

IN THE SEYCHELLES COURT OF APPEAL

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

Criminal Appeal SCA 06, 15 & 16/204

(Appeal from Supreme Court Decision CR 53/2012)

Dave Rose

Christopher Nicholas

Leslie Payet

Appellants

Versus

The Republic

Respondent

Heard: 01 December 2016

Counsel: Mr. Anthony Juliette for the 1st & 3rd Appellants

Mr. Anthony Derjacques for the 2nd Appellant

Mr. Benjamin Mathew Vipin for the Respondent

Delivered: 09 December 2016

JUDGMENT

J. Msoffe (J.A)

[1] The 15th day of August 2012 was a public holiday in Seychelles and there were not many people walking along the streets of Victoria, Mahe, in the afternoon of that day. At around 14.30 hours Mr. Vijish V. Joy and Mr. Madhu Manoj were walking along La Promenade, Victoria, on their way to their workplace at the Indian Ocean Tuna factory when they were attacked by people they identified to be the Appellants herein. Since they were in the company of Ms. Kelly Dubel at the material time the charge that was subsequently preferred in court against them read as follows:-

Count 1

Statement of offence.

Robbery with violence contrary to and punishable under Section 281 of the Penal Code read with Section 23 of the Penal Code.

The particulars of offence are that, Leslie Payet of Majoie, together with persons known to the Republic namely Christopher Nicholas of Hangard Sreet, Dave Rose of Hangard Street and Ms. Kelly Dubel of Majoie, on the 15th of August 2012, at La Promenade, Mahe with common intention robbed Mr. Vijish V. Joy of his mobile phone and also around also SR100/- in different denominations and also robbed from Mr. Madhu Manoj SR500/- and at the time of robbery used knife and personal violence to the said Mr. Vijish V. Joy and Mr. Madhu Manoj.

[2] After a full trial, they were all convicted as charged. They were sentenced to terms of imprisonment as follows:-

The first Appellant, 12 years; the second Appellant, 10 years; the third Appellant, 10 years and the fourth Accused, 1 year.

Dissatisfied, the Appellants are appealing. It appears the fourth accused was satisfied with the conviction and sentence meted on her because there is no record that she is appealing.

[3] Both the first and third Appellants have a common memorandum of appeal with three grounds of appeal filed on their behalf by learned counsel. The second Appellant has his own grounds of appeal filed by learned counsel. However, the common thread that runs through all the grounds is based on the following grounds of complaint:-

1. That the Learned Judge erred in his findings on the CCTV evidence in that the CCTV camera is in Market Street, which is very far from the alleged crime scene at La Promenade and that it shows no act of robbery.
2. That the Learned Judge erred in his appreciation of the identification evidence in that such identification was a dock identification without an identification parade having been properly conducted.

3. That the Learned Judge erred in finding that there was common intention by the Appellants to commit the offence of robbery with violence as this was not supported or corroborated by any independent testimony.
4. That the sentences given were harsh and were not in line with the principles laid out in *Ponoo vs Attorney General*.

[4] We think it is fair to say that this appeal is based on the findings of fact by the trial Judge under paragraphs 12, 13, 14 and 17 of his Judgment. In view of the importance we attach to these findings we propose to reproduce the paragraphs verbatim as under, with a caution that at the trial the first Appellant herein was the third accused, the second Appellant was the second accused and the third Appellant was the first accused.

[12] *Having thus analysed the evidence when one considers the evidence of the two victims in this case namely Nadoo Manoj and Vijish V. Joy it is clear that on the 15th of August 2012 around 14.40 hrs they had seen four persons including a lady approaching them. It is apparent from the evidence of Nadoo Manoj that two of these individuals who he identified in open court as the 1st accused and the 3rd accused had attacked him. The 1st accused had pointed a knife at his neck and the 3rd accused had held him and they had taken his bag which was on his back and his wallet which had about SR500. He identified the accused in open court. Witness Vijish V. Joy stated that the 2nd accused had assaulted him and then the other two accused namely the 1st and 3rd accused had come and they too had beaten him up and taken his phone, headset and SR70.*

