Republic v Dubignon
(1998) SLR 52

Romesh KANAKARATNE Senior State Counsel for the Republic
John RENAUD with Frank ELIZABETH for the accused

Judgment delivered on 27 October 1998 by

PERERA J: The accused stands charged with two offences: count 1 with the importation of a controlled drug into Seychelles contrary to section 3 read with sections 10(b) and 27(c) of the Misuse of Drugs Act (Cap 133) and punishable under section 29 of the Second Schedule of the said Act; and count 2 with the offence of official corruption, contrary to section 91(b) of the Penal Code (Cap 158).

Particulars of the offence are as follows:

Mr J Renaud, counsel for the accused, has raised two preliminary points of law which require initial consideration. They relate to an alleged duplicity in count 1, and a submission that this Court has no jurisdiction to try an offence alleged to have been committed in a foreign jurisdiction.

Is Count 1 bad for duplicity?
Section 3 of the Act provides that –

> Subject to this Act. a person shall not import or export a controlled drug.

Section 10(b) states –

> A person shall not –
> (a) .....
> (b) do any act preparatory to, or in furtherance of, an act outside Seychelles which if committed in Seychelles would constitute an offence under the Act.

Similarly section 27(c) states –

> A person who –
> (a) .....
> (b) .....
> (c) attempts to commit or does any act preparatory to or in furtherance of the commission of 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.

Mr Renaud contends that the offence of importation contained in section 3 is disjunctive

and independent from sections 10(b) and 27(c) and hence the prosecution has to prove beyond a reasonable doubt that the accused committed the offence of importation and not merely an act preparatory to importation outside Seychelles.

The evidence for the prosecution to prove the charge of importation is primarily based on the evidence of Nassor Sultan (PW2), a businessman in Mombasa, Kenya. It was sought to establish through this witness that the accused made arrangements with him to send the quantity of cannabis resin exhibited in this case, to Seychelles; that the said quantity comprising 87 bars was handed over to the accused by him for that purpose and that the accused paid him, at least partly, for doing all acts necessary to packaging and exporting to Seychelles from Mombasa, Kenya.

Mr Kanakaratne, Senior State Counsel, contends that under section 10(b), an offence of importation envisaged in section 3 can be proved if any preparatory act which would constitute an offence under the Misuse of Drugs Act, is done outside Seychelles. Further he contended that all that the prosecution had to do under sections 10(b) and 27(c) was to prove such a preparatory act to establish the offence of importation under section 3.

There is a distinction between duplicity in a count and duplicity in a charge which consists of one or more counts. Basically, no one count of a charge should charge an accused with having committed two or more offences. However, by an exception to the general rule against duplicity, it is permissible to charge a number of separate offences in one count provided that the charges are conjunctive as opposed to in the alternative, and that the acts are so closely bound together that they can fairly be said to constitute a single activity. In the instant charge, count 1 charges the accused with the offence of importation prohibited by section 3 and, by the use of the words "read with", conjunctively with the offences under sections 10(b) and 27(c). In the Misuse of Drugs Act, the word "import" has not been defined. However, in the previous Dangerous Drugs Act (Cap 186) found in the 1971 enactment of the laws of Seychelles, the word "import" was defined as –

> Import with its grammatical variations and cognate expressions, in relation to Seychelles, means to bring, or cause to be brought into Seychelles by air or water, otherwise than in transit.

In Mauritius, section 2 of the Dangerous Drugs Ordinance 1950 defined the word "import" in identical terms. So also did the Customs Ordinance of 1950. However, the Dangerous Drugs Act 1974, which repealed the 1950 Ordinance, defined "import" as –

> "Import" does not apply to a dangerous drug in transit.

In the case of *Mian and Or v The Queen* 1981 MR 561, it was contended that by not reproducing the original definition, the legislature intended to restrict the meaning of the term to its ordinary meaning, namely "to bring" but not "cause to be brought". The Court agreed that the dictionary meaning of the word "import" is "to bring into a country from

abroad", but held that it implied the bringing in of one's person, accompanying one's person or bringing in through the intervention of others. Otherwise the restriction of the term "import" to mean only "to bring", would not have made an import through an export agent an "import" for the purposes of the Drugs Act. Such an interpretation would lead to serious consequences.

In Seychelles, in the absence of any definition, the word "import" must be taken in the broader sense of "to bring" or "cause to be brought" by air or sea. Hence the prosecution alleges that the accused imported the quantity of cannabis resin from Mombasa, Kenya, in the sense of "caused to be brought", as stated in the particulars of the offence by "doing an act preparatory to importing to Seychelles 109 kilograms and 685 grams of cannabis resin by making arrangements with one Nassor Sultan of Mombasa, Kenya to send the drugs to Seychelles, and by handing over the said drugs to the said Nassor Sultan for the said purpose, and being involved in a financial transaction with the said Nassor Sultan in respect of sending the said drugs to Seychelles." The preparatory acts envisaged in sections 10(b) and 27(c) are therefore conjunctive to the prohibition against importation in section 3. Section 10(b) prohibits the doing of any preparatory act outside Seychelles which would constitute an offence under the Misuse of Drugs Act, which in the present case is importation of a controlled drug. Similarly section 27(c) prohibits the doing of an act preparatory to the commission of an offence under the Misuse of Drugs Act, which again, in the present case is importation of a controlled drug. That section further provides that an offender could be charged with committing the offence (importing) and be punished for such offence. Section 27 in any event is not in itself a specific offence envisaged under section 29 read with the second Schedule to the Act. Count 1 therefore does not contain three separate offences but one offence of importation read with the offence of doing preparatory acts for the purpose of committing the offence of importation. There was therefore one criminal activity. In the case of *Jemmison v Priddle* (1972) 1 QB 489 the shooting of two deer by the same person with the same gun, the shootings occurring within seconds of each other, was considered to be one activity. That case was followed in the case of *R v Bristol Crown Court ex parte Willets* [1985] Crim LR 219 where it was decided that a count which alleges that an accused had in his possession five video tapes containing obscene material, was not bad for duplicity as the purpose was to publish them for gain. It was therefore one criminal activity. Similarly, importation involves preparatory acts of purchasing, packaging and processing the export documentation through customs and shipping authorities, which could be done solely personally, partly personally with the assistance of the agent, or solely though an agent. In this sense if the prosecution succeeds in proving any such preparatory act done by the accused himself or though an agent then the offence of importation charged in count 1 can be maintained. Accordingly count 1 of the charge in the present case is not bad for duplicity.

