8 Cox Cc 498 at p 501** and **Kuruma, Son of Kaniu v R [1055] AC 197, PC** which held that evidence illegally obtained is admissible.

[43] Firstly the statutory provision referred to is set out in section 30B (4) of the Criminal Procedure Code CAP 54. What court must consider at this stage is to make a judicial assessment of the impact of the admission of such evidence on the fairness of the proceeding **Archbold Criminal Pleading, Evidence and Practice 2012 15-464** i.e. whether the evidence gathered as a result of the failure to follow this procedural law, if admitted at the discretion of court would result in unfairness to the accused. In using its discretion this court relies on the findings in cases of **Khan v U.K (2001) 31 E.H.R.R. 1016** and **R v P [2002] 1AC 146** where **Lord Hobhouse** of the House of Lords, pointed

out that a defendant is not entitled to have unlawfully obtained evidence excluded simply because it has been so obtained.”

We are in agreement with the learned Trial Judge.

50. The modern trend in England is to the effect that in any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an ‘adverse effect on the fairness of the proceedings’ that the court ought not to admit. There is nothing in our view in the prosecution evidence or in the dock statement of the 1st Appellant to indicate that the admission of the finger print evidence would have such an ‘adverse effect on the fairness of the proceedings’. In **Callis VS Gunn [1964] 1 QB 495, [1963] 3 AER 677** it was held finger print evidence was held to be admissible even though the accused had not been cautioned when asked by a police officer for his prints, that they may be used in evidence against him at his trial. **Lord Parker CJ** said: “In my judgment finger-print evidence taken in these circumstances is admissible in law subject to this over-riding discretion. That discretion, as I understand it, could certainly be exercised by excluding the evidence if there was any suggestion of it having been obtained oppressively, by false representations, by a trick, by threats, by bribes, anything of that sort.” Callis and Gunn was cited and followed in the local case of **Mondon VS The Republic [1990] SLR 84** where the police officer who took the finger prints of the appellant did not inform or warn him that the finger-prints might be used at his trial. The learned CJ said: “...that omission was not fatal. It seems to me that so long as there was no evidence indicating that the finger prints were obtained from the appellant in any oppressive manner or by false representation or through trickery”.
51. In **R VS Voisin [1918] 1 KB 531** the accused was convicted of the murder of a woman, part of whose body was found in a parcel in which there was also a piece of paper with the words ‘Bladie Belgiam’. The accused had been asked by a police officer if he had any objection to writing down the two words ‘bloody Belgian’ and had replied ‘Not at all’; he had written down ‘Bladie Belgiam’. The accused appealed ‘unsuccessfully’, against his conviction on the ground, among others, that his writing ought to have been rejected as he had not been cautioned before being asked to write the words down.
52. In **Kuruma, son of Kaniu VS R [1955] AC 197**, the accused had been convicted of being in unlawful possession of ammunition, discovered during a search of his person by a police officer below the rank of those so permitted to search. The Privy Council was of the opinion citing **Lloyd VS Mostyn 1842 10 M&W 478** that the evidence had been rightly admitted. Its view was that, ‘if evidence is relevant, it does not matter how it was obtained’. In **King VS R [1969] 1 AC 304** the appellant who had been convicted for

possession of dangerous drugs argued that the search warrant had not been read to him when the house was searched and that he was not therefore legally searched. Dismissing his appeal the Court held that this was not a case in which evidence had been 'obtained by conduct which was reprehensible'. The Court had gone on to say that there was no evidence in that case of 'oppressive conduct or trickery by the police'.