[13] *Further the evidence of the prosecution clearly indicates that soon after this incident around 2.51 p.m all four accused were seen together close to the scene of crime at Market Street and were caught on CCTV camera placed in the area. They were identified on the video clip by both witnesses and Vijish V. Joy was able to identify his head set on one of the accused. Police officer Denis Sauzier who had been operating*

the CCTV camera for 5 years had noticed the suspicious behaviour of the accused and contacted Central police station and had been told that two Indians had been beaten up in the vicinity of La Promenade by a group of three men and a lady. The persons were subsequently identified by other police officers. It is to be noted that the 1st 2nd and 3rd accused in their unsworn statements from the dock admit it was them on the P4 video recording.

[14] *It is apparent that when one watches the video recording of the CCTV camera, an altercation with some other persons has been recorded which clearly shows the aggressive nature of the 1st accused and the other accused even though the 1st accused in his statement attempts to show court he is not aggressive and states he will never attack anyone. The recording shows the 1st accused and the other accused acting in an aggressive manner with some other persons. The fact that violence and a dangerous weapon was used and injury was caused to the victims in this instant case is clearly borne out by the evidence of both victims who identify the 1st 2nd and 3rd accused as the attackers.*

[17] *Further it is apparent that the victims had observed the four accused walking towards them before they were actually attacked so the defence contention that they would have not been able to identify them as they were attacked suddenly and would have been afraid bears no merit. Further the incident occurred in broad daylight. When one considers the evidence as a whole this court is satisfied that the prosecution has satisfied court beyond reasonable doubt that it was the four accused who had committed the attack on the victims and stolen items and cash from them. The evidence of victim Manoj that a knife was used in the attack is corroborated by the evidence of the other victim Vijish and by the medical evidence of Dr. Afif. Though subject to cross examination there were no material contradictions that would make one disbelieve the evidence of the prosecution witnesses in this case.*

- [5] It is evident from the above paragraphs that the Appellants' convictions were based on evidence of identification at the scene, dock identification and the footage on the CCTV camera. The question is whether there is basis for us to interfere with the findings of fact made by the trial Judge on the above aspects of the case.
- [6] It is trite in many jurisdictions that Courts of Appeal are slow to interfere with findings of fact by courts below unless they are perverse, manifestly unreasonable, or if there were misdirections or non-directions on the evidence, etc. In saying so, we are aware that under Rule 31(1) of the Court of Appeal Rules, 2005 appeals to this Court are by way of a re-hearing but there must be strong and compelling reason(s) to interfere with findings of fact by a trial Judge.
- [7] The correct approach in deciding whether or not to interfere with findings of fact by a trial Judge was stated by the UK Supreme Court in the fairly recent decision of **McGraddie v McGraddie** [2013] UK SC 58; [2013] 1 WLR 2477 as summarized in the head note thus:-

It was a long settled principle, stated and restated in domestic and wider common law jurisprudence, that an appellate court should not interfere with the trial Judge's conclusions on primary facts unless satisfied that he was plainly wrong.

Lewison L.J. returned to the topic in Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5; [2014] ETMR 26. In a vivid passage at para [114] he said:

Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applied not only to findings of primary fact, but also the evaluation of those facts and to inferences to be drawn from them. ... The reasons for this approach are many. They include

- i. The expertise of the trial judge in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.*

- ii. *The trial is not a dress rehearsal. It is the first and last night of the show.*
- iii. *Duplication of the trial judge's role on appeal is a disproportionate use the limited resources of an appellant court, and will seldom lead to a different outcome in an individual case.*
- iv. *In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.*
- v. *The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).*
- vi. *Thus even if it were possible to duplicate the role of the trial judge it cannot in practice be done.*

[8] Prior to the decision in **McGraddie** the same principle had been restated or enunciated in other cases as under:-

[9] In **Clarke v Edinburgh & District Tramway Co. Ltd** 1919 SC (HL) Lord Shaw of Dunfermline stated that an appellate court should intervene only if it is satisfied that the Judge was "plainly wrong". IN **Thomson v Kvaerner Goan Ltd** [2003] UKHL 45; 2004 SC (HL) 1 Lord Hope of Graighead had this to say:-

*It can, of course, **only be on the rarest occasions**, and in circumstances where the appellate court is convinced by the plainest of considerations, that it would be justified in finding that the trial Judge had formed a wrong opinion.*

[Emphasis supplied.]

