IN THE SEYCHELLES COURT OF APPEAL

DAVID SOPHA - 1ST ACCUSED

DANNY CONSTANCE - 2ND ACCUSED

Versus

REPUBLIC

Court of Appeal No 2 & 3 of 1991

Mr Danny Lucas for the 1st accused
Mr Anthony Derjacques for the 2nd accused
Mr Serge Rouillon for the Republic

Judgment

David Sopha and Danny Constance were convicted of having on December 27, 1990 robbed Robert Rahm of a bag containing a number of articles, among them towels, glasses and a wallet containing the sum of approximately SR700 in Swiss Francs.

Robert Rahm was a Swiss National. With his wife Anita Rahm he was holidaying in Mahe. On December 27, at about midday, they were walking along the Belombre Road in the direction of Fisherman's Cove. They were set upon by two males, one armed with a knife. One of the men snatched the bag which Robert Rahm was carrying. The other man slashed him with a longish knife. He suffered serious wounds one of which necessitated the removal of his spleen.

Seeing her husband was being attacked Mrs Rahm fled. The man with the knife pursued her and pushed her down. Both men escaped through a fence at the side of the road.

A jeep which was being driven by Mark Kuney from the direction of Fisherman's Cove came upon the scene as the men fled. Kuney testified to having seen three men attacking the Rahms. He helped the Rahms into the jeep, drove them to the Beau Vallon Police Station and from there to the hospital in Victoria. There Mr Rahm received prompt and effective treatment which resulted in a comparatively rapid recovery and a prognosis of no permanent disability.

On January 3, 1991 an identification parade was held at the Victoria Police Station. The second appellant, Danny Constance was in the line up but Mrs Rahm failed to identify him.

Robert Rahm gave evidence on January 5, 1991 while he was a patient at the Victoria Hospital. He testified that as they walked along, he turned around at one stage and saw two persons with black skins walking in the same direction behind them some 20 metres away. They continued walking. Some 5 minutes later he looked around again. The men were then some 8 metres away. At that moment the men started running in their direction - leaping like tigers. The bigger of the two men took his bag away and ran towards the woods. He identified that man as the appellant Constance who was then sitting at the hearing handcuffed to Sopha and under guard. The other man was smaller and tough. As one of the men took his bag away he felt cuts on his left and right side. He was then a bit dizzy and his knees were buckling. He saw his wife running away and saw her pushed to the ground by the man who had cut him. Then he saw a white jeep approaching. He described his bag and identified some of the contents.

Under cross examination he stated that he wore optical sunglasses to correct short-sightedness. He had his glasses on that morning. They fell after he was attacked. He worked as a gardener in Switzerland and was used to working in the sun. As a European he took more notice of people with darker skins and foreign to him. He had seen the face of the attacker he identified for three seconds.

In a statement given to the police on January 3, 1991 he was recorded as saying -

> "For identification I cannot say how they looked exactly. The man with the knife was smaller than the other .... with moustache. The other man was 1.85-1.90m, with beard. Age between 28/30 years."

Anita Rahm confirmed her husband's version of how the incident had taken place. She did not pick out the appellant, Constance, at the identification parade.

A very important witness in the case was David Dodin. He lives at Beau Vallon and at the time of the incident worked at the Sadeco Farm in the area where it took place. On December 27, 1990 he took his morning break at 10.00a.m. and walked with a co-worker towards a shop near the Police Station. On the way he climbed a boulder to pick a mango and as he did so he heard someone call to him in creole "hey you, sack of hens". He looked in the direction of the voice and saw some 20 feet away the person who had called sitting on a boulder under a mango tree. It was David Sopha. With Sopha was another man whom he knew by face but not by name. He knew Sopha well and he also knew his family. They lived at Le Niol. Dodin continued on his way to the shop. When he returned to work he did not see them.