53. In the case of **Jeffrey VS Black [1978] QB 490** it was stated that the mere fact that evidence is obtained in an irregular fashion does not itself prevent that evidence from being relevant and acceptable to court. Any court has the discretion to decline to allow any evidence brought by the prosecution if they think it will be 'unfair or oppressive to allow it'.
54. In **R VS Khan [1996] 3 AER**, Khan was being investigated for drug smuggling and in order to obtain evidence the police attached a listening device to his home. Although there was no statutory authorisation for use of such devices at the time the police obtained a tape showing Khan involved in the importation of heroin, they sought to use it in evidence against him at the trial. On appeal it was argued that the tape was obtained in breach of article 8 right to privacy and should have been excluded. The House of Lords however held that the evidence was rightly admitted under the common law and section 78 of the Police and Criminal Evidence Act 1984(PACE) and that it did not 'affect the fairness of the proceedings'.
55. In **R VS Sanghera [2001] Cr App 299** evidence was admitted following an unlawful search at the defendant's house. He argued that the evidence should be excluded under section 78 of PACE, 1984. The trial judge rejected the submission and convicted the defendant. The Court of Appeal upheld the conviction on the basis that the police had acted in good faith and the 'defendant had not been prejudiced in any way'.
56. In **R VS Latif [1996] 1 WLR 104** it was held that the proceedings could be stayed where it was 'an affront to public conscience' for the proceedings to continue or for the conviction to stand.
57. In Canada evidence obtained in breach of the Charter will be excluded only if its admission is 'likely to bring the administration of justice into disrepute'. In the Canadian cases of **R VS Mann [2004] 3 SCR** and in **R VS Lerke [1986] 25 DLR (4th) 403** it was said that the administration of justice may sometimes also be brought into disrepute by the exclusion of reliable evidence. In Australia in the case of **R VS Ireland [1970] 126 CLR 321** it was held "On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained

with the aid of unlawful and unfair acts may be obtained at too high a price. Hence the judicial discretion.”

58. In the United States of America, there appears to be a considerable difference of opinion among the judges both in the State and Federal Courts as to whether or not the rejection of evidence obtained by illegal means depends on certain articles in the American Constitution. In **Olmstead VS United States 277 US 438 (1928)** however, the majority of the Judges of the Supreme Court were of the opinion that the common law did not reject evidence obtained by illegal means.
59. In the Botswana case of **Seeletso VS The State [1992] BLR 71 (HC)** it was held, dismissing the appeal, that if there was a search of the appellant’s premises without a warrant and the procedure adopted by the police was in breach of section 52 of the Criminal Procedure and Evidence Act, that would not necessarily render whatever evidence was obtained of such a search inadmissible. The test to be applied in considering whether evidence obtained under such circumstances was admissible was whether it was ‘relevant to the matters in issue’. If it was, then barring express statutory provisions to the contrary, it would be admissible and the court would not be concerned with how the evidence was obtained.
60. We are of the view that taking into consideration the evidence of Dixie and the 1st Appellant, on the issue of taking the 1st Appellant’s finger prints, and having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence does not have an adverse effect on the fairness of the proceedings and is not an affront to the public conscience. There is no evidence of oppressive and reprehensible conduct or trickery on the part of the police and it cannot be said that the 1st Appellant had been prejudiced in any way. The evidence pertaining to the finger prints found on the plastic bags was relevant to the matters in issue. We have to bear in mind that just as much there is the public interest in the protection of the individual from unlawful and unfair treatment, there is also the public need to bring to conviction those who commit serious criminal offences. Vital and relevant evidence should not be shut out because of a simple mistake by a police officer.
61. Ground (e) of appeal, although not canvassed in the Skeleton Heads of Arguments or argued before us, namely, that the single print found on one of the bags containing drugs was not proof beyond reasonable doubt that the drugs belonged to the 1st Appellant; is not well founded in our view. Finger-prints are a very strong circumstantial evidence and in many cases convictions founded on them have been upheld where there had been no other evidence of identity. In the case of **R VS Castelton [1990] 3 Cr App Rep 74** the Court of Appeal upheld the conviction for burglary where the only evidence against the appellant was the finger-prints found on a candle which had been left behind at the place

of burglary. In the local cases of **Mondon VS The Republic [1990] SLR 84 – (judgment of the Supreme Court on an appeal from the Magistrate’s court)** and **The Republic VS Treffe Finesse Criminal Side No. 11 Of 1994 – (Unreported Judgment of the Supreme Court dated 20th May 1996)**, the conviction of the accused was solely based on the finger-prints of the accused found at the scene of crime.