[10] Furthermore, in the majority decision of the Canadian Supreme Court in **Housen v Nikolaisen** [2002] 2 SCR 235 at para 14 the court stated:-

*The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. **The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders and rulings being challenged.***

[Emphasis supplied.]

- [11] In explaining why appellate courts are not in a favourable and better position to determine factual matters the Court in **Housen** (supra) had this to say:-

Appeals are telescopic in nature, focusing narrowly on particular issues as opposed to viewing the case as a whole.

- [12] In the more recent decision in **Clydesdale Bank v Duffy** [2014] EWCA Civ 1260 the Court of Appeal set out a clear statement of the limited role of a Court of Appeal in relation to findings of fact by the trial Judge thus:-

*The Court of Appeal is not here to retry the case. Our job is to review the decision of the trial judge. If he has made an error of law, it is our duty to say, **but reversing a trial judge's findings of fact is a different matter.***

[Emphasis supplied.]

- [13] In yet another recent decision in **Goyal v Goyal** [2014] EWCA Civ 523 Lord Justice Kitchin warned about the need for not interfering with findings of fact by trial Judges when he stated:-

*This applies not only to findings of primary fact but also to the evaluation of those facts and to inferences to be drawn from them. The reasons for this approach include **the expertise of trial judges in determining what facts are relevant to the issues to be decided and what those facts are if they are disputed.***

In making his decision the trial judge will have regard to the whole of the evidence presented to him whereas an appellate court can only consider aspects of that evidence and duplication of the trial judge's role on appeal is a disproportionate use of limited resources of an appellate court and will lead to a different case.

[Emphasis supplied.]

[14] Coming back to the instant case, like the trial Judge, we too have no doubts in our minds that the Appellants were identified at the scene of crime on the material day and time. All conditions favouring a correct identification were present. It is true that the witnesses were strangers to the Appellants. But it is also true that the incident took place in broad daylight. The Appellants were not masked as not to allow for correct identification. The witnesses spent some amount of time in the course of the incident. All this time the witnesses were very much aware of the persons who were attacking them. In the course of the attack the witnesses and the attackers (the Appellants) stood in close proximity. Further, the witnesses could describe who did what in the course of the attack. For instance, Madhu Manoj stated that the third Appellant pointed a knife at his neck while the first Appellant had held him. Vijish V. Joy testified that the second Appellant assaulted him and then the other Appellants came and they too beat him and took his phone, headset and SR70. Further, at page 67 of the record, when he was asked as to whether he could recognize his attackers, despite being in a state of shock, his answer was in the affirmative.

[15] We are also satisfied that the trial Judge properly invoked the doctrine of common intention under section 23 of the Penal Code. The fact that the victims were assaulted by all the Appellants was indicative of common intention. This is clear from the evidence that when the Appellants held the victims, one of them pointed a knife at the victims, the other held the other victim while the other stole the items. This aspect of the case is best captured in the record of proceedings at pages 63 – 64 thus:-

Q Now coming to the incident could you describe exactly who caught you?

A The 1st one and the 3rd one.

Q What did they do the 1st and 3rd accused?

A It was the 1st one and the 3rd one who caught me and the 1st one placed the knife under my neck.

Q And after that could you explain to court what happened?

A After that they took my bag and my wallet was inside and they took Sr 500 from my wallet

Q Where was your bag?

A It was on my back.

Q Now after they took the money from your bag what did they do?

A After they took the money they left me and caught my friend.

Q Who went to your friend?

A The 2nd one.