The Territorial Jurisdiction to try Count 1

Mr Renaud also raised the issue of the jurisdiction of this Court to try an offence allegedly committed in Kenya. He referred the Court to section 6 of the Penal Code (Cap 159) which provides that-

> The jurisdiction of the Courts of Seychelles for the purpose of this Code extends to every place within Seychelles.

He contended that in this respect, section 10(b) was in conflict with section 6 of the Penal Code in that it violates the rule of territorial application of penal laws. He submitted that if an offence has been committed in a foreign country, it is punishable by the laws of that country and hence the legislature cannot consider such an offence committed abroad as an offence committed in Seychelles and punish the offender.

Section 34(b) of the Dangerous Drugs Act 1986 of Mauritius is similar to section 10(b) of our Act. In the case of *Jeeawoodv v R* 1989 MR 258, the Court held thus –

> "There cannot be any doubt that section 34(b) of the Dangerous Drugs Act 1986 makes it an offence to do anywhere in the world an act preparatory to the commission, in Mauritius, of an offence under the Dangerous Drugs Act, immaterial of the fact whether such act is an offence in the country where it is perpetrated or as a result of any international treaty. That law was duly enacted by Parliament which, under section 45 of the Constitution, is empowered to make laws for the "peace, order and good government of Mauritius."
>
> It is accepted that the laws enacted by a country are usually meant for its territory and its territory alone. There is however nothing to prevent Parliament, which is sovereign, to enact laws punishing acts done outside the jurisdiction if preparatory to the commission of an offence in Mauritius."

In Seychelles the legislative power is vested in the National State Assembly under article 85 of the Constitution. But such power has to be exercised "subject to and in accordance with the Constitution", which is the supreme law of the country. Hence, so long as the National State Assembly legislates within the framework of the Constitution, it is supreme. Where the procedure laid down in article 86 has been followed in enacting any act, the National State Assembly can validly pass any law even with extra-territorial operation.

Section 6 of the Penal Code limits the jurisdiction of the Courts in respect of offences under the Code to every place within Seychelles. Section 7, however, states as follows –

> 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."

Section 3(b) of the Penal Code saves certain laws from the general territorial rule and provides that –

> Nothing in this Code shall affect –
> (a) .....
> (b) the liability of a person to be tried or punished for an offence under the provisions of any law in force in Seychelles relating to the jurisdiction of the Courts of Seychelles in respect of acts done beyond the ordinary jurisdiction of such Courts.

There is however a general principle that a court will not enforce the penal or revenue laws of another country. In the case of *R v Salim Ali Hamad El Mauley* (1981) SLR 6, a Tanzanian National was charged under section 310 of the Penal Code for unlawful possession of traveller's cheques which admittedly were purchased in Tanzania, Kenya and Zambia in contravention of the foreign exchange regulations in those countries. At the trial the prosecution conceded that there were no such regulations in Seychelles and hence a person could lawfully purchase traveller's cheques. It was held that in terms of section 7 of the Penal Code, the acts done outside the jurisdiction not being an offence in Seychelles, this Court had no jurisdiction.

Section 10(b) of the Misuse of Drugs Act is not a strange enactment. For instance, section 312 of the Penal Code has a similar provision for receiving property dishonestly acquired outside Seychelles. Hence because importation of a controlled drug is an offence in Seychelles, any preparatory acts done outside Seychelles are offences under section 10(b).

Facts in Issue

The case for the prosecution is based primarily on the evidence of Nassor Sultan (PW2), who admittedly is an accomplice being charged in Kenya with the offence of trafficking in respect of the same offence the present accused is charged with. It is also based on circumstantial evidence, as apart from the evidence of Sultan (PW2) there is no direct evidence of the accused's involvement with preparatory acts alleged to have been done in Mombasa, Kenya. Before considering the evidence in the case, I warn myself that the evidence of an accomplice must be corroborated in material particulars by independent evidence which not only confirms that the offence has been committed, but also that the accused committed that offence. Hence corroborative evidence should consist of relevant, admissible, credible and independent evidence which implicates the accused in a material particular. Implication, however, may be satisfied by a combination of items of circumstantial evidence, each innocuous on its own, which together tend to show that the accused committed the crime (*R v Hills* (1987) 86 Cr App R 26).

In the instant case, as the case for the prosecution involves the consideration of the evidence of an accomplice and also circumstantial evidence, I would additionally warn myself that the incriminating facts must be incompatible with the innocence of the

accused and incapable of explanation upon any other reasonable hypothesis than that of the guilt of the accused.

I shall now proceed to examine the evidence, mindful of the warnings as regards the need for corroboration and as regards the reception of circumstantial evidence.