62. For the reasons set out above we dismiss all the grounds of appeal against conviction.

Appeal against Sentence:

63. It is trite law that appellate courts will only interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:

- i. Acted upon a wrong principle and the sentence cannot be justified in law, as it is far outside the discretionary limits;
- ii. Allowed extraneous or irrelevant matters to guide or affect him or failed to take into consideration relevant matters;
- iii. The sentence is harsh, oppressive and manifestly excessive.

Also as a matter of principle an appellate court will not interfere with the discretion of a court of first instance merely on the ground that the appellate court would have passed a different sentence.

64. The purposes of sentencing are: to denounce the commission of offences and to punish offenders, to protect the community, to deter offenders, and to establish conditions for facilitating rehabilitation of offenders.

65. As regards ground (a) we find that the Appellants, having been convicted of two of the three offences for which they were charged, only two life sentences have been imposed on the Appellants and not three, as stated in the Skeleton Heads of Arguments.

66. As regards ground (b), a reading of the **1995 Misuse of Drugs Act**, which was applicable to the Appellants in this case, makes it clear that for unauthorised traffic in a controlled drug where the quantity is more than 250 grammes the sentence prescribed is a mandatory life imprisonment. To argue that imposing a sentence of life imprisonment was at the discretion of Court and therefore only a maximum sentence that could be imposed and not a minimum mandatory is faulty in view of the fact that the law had prescribed a maximum 60 years and SCR500,000 and a minimum 20 years for the first offence and 25 years for second or subsequent offence for unauthorised traffic in a controlled drug which is 250 grammes or less. The Appellants had admitted this in their Skeleton Heads of Arguments by stating “The sentence applicable to the Appellants would indeed be a life sentence. The learned trial Judge did not find it fit to depart from

this mandatory sentence despite the urging of defence Counsel. He felt himself bound by what the Legislature has prescribed”.

67. There is however nothing, as argued by the Appellants in their Skeleton Heads of Arguments, in the Sentencing Order which indicates that the learned Trial Judge “felt himself bound by what the Legislature has prescribed”, like the Magistrate who had stated in Poono that “as a result of the minimum mandatory term the fact that the accused is a first offender which is a mitigating circumstance, is almost irrelevant. It stands only to be considered to the extent whether he should be given a term above the 5 years prescribed.” (The judgement of this Court in **Jean Fredrick Poonoo VS Attorney General [2011] SLR 424** referred to in the Skeleton Heads of Arguments) In fact the learned Trial Judge having considered both the mitigating and aggravating facts had stated “I am therefore satisfied that considering the quantity of controlled drug trafficked, this is a fit and proper case to impose a term of life imprisonment on each accused which would be just and appropriate punishment even having considered the plea in mitigation of learned counsel for the accused.”
68. As regards ground (c), which had been sneaked in through the Skeleton Heads of Arguments without having obtained the leave of court, that the learned Trial Judge had failed to call for a probation report; is frivolous. The family circumstances of the Appellants had been considered. The Trial Judge had stated in his Sentencing Order: “In this instant case learned counsel for the accused in mitigation specified the family circumstances of both the accused and moved court for a social service report to support the facts stated by him. The offenders are not minors or elderly persons and the prosecution has not challenged the family circumstances mentioned by learned counsel for the accused. As these circumstances have not been challenged I will proceed to accept them and therefore the necessity of calling for a social service report does not arise. Other than the family circumstances and the fact that both accused are first offenders as submitted by learned counsel for the accused, I see no other facts or special circumstances that could be considered in mitigation for both accused”. What more could a probation report state, than the accused who were adults had submitted to Court.
69. This Court stated in the recent case of **Naddy Dubois and two others VS The Republic SCA 7, 12 &13 of 2014**, citing an earlier decision of this Court, **Roger Aglae vs The Republic, Cr No.15 of 1997** that obtaining a pre-sentencing (probation report) is not a necessary must before sentencing an offender. **The Supreme Court of Appeal of South Africa in the case of Sadhasivan Nolan Chetty and The State, Case No: 742/12** stated: “The probation officer’s report is not an end in itself. It is but one means of placing reliable information before a court in order to enable it to impose a properly informed sentence,... If that information can be placed before the court in another satisfactory way, there is no need for a probation officer’s report.”