[16] As for the evidence of dock identification in this case it should be stated that as was held in **Moustache v R** [2015] SCCA 42, here too, this was done merely to reinforce the witness's prior identification of the Appellants. At any rate, with or without the dock identification, there was still strong evidence to ground the conviction.

[17] Regarding the video footage it is pertinent to note the record of proceedings at page 82 where Vijish V. Joy had the following to say in cross-examination:-

Q Now when you were watching the video clip did the police tell you that these are the 4 people that they had arrested in connection with the incident that you had reported?

A The police said we had arrested them but we need to confirm if it is them.

Q Did the police (sic) other clippings, other photos of potential suspects?

A They showed only this clipping.

Q When you say clipping you mean video not photographs?

A We were shown the video and we confirmed to the police that it was the 4 people.

Q Now at the court house did any woman police officer point to them and say that these are the 4 accused?

A No, nobody told us but it was us who identified them.

[18] So, as already stated, it is discerned from the above record of proceedings that the video footage was brought in in evidence just to confirm the witness's prior identification of the Appellants. In saying so, we are mindful of the fact that the CCTV camera evidence showed no act of robbery; all it showed was that the Appellants were spotted at Market Street, not very far from the scene of crime. But the fact that the crime took place at around 2.30 p.m or thereabout, and that a few minutes later they were all spotted together at Market Street, circumstantially this was of significant importance to the case against them.

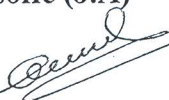
[19] In the upshot, mindful of the fact that this is essentially an appeal based on findings of fact by the court below, and in view of the limited powers conferred to a Court of Appeal as stated in the above cited authorities to which we subscribe to, and having looked at the evidence in sufficient detail, and conscious of the need to be slow and cautious in dealing with an appeal based on findings of fact, we see no basis for interfering with the trial Judge's findings of fact based on his appreciation of the evidence on record.

[20] In similar vein, given the seriousness of the crime we find no basis for interfering with the sentences imposed on the Appellants.

[21] In the end result, we dismiss the appeal in its entirety. As already ordered by the Supreme Court, we too order that the period(s) spent in remand custody should count towards sentence.



J. Msoffe (J.A)



I concur:

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S. Domah (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 09 December 2016

IN THE SEYCHELLES COURT OF APPEAL

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

Criminal Appeal SCA06, 15 & 16/2014
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1. Dave Rose
2. Christopher Nicholas
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Appellants

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The Republic

Respondent

Heard: 01 December 2016
Counsel: Mr. A. Juliette for the 1st & 3rd Appellants
Mr. A. Derjacques for the 2nd Appellant
Delivered: 09 December 2016

DISSENTING JUDGMENT

A.Fernando (J.A)

1. The 2nd and 3rd Appellants have appealed against their convictions for robbery with violence contrary to section 281 of the Penal Code and the sentences of 10 years imprisonment imposed on each of them and the 1st Appellant had originally appealed only against his sentence of 12 years imprisonment imposed on his conviction for robbery with violence contrary to section 281 of the Penal Code. Ms. Kelly Dubel who had been convicted along with the three Appellants by the Trial Court on the basis of common intention under section 23 of the Penal Code has not appealed probably in view that she had been sentenced only to a period of one year and that in January 2014.
2. When this case was mentioned on the 19th of October 2016, the 1st Appellant informed Court that he was appealing both against conviction and sentence and the 2nd and 3rd Appellants confirmed their position regarding their appeals.

3. At the very outset I wish to say that we have stated on several earlier occasions that persons can be charged under section 23 of the Penal Code only in instances where an offence different to what two or more persons originally formed a common intention to prosecute has been committed. This is clear from the wording in **section 23 of the Penal Code** set out herein:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence”.

This is not one of such cases, since I find from the facts of this case, the common purpose of those who attacked the victims and the offence committed and for which they were charged was one of robbery. The correct section to have been used in this case was **section 22 of the Penal Code** which states that:

“When an offence is committed, each of the following person is deemed to have taken part in committing the offence and be guilty of the offence, and may be charged with actually committing it, namely every person who actually does the act or makes the omission which constitutes the offence... and every person who aids or abets another person in committing the offence...”

