

**IN THE SEYCHELLES COURT OF APPEAL**

**[Coram: A.Fernando (J.A) ,M. Twomey (J.A) ,J. Msoffe (J.A) .]**

**Criminal Appeal SCA 27/2013**

**(Appeal from Supreme Court Decision CR 32/2010)**

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Antoine Labrosse

Appellant

Versus

The Republic

Respondent

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Heard: 30 November 2016

Counsel: Ms. Alexandra Madeleine for the Appellant

Mr. Jayaraj Chinnasamy for the Respondent

Delivered: 09 December 2016

**JUDGMENT**

**J. Msoffe (J.A)**

**INTRODUCTION**

[1] In the Supreme Court the Appellant was charged with two counts 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 Antoine Labrosse of Anse Aux Pins together with a person known to the Republic, namely Freddy Paul Oreddy on the 12<sup>th</sup> February*

*2010, at Foret noire, Mahe, with common intention robbed Mr. Kannan Ponnusamy Pillay of a black briefcase containing more than R100,000 in different denominations and at the time of such robbery used personal violence to the said Kannan Ponnusamy Pillay.*

*COUNT 2*

*Statement of Office;*

*Committing an act with intent to cause grievous harm to a person contrary to Section 219 (a) of the Penal Code and punishable under Section 207 of the Penal Code read with Section 23 of the Penal Code.*

*The particulars of offence are that Antoine Labrosse of Anse Aux Pins, together with a person known to the Republic, namely Freddy Paul Oreddy, on the 12<sup>th</sup> day of February 2010, at Foret Noire, Mahe, with intent to cause grievous harm to the Kannan Ponnusamy Pillay, having common intention caused grievous harm to Kannan Ponnusamy Pillay.*

- [2] As we remarked in **Freddy Oreddy v Republic** SCA CR. No.3/2011, we fail to understand why the trials of the Appellant and Freddy Oreddy were split and each tried separately. Since both were alleged to have committed the offence(s) together there was no reason for separate trials. In fact, if they had been charged and tried together the doctrine of common intention under section 23 of the Penal Code which was discussed by the trial Judge in his Judgment would have made more sense. Indeed, the fact that they were tried separately appears to have put the Judge in a rather difficult and awkward situation because in the process he ended up making findings against Freddy Paul Oreddy who was not being tried before him. If they had been tried together the Judge's findings like ..... *in all the acts as described by the prosecution witnesses clearly indicate that **both** persons Antoine Labrosse and **Paul Oreddy** had been acting ... etc*, would have made more sense. (Our emphasis).
- [3] Anyhow, we may as well observe here that Freddy Paul Oreddy was indeed tried and convicted by the Supreme Court and he was sentenced to twelve years imprisonment. On appeal to this Court vide SCA Cr No.3/2011 his appeal was allowed and he was acquitted

accordingly. This Court was of the view that there was no sufficient evidence to sustain the conviction of Freddy Paul Oreddy hence the acquittal. However, his case was somewhat different from this one because as shall be shown hereunder there is enough evidence to sustain the conviction in this case.

[4] After a full trial in this case the Appellant was convicted as charged and sentenced to a term of 18 years imprisonment. In sentencing the Appellant, the Judge took note of the fact that Freddy Oreddy had been sentenced to 12 years in another trial but he opined that since it was the Appellant who inflicted the blow on the victim a sentence of 18 years imprisonment was appropriate and merited in the circumstances. We will come back to this aspect of the case later in the course of this Judgment.

[5] In this appeal the Appellant has canvassed a total number of 9 grounds. However, the grounds crystalize on four aspects of the case:- Identification and the value to be attached to it, circumstantial evidence, dock identification, inconsistencies/contradictions in the witness testimonies, and finally sentence.

