

IN THE SEYCHELLES COURT OF APPEAL

[Coram: S. Domah (J.A), A. Fernando (J.A), J. Msoffe (J.A)]

**Criminal Appeal SCA07, 12 & 13/2014
(Appeal from Supreme Court Decision CR 43/2012)**

Naddy Dubois

Marie Jean

Shelton Jean

Appellants

Versus

The Republic

Respondent

Heard: 06 April 2017

Counsel: Mrs. Alexia Amesbury for the 1st Appellant
Mr. Nichol Gabriel for the 2nd Appellant
Ms. Karen Domingue for the 3rd Appellant
Mr. Chinnasamy Jayaraj for the Respondent

Delivered: 21 April 2017

JUDGMENT

A. Fernando (J.A)

1. The Appellants have appealed against their convictions and sentences imposed against them by the Supreme Court under several charges under the National Drug Enforcement Agency Act (NDEA) and the Penal Code.
2. The following charges were laid against the Appellants before the Supreme Court as stated in the court record:

“COUNT 1

Statement of Offence

Obstructing, interfering with, resisting or delaying NDEA Agents in the exercise of their duties contrary to Section 16 (6) (c) of the NDEA Act and read with Section 23 of the Penal Code (Chapter 158) and punishable under Section 17(3) of the NDEA Act.

Particulars of offence

Naddy Dubois of Corgate Estate, Mahe and Marie Jean of Corgat Estate, Mahe and Shelton Jean of Corgate Estate, Mahe and Jean-Yves Dubois of Corgate Estate, Mahe on the 10th July 2012 at around 13.30 hrs at Corgate Estate, Mahe, delayed, obstructed, interfered with, resisted NDEA Agents namely Michel Nourrice, Agent Yvon Legaie, Agent Patrick Hortere in the exercise or performances of their duties or attempted to prevent the NDEA Agents to perform their duties.

COUNT 2

Statement of offence

Committing an act intended to threatening another with injury or violence to omit to do any act which that person is legally entitled to do contrary to section 89 (a) read with section 23 of the Penal Code and punishable under section 89 of the Penal Code.

Particulars of offence

Naddy Dubois of Corgate Estate, Mahe and Marie Jean of Corgate Estate, Mahe and Shelton Jean of Corgate Estate, Mahe and Jean-Yves Dubois of Corgate Estate, Mahe on the 10th July 2012 at around 13.30 hrs at Corgate Estate, Mahe, threatened with violence and injury and committed bodily injuries against the NDEA Agents namely Michel Nourrice, Agent Yvon Legaie, Agent Patrick Hortere in the exercise or performances of their powers or duties and prevented the NDEA Agents from performing their duties.

COUNT 3

Statement of offence

Committing acts wilfully and unlawfully destroying or causing damages to the property contrary to section 325 (1) read with section 23 of the Penal Code and punishable under section 325 of the Penal Code.

Particulars of offence

Naddy Dubois of Corgate Estate, Mahe and Marie Jean of Corgate Estate, Mahe and Shelton

Jean of Corgate Estate, Mahe and Jean-Yves Dubois of Corgate Estate, Mahe and Vincent Marie of Foret Noire, Mahe and Andrew Sophola of Corgate Estate, Mahe on the 10th July 2012 at around 13.30 hrs at Corgate Estate, Mahe, caused damages to the Vehicles S 4946, S 17747, S 17574 belonging to NDEA by pelting stones.

COUNT 4

Statement of offence

Committing acts of assault or attempts to assault NDEA Agents Contrary to section 16 (6) (a) of the NDEA Act and read with section 23 of the Penal Code punishable under section 17(3) of the NDEA Act.

Particulars of offence

Naddy Dubois of Corgate Estate, Mahe and Marie Jean of Corgate Estate, Mahe and Shelton Jean of Corgate Estate, Mahe and Vincent Marie of Foret Noire, Mahe and Andrew Sophola of Corgate Estate, Mahe on the 10th July 2012 at around 13.30 hrs at Corgate Estate, Mahe, assaulted the NDEA Agents namely Michel Nourrice, Agent Yvon Legaie, Agent Patrick Hortere and attempted to assault other NDEA Agents while performing their duties.