Evidence in brief:-

4. PW 5, N. Manoj, an Indian employee at IOT had stated that while he and his workmate V. Vijoy, also a fellow Indian, were on their way for work they had been attacked by the three Appellants, who had approached them in front, at the La Promenade around 2.40 pm. The Appellants had been in the company of a woman. The 1st and 3rd Appellants had caught him and the 3rd Appellant had placed a knife under his neck. After that they had robbed him of RS 500 from the wallet which was inside his bag. Thereafter the 1st, 2nd and 3rd Appellants had attacked Vijoy and taken his phone, head set and cash. He had said that one of them was a rasta. He had said that he “did not know much” as he was “in a shock”. Counsel for the Republic at the hearing before us tried to place his own interpretation as to what the witness meant by being “in shock”. According to Counsel, PW 5 never expected to be attacked while on his way for work and thus was ‘surprised’. If that was the case Counsel should have clarified this from PW 5 when he testified as to what PW 5 meant by being “in shock”, rather than try to come up with his own interpretation at the hearing of the appeal. Thereafter the Appellant’s had gone “to the Krishna Mart side.” It is to be noted that Krishna Mart is not a dead-end, and from Krishna Mart, one can go towards Anse Etoile, STC, National Library, Castor Road or Market Street. Manoj had said he suffered a minor scratch and body pain as a result of the incident. N. Manoj had made a dock identification of all three Appellants in Court and on

the video clip that was played in Court. It is to be noted that this was 11 months after the alleged robbery. Under cross –examination Manoj had said “everything happened very quickly”.

5. PW 6, V. Vijoy had corroborated the evidence of Manoj so far as the incident is concerned. He too had made a dock identification of the three Appellants in Court and from the video clip that was played in Court. He had said that the white head set that one of the Appellants’ is seen wearing on the video was the one that was robbed from him. He had admitted under cross-examination that there are many other headsets like his. It was only in cross-examination that it had transpired for the first time under the cross-examination of Vijoy that he and Manoj had been shown the video clip when they went to the police station after the incident.

The following dialogue between Vijoy and Defence Counsel is to be noted:

“Q. Now when you were watching the video clip did the police tell you that these are the 4 people that they had arrested in connection with the incident that you had reported?

A. The police said we had arrested them but we need to confirm if it is them.

Q. Did the police other clippings, other photos of potential suspects?

A. They showed only this clipping.” (verbatim but emphasis added by me)

There is no evidence that Vijoy and Manoj had given a description of the Appellants before they were shown the video.

6. PW 1, Dr. Hussein Afif, who had examined V. ViJoy on the 16th of August 2012 had said that he found a small bruise below the left eye (black eye), which is compatible with a blow to the face with the fist or any blunt object, one or two days prior to examination. He had found no other visible injuries. V. Vijoy had reported of pain on the left side of the chest which the doctor had said was compatible with a blow to the chest. PW 1 had also examined M. Manoj on the same day and found a small bruise on the back of the neck compatible with being struck by a sharp object such as a knife or by a tough finger nail. But the doctor had stated that Manoj had not told him of being attacked with a knife.
7. PW 2, Rajesh testifying before the Court had said that Vijoy had told him that 3 guys and a lady who came from the opposite direction attacked them and kept a knife at them, grabbed the neck and took the mobile and money from the bag and pocket.
8. PW 3, S. Garrad, testifying before the Court had said that he was a security consultant who looks after the police camera system installed all around the town vicinity and had downloaded a footage from a camera. According to him the machinery was working properly and that nobody can interfere with the footage as it is encrypted. The camera according to him was pointing towards church street going to the market street looking at

the cross roads there. The date of the footage is 15th August and the time is 14.50 hours. He had said that he cannot identify the persons but “If you know somebody for a long period of time, if you had lived with them, it is a lot easier but if you don’t know them then it is not”. In other words identity is difficult but recognition was a possibility. PW 3 had gone on to say under cross-examination that he could say “with confidence based on his experience, it will be extremely difficult for somebody who doesn’t know these people to identify them on the footage.”