### **PROSECUTION CASE**

[6] Very briefly, the prosecution case was that in the morning of 12<sup>th</sup> February 2010 at around 8.40 am the complainant in this case had just started his motorbike with the intention of going to the bank to deposit money and cheques when he was hit by someone somewhere opposite the Fresh Cut building at Foret Noire. The object used to hit him was a square piece of wood. Due to the force of the blow he lost vision in both eyes. Prior to being hit he had seen Freddy Paul Oreddy standing near a building close to his shop about five metres away. Sharon Barra gave evidence and her testimony was that on the same day at around 9.00 a.m while passing along the old Fresh Cut building she saw two men next to a wall hitting the motor cycle driver with a piece of wood. She witnessed the scene of incident from about 30 metres away but she could not identify the assailants. In the meantime, Andy Tall went to the scene of the incident where he had seen “two men one taller than the other running but he could see the taller man better”. According to him “the taller man” was the Appellant in this case. The evidence of Melville Molle was also to the effect that on the date of incident he saw the Appellant running past his house. The Appellant came

towards him and he saw him face to face. He further stated that the Appellant attempted to jump over rocks but had fallen down at the third rock. As the Appellant fell down Freddy Paul Oreddy came in running and in the meantime the Appellant got up, picked up the victim's bag he was holding at the time and they both ran away together.

- [7] The other version of the prosecution case was borne out by the testimonies of Joachim Allisop, Superintendent Elizabeth and Sergeant Emille on fingerprint evidence. This aspect of the case will be discussed later in the course of this Judgment.

### DEFENCE CASE

- [8] The Appellant opted to exercise his constitutional right of remaining silent for which no adverse inference is drawn.

### IDENTIFICATION

- [9] **Lord Widgery C.J. in R v Turnbull [1977] QB 224** had warned of the possibility that a mistaken witness can be a convincing one and a number of such witnesses can all be mistaken and that mistakes in recognition of close relatives and friends are sometimes made. In **R v Bentley [1991] Crim. L. R. 620, CA**, Lord Lane C.J. observed that recognition evidence could not be regarded as trouble free. Many people had experienced seeing someone in the street whom they knew, only to discover they were wrong. A witness who says that "I could have sworn it was you" may later find that he was mistaken even in recognition.

- [10] It is trite law that evidence of identification must be approached with caution. The reason is set out in the well known case of **S v Mthetwa 1972 (3) SA 766** in which Holmes JA held:

*Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both*

*as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive.*

- [11] The decision in **Muvuma Kambanje Situna –vs- The People (1982) ZR 115** is also instructive on this point. In the said case, it was held that:-

*If the opportunity for a positive and reliable identification is poor then it follows that the possibility of an honest mistake has not been ruled out unless there is some other connecting link between the accused and the offence which would render mistaken identification too much of a coincidence.*

- [12] The **South African Law of Evidence**, 4<sup>th</sup> Ed, Butterworths, 1988 states the following at page 614:-

*The accuracy of a witness's observation depends first, of course, upon his eyesight. Secondly, it will be affected by the circumstances in which he saw the person in question; the state of the light, how far away he was, whether he was able to see him from an advantageous position, how long he had him under observation. Thirdly, impressions of appearance may be distorted by the witness "prejudices and preconceptions".*

- [13] Learned Counsel for the Appellant submits that the trial Judge's substantial reliance on the identification witnesses of Molle and Andy Tall is flawed. Her reasoning is that Molle who was suffering from cataract at the time had just waken up in the morning and was not wearing his glasses. Furthermore, that Molle's evidence could not be relied on because of his age and his own confirmation that he was not 100 percent in good mental state. We are of the view, however, that his evidence would be relied on because despite his age he was able to recognize the Appellant because he knew him well even before the incident happened. The witness further had time to see the Appellant when he ran past him and tripped. He had an excellent opportunity to observe him. Facial identification, in these

circumstances, where the person is well-known to the identifying witness, is of vital importance. In **S v Mehlape 1963 (2) SA 29 (A)** at 32A-F it was said:-