COUNT 5

Statement of offence

Committing acts with intend to cause grievous harm to a person contrary to section 219(a) of the Penal Code read with section 23 of the Penal Code and punishable under section 219(a) of the Penal Code.

Particulars of offence

Naddy Dubois of Corgate Estate, Mahe and Marie Jean of Corgate Estate on 10th July 2012 at around 13.30 hrs at Corgate Estate, Mahe, unlawfully wounded an NDEA Agent Michel Nourrice by throwing flower pot with full of soil and jar with the common intention to cause grievous harm.

COUNT 6

Statement of offence

Committing acts with intend to cause grievous harm to a person contrary to section 219(a) read with section 23 of the Penal Code and punishable under section 219 of the Penal Code.

Particulars of offence

Marie Jean of Corgate Estate and Naddy Dubois of Corgate Estate on 10th July 2012 at

around 13.30 hrs at Corgate Estate, Mahe, unlawfully wounded an NDEA Agent Yvon Legaie by throwing a can spray with the common intention to cause grievous harm.”

3. At the conclusion of the trial the 1st, 2nd, and 3rd Appellants had been convicted of counts one, two, three, and four and sentenced to periods of imprisonment of 11, 5, 2 and 11 years respectively in respect of the said counts. The 1st Appellant had been convicted of count 5 and sentenced to a period of 5 years and the 2nd Appellant had been convicted of count 6 and sentenced to a period of 5 years. All sentences against the Appellants had been ordered to run concurrently.

4. The Appellants have averred in their Notice of Appeal against conviction that:

“The conviction of the Appellants was unsafe and unsatisfactory for the following reasons:

a. The Appellants were prejudiced in their defence as the counts were duplicitous “an indictment may contain more than one count, but each count must allege only one offence, so that the defendant can know precisely what offences he or she is accused of”

(i) In count 1 the Appellants are alleged to have **delayed, obstructed, interfered, resisted the NDEA agents or attempted to prevent the NDEA agents to perform their duties**. The charge should have clearly and unambiguously laid out which of the several acts contained in section 16(c) the Appellants had committed and not simply charged them with **ALL** the section says, as this violates article 19(2) of the Constitution and is duplicitous.

(ii) In count 2 “threatening another with violence **OR** injury and the particulars goes on to say that the Appellants “committed bodily injuries against the NDEA agents” i.e. actual bodily harm, and “prevented the NDEA agents from performing their duties”. Which of the several acts did the Appellant do?

(iii) In count 5 and 6 “acts intended to cause grievous bodily harm” but in the particulars 1st and 2nd Appellants are alleged to have “unlawfully wounded” NDEA agents.

b. The trial Judge erred by convicting the Appellants for a multiplicity of offences and the 1st 2nd and 3rd Appellant received multiple imprisonment for the same offence but under different laws.”

5. As against sentence they have averred, as per the court record –

“The sentences of 11 years, 5 years, 2 years, 11 years, 5 years and 5 years imprisonment is manifestly harsh and excessive in all the circumstances of the case, especially considering: the sentencing pattern of courts for similar offences;

The total sentence imposed is 39 years but the 1st 2nd and 3rd Appellants will each serve 11 years.

- (i) The Appellants were convicted on count 1 for an offence contrary to section 16(c) of the NDEA Act read with section 23 of the Penal Code and punishable under section 17(3) of the NDEA Act and the 1st, 2nd and 3rd Appellants were sentenced to 11 years of imprisonment. The custodial sentence that a Judge could legally impose on a conviction for an offence under the section of the NDEA Act which they were convicted is “**a term not exceeding 5 years**’ the Learned trial erred when he sentenced them to 11 years of imprisonment as this sentence is not only harsh and excessive but also illegal as it is not a sentence that is “established by law” for an offence under section 16 (c) of the NDEA Act.
- (ii) The Appellants were convicted on count 2 for an offence under section 89 (a) of the Penal Code read with section 23 of the Penal Code and the first 3 Appellants were sentenced to a **term of 5 years imprisonment**. Imposing the **maximum** sentence of 5 years imprisonment for a misdemeanour of “threatening violence” is manifestly harsh and excessive in all the circumstances of the case.
- (iii) The Appellants were convicted on count 3 for an offence under section 325 (1) of the Penal Code read with section 23 of the Penal Code and punishable under section 325 of the same and the first 3 Appellants were sentenced to 2 years of imprisonment. Imposing the **maximum** term of 2 years imprisonment for a misdemeanour (criminal damage to vehicles) is manifestly harsh and excessive.
- (iv) The first 3 Appellants were convicted on count 4 for an offence under section 16 (6) (a) of the NDEA Act read with section 23 of the Penal Code in that the Appellants had “assaulted NDEA Agents, and the offence is punishable under section 17 (3) of the NDEA Act and the first 3 Appellants were sentenced to 11 years of imprisonment. This sentence is manifestly harsh and excessive considering the sentencing pattern of courts for similar offences.
- (v) Although charged with an offence under section 219 of the Penal Code, the 1st Appellant was convicted for a lesser offence under section 236 of the Penal Code; assault occasioning actual bodily harm and sentenced to a term of 5 years imprisonment. This sentence is manifestly harsh and excessive considering the sentencing pattern of courts for similar offences.