9. PW 5, D. Sauzier, the police officer who was performing CCTV duty on the 15th of August testifying before the Court had stated that she had observed in one of the cameras located at the corner from the church street coming into the Market Street, at 2.51 pm, “four people, three males and one female walking quite fast and they looked suspicious”. One of them had been a rasta, two of them had been of a dark complexion and the woman had been of a fair complexion. Since she found them to be suspicious she had rung up the Central Police Station and asked “if there was any report of any robbery or somebody who had been beaten up.” According to her testimony, it is then she had been informed of an incident at La Promenade. Later the 4 persons seen on the video had been identified by police officers, Corporal Issac and P C Furneau, who knew them. We do not find the testimonies of these police officers in the recorded proceedings. Her answer in cross-examination whether she contacts the Central police station every time she sees on camera someone walking suspiciously, is unconvincing. She had confirmed that the camera was located not at La Promenade where the incident took place. No evidence had been placed before the Court as to the distance from La Promenade and the place where the camera was located nor how long it would take for a person to walk or run from La Promenade to the Place where the camera was located at Market street, evidence in my view any prudent Prosecutor should have placed before the Trial Court. I have stated at paragraph 4 above that Krishna Mart is not a dead-end.

The following answers to the questions in cross examination in relation to PW Sauzier calling the Central Police station on seeing the Appellants on camera are puzzling and places PW Sauzier’s evidence in serious doubt:

Q. Furneau stated to you that indeed there was a woman on the phone at the very same time that you were calling?

A. Yes she was reporting the incident

Q. That woman was reporting that she was seeing an incident at La Promenade?

A. Yes

Q. At the very time that you were calling?

A. Yes (emphasis added by me)

It is clear that La Promenade and the place at Market Street are two different places.

10. Counsel for the Republic in his Written Submissions filed before the Court had said: “The CCTV was viewed after receiving the complaint from a lady who saw them going towards market from the bus stand after witnessing the incident”. Since this was a matter that would have directly linked the Appellants to the incident, I asked Counsel for the Respondent to point out that evidence on record. Not only did he fail to do so but went on to state that this was some information the police received from a lady who was not a witness that was called in the case. That being so it would be ‘Hearsay Evidence’. When questioned as to why she was not called Counsel for the Respondent said that she was out of the country. Counsel is advised that he should not mislead Court in filing Written Submissions as we tend to rely on them so far as the facts of a case are concerned. Counsel for the Republic also tried to argue that what was recorded in the proceedings in relation to the quoted part at paragraph 9 is not accurate. I am of the view that we have to go by the proceedings as recorded, in the absence of an agreement by both Counsel to an agreed Affidavit of facts different to that of the proceedings as recorded or to go by the Judge’s Notes if there be any.
11. The 3rd Appellant in his Cautioned Statement that had been admitted after a *voire dire* had stated that he and his girl friend, Ms. Kelly Dubel; who had been convicted along with the three Appellants by the Trial Court; had witnessed two men struggling with two Indians while they were at the La Promenade around noon on the 15th of August 2012. They had gone to take a look and had gone in the same direction of the two men, when the two men left. He had claimed that he does not know the two men who had attacked the two Indians. The 3rd Appellant had not mentioned about meeting the 1st and 2nd Appellants near the Deepam theatre in his Cautioned Statement. In his Dock Statement before the Trial Court the 3rd Appellant had differed from what he had stated in his Cautioned Statement and not spoken of witnessing an incident at La Promenade or seeing any one being attacked. He had however admitted meeting the 1st and 2nd Appellants near the Deepam theatre, which is at Market Street and inquiring from them where he could get food since it was a public holiday. He had said that this was when he would have been caught on the CCTV camera located at Market Street. He had denied attacking the Indians. He had also stated that Vijoy and Manoj were able to identify them in the dock because S.I. Dennis had shown them to Vijoy and Manoj when they had come to court on a previous occasion. The 1st and 2nd Appellants have in their Dock Statements given evidence similar to the 3rd Appellant and corroborated what the 3rd Appellant had stated in his Dock statement about the meeting near Deepam theatre and denied that they attacked the two Indians.
12. The difference between the 3rd Appellant’s cautioned statement and his dock statement may give rise to suspicion as regards the 3rd Appellant, but certainly suspicion alone does not meet the test of proof beyond reasonable doubt. In this case it has not been established beyond reasonable doubt that the dock statement is a lie by reliable independent evidence as stated in the case of **Taylor (1998) Crim LR 822** and it is possible that the motive for the lie, if that be a lie, may have been the fear of being