*It has been stressed more than once that in a case involving the identification of a particular person in relation to a certain happening, a court should be satisfied not only that the identifying witness is honest, but also that his evidence is reliable in the sense that he had a proper opportunity in the circumstances of the case to carry out such observation as would be reasonably required to ensure a correct identification.*

- [14] As regards Andy Tall, counsel submits that his evidence is unreliable as his observation was made under fleeting circumstances; the two persons he observed had been running away very fast. The law thus far suggests that these kinds of testimonies are unreliable. However, his testimony has to be seen in the light of the fact that he testified that before the ordeal, he had seen the Appellant several other times before even though he did not know him. Secondly, even though the Appellant was running away, he was able to get a glimpse of him full face.
- [15] Mr. Andy Tall and Mr. Molle testified that they had observed the Appellant in broad daylight and had seen him face to face. With both witnesses, it comes out clearly through their testimonies that this was not their first time(s) to see the Appellant. Mr. Molle testified that he had known the Appellant since he was a small boy and Tall testified that he had seen the Appellant about three times prior to the incident.
- [16] It is our view that excellent opportunity was constituted by sufficient time within which the witnesses observed the suspects. The events took place in broad daylight with fairly long durations of time. Therefore, there was no question of possible mistaken identity.
- [17] We may as well add here that the trial court believed these witnesses. That court had the opportunity of observing the demeanour of these witnesses. As a Court of Appeal we do not have that advantage because we only rely on the transcript before us. The determination of a witness's demeanour is always at the exclusive domain of the trial court.

Having observed their demeanour and believed that they were credible, we have no strong reasons for faulting the Judge on the credibility he attached to the witnesses.

### **CIRCUMSTANTIAL EVIDENCE**

[18] Under this ground of appeal the complaint is that in all the circumstances of the case the Judge erred in finding that there was no other reasonable explanation other than the Appellant's guilt. Learned counsel is of the view that, a consideration of the matters submitted in grounds 1 to 6 of the appeal should have led the Judge to the inevitable conclusion that the facts of the case were more in favour of the Appellant than the prosecution.

[19] The law on circumstantial evidence is settled. In the often cited case of **Guy Bristol v Republic** [1980] SLR 38, it was stated:-

*The Magistrate took all the above evidence into account and said there was strong circumstantial evidence that the appellant took the money. However he failed to direct himself specifically as is necessary in a case depending entirely on circumstantial evidence. In such a case, the trial Judge or Magistrate must direct himself that before an accused person can be convicted he must first find that the inculpatory facts are inconsistent with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt ....*

[20] To add to the case of **Bristol**, there is also the persuasive case of **David Zulu v The People** [1977] ZR 151 (SC) that in order to feel safe to convict the court must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only of an inference of guilt.

[21] In the instant case there is evidence that the Appellant was seen near the scene of incident in suspicious circumstances. Apart from the victim's testimony, there was the evidence of

Mr. Molle and Mr. Tall who identified him in broad daylight. Mr. Molle saw him running past him after the incident. Surely, when all this evidence is taken together with other pieces of evidence in the case the circumstantial evidence had taken the case outside the realm of conjecture and had attained a degree of cogency which permitted an inference of guilt.

### **DOCK IDENTIFICATION**

[22] Learned Counsel for the Appellant has also taken issue with the dock identification of the Appellant by Molle and Andy Tall. He has cited the case of **Pragassen and Others v R** No.4 (1974) SLR 13 to the effect that dock identification without an identification parade having previously been held is improper, unsatisfactory and should be avoided where possible.

[23] It is trite law that dock identification carries little weight unless it is shown to have been sourced in an independent preceding identification. But, there is no rule of law that dock identification must be discarded altogether. In the case of **Terrell Nailly v The Queen** [2012] UK PC 12, the Privy Council stated:-

*When considering the admissibility, and the strength, of identification evidence, it is often necessary to consider separately **the circumstances in which the witness saw the accused and the circumstances in which he later identified him** .... The decision whether to admit dock identification evidence is one for the trial Judge, to be exercised in the light of all the circumstances. Ultimately the question is one of fairness .....*

[Emphasis supplied.]