The only direct evidence to implicate the accused with the offence of importation comes from Nassor Sultan (PW2) who is to be regarded as an accomplice as he is being charged in Kenya in respect of the same transaction. His testimony was that sometime towards the end of September 1997 he met one Kamal William, whom he had known since 1996, at the "Cowrie Shell" guest house in Mombasa, Kenya. Kamal introduced him to the accused who was there. Later in the absence of Kamal, the accused asked him whether he could arrange for about 100kg of cannabis resin to be exported to Seychelles. He told him that he would find out and inform him later. The following day, he went with his brother Rachid and met with the accused. He agreed to undertake the exportation, and wanted US dollars 10,000 as his charges. The accused gave him US dollars 2,000 and 5000 French Francs as an advance payment. The accused gave the consignee's address as "Waterloo Factory, PO Box 294, Seychelles."
He then went to a scrap metal dealer in Mombasa to purchase empty gas cylinders which he intended to use to pack the drugs. George Maina (PW3), the yard assistant of the "Mama Rose Scrap Yard" testified that an "Arab looking man" came to the yard on three occasions and that on the third occasion on 4 October 1997, he purchased 12 empty gas cylinders for a sum of Kenyan Shillings 8,400 (receipt exhibit P160). He identified the 12 cylinders exhibited in the case as exhibits P120 to P131. He stated, however, that at the time of the sale, they were painted blue whereas they are now painted grey. Nassor Sultan admitted that he painted them grey and stenciled the letters CO2 and numbered them in blue paint (Photo exhibits P101 to P112 - numbered as 65689, 67556, 78689, 45897, 37867, 37867 (two cylinders numbered the same), 37896, 25767, 34689, 27867, 34585, and 36879 respectively).

In the meantime, receiving a telephone call from the accused, Nassor Sultan went to the "Cowrie Shell" guest house where he received the drugs packed in two travelling bags. He did not check the weight or the number of bars at the guest house, but he did so after taking them to his residence and found 87 bars of cannabis resin weighing about 108 or 109 kg. He cut the bottom portions of the cylinders to insert the bars inside. First he wrapped them in light brown coloured cellophane paper (P98), placed them in batches of about 8 bars in each cylinder and welded the inner sides to prevent shaking. The bottom portions of the cylinders were marked as exhibits P132 to P143. These portions were re-welded thereafter and the cylinders were painted grey and numbered and marked as stated earlier. They were then placed in three wooden pallets (exhibits P145 - P147) and made ready for export. The witness, Sultan, identified the 87 bars of cannabis resin exhibited as P9 - P95, the cellophane wrapping (exhibit P98) and the 12 cylinders marked exhibits P120 - 131 and the bottom portions exhibits P132 - P144 as the items he personally handled for exporting the consignment to Seychelles at the instance of the accused.
The export documentation was to be handled by an agency run by one Peter Mwanzia

(PW25) and one Patrick Omala. On 2 October 1997, Sultan agreed with Patrick, who was one of his colleagues in school, to process the documentation for a fee of Kenyan Shillings 10,000. Sultan testified that at his request, the agents prepared a fictitious invoice under the firm name of "Chemigas Limited" (exhibit P148). It relates to a sale of 12 empty gas cylinders in 3 pallets for Kenyan Shillings 294,000 to "M/S Waterloo Factory, P.O. Box 294, Victoria, Mahe, Seychelles" to be shipped from Mombasa to Seychelles on board the vessel "Nedlloyd Merwe" on 9 October 1997. Sultan admitted in evidence that the fabrication of this invoice was necessary in view of the illegal nature of the shipment. The prosecution produced a specimen invoice from the genuine firm "Chemigas Limited" in Nairobi, Kenya as exhibit P161, which corroborated Sultan's assertion. It was also observed that the calculation of figures in the fabricated invoice was incorrect.

Mwanzia identified the "application for shipping order" (exhibit P149) prepared by him in his handwriting on the basis of the particulars of the fictitious invoice (P148). He however changed the name of the vessel to "PO Nedlloyd Mombasa".

Samuel Tumbo (PW5), the Exports Supervisor of Mackenzie Maritime Limited, Kenya, testified that Mwanzia presented an application for a shipping order and an invoice as an agent for "Chemigas Limited" on 3 October 1997. On the basis of the particulars furnished, he prepared the "Standard Shipping Order" (exhibit P150), and the "Export Entry" (exhibit P151). The name of the Clearing Agent in the Export Entry was "Magutu Enterprises Ltd". Mwanzia in his testimony explained that his agency did not have a licence to practice although they started business in July 1997. Hence he used the company name of Magutu Enterprises Ltd, whose Director John Wachira was known to him. The three pallets containing the 12 cylinders were stored inside a container bearing the number KNLU-3147418 (photo exhibit No. P158).
The "Standard Shipping Order" and the "Export Entry" were tendered to the customs and excise department, Mombasa on 6th October 1997. The port charges to be paid were left by Nassor Sultan with the Mwanzia's secretary. Sultan testified that the accused, who was still at the guest house, was in constant contact with him. According to the immigration documents produced by the prosecution the accused left Seychelles for Kenya on flight KQ 453 on 20 September 1997 and returned from Nairobi, Kenya on flight KQ452 on 11th October 1997 (exhibits P165 and P166). The passenger lists produced by the Manager of Kenya Airways in Seychelles (exhibits P208 and P209) contain the name of the accused as departing and arriving on those two flights.

Mwanzia (PW25), the Clearing Agent, stated that the goods for shipment were packed by Sultan and delivered at his office, and that he did not check the contents. In any event the consignment according to the invoice was 12 empty gas cylinders in three pallets. He testified that these items were passed by the Port Authorities and Police Security at the Port as they were consistent with the documents.

After handing over the container to the Port Authorities, Mwanzia took the documents to Mackenzie Maritime Ltd for the preparation of the Bill of Lading and the cargo manifest (P159). These documents were prepared on 28 October 1997 after the container was

loaded into the vessel. Six copies were collected by Sultan and one of each of them (exhibit P158 and exhibit 159) were left at the office of the Clearing Agent.