Later around noon he went to the store to hang a bag and he heard a scream. He left to go to the same shop to purchase lunch. Arriving at the bend he heard persons

walking in the grasses. He gave chase. He saw Constance - who was the man he had seen earlier with Sopha. He had a bag in his hand. He called out to Constance using an oath and telling him that he had recognized him.

When he got to the road he saw a white man entering a jeep. Three people were with him, a woman, a driver and another man who was injured.

That afternoon the police came to see him and he told them what he had seen. At an identification parade held on January 4, 1991 he identified Danny Constance as the man he had seen with Sopha about 10.00 a.m. on December 27, 1991 and later about noon running in the grasses with the bag.

When asked to point to the accused Constance in Court Dodin pointed on three occasions to the Court Usher who was sitting next to the interpreter. In due course he realized his error and pointed to Constance in the dock. He appears to enjoy drinking and sometimes drinks too much. He was scheduled to attend the identification parade held on January 3, 1991 but when L/Cpl. Belle went to pick him up he seemed to be suffering from a hang-over and L/Cpl. Belle did not collect him though he insisted he was alright. He attended the parade the next day.

Towards the end of his cross-examination by Mr Lucas for the appellant Sopha, he is recorded as having said -

> "Two days after the 25th I slept at my place, I did not go to work. On that day my family was at my place."

If that were so he would have been at home on December 27 and could not have seen what he testified that he had seen. Because of that reply and his mistakenly having pointed to the usher when asked to point to Constance, Mr Derjacques, for Constance felt that he needed to ask no questions and

stated that he adopted all the replies given to Mr Lucas and that he would not cross-examine. Thereupon the prosecutor is recorded as saying -

"I cannot re-examine My Lord."

If correctly recorded the statement is difficult to understand. The witness had been cross-examined by counsel for one accused. Counsel for the second accused had said he had no cross-examination. Re-examination could then have followed naturally. Later the prosecutor sought to have Dodin recalled for re-examination, an application which the trial judge refused.

It was submitted that failure to re-examine Dodin should be interpreted as an acceptance of his statement in cross-examination that he was asleep at home two days after Christmas and did not go to work. An analogy was drawn between failure to re-examine and failure to cross-examine. This, it has been held, may lead to an inference that evidence given in chief is accepted. This is understandable. There would be on the record only one unchallenged version of events. This is not the case with failure to re-examine. Dodin's account of what had happened on December 27 was on record in the examination-in-chief. The evaluation of the contradiction would be a matter for the judge reaching findings of fact.

Be that as it may, there does not appear to have been sound reason for refusing the application to recall Dodin. The case for the prosecution was still in progress. Leave could have been given for further cross-examination had this seemed just in the light of the recall.

The other significant piece of evidence led by the prosecution was a statement allegedly made by the first appellant, David Sopha, shortly after his arrest on December

28, 1991. The statement was taken by Sgt. Dogley and was in its terms completely exculpatory setting out an effective alibi. In it Sopha stated that from approximately 8.30 a.m. on December 27 to 2.30 p.m. that day he had been in the forest at Le Niol with the second appellant Danny Constance looking for a species of bird called paille-en-queue. Counsel for Sopha objected to the admission of the statement on the ground that it had been extracted from his client by force and threat. A voir-dire was held in the course of which Sopha gave evidence. The judge ruled that the statement was admissible.

In his evidence at the voir-dire Sopha testified that he said in the statement that he was in the forest at Le Niol because he had been threatened and beaten. The truth was that he had been picking mangoes at Sadeco near the scene of the robbery, had seen the attack on the Rahms and had identified one of the attackers to the police as a man called Elvis Sopha.

In his judgment the trial judge referred to the evidence given by Sopha at the voir-dire. He noted that Sopha had said that the contents of the statement were false and for once he agreed with Sopha that that was so.

Mr Lucas contended that the trial judge erred in so doing. Evidence at a voir-dire could be used only to determine the issue of admissibility, not the issue of guilt or innocence.