- (vi) Although charged with an offence under section 219 of the Penal Code the 2nd Appellant was convicted for a lesser offence under section 236 of the Penal Code; assault occasioning actual bodily harm and sentenced to a term of 5 years imprisonment. This sentence is manifestly harsh and excessive considering the sentencing pattern of courts for similar offences.
 - (vii) By sentencing the 2nd Appellant to a term of 11 years of imprisonment the learned trial Judge failed to give proper or any consideration at all that the 4th Appellant was a minor suffering from asthma a fact that was before the court as that was the ground used to remand the 2nd Appellant to bail during the trial.
 - (viii) The Learned trial Judge failed to obtain a pre-sentencing (probation report) although defence counsel requested one so as to satisfy himself that adequate care and provisions were available to assist the minor.
 - (ix) The learned trial Judge failed to apply correctly the principle of proportionality of sentences.
6. PW 1 NDEA agent Yvon Leggaie had testified to the effect that on the 10th of July 2012, he along with agents Nourrice, Hortere and Michel were on patrol duty, when they received information of an ongoing drug transaction at the house of N. Dubois, the 1st Appellant. They had then gone to the house of the 1st Appellant and said that they were NDEA officers and requested that the door be opened to conduct a search of the premises. Since their efforts to get the inmates of the house of the 1st Appellant to get the door of the house opened failed, he had started to force open the door with a crowbar. The 1st Appellant had then opened the door armed with an axe in his hand and abused him and the other NDEA officers in filthy abusive language and threatened to cause them serious injuries, saying that they will not search his house as there were no drugs therein. According to PW 1 he had seen about 10 to 15 people inside the house armed with machetes and knives. The 2nd and 3rd Appellants had then come out of the house with a pipe and piece of wood respectively, approximately 1 meter long and used filthy abusive language on them and threatened to cause them serious injuries. There were others inside the house who were armed and threatening to attack and kill the NDEA officers. In the course of this melee the 1st Appellant had hit PW1 on his chin with his fist. When the other NDEA officers whose assistance by way of reinforcement had been called had arrived the Appellants had closed the door of the house. Later when the door was opened PW 1 had seen pieces of foil paper, blades, knives, lighters and bent glasses on a table and the floor of the house. While inside the house the 1st Appellant had thrown a glass jar of mayonnaise in the face of PW 3, agent Nourrice, which caused him injuries and to bleed. The 2nd Appellant had thrown a spray can at PW 1 which hit him on his forehead. When PW 1 through fear was running out of the house, the 1st Appellant had thrown a flower pot at him which hit him on his left eye. This had made him dizzy and

caused him to fall on the corridor. The 1st and the 3rd Appellants had then kicked him several times. PW 1 had then managed to get up and run away from the 1st Appellant's house towards their vehicles. The rest of the NDEA officers had already run to their vehicles by this time. The Appellants had continued to throw rocks, bricks and bottles at the NDEA officers and their vehicles, which caused damage to the vehicles. The NDEA officers had not been able to conduct a search of the house as a result of the attack on them. PW 1 had thereafter been taken to the Victoria hospital where he was attended to. As a result of the injuries he sustained PW 1 had to be on leave for a period of 1 ½ months and had to go regularly for physiotherapy. The evidence of PW 1 Leggaie had been corroborated by PW 3 Nourrice. PW 5 Hortere had testified to the effect that they were unable to carry out a search in the premises of the 1st Appellant due to the threats and violent conduct on the part of the persons at the premises of the 1st Appellant, among whom were the Appellants.