Sultan testified that the accused instructed him to post the Bill of Lading and other documents needed for clearing by registered post addressed to "Lina Palmyre, c/o PO Box 450, Seychelles International Airport, Mahe, Seychelles." He used a fictitious name of "M/S Al-Suuad, P.O. Box 83215, Mombasa" as the sender however as he feared that he would get involved if the letter was returned undelivered. The postal receipt issued by the General Post Office, Mombasa, Kenya has been produced as exhibit P156. Geoffrey Georges (PW4) a postal officer from the GPO in Mombasa identified his writing and the signature on the receipt and produced the letter bill (exhibit 25) which shows that this registered letter left Nairobi on 31 October 1997 and was received in Seychelles on 3 November 1997. Miranda Francourt (PW7), a Clerk at the Seychelles Post Office testified that consequent to a notice sent, Lina Palmyre, the addressee, who was personally known to her, came to the Post Office on 5 November 1997 and received the letter, after signing the receipt bearing No 08291 (exhibit P162). Geoffrey Georges (PW4) testified that the sender had used a "Post Officer cover" sold at the Police Office. The registered letter rate was "29 Kenyan Shillings per 10 g". Hence as 203 Kenning Shillings were charged, as per the receipt, the weight would have been about 70 g.

Lina Palmyre (PW9) the sister of the accused, testifying for the prosecution admitted that she received a "registered letter" addressed to her and identified her signature on receipt (exhibit 162). She stated she was expecting that letter as her brother, theAacused had told her to collect it for him, although addressed to her. She did not open it on receipt, but merely gave it to the accused. She further stated that it was an A4 size envelope.

The foregoing was a brief summary of the evidence for the prosecution to establish the preparatory acts done by the accused outside Seychelles. Section 10(b) implies that had the accused done those acts in Seychelles, it should be an offence under the Act. Section 3 prohibits both the exportation and importation of a controlled drug. Hence when those acts are done in Seychelles, they are done preparatory to or in furtherance of the offence of exportation. If done outside Seychelles, they are done preparatory to or in furtherance of an importation to Seychelles. As both exportation and importation are offences under section 3, as has already been found, the charge of importation can be established by proving preparatory acts done or caused to be done outside Seychelles, both under sections 10(b) and 27(c).

Sultan testified that on 3 November 1997 the accused telephoned him and stated that the container had been seized by the police. He did not contact him thereafter.

ASP Ronny Mousbe (PW29) in his testimony stated that the police had information that the cargo ship P&O Nedlloyd Mombasa had on board a container containing hashish. He then obtained the cargo manifest of all cargo being offloaded from that vessel in Seychelles. He located the container addressed to the Waterloo Factory, purportedly

containing 12 empty gas cylinders. He checked with Mr Hyacinth Payet, the General Manager of that factory and found that he had not ordered such a consignment from anywhere. On 3 November 1997 having received further information that certain persons were trying to gain entry to the container, he obtained the necessary permission and moved the container bearing No KNLU3147418, with a seal bearing No 1677815 intact to the Drug Squad premises and guards were placed. Patrick Barallon (PW22), Managing Director of Land Marine Ltd, testified that the container was offloaded on 31 October 1997 with seals intact. David Arrisol (PW23) the Tally Clerk attached to Land Marine Ltd, identified his handwriting on the tally sheet (exhibit P207) wherein the container in issue was itemised as item 11. He also certified that the seals were intact. The container was opened on 14 November 1997 around 11.30 am in the presence of ASP Mousbe, Gilbert Simeon (PW27), Trades Tax Officer, and Hyacinth Payet (PW20), General Manager of the Waterloo Factory, who all testified that the seals were intact at the time of opening. It has therefore been established that the container which was sealed and loaded in Mombasa on 28 October 1997 was opened in Seychelles on 14 November 1997 and accordingly, on the basis of the evidence, the Court is satisfied that there had been no opportunity for anyone to tamper with the contents in the course of the voyage until it reached Seychelles and was opened.

ASP Mousbe further testified that the bottom portions of the 12 cylinders were cut open and that inside were bars of cannabis resin wrapped in light brown cellophane paper and secured with metal rods welded inside the cylinders. He seized 87 bars, which he handed over to ASP Ernest Quatre (PW28). The bars were put inside three black plastic bags, sealed and registered as CB 1095/97. ASP Quatre testified that on 17 November 1997 he handed them back to ASP Mousbe for the purpose of taking them to Dr Gobine, the analyst. Exhibit PI, the letterof request for analysis gives a detailed description of the wrappings of the bars. The report and the 87 bars were returned by Dr Gobine to ASP Mousbe on 19 November 1997. Dr Gobine (PW1) identified the seals placed by him when he handed over the drugs to ASP Mousbe and produced his report (exhibit P2) wherein he had certified that the 87 bars of resinous material are cannabis resin, weighing a total of 109kg 685g. On an application made by the defence, the 87 bars were weighed in Court by Dr Gobine. It was found that the total weight was 109kg 645g, which was 40g less than when they were originally weighed. Dr Gobine once being recalled, testified that there is always a permissible error of 5g. He also stated that the weighing scale was very sensitive and that due to the unevenness of the base, there was a "parallel lax" resulting in slight inaccuracies. He however maintained that when he weighed them at the laboratory, the total weight was 109kg 685g. On a consideration of the evidence of Dr Gobine I am satisfied that the weight given in the report (exhibit P2) is correct and that the slight discrepancy, considering the total weight of the drugs creates no doubt as to the nature, substance or identity of the exhibits. On 10 November 1997, four days before the container was opened, the accused had offered a sum of R200,000 to PC Bradford Samedi (PW10) seeking his assistance to remove the gas cylinders from the container. ASP Mousbe testified that PC Samedi, an officer of the Drug Squad at Newport, was engaged on patrol duty as well as guard duty at night on shifts. PC Samedi in his testimony gave a detailed account of his meeting with the accused at Plaisance and Roche Caiman. He stated that the accused told him

that the cylinders contained drugs belonging to him and that he had spent a considerable sum of money to import them from Kenya. Samedi and the accused had worked at the Fire Brigade before and knew each other well. Samedi informed ASP Mousbe about the conversation, and on his instructions, agreed to help him with the intention of setting a trap. ASP Mousbe stated that Samedi was asked by him to talk to the accused on his telephone regarding the agreement to help, and he listened on the speaker.