A distinction must be drawn between cases in which a judge sits alone as judge of both law and fact and cases in which a judge sits with a jury who are the sole judges of fact. If a voir-dire is held in the absence of the jury, it is obvious that evidence given then would not be available to the jury in determining innocence or guilt. The jury would not have heard it.

In practice if the statement is admitted much of the evidence given in the absence of the jury is repeated in their presence - emphasing that there is no inherent division between evidence tendered to prove admissibility and evidence tendered to prove guilt. Indeed that evidence is often vital in determining the weight the jury will give to the statement in its deliberations. If perchance a piece of evidence given in the absence of the jury is not repeated in their presence then clearly the trial judge would err if he referred to it in his summing up. It would not have been evidence before the jury. Where a judge sits as judge of both law and fact all the evidence is before him and can be used to determine all the issues arising in the case.

It is true that an accused person wishing to challenge a statement may find himself giving evidence at a stage of the trial when a case has not yet been made out against him. He may make a statement in the course of giving evidence which assists the prosecution to make out a prima facie case. An accused person is, however, under no compulsion to give evidence at the voir dire. He elects to do so. Any statement made in the course of giving evidence would be a voluntary statement and like any other voluntary statement, however and whenever made, would be admissible at the trial on the issue of guilt or innocence. The trial judge did not err in referring in the course of his judgment to the evidence at the voir-dire.

At the close of the case for the prosecution Mr Lucas submitted that there was no case for his client to answer. The trial judge rejected the submission without elaborating reasons. The submission was rehearsed before this court. It was common ground that the principles to be applied in determining whether there was a case to answer were succinctly summarised in R V Galbraith (1981) 73 Cr App. R.124. The circumstances of a trial by a judge with a jury were then being considered but the principles seem equally

applicable where the judge sits as judge of both fact and law.

Where there is no evidence against an accused person at the close of the prosecution a no case submission must succeed.

Where there is some evidence which appears vague or weak because of internal inconsistencies or inconsistencies between the evidence of witnesses, the judge must decide whether, taken at its highest, a jury properly directed could convict. If the evidence taken at its highest could sustain a conviction the case should be allowed to go to the jury.

At the close of the case for the prosecution the evidence against Sopha taken at its highest was -

(a) He had been identified by Dodin as having been on the spot at 10.00 am. Dodin's credibility as a witness was subject to criticism but the decision of case or no case should be based on his evidence being accepted.

(b) He had asserted on oath the he was on the scene at the time of the crime, had seen it being committed and had given the police the name of one of the participants.

(c) He had sought to set up a false alibi placing himself in the forest at Le Niol with Constance. There was evidence that Constance had been identified as a participant in the crime.

On that evidence we are satisfied that there was prima facie evidence of his implication in the crime and that the trial judge correctly ruled that the no case submission failed.

It was obvious that the issue of identification was pivotal to the proof of the prosecution's case. It was submitted that the trial judge failed to approach that issue properly and more particularly did not use the guidelines set out in R V Turnbull [1977] 1 QB 224. At one point the trial judge stated that the present case was unlike Turnbull since in that case the identifying witness had only a brief moment in which to identify the subject whereas here Mr Rahm had 3 seconds. At another point he stated that he had given "detailed attention to all the guidelines contained in the Turnbull case so that there is no miscarriage of justice."

The guidelines in Turnbull are not restricted to "fleeting glance" cases. The judgment states at p.228 -

> "First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications."

In particular, stress was laid on considering the circumstances of the identification - the distance, the light and any material discrepancy between the description given of the accused to the police and the actual appearance of the accused.

The Court acknowledged that recognition might be more reliable than identification but even then errors can occur and the jury should be reminded of that.

Judged by the Turnbull guidelines the circumstances of the identification by Mr Rahm were good. It was clear daylight, the attacker and Mr Rahm were briefly face to face at a distance of 8 metres or less and Mr Rahm's attention would clearly have been concentrated on him. The description given to the police could be described as vague but there was no material discrepancy.