[24] But in our view this was a case of recognition of the Appellant who was known or had been seen on earlier occasions by Mr. Molle and Mr. Andy Tall. So the dock identification was done merely to confirm the witnesses' prior recognition of the Appellants.

[25] As was also held in **Moustache v R** [2015] SCCA 42, dock identification is usually admissible in evidence to reinforce prior identification of the accused person.

[26] This ground of appeal need not detain us. An identification parade is not necessary where there is good and cogent evidence linking an accused person to the crime. Mr. Molle testified that he had known the Appellant for a long time. Mr. Andy Tall deposed that he had seen the Appellant prior to the incident and he had clearly recognized him, etc. In spite of this, whether or not an identification parade was necessary in the circumstances of this case is not a serious matter because, as shall be shown hereunder, the Appellant's conviction was not grounded solely on the evidence of these witnesses.

### **INCONSISTENCIES/CONTRADICTIONS**

[27] In his further submission, learned Counsel for the Appellant is of the view that the Judge erred in not attaching weight to inconsistencies and contradictions in the prosecution case. The alleged inconsistencies/contradictions were about the witness testimonies on who was wearing a hood, whether the money/document stolen were in a briefcase or a plastic bag, whether the witnesses described the Appellant properly, etc.

[28] With respect, the inconsistencies/contradictions, if any, did not go to the root of the case. Contradictions *per se* do not lead to the rejection of the evidence of an otherwise reliable and truthful witness. Inconsistencies/contradictions, if any, may only simply be indicative of an error. In law not every error affects the credibility of a witness. We say so because the correct approach is to look at the evidence as a whole and see whether or not it points to the accused person's guilt. As Heher AJA observed in the South African case of **S v Chabalala** (1) SACR 134 SCA:-

*The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.*

[29] In this case, the Judge weighed the evidence as a whole and ultimately came to the conclusion that the case against the Appellant was proved beyond reasonable doubt. So, the alleged inconsistencies/contradictions, if any, were immaterial in the circumstances of the case.

### **FINGERPRINT EVIDENCE**

[30] This aspect of the case began with the evidence of Sergeant Emille Fred who went to the scene of crime, picked up the piece of wood used in hitting the victim and next to the house of Andy Tall he also picked up several pieces of papers and cheques. At around 10.15 hours Sergeant Allisop arrived at the scene and took the documents from Sergeant Emille Fred. As to what happened thereafter, is best captured in the evidence of these witnesses as per paragraphs 11 and 12 of the Judgment of the trial Judge thus:-

[11] *..... Joachim Allisop. .... sprayed the documents and obtained latent impressions from four of the A4 size papers containing a list of commodities, from two bank statements, a Rising Sun invoice also from an MCB and a Barclay's bank cheque. He had labelled one impression A on the A4 size paper and produced it as P2 (a). He explained in detail the procedure how he proceeded to photograph and enlarge the print of his impression on the A4 size paper and also the left middle finger impression of the accused Antoine Labrosse which too had been received by him. Having photographed enlarged and mounted side by side both impressions they were sent for comparison to Superintendent Elizabeth.*

[12] *Superintendent Elizabeth stated he was attached to the Scientific Support and Crime Record Bureau. He further stated he had compared the mounted finger impressions sent to him i.e the impression taken from the A4 size paper and the impression taken from the left middle finger of the accused Antoine Labrosse and found them to be identical. In his report P9 he had marked 10 points of similarities which agreed in sequence and details of ridge characteristics. He stated that the accused had been taken into custody at the time the documents were handed over to him for comparison. He further*

*stated he could not recall if one Paul Oreddy too had been arrested at that time. The documents were handed over to him on the 13<sup>th</sup> of May 2010 at 13.30 hrs. He further clarified the fact that no two persons have been found to have the same finger prints.*

[31] It is in evidence that all the documents were identified by the victim as what he had in his possession on that day prior to being attacked and robbed. Among the documents was exhibit P2(a) on which the fingerprint of the Appellant was identified. If so, the Appellant cannot deny the fact that his fingerprint impressions were on the documents recovered by the police. If he was not at the scene nor the perpetrator of the crime the question that would bear on anyone's mind would be this:- How then did his fingerprints get there? There seems to be no other explanation other than that he was at the scene and he committed the crime on the date in question.