7. The photographs showing the injuries sustained by PW 1 and PW 3, the medical reports pertaining to PW 1 and PW 3 and the photographs depicting the damage to the cars had been produced before the Trial Court. The medical reports show that PW 1 and PW 3 had reported to and had been examined at the Victoria hospital on the day of the incident and this corroborates their version as to the injuries suffered by them. The testimony of the doctors who testified for the prosecution in the case show that PW 1 and PW 3 had suffered injuries on the day of the incident.
8. Defence had not challenged that the NDEA officers' visit to the house of the 1st Appellant to carry out a search of the premises nor the injuries on PW 1 and PW 3 and the damage to the NDEA vehicles. There are no grounds of appeal filed in relation to the factual position as narrated by the prosecution witnesses. The defence position had been that the Appellants had not attacked the NDEA officers and caused them injuries and that PW 1's injuries were as a result of him tripping and falling at the 1st Appellant's house.
9. There is not an indication at all from the line of cross-examination by the defence that the Appellants were prejudiced in their defence since the counts were duplicitous and as a result the Appellants did not know precisely what offences they were accused of; namely, the complaint they are seeking to make before this Court on appeal. The defence position, although accepting their presence at the scene of the incident, had been one of a total denial of the entire incident, namely the commission of any of the offences by the Appellants, as testified by the prosecution witnesses. Their position is that there had been no threats or attack on the NDEA officers or damage to the NDEA vehicles by any one of the Appellants and that it was the NDEA officers who forced themselves into the house and attacked the two sons of the 1st and 2nd Appellants. The testimony of the Appellants does not give a plausible explanation as to the injuries suffered by the PW1 and PW 3, damage to the NDEA vehicles and the calling for reinforcements. To accept the defence version would mean that the NDEA officers, without any justification came

into the house of the 1st Appellant and attacked his two sons, suffered injuries in the process, got their vehicles damaged and left. The Appellants have not attributed any motive for this senseless behaviour on the part of the NDEA officers.

10. The Appellants' sole ground of appeal against conviction is that: "the Appellants were prejudiced in their defence as the counts were duplicitous "an indictment may contain more than one count, but each count must allege only one offence, so that the defendant can know precisely what offences he or she is accused of". That each count must allege only one offence is a correct statement of the law of what has come to be known as the rule against duplicity, i.e. no one count of the indictment should charge the defendant with having committed two or more separate offences. Where a count is bad on its face for duplicity, the defence should move to quash it before the accused are arraigned. There has been no objection to the indictment at the commencement of the trial, during the course of the trial or at the stage of submissions before the Supreme Court by Counsel for the Defence.
11. In count 1, the appellants have been charged under **section 16(6)(c) of the NDEA Act** which reads as follows: "*A person who delays, obstructs, impedes, interferes with, resists or delays an NDEA agent or any person lawfully accompanying or assisting an NDEA agent in the exercise or performance of his powers or duties or attempts or conspires, is guilty of an offence*". The punishment for the said offence is to be found in section **section 17(3) of the NDEA Act** which states: "*A person who is guilty of an offence under section 16(6) is liable on conviction, to a fine not exceeding R5,000,000 or to imprisonment for a term not exceeding 20 years, or to both*". Thus we find that by whichever acts the offence is committed it is deemed as one offence. By refusing a search of the premises, threatening the NDEA officers with serious injury and attacking them with fists, a glass jar, spray can and a flower pot and damaging their vehicles by pelting stones; the Appellants had "delayed, obstructed, interfered, resisted the NDEA agents or attempted to prevent the NDEA agents to perform their duties". According to the prosecution evidence the Appellants had committed all the acts particularised in count 1 and thus the prosecution was perfectly entitled to refer to all the acts the Appellants had committed in count 1 and thus there is no ambiguity in count 1 and we therefore fail to see how the Appellants could have been prejudiced as a result of the way count 1 has been framed. In fact the Appellants must consider themselves fortunate that the prosecution had not decided to have separate counts for delaying, obstructing, interfering, resisting the NDEA agents or attempting to prevent the NDEA agents to perform their duties.
12. In count 2, the Appellants had been charged under **section 89(a) of the Penal Code** which reads as follows: "Any person who threatens another with any injury, damage, harm or loss to any person or property with intent to cause alarm to that person, or to cause that person, to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as a means of avoiding the execution of