Dodin's recognition of Sopha was reinforced by his evidence that his attention was first drawn to him because he had spoken. He knew Constance by sight. Later when he saw him running in the bushes with the bag he swore at him and shouted that he had recognised him. While the judge's comment that Turnbull was unlike the present case, suggesting as it could be urged that it was inapplicable, was infelicitous the fact is that he did say that he had applied the guidelines. An analysis of the evidence against the guidelines indicates that the identifications by Dodin and Rahm could be said to be reliable.

We are satisfied, however, that the trial judge gave undue weight to Mr Rahm's identification of Constance during the hearing at the hospital. It was true that he sat with Sopha and Mr Rahm picked him out. The two accused persons were however quite dissimilar and it would be obvious that Constance was the man. It may have been unfortunate that Mr Rahm could not attend an identification parade though it should not have been beyond police ingenuity to mount a parade at his bedside. Had the case rested on the dock identification alone it should have failed. The identification by Dodin, however, remained and received some support though little from the dock identification. The judge's error in placing undue weight on the dock identification did not, on the evidence, result in a miscarriage of justice.

It should perhaps be noted that the fact that another possible identifying witness with an equal opportunity to make an identification fails to do so can in no way affect the strength of the evidence of a witness who does identify an accused. There can be wide variations between the ability of individuals to note and retain mental images they perceive. Each identification must be judged against the objective circumstances in which it was made.

Predictably Dodin's evidence was severely criticised. He was given to drink. He had mistakenly identified the usher. He had in cross-examination asserted that two days after Christmas he had been at home with his family. As far as the last statement is concerned that was plainly an error arising from confusion of dates. ASP Valentin had testified that on December 27th he had gone to the scene straight after receiving the report of the robbery at 12.05 pm. There he had met Dodin. As a result of what Dodin had told him he had gone to Sopha's home at Le Niol. Dodin could not have been at home on the day of the incident.

It is a trite observation that the judge of first instance seeing and hearing the witnesses is in a better position to judge the credibility of witnesses than an appellate tribunal reading a record. Even on a perusal of the record it cannot be said that the trial judge erred in accepting Dodin as a credible witness - though he was occasionally liable to be confused.

Both appellants submitted that the trial judge had effectively misdirected himself on the issue of burden of proof.

After recapitulating the evidence led by the prosecution the trial judge noted that he had ruled against submissions that there was no case to answer and that Sopha had elected to remain silent. He then stated -

> "No adverse inference is drawn. I bear in mind that it is incumbent upon the prosecution to prove the accused's guilt beyond a reasonable doubt and not for the accused to prove his innocence. Innocence is always presumed until the contrary is proved."

On the issue of circumstantial evidence he stated -

> "The evidence against the first accused is substantially circumstantial. Where a case

> depends exclusively upon circumstantial evidence, it is necessary for a trial judge to direct himself, expressly that he must find before deciding upon conviction, that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis other than guilt."

Neither of these directions was faulted. It was submitted, however, that his analysis of the evidence revealed that the judge had indeed reversed the burden. He pointed out that Constance must have told Sopha when they met on the afternoon of December 27, 1991 that the police had called at his (Constance's) home asking for Sopha. In those circumstances an innocent man would have called at the police station as soon as possible to dispel any suspicions that he had participated in the crime. The trial judge was there examining Sopha's conduct testing its consistency with guilt or innocence. He was not reversing the burden of proof.

The criticism in the case of the appellant Constance is more substantial. Dealing with the issue of alibi the trial judge stated -

> "When the burden of proof is on the accused the required standard of proof is proof on a balance of probabilities which can be explained as more probable than not in a civil case. In considering the alibi evidence adduced by the second accused I have borne this in mind. However, if as the prosecution asserts the alibi evidence is false, the prosecution bears the burden of satisfying the court that this is so and the standard of proof required of the prosecution is proof beyond reasonable doubt."