implicated in the robbery if he were to accept the position that he was at the La Promenade and was a witness to the robbery. Thus it does not satisfy one of the tests laid down in **Lucas (1981) QB 720**, namely that there was no innocent motive for the lie, if that was a lie. Further a lie can only corroborate the prosecution case but cannot be relied upon by the prosecution if that is the only evidence against an accused person. In the Zimbabwean case of **Madziwa VS S, referred to in John Reid Rowland's Criminal Defender's Handbook, 3rd edition 1992, pg 94** it was pointed out that weak evidence of identification is not made any more reliable by the mere fact that the appellant was in the vicinity at the time and lied about this fact, as even an innocent person can lie out of a sense of panic.”

Issue of Identification:-

13. The only issue in this case is as per the grounds of appeal filed by the all the Appellants is one of identity of the persons involved in the robbery. There is no doubt as to the fact that the two persons had been robbed and also suffered minor injuries at the time of the robbery. The evidence as to the identity comes from N. Manoj and V. Vijoy who had made a dock identification of the three Appellants in Court 11 months after the robbery and on the CCTV video clip played before the Trial Court and the fact that the three Appellants were seen walking hurriedly in a suspicious manner about 11 minutes after the robbery at Market Street by PW Sauzier, who was keeping watch of the CCTV cameras. All three Appellants have admitted that they are the ones seen on the CCTV cameras at Market Street but deny any involvement in the robbery. So far as the 3rd Appellant is concerned there is also the Cautioned Statement which had been admitted after a *voire dire* where he places himself at the scene of the robbery but departs from that position when he made the Dock Statement.

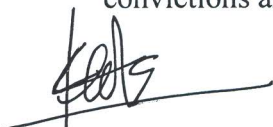
14. I am of the view that although dock identification remains legally admissible, it should be relied upon with extreme caution, especially in cases like this, where there has been no identification parade before and a long time had elapsed between the incident and when the dock identification takes place (in this case 11 months). A dock identification of an accused, by a witness within a reasonable time of him having identified the accused at an identification parade, may throw some weight on the correctness of the subsequent identification, but there is no evidence on record in relation to this matter. I have to bear in mind that there is always the tendency for a witness to merely point out the persons arraigned in the dock before him as his assailants. This is because he feels that the police would not have made a mistake in arresting his assailants and there is also the human instinct to seek retribution for the wrong done to him. It is not everyone who will only have the pursuit of truth to guide him and the willingness to appreciate that there is a likelihood of him being mistaken as to identification, in such a situation.