On 13 November 1997 at the request of the accused, Samedi met with him at his residence at Cascade. There was one Jean Francoise with him. Both of them then went to Anse Aux Pins where one Dave Benoiton joined them. From there they came to Bel Air, where the accused visited a house and brought a metal cutter (exhibit PI 63). He was told to use it to cut the lock of the container. They planned to enter the Drug Squad compound in the early hours of the morning of 14 November 1997. Samedi was asked to cut the lock in advance so that the removal of the cylinders could be done quickly. Samedi was on the night shift that night.

Being informed of the plan by Samedi, ASP Mousbe detailed 20 special support unit officers on watch duty at the Drug Squad premises. They lay concealed inside the office with lights switched off. Samedi telephoned the accused to tell him that everything was ready for them to enter. A short time later the accused arrived in a blue pickup and parked it away from the Drug Squad premises. He then came up to the fence near the office of ASP Mousbe and spoke with Samedi. Then he went away stating that he would return with some men. Later he came back for the second time that night, but did not get into the compound as daylight was approaching. The next day, 14 November 1997, the accused telephoned Samedi once more and told him that he had lost a lot of money on the drugs and that he was serious about getting them back.

Before the break-in was planned for the night of 13 November 1997, the wire mesh fence behind the "bonded warehouse" had been cut. After ASP Mousbe produced a sketch of the Drug Squad premises (exhibit P210), the Court on a visit to the locus in quo observed that the cut was large enough to enable a person to come into the premises from the adjoining compound. The cutting could have been done without anyone observing from the office. The container was in front of that warehouse. It was observed that had Samedi been the only guard on duty that night, the cylinders could have easily been removed through the fence to be loaded to a vehicle parked in the adjoining compound. The sketch also indicated as point A the spot where the accused allegedly spoke with Samedi, watched by ASP Mousbe from his office, which was 12.9 metres away and had an unobstructed view.

Andoise Gustave (PWll) who was on guard duty at the new port entrance gate in November 1997 testified that the accused met him near the airport on 8 November 1997 and asked for his assistance to get the drugs in a container which was in the compound of the drug squad. He told him that he could not take the risk. Then he offered him a bottle of whisky, which he did not take. The next day he reported the matter to ASP Mousbe. ASP Mousbe in his testimony corroborated the evidence of Gustave.

Subsequent to the opening of the container and the seizure of the drugs on 14 November 1997, investigations commenced around 21 November 1997 in Kenya. Police Inspector Samuel Nguriathi of the Kenyan Police Force (PW8), testified that in the course of his investigations he interviewed Nassor Sultan (PW2), George Maina, the scrap yard assistant (PW3), and Peter Mwanzia (PW24) and Patrick, the clearing agents. He stated that in the course of the investigation he took into custody the export documents, the postal receipt and the invoice. He further stated that of all the documents, including the invoice purportedly from "Chemigas Limited" (exhibit P148), were fabrications and that the name "Maguto Enterprises Ltd" in the export entry had been used without the consent of that company.

Charles Kinaro (PW6) a police corporal of the Kenyan Police testified that he assisted Inspector Nguriathi in the investigation. He seized the postal receipt (exhibit P156) from the possession of Nassor Sultan, who stated that he had posted the export documents to Seychelles. Nassor Sultan in his evidence stated the same. He further stated that Nassor Sultan is being charged with the offence of trafficking in dangerous drugs and that Peter Mwanzia and his partner are also being charged with similar offences and with the offence of forgery of documents. Hence Nassor Sultan and Peter Mwanzia who testified for the prosecution should be regarded as accomplices in this case. It must however be stated that in the instant case Mwanzia testified that he did not know the accused nor that Nassor was acting for him. Hence he is not per se an accomplice of the accused. The only evidence is that the invoice from "Chemigas" which was the basic document upon which the export documentation commenced, was fabricated by his clearing agency. The prosecution case against the accused is based primarily on the evidence of Nassor Sultan who is clearly an accomplice. Hence once again I warn myself that to convict the accused on the testimony of the accomplice, the Court must be satisfied that it can be corroborated by independent evidence which connects or tends to connect him with the offence. Evidence capable of amounting to corroboration has been defined as "evidence which is relevant, admissible, credible and independent and which implicates the accused in a material particular". I shall accordingly, for the sake of clarity, consider the foregoing evidence under those various heads.

1. **Relevant** - The word "relevant" in the law of evidence means that any two facts to which it is applied are so related to each other that, according to the common course of events, one, either taken by itself or in connection with other facts, proves or renders probable the past, present or future existence or nonexistence of the other.

In the instant case, the Court is satisfied that only relevant evidence has been admitted and where objections had been raised as regards the relevancy of any evidence they had been considered and ruled upon in the course of the proceedings.

2. **Admissible** - In the instant case, the prosecution relied on several photocopies of export documentation processed in Kenya. They were produced through Inspector Nguriathi (PW8) who testified that the originals were seized by him in the course of his investigations and that they were to be used in the criminal trial in Kenya. The

admission of photocopies was not objected to by the defence in general, but where it was objected to rulings were made thereon. Further, computer processed documents were admitted upon obtaining certificates under section 15(5) of the Evidence Act and considering the relevant evidence as to the reliability and authenticity.

Hence the independent evidence adduced to corroborate Nassor Sultan's evidence has been both relevant and admissible.

3 **Credibility of Sultan's Evidence**

The defence suggested to witness Sultan that he was testifying for the prosecution on the basis of a promise of leniency in the trial in Kenya. He denied this, and stated that he is presently facing charges for trafficking there and that till the trial commences he has been released on bail. In the instant case this witness admitted his entire involvement in the exportation of the drugs exhibited in this case on the instructions of the accused. He frankly stated that he knew that the consignment contained drugs and that in fact those drugs were handed over to him by the accused himself. He further admitted that he caused an invoice to be fabricated by the clearing agent and that he inserted a fictitious name in the postal receipt (exhibit P156) as the whole of the transaction was a "dirty deal."