such threat is guilty of a misdemeanour and is liable to imprisonment for five years”. (underlining by us). In view of the provisions of section 114(b) (i) of the Criminal Procedure Code referred to at paragraph 13 below we see no ambiguity in count 2 and fail to see how the Appellants could have been prejudiced as a result of the way count 2 has been framed. It has been the evidence of the prosecution that the Appellants had threatened violence and injury to the NDEA officers in the exercise or performances of their powers or duties and prevented the NDEA Agents from performing their duties which they were legally entitled to do under the law, namely to conduct a search of the premises of the 1st Appellant for prohibited drugs. The fact that that count 2 had gone on to state that the Appellants had “committed bodily injuries against the NDEA agents” does not make count 2 defective. For the fact remains according to the evidence of the prosecution the Appellants had not stopped with the threats but went on to commit actual bodily harm to the NDEA agents.

13. We see no duplicity or ambiguity in counts 5 and 6 with which the 1st and 2nd Appellants had been charged, namely, under section 219(a) of the Penal Code. **Section 219(a) of the Penal Code** with the heading ‘Acts intended to cause grievous harm or to prevent arrests’ reads as follows: “Any person who, with intent to maim, disfigure or disable any person, or to do some grievous harm to any person, or to resist or prevent the lawful arrest or detention of any person unlawfully wounds or does any grievous harm to any person is guilty of a felony, and is liable to imprisonment for life”.
14. Rules pertaining to framing of charges are to be found in **section 114 of the Criminal Procedure Code** which states that the provisions contained therein shall apply to all charges and information and, notwithstanding any rule of law or practice, a charge or an information shall, subject to the provisions of this Code, not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of the Code. **Section 114(b)(i)** states: “Where an enactment constituting an offence states the offence to be an omission to do any one of any different acts in the alternative, or the doing or the omission to do any act in any one of any different capacities, or with any one of different intentions, or states any part of the offence in the alternative, the acts, omissions, capacities or intentions, or other matter stated in the alternative in the enactment, may be stated in the alternative in the count charging the offence”.
15. Commenting on an identical provision in the Indictment Rules 1971 of UK, it is stated in **Blackstone’s Criminal Practice 2010 D 11.49**: “What is required, therefore, is a correct assessment of whether a statutory provision is creating one offence that may be committed in a number of alternative ways, or is creating several separate offences. If the former, these statutory alternatives may be particularised as alternatives in one count; if the latter, the rule against duplicity applies and each alternative the prosecution wish to put before the jury must go into a separate count”. In **Naismith (1961) 1 WLR 952, Ashworth J**, in determining whether an allegation that N had ‘caused grievous bodily harm, to H with intent to do him grievous bodily harm, or to

maim, disfigure or disable him' was bad for duplicity had said: *"It seems to this court that the proposition with which [counsel for the crown] started his argument is the right approach. That approach is to keep in mind the distinction between a section creating two or more offences and a section creating one offence but providing that the offence may be committed in more than one way.....so far as the intents specified in section 18 are concerned, they are variations of method rather than creation of separate offences in themselves. It is probably true to say that the species of assault mentioned in that section, of which there are three, are each in themselves different offences, that is to say, wounding, causing grievous bodily harm and shooting, but that difference does not affect the result of this case in the least because the only act or species of assault alleged was causing grievous bodily harm". Lord Widgery CJ in Jemison V Priddle [1972] 1 QB 489 said: "I agreethat it will often be legitimate to bring a single charge in respect of what might be called one activity even though that activity may involve more than one act". In a similar vein, Lord Diplock had said: "Where a number of acts of a similar nature committed by one or more defendants were connected with one another, in the time and place of their commission or by their common purpose, in such a way that they could fairly be regarded as forming part of the same transaction or criminal enterprise, it was the practice, as early as the 18th century, to charge them, in a single count of an indictment". Blackstone's Criminal Practice 2010"at D 11.44 states: "In summary, the conclusion in DPP V Marriman (1973) AC 584 was that a count is not to be held bad on its face for duplicity merely because its words are logically capable of being construed as more than one criminal act. This applies whether a count is against one accused or several."*