15. In **Blackstone's Criminal Practice at D21.29** it is stated that: "when the witness is asked to identify the accused in the dock at his trial the accused is at a great disadvantage – the eyes of the witness are bound to go to the person sitting in the dock". It is for these reasons that it had been said in **Edwards V The Queen [2006] UKPC 29** that "The 'dock identification of an accused for the first time during the course of the trial itself has long been considered an unfair and unsatisfactory procedure". In **Cross & Tapper on Evidence 12th edition, p 709** it is stated: "The least satisfactory method of all is to ask the witness to identify the man in the dock as the criminal". In **R V Tricoglus (1976) 65 Cr App Rep 16** it was held: "It has all the disadvantages of a confrontation, and compounds them by being still more suggestive". In **Archbold 2009, 14-42** it is stated that "The identification of a defendant for the first time in the dock is both an undesirable practice: see **R V Cartwright, 10 Cr. App. R. 219**, CCA; and a serious irregularity: see **R V Edwards (2006) 150 S. J. 570 PC**. In the South African case of **Maradu 1994 (2) SACR 410 (W)** the court held that the danger of a dock identification is the same as that created by a leading question in examination-in-chief, which is normally inadmissible: it suggests the answer desired. Commenting on the disadvantages of dock identification it was said in the Zimbabwean case of **Mutsiziri 1997 (1) ZLR 6** "Everything about the atmosphere of the court proceedings points to the accused and to him alone, as the person who is to be identified by the witness". In the local case of **Moustache V R (2015) SCCA 42** it was said about dock identification "It is generally regarded as the most problematic of all forms of visual identification. It is also of little probative value when made by a person who has no prior knowledge of the defendant because the trial circumstances may compel the witness to identify the defendant at the dock.
16. In this case it is to be noted that the Appellants were total strangers to the witnesses, that the Appellants do not have any clearly visible physical features as could be seen when arraigned before us when this case came up for hearing; and could not be distinguished from the many other persons you see walking on the streets. It also has to be borne in mind that the incident had taken place very quickly as per witness testimony and that the witnesses were in a state of shock when the incident took place. It is for this reason that I state that a prudent prosecutor should bear these factors in mind when leading the evidence of witnesses in a case of this nature and for a Trial Judge to ensure that the witnesses are not mistaken in their dock identification of the accused before convicting them.
17. Some of the reasoning that appears to have persuaded the learned Trial Judge in convicting the Appellants are in my view is most unconvincing. The learned Trial Judge had stated: "It is apparent that when one watches the video recording of the CCTV camera, an altercation with some other persons has been recorded which clearly shows the aggressive nature of the 1st accused (3rd Appellant before us) and the other accused even though the 1st accused in his statement attempts to show court he is not aggressive

and states he will never attack anyone.” To start with that “he will never attack anyone” is an incorrect statement, for what the 3rd Appellant had stated in his dock statement is: “I would never attack somebody for Rs 500/- and a telephone...” Secondly the aggressive nature attributed to the 3rd Appellant by the learned Trial Judge, by watching the video recording of the CCTV camera located at Market Street cannot be taken as proof of a crime committed by him elsewhere. Also the leaned Trial Judge’s statement that the evidence of the victims stand corroborated by the evidence of Dr. Afif cannot prove the identity of the Appellants, which is the only issue in this case. I do not know what the learned Trial Judge would have done had he not been persuaded by such reasoning.

18. There is no evidence to indicate that Manoj or Vijoy had been asked to give a description of the persons who attacked them before they were shown the video clip at the police station or in Court. There is no evidence as to how long they were able to see the Appellants. When taken into consideration with their evidence that the incident happened “very quickly”, that they were in a state of shock when they were attacked, that they had been shown the Appellants on a video clip after the robbery, that the Appellants are total strangers to the witnesses who were foreigners, that they had made a dock identification 11 months after the robbery, that according to the 3rd Appellant’s dock statement that they were shown to Manoj and Vijoy when they were in Court, that the incident had taken place at a place different from where the CCTV cameras had caught the Appellants on video and that too only walking hurriedly, PW Sauzier’s admission that she had seen them walking at Market street simultaneously when the incident was taking place at La Promenade, the basis given by her as to why her suspicions were aroused, the absence of any evidence that whoever attacked Manoj or Vijoy had gone in the direction of where the CCTV cameras had caught them on video as highlighted at paragraphs 4 and 10 above, and the Prosecutor’s failure to advert to any one of these matters; places too many dents in the prosecution case, that no reasonable court in my view could have convicted them. It was incumbent upon the Trial Judge to have dealt with these matters in his judgment, but I find that he has failed to do so.

19. I am therefore compelled to allow the appeals of all three Appellants and quash the convictions and the sentences imposed on them.


A.Fernando (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 09 December 2016