This witness met the accused on two or three occasions at the "Cowrie Shell" guest house. In Seychelles he identified the accused from a photograph in an album shown to him at an identification parade held at the police station in the presence of ASP Mousbe and Inspector Nguriathi. Hence he claimed that he was certain about the identity of the accused as Tony Dubignon and no one else. The Court is satisfied that this witness was utterly truthful in his testimony. He was frank and clear, although he was inculpating himself. He had no motive to inculpate the accused without reason. But his evidence needs corroboration on material particulars to be admissible.

4. **Independent Evidence**

What then constitutes the independent evidence that corroborated Sultan's oral evidence which not only show that the offence had been committed but also that it was the accused who committed it?

Independent evidence must emanate from a source other than the accomplice. Hence I shall examine the evidence by classifying it under different sub-heads.

(a) Evidence of Surrounding Circumstances

The prosecution adduced the evidence of Marie Anne Bijoux (PW26) the manageress of Air Booking Ltd, an agent of Kenya Airways, and David Bastienne (PW17), a reservation assistant, to establish that the accused was issued an air ticket on flight KQ 453 for travel on 20 September 1997 to Mombasa via Nairobi with the return date to Seychelles kept open (exhibit P204). Immigration Officer, Leon Bonnelame (PW13) produced the embarkation card (exhibit P165) and the disembarkation card produced by the accused on 11 October 1997 when he returned on flight KQ 452 from Nairobi. Documentary evidence in the form of embarkation and disembarkation cards was also

produced as exhibits P170 to P177 to show that the accused had travelled frequently to Nairobi. It was also sought to be established that one Kearer William alias Kamal William, who witness Sultan stated introduced the accused to him, was also present in Mombasa during the relevant period and was also a frequent visitor to Nairobi about the same time that the accused visited Nairobi. An air ticket (exhibit P206) shows that this Kamal William travelled to Mombasa via Nairobi on flight KQ 453 on 6 September 1997 with the return date open. The embarkation card (exhibit P167) shows that he left Seychelles that day and the disembarkation card (exhibit P168) shows that he returned to Seychelles on 27 September 1997. Hence from 20 September 1997 to 27 September 1997, both the accused and Kamal Williams were in Mombasa. This independent evidence corroborates Sultan's evidence that sometime in late September 1997 he met with Kamal William, whom he had known before introduced him to the accused. This evidence also corroborates his oral evidence that the accused did in fact have the opportunity to arrange the exportation of the drugs by delivering them to him and being present in Mombasa till such time as the export documentation was complete.

Sultan also testified that after the accused left Kenya on 11 October 1997 he made telephone calls on 13 October 1997 and 16 October 1997 to the accused's telephone number 515554 (in Seychelles) from his home telephone number 227605 (in Mombasa). The September/October 1997 telephone bill was produced through Hezborn Agutu (PW14) the Manager (Investigations) of the Kenya Post and Telecommunications Corporation and exhibited (exhibit P152)as proof of those two telephone calls. Telephone bills for the period 15 September 1997 to 15November 1997 (exhibit P153 and P154) produced by David Watson (PW11) the Chief Executive of Cable and Wireless (Sey) Ltd established that the telephone number of the accused was 515554. Exhibit P153 shows that a telephone call was made on 12 October 1997, two calls on 13 October 1997, one call on 15 October 1997, one call on 16 October 1997 and another call on 22 October 1997 to Sultan's telephone number 227605 (Mombasa) from the accused’s telephone number 515554 (Seychelles). These telephone calls corroborate Sultan's evidence that the accused was getting worried about the delay in receiving the shipment. Sultan testified that he explained that the delay was due to the bad weather conditions in Mombasa. The ship left Mombasa on 28 October 1997, as per the bill of lading (exhibit P155) and the cargo manifest (exhibit P159).

(b) <u>Implication of the Accused in Material Particulars</u>

Sultan testified that the export documents were posted to Lina Palmyre, the sister of the accused, as instructed. Exhibit P156, the postal receipt, is dated 28 October 1997 and it was received by Lina Palmyre on 5 November 1997 (exhibit P162). She testified that she collected the envelope and handed it over to her brother the accused who had asked her to do so. This oral and documentary evidence connect the accused with the importation of drugs by independent corroboration of the testimony of Nassor Sultan that the accused caused the drugs to be exported in Mombasa to be imported in Seychelles by him and that he needed the export documents to clear them on arrival.

(c) <u>Evidence of the Accused's Conduct as Corroboration</u>

As has been seen, the prosecution sought to establish the identity of the accused by the

evidence of Nassor who testified that he met him personally and received the instructions to export the drugs which he supplied and made an advance payment. That witness also positively identified the accused at the identification parade by means of a photograph album containing over 50 photos, and also a dock identification. This identification was corroborated by the accused's own conduct subsequent to his return to Seychelles on 11 October 1997. Apart from the telephone calls he made to Sultan and the collection of the export documents through his sister, he sought to remove the consignment of drugs by unlawful means. The evidence of PC Samedi (PW10), and Andoise Gustave (PW11) regarding the assistance sought to remove the drugs on the promise of gratifications and the admission to Samedi that he had spent a good deal of money in importing the drugs which belonged to him, are relevant in this respect. The evidence of those two police officers was credible and the defence did not seek to attribute any motive as to why they should implicate the accused. Further ASP Mousbe testified that in the early hours of 14 November 1997 when the accused was expected to enter the Drug Squad compound to remove the drugs, he saw the accused, whom he knew very wel,l driving in a blue pickup in front of the Land Marine Division, which is opposite the Drug Squad office, and reversing. Later from his office window, he once again saw the accused accompanied by Dave Benoiton talking to PC Samedi near the fence. This evidence remains uncontradicted by cross-examination and hence should be considered as evidence relevant to the conduct of the accused for the purpose of connecting him to the commission of the offence.