[32] It is trite that the value of fingerprint as evidential material to connect an accused person to a crime is well-known. If the evidence of a fingerprint expert is clear and convincing, a conviction could even be based solely on the fingerprint evidence without additional evidence connecting the accused person to the crime – **S v Arendse** 1970 (2) SA 367. The decision in **Arendse** merely confirmed what had otherwise been the law for a long time in other jurisdictions – See, for instance, **Parker v Rex**, 14 Commw. L.R. 681 [Australia, 1912] and the decision of a Pennsylvania court given in 1931 in the case of **Commonwealth v Albright**, 101 Pa. Super. 317.

[323] In this case, Sergeant Emille Fred, Sergeant Joachim Allisop and Superintendent Elizabeth gave evidence in sufficient detail on how they dealt with the fingerprint in the case. They were subjected to thorough cross-examination but the veracity of their testimonies remained unshaken.

[34] These witnesses were experts in the field with considerable years of both theoretical and practical experience; 11 years in the case of Sergeant Joachim Allisop and 27 years in respect of Superintendent Elizabeth. Further, during those years they also attended training and refresher courses; locally in the case of Sergeant Joachim Allisop and both locally and abroad in the case of Superintendent Elizabeth.

[35] The trial court believed these witnesses. We too have no reason(s) to disbelieve them. We are satisfied that they were credible witnesses and their evidence is clear and convincing. We are equally satisfied that, even without other pieces of evidence, the fingerprint evidence in the case is enough to sustain the conviction. Fortunately, however, as already shown above, there were other pieces of evidence connecting the Appellant to the crime in issue.

### SENTENCE

[36] As already observed, in sentencing the Appellant the trial Judge considered the 12 years sentence meted on Freddy Paul Oreddy but felt that the Appellant deserved a stiffer sentence. The trial Judge reasoned as follows:-

*There is no doubt in the mind of this court that **it was the accused in this case, Antoine Labrosse, who had inflicted the blow on the victim** .... Considering the fact that it was **this accused who inflicted the blow on the victim** resulting in the grievous and permanent injuries, I proceed to sentence the accused to a term of 18 years imprisonment.*

[Emphasis supplied.]

[37] As it is, it is evident that the trial Judge passed the sentence of 18 years imprisonment because he thought it was the Appellant who inflicted the blow on the victim. With respect, this finding is not borne out by the record. As already shown in paragraph 6 (supra), no witness ever testified to have seen the Appellant inflicting the blow on the victim. If anything, the evidence against the Appellant in this respect was purely circumstantial.

[38] Nevertheless, we consider that robbery is a serious crime. The victim was attacked in the course of a robbery. As a result of the attack the victim has since lost his left eye as confirmed by Dr. Verma in both his evidence in court and in the medical report (exhibit P11). This means that the victim has to come to terms with the fact that he has to live without the eye for the rest of his life.

[39] While we are of the view that the crime committed on the victim is a serious one, we nevertheless think there is need to revisit the sentence of 18 years imprisonment so as to bring it in line with the sentence of 12 years earlier imposed on Freddy Paul Oreddy.

[40] We accordingly dismiss the appeal against conviction. We vary the sentence of 18 years and reduce it to 12 years imprisonment with an order that the time spent in remand custody should count towards sentence.

**J. Msoffe (J.A)**

**I concur:.** ..... A.Fernando (J.A)

**I concur:.** ..... M. Twomey (J.A)

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