70. On the issue that the sentence is wrong in principle as averred in ground (a), we state that the sentence prescribed in the Misuse of Drugs Act of 1995, as stated earlier, for unauthorised traffic in a controlled drug where the quantity is more than 250 grammes was a mandatory life imprisonment and thus the sentence was not wrong in principle. The Appellants in their Skeleton Heads of Arguments stated that since the sentence in this case was passed, the law has been amended and there is no mandatory life imprisonment for drug offences. The Appellant argues citing the case of **Wilven Cousin VS The Republic SCA 21 of 2013**, that he should have the benefit from the change of law in his favour, in accordance with the principle of ‘la peine la plus douce’. In Wilven Cousin the appellant was arrested in 2011 at a time when the law required that a person convicted of possession shall be sentenced to a minimum term of 5 years. That provision was repealed in 2012 and no minimum sentence was retained for a first offender in regard to possession. Cousin was sentenced on the 7th of August 2013, after the change to the law. This Court therefore held that Cousin should have benefited from the change of law in his favour, along the principle of “la peine la plus douce”. The facts of this case are different, since the Appellant in this case was sentenced on the 27th of July 2015, almost a year prior to the enactment of the **Misuse of Drugs Act 5 of 2016**.

71. It is correct that the **Misuse of Drugs Act 5 of 2016** which came into effect in June 2016 does not prescribe any mandatory sentences for drug offences but sets out the maximum sentences that could be imposed. For trafficking, the maximum sentence prescribed is life imprisonment. However it indicates a minimum sentence for aggravated offences and for trafficking, it is 15 years. Section 7(4) of the Act states “Where a person is convicted of the offence of trafficking in more than 1.5 kilogrammes of cannabis... the court shall treat the offence as aggravated in nature.” In this case the Appellants had been convicted of trafficking in an amount, more than 32 times of such quantity, namely, 47.4 kilogrammes of cannabis.

72. The learned Trial Judge had in passing the sentences, having considered the mitigating factors pertaining to the family circumstances of the Appellants and the fact that both Appellants are first offenders, stated: “On the contrary many aggravating factors exist. The quantity of controlled drug 47,435.1 grammes is well over the prescribed amount of

250 grammes set out in the Second Schedule. Both accused have been found guilty of actual trafficking of the controlled drug based on transportation and not on the presumption. It is clear to this court that the quantity of controlled drug taken into custody, clearly indicates that both accused were involved on a very large scale in the trafficking of the controlled drug. And therefore suitable deterrent punishment should be given considering the adverse and dangerous effects this drug has on society, especially the younger generation in a country with a small population like the Seychelles. The accused have not expressed any form of remorse or regret. The fact that it was a Class B drug and not a Class A drug is offset by the quantum of controlled drug taken into custody.” We agree with the learned Trial Judge on his reasoning.

73. There are other aggravating factors that have a bearing on sentence, namely, the planning, organisation, and the methods adopted to avoid detection; whether the purpose of offending is commercial or individual consumption; whether the role played by the accused can be described as leading, significant but not leading, or lesser; whether there was willingness on the part of the accused to cooperate with the authorities; and whether the accused pleaded guilty and at what stage of the proceedings. We find that the offence had been well planned out and organized. The very fact that the drugs were transported in the stealth of the night shows this. The manner and place the drugs were concealed, namely, wrapped in plastic bags, concealed inside barrels and concealed amongst rocks which was very difficult to access, shows that steps had been taken to avoid detection. It is clear that both Appellants had played a leading role in the commission of the offence. They did not plead guilty nor had agreed to cooperate with the authorities.
74. We are also of the view that the life sentence imposed on the Appellants is not grossly disproportionate to the offence committed by them, namely trafficking in 47.4 kilogrammes of cannabis.
75. We see no basis for interfering with the sentence of the Appellants for life imprisonment, imposed by the trial court, which this Court has determined should be in respect of count 2. In view of the sentence of life imprisonment imposed on count 2, we would leave the conviction of the Appellants on count 3 on file without imposing any sentence.
76. We therefore dismiss the appeal of the Appellants both against conviction and sentence.

A.Fernando (J.A)

I concur:.

M. Twomey (J.A)

I concur:.

B. Renaud (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 11 August 2017