ASP Mousbe further testified that in the course of the investigations several searches were made at the residence of the accused's mother with whom he usually resided at Cascade and at Petit Paris where he frequented, and at Mont Buxton where one Dave Benoiton lived. Having failed to apprehend him, charges were filed in this Court on 10 February 1998 and an open warrant was obtained for his arrest. Subsequently a police announcement was made over the radio and television informing that the police were searching for several persons and that if they did not surrender by a particular date the search would be handed over to the army. ASP Mousbe testified that on 11 April 1998 around 7.15 pm he received a telephone call from Mrs A Antao, attorney-at-law, that one of her clients called "Chaka Zulu" wanted to surrender. He accompanied her to Cascade where the accused surrendered to him at his mother's residence. The accused has been on remand since then. Before the accused surrendered, but after the open warrant was issued this Court, being satisfied on the basis of an affidavit filed by ASP Mousbe that the accused was absconding, acted under section 31(1) of the Misuse of Drugs Act and seized the "realisable property" of the accused.

Hence the evidence of ASP Mousbe as regards the unsuccessful attempts made to apprehend the accused, and the subsequent surrendering to the police established that he was absconding arrest. In the absence of any reason as to why he was not available at the usual places where he resided or frequented, the court would infer that he was absconding due to the fear of being arrested in connection with the offence he has been charged in this case.

Another factor to be considered is the consigning of the container to the Waterloo

Factory. Mr Hyacinth Payet (PW21) the General Manager, testified that he had never ordered CO2 gas for his soft drinks factory from Kenya, and that the consignment had been wrongly addressed to his company. Nassor Sultan testified that this address was given to him by the accused. Hence the fact that the container was consigned to a company fictitiously attracts the inference that it was done due to the illegal nature of the shipment. That conduct corroborates Sultan's evidence against the accused.

The Case for the Defence

The accused exercised his right to remain silent in terms of section 184 of the Criminal Procedure Code, but called witnesses in his defence. No adverse inference is drawn from the accused's election to remain silent. I bear in mind that it is incumbent upon the prosecution to prove the accused's guilt beyond a reasonable doubt, and that the accused has no burden to prove his innocence. The defence called Kearer William alias Kamal William (DW3) to establish that the prosecution charged him with the same offence in respect of the same consignment of drugs imported from Mombasa, in case No Cr. 57/97 of this Court (exhibit D2). In that case, William was produced before this Court on 19 December 1997 and remained in custody. Charges were filed on 22 December 1997. On 10 February 1998, counsel for the prosecution informed the Court that subsequent to interrogating certain witnesses, the Attorney General had decided that although the evidence disclosed a degree of involvement, it was not sufficient to proceed against that accused, and hence sought to withdraw the charges in terms of section 178 of the Criminal Procedure Code. Accordingly William was acquitted. The Court was also informed that the new material available implicated a prime suspect who was being charged that day. It was in these circumstances that the charges were filed against the instant accused in this case on the same day. In his testimony Kearer William admitted that he made a voluntary statement to Lance Corporal Maxime Payet (DW2) on 16 December 1997 (exhibit D3). In that statement he stated that he went to Mombasa via Nairobi on 6 September 1997. He further stated thus (as appears in the translation from Creole):

> My reason for me to go to Mombasa, Kenya is because I had a good sum of money with me to buy some drug, hashish. Around 12 September 1997, I saw a man who I know him as Rashid but I do not know his surname. After I had question people on the subject for buying drugs hashish. Then I saw him and introduced myself to him and we talked for quite a long time in my guest house Octopusy where I was living. Around 9.00 on the same night I gave Rashid my money, I mean 5000 US dollars. Rashid assured me that he is going to bring my hashish around midnight. Then Rashid left my room and went away. Then I waited for him but did not see him until I returned back to Mahe. I knew Nassor very well he is also an African and he lived at Mombasa. I'm friend with him but I do not do any drug transaction with him.

Although in his examination-in-chief he admitted that the statement was made voluntarily, on being cross-examined he denied that he spoke to anyone about hashish. He also denied that he stated that he did not know the surname of Rashid, who according to the evidence was the brother of Nassor Sultan. He repudiated the

statement and stated that Lance Corporal Payet had introduced statements which he never made. He however admitted that he signed that statement at five places. The Court is satisfied that the statement was made voluntarily and that the witness was trying to resile from its contents due to his admissions as regards purchasing of hashish. This witness had therefore made a voluntary statement previously which was inconsistent with his testimony before this Court thus impugning his credibility.

William however denied that he introduced the accused to Nassor Sultan. He was undoubtedly seeking to distance himself from the accused to prevent any suspicion that both of them travelled to the same destination for a common purpose and met with Nassor Sultan, who had admitted that the accused was introduced to him by William. Lina Palmyre, the sister of the accused to whom the export documents were posted on the instructions of the accused, admitted that during the time of the alleged importation, she was having an affair with Kearer William.

Hence at the time of institution of proceedings the prosecution had the voluntary statement of Kearer William to connect him with the importation of the drugs. Mr Renaud, counsel for the accused emphasised the averment in the affidavit dated 17 December 1997 (exhibit Dl), filed by Lance Corporal Maxime Payet, wherein he had averred inter alia that "the evidence so far available establishes direct involvement of the suspect in importing the said quantity of cannabis resin...."; and contended that the subsequent charging of Tony Dubignon on the same facts and for the same offence as the primary offender would cast a reasonable doubt on the prosecution case, which doubt must be resolved in favour of the present accused. As I have already stated, the Attorney General did not state that William was prosecuted in error. He stated that subsequent material elicited from witnesses showed the involvement of William but not to the extent of maintaining a charge before a Court. The evidence of Kearer William in the instant case showed that he was an unreliable witness who was guarding himself from disclosing any part in the transaction. Hence the decision of the Attorney General to withdraw the charges due to insufficient evidence cannot be used to the benefit of the present accused against whom there was substantial evidence.