16. There is no violation of article 19(2) of the Constitution as count 1 has sufficiently informed the Appellants in detail of the nature of the offence they had committed by making reference to the acts the Appellants had committed.
17. If several offences had been committed in the course of an incident the prosecution is at liberty to charge the offender with all such offences and for a Court to convict such offender with a multiplicity of offences. However where the same act constitutes separate offences under different laws a Court should not impose multiple terms of imprisonment on the offender for the same act.
18. We therefore dismiss all the grounds of appeal against conviction and strongly warn Counsel to read the relevant provisions of the law before they come up with absolutely frivolous grounds of appeal and waste the time of this Court.
19. In the first ground of appeal against sentence, Counsel for the Appellants had urged that the sentence imposed by Court in respect of count 1 "is illegal as it is not a sentence that is established by law for an offence under section 16 (c) of the NDEA Act". In making this statement, Counsel had not only read properly count 1 of the Indictment which

specifically refers to section 16(6)(c) but failed to look into the penalty provided by the NDEA Act in section 17(3) for committing an offence under section 16(6)(c) of the said Act. According to **section 17(3)** “A person who is guilty of an offence under section 16(6) is liable on conviction, to a fine not exceeding R5,000,000 or to imprisonment for a term not exceeding 20 years, or to both” We state that this is irresponsible conduct on the part of Counsel.

20. The imposition of the maximum sentences under counts 3 and 4 for offences under section 89(a) and 325(1) in our view are justified in view of the facts of this case. To threaten injury and violence, to the extent as borne out by the evidence, with intent to prevent NDEA officers from performing their duties and to attack and damage vehicles used in conducting search of premises suspected of drug dealing have to be viewed very seriously by the courts. The drug menace is a scourge on our society and to threaten those involved in combating it and damaging their vehicles in our view calls for the maximum penalty.
21. We do appreciate that the Appellants’ acts of assaulting and causing injuries to Yvon Legaie and Michel Nourrice, for which they have been charged under counts 4, 5 and 6 are treated as separate and distinct offences both under NDEA Act and the Penal Code, namely, sections 16(6)(a) of the NDEA Act and 219(a) of the Penal Code. The said offence under the NDEA Act has been created by the Legislature in its wisdom, to provide special security to officers who are involved in the difficult battle against the drug menace. **Section 16(6)(a) of the NDEA Act** states: “A person who assaults or attempts to assault an NDEA agent or any member of the family of an NDEA agent is guilty of an offence” and the punishment for such offence has been prescribed in **section 17(3)** of the said Act which states: “A person who is guilty of an offence under section 16(6) is liable on conviction, to a fine not exceeding R5,000,000 or to imprisonment for a term not exceeding 20 years, or to both”. Section 219(a) of the Penal Code as stated earlier reads as follows: “Any person who, with intent to maim, disfigure or disable any person, or to do some grievous harm to any person, or to resist or prevent the lawful arrest or detention of any person unlawfully wounds or does any grievous harm to any person is guilty of a felony, and is liable to imprisonment for life”. Although section 219(a) makes intention a specific element of the offence the element of intention needs to be established even in relation to an offence under section 16(6)(a) of the NDEA Act, when taking into consideration the seriousness of the offence and the stiff penalty prescribed for the offence. An offence under section 219(a) however carries a penalty of imprisonment for life. We do not fault the learned Trial Judge for having convicted the Appellants under counts 4,5 and 6, but are of the view that in sentencing he could have chosen to stay passing sentence either on the counts under the NDEA Act or the Penal Code and left them on file. However the fact that he had decided to pass concurrent sentences in respect of these counts shows that he entertained such intention and thereby we hold no prejudice had been caused to the Appellants.

22. It is the complaint of the 1st and 2nd Appellants that although each one of them had been charged with an offence under section 219 of the Penal Code in counts 5 and 6 respectively they both had been convicted for a lesser offence under section 236 of the Penal Code, namely assault occasioning actual bodily harm and sentenced to a term of 5 years imprisonment. We are unable to comprehend why the 1st and 2nd Appellants are complaining regarding this when the learned Trial Judge in our view could have convicted them under section 219(a) for unlawful wounding as charged, on the basis of the evidence adduced in this case. A conviction under section 219(a) would have made them liable to imprisonment for life. Further under section 156(2) of the Criminal Procedure Code *“When a person is charged with an offence, and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”* The fact that the injuries on PW 1 Legaie and PW 3 Nourrice were not permanent or serious and they had suffered only minor lacerations, bruises and abrasions as argued by the Appellants in their skeleton heads of arguments is of no relevance since the actus reus that needs to be proved under the Penal Code in section 219(a) is ‘unlawful wounding’ and under section 236 an ‘assault occasioning actual bodily harm’.
23. We do not find that any one of the sentences imposed in respect of the offences for which the Appellants had been convicted are “manifestly harsh and excessive” taking into consideration the conduct of the Appellants. In fact the learned Trial Judge had shown leniency in sentencing and ordering that the sentences to run concurrently. To vary any one of the sentences would be to send the wrong message to society that officers involved in the fight against drugs can be threatened, abused, set upon and attacked and their vehicles damaged.
24. We are of the view that obtaining a pre-sentencing (probation report) is not a necessary must before sentencing an offender. It is to be noted that the record does not bear out that Counsel for the Appellants had requested while pleading in mitigation of sentence, for a pre-sentencing (probation report) as stated at paragraph (viii) in his grounds of appeal against sentence. In the case of **Roger Aglae vs The Republic, Cr No.15 of 1997** this court said: *“In Seychelles, however, there is no legal obligation, statutory or otherwise, placed on a court to obtain a social welfare report for the purpose of assisting the court to pass an appropriate sentence. Although such reports are desirable, or even essential, in some cases (and where necessary, courts are encouraged to ask for them) calling for them is discretionary, not mandatory.”* 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, taking into account along with all of the other relevant factors, the best interests of an accused person’s minor children who will inevitably be prejudiced by the sentencing of their parent. If that information can be placed before the court in another satisfactory way, there is no need for a probation officer’s report.”* In the instant case, like in the

South African case Sadhasivan Nolan Chetty we find from the record that the relevant information had been furnished to the Trial Court to the effect that Jean-Yves Dubois who was the 4th accused at the trial before the Supreme Court was a minor and suffering severely from asthma and that the 2nd Appellant, his mother was his caregiver when Counsel for the Appellants pleaded in mitigation of sentence. But we find from a medical report issued by the Health Services Agency which is on file that the date of birth of the 4th accused is 13-03-1997 and is 20 years now and had been 16.10 years when the plea in mitigation of sentence was made. All that the medical report states is that he had been “suffering from bronchial asthma and attended clinic frequently for management”. There is no mention of him needing a carer to take care of him. The 4th accused who was convicted along with the Appellants had been placed on probation by the Trial Judge when sentencing and his probation period has also now come to an end. In the **South African case of S v M (Centre for Child Law as amicus curiae) 2007 (2) SACR 539 (CC) Sachs J** stated that: “while a trial court should ‘find out whether a convicted person is a primary caregiver whenever there are indications that this might be so’, it was not necessary to obtain a probation officer’s report in every case: the accused could be asked for the necessary information” In the **South African case of S v EB 2010 (2) SACR 524 (SCA) Cloete JA** pointed out: “while one has sympathy for children in situations such as this, ‘their emotional needs cannot trump the duty on the State properly to punish criminal misconduct where the appropriate sentence is one of imprisonment’. In the case of **Haron Mandela Naibei vs The Republic, Criminal Appeal Case No. 116 of 2013, the High Court of Kenya sitting at Bungoma** stated: “A court is entitled to call for a probation report on an accused before passing its sentence. However, such a probation report is not binding on the court. The report only acts as a guide. A court can either adopt or ignore such a report”.

25. We are also of the view that the principle of proportionality has no application in the circumstances of this case. We therefore dismiss the appeal of the Appellants on sentence.

26. We dismiss the appeals of all three Appellants both against conviction and sentence.

A.Fernando (J.A)

I concur:

S. Domah (J.A)

I concur:

J. Msoffe (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 21 April 2017