The evidence of Sultan that he posted the export documents to the accused, addressed to his sister and received by her, was sought to be challenged by adducing the evidence of Therese Nora Dubignon (DW1), the mother of the accused. She testified that she was present when her daughter brought the envelope and gave it to her son, the accused. She stated that she had asked her son to purchase some hair dye but he had failed to do so. She further stated that the envelope contained two Muslim caps and two cassettes which were produced in court. It was clear that this was a desperate attempt to cast a doubt as to the contents of the envelope about which the only evidence was that of Sultan. This attempt failed as items such as caps and cassettes would have come as a parcel and not as a letter. The witness admitted that registered letters are issued from a counter inside the Post Office, while parcels are delivered in a different section outside. According to the evidence of the Postal Clerk Miranda Francourt, the letter was delivered as a registered article through the counter inside the Post Office. Further the Kenyan Postal Officer Geoffrey-Georges (PW4) stated that what was posted

in Mombasa was a registered letter and that the charges were calculated for a registered letter. Hence I reject the evidence of Nora Dubignon both on the facts she sought to establish, and as she was admittedly present in Court throughout the proceedings.
Mr Renaud also submitted that even a charge of importation required proof of knowledge and possession. It was submitted that the accused did not possess or have any control over the container nor the contents therein and hence the offence of importation had not been proved. It was also submitted on the basis of *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256 that the accused did not even have the opportunity or right to open the container which the prosecution alleged contained drugs imported by him. He further submitted that the cargo was not collected by the accused and hence the process of importation was incomplete, and that in any event it was addressed to a different consignee.

In the case of *Donald Clarisse v The Republic* (1982) SLR 75 it was held that as importation could be done by causing the good to be brought, and that proof of possession by the accused was not necessary. Proof of possession was necessary only where a person himself brought drugs from abroad. A similar view was taken in the Mauritian case of *Mian & Ors* (supra) where the Court held that the offence of importing opium was proved where the acts of the accused showed that, although they had not personally brought the opium from abroad, they had caused it to be so brought.

Hence on a consideration of the totality of evidence in respect of count 1, the prosecution has established beyond a reasonable doubt that the accused imported the quantity of cannabis resin seized from the container shipped on vessel P&O Nedlloyd Mombasa, by causing it to be brought to Seychelles.

Accordingly I convict the accused on count 1 as charged.

The charge under count 2
In this charge, the prosecution alleges that the accused in November 1997 at Roche Caiman corruptly offered to give PC Bradford Samedi, a Public Officer, a sum of R200,000 for assisting him to have access and gain entry to the drug squad office in order to take away the controlled drugs stored in 12 gas cylinders kept inside a container.

Section 91(b) of the Penal Code is as follows-

> Any person who -
> (a) .....
> (b) corruptly gives, confers or procures, or promises or offers to give or confer, or to procure or attempt to any person employed in the Public Service, or to, upon, or for any other person, any property or benefit of any kind on account of any such act or omission on the part of the person and employed, is guilty of a misdemeanour and is liable to imprisonment for three years

The essence of a charge under section 91(b) is the act of giving or promising to give any person employed in the Public Service any property or benefit of any kind to do or omit to do an official duty. The word "property" is defined in the Penal Code as including "anything animate or inanimate capable of being subject of ownership". Hence money, in whatever form is property for this purpose. Admittedly PC Samedi, to whom the accused allegedly promised R200,000, is a Public Officer. He was also admittedly on guard duty at the drug squad premises and hence was in a position to omit to do his official duties and permit the accused to enter and remove the drugs from the premises and also illegally cut the lock of the container with the metal cutter provided by the accused.

Mr Renaud submitted that a charge under section 91(b) could not be maintained purely on the evidence of an alleged recipient or would-be recipient of a gratification. He submitted that there was no proof that the accused paid R200,000 or that PC Samedi received that amount. That was not necessary as the case for the prosecution is that the accused "promised or offered to give", which acts are included in the offence under section 91 (b). He further submitted that at the point Samedi agreed to assist on the basis of the offer of money, he himself became liable to be prosecuted under section 91 (a) which makes it an offence to "agree to receive" a gratification. A similar situation arose in the case of *Uganda v Mukhalwe* (1968) EA 373. In that case a magistrate in Uganda solicited a bribe of 100 Shillings and two bunches of Matoke (cooking bananas) from a defendant in a case to give judgment in his favour. The defendant agreed, but reported the matter to the police. The police set a trap and gave the defendant 30 Shillings in marked notes which he handed over to the magistrate. The magistrate asked the defendant to deliver the Matoke to his residence. The police arrested the magistrate, and in a subsequent trial he was convicted and sentenced.

In that case, the agreement to give did not constitute an offence as it was done to set a trap through the police. Similarly in the instant case, the agreement to receive does not constitute an offence as it was done for the same purpose. According to the evidence PC Samedi agreed to permit his duties to be influenced with the intention of trapping the accused and not to benefit by the offer. ASP Mousbe testified that PC Samedi reported the matter to him immediately on his return to the office and that it was he who instructed him to proceed as if his agreement to assist was genuine. From that moment both PC Samedi and ASP Mousbe were performing their legitimate duties as police officers to apprehended the accused.

The offence however requires an overt act apart from the mere evidence of a person that someone has offered a gratification for the performance or non performance of a public duty within his scope of employment. The overt acts in the present case are the various telephone calls between the accused and PC Samedi monitored by ASP Mousbe either on the speaker or the parallel line and the fact that the accused, in reliance on the assistance promised by PC Samedi, came to the drug squad premises in the early hours of 14 November 1997 to execute the plan. There is also the evidence of Gustave, who was guarding the main port entrance, that he too was promised a

bottle of whisky by the accused to permit entry to the drug squad premises. The latter offer is however not part of count 2, but provides additional evidence of an overt act independent of the evidence of PC Samedi. The Court is therefore satisfied beyond a reasonable doubt that the prosecution has established the charge under count 2. Accordingly I convict the accused on count 2 as charged.

The accused is therefore convicted on both counts 1 and 2 as charged.

Record: Criminal Side No 003 of 1998