The two parts of this formulation contradict each other. Surely in every case in which the prosecution presses a charge where an accused person sets up an alibi there is an assertion by the prosecution that the alibi is false. There can therefore be no case in which the prosecution does not

have to prove beyond a reasonable doubt that the alibi is false. If that is so there can never be a burden on an accused person to prove an alibi whether on the balance of probability or not. Counsel for the State properly conceded that the formulation was erroneous.

The proper approach is to examine the alibi and decide whether or not it has been established. If it has been established then the accused must be acquitted. If it has not been established but it appears that it may be true, then the accused should also be acquitted since there would be doubt as to whether the accused is guilty or not. If the alibi is clearly rejected then the case for the prosecution must be examined to determine whether it establishes the guilt of the accused. The rejection of an alibi is not of itself a ground for basing guilt. A conviction must be based on the strength of the case for the prosecution not the weakness of the defence.

Despite the contradictory formulation of principle the trial judge did, however, go on to examine the alibi in great detail. He concluded for reasons based on the evidence that it was fabricated and he concluded that "the prosecution had proved that the alibi evidence is false beyond doubt." Effectively the judge in considering the case did not shift the burden. There was therefore no miscarriage of justice and the proviso can be applied.

In reaching that conclusion we have carefully considered and given due weight to the case of R v Johnson [1961] 1 All E.R. 1478. There can be no doubt that a misdirection as to burden of proof is fundamental. In this case, however, the erroneous formulation was immediately followed by a statement which correctly placed the burden of disproving an alibi on the prosecution. Thereafter the analysis in the judgment demonstrated that the proper approach had in fact been applied. In the Johnson case (supra) there were several

references to a burden of proof resting on an accused who raised an alibi. These clear instructions justify the different approach to the application of the proviso taken in this case.

A number of other issues were raised which need to be mentioned.

On behalf of the first appellant, Sopha, it was submitted that the judge should have informed him of his right to be represented by counsel at the hearing at the Victoria Hospital when the evidence of Mr and Mrs Rahm was taken.

Sopha was aware of his right. He stated that he had a lawyer who was supposed to be waiting for him at the court premises but was not there. The issue essentially, therefore, was whether there should have been an adjournment to enable counsel to be present. In the circumstances it was reasonable to proceed in the absence of counsel. The Rahms gave no evidence directly implicating the appellant David Sopha. He said he had no question to ask and wise counsel would have been well advised to do the same.

There was a complaint that the police photographer WPC Prea had inexpertly photographed the exhibits tendered in evidence at the first hearing. These had been recovered by a witness, Yvon Dugasse, some distance from the scene and taken to the police. The exhibits had been shown to Mr Rahm in the course of his evidence after he had given an adequate description of them. They had then been tendered. Since the intention was to allow the Rahms to take the bag away on their departure the photograph was taken to provide a record of its appearance. Since the exhibits had already been tendered any alleged lack of professional skill in adequately labelling and photographing them for the photograph was immaterial. The Court, counsel and the accused persons had seen the exhibits. Nothing turned on their appearance.

It was submitted that the mens rea necessary for stealing had not been proved. It was possible that the attackers may not have intended to deprive the Rahms permanently of the bag and its contents. This was the inference, it was said, that could be drawn from the fact that the bag was found some distance from the scene by Yvon Dugasse. This submission is wholly without merit. The circumstances are plainly distinguishable from those of R v Easom [1971] 2 QB 315 which was quoted in support. There the accused persons had searched a bag and left it intact near the owners who were asleep. In this case the robbers merely discarded objects possession of which would have implicated them in the crime. Subsequent recovery by the owners was purely fortuitous.

Finally there was the general criticism that the judgment of the trial judge failed adequately to analyse the evidence. He had recounted the evidence led on behalf of the prosecution and on behalf of each of the appellants - doing no more than recounting and thereafter had set out his conclusion. On a proper analysis it was contended the only conclusion which could have been reached was that the prosecution had not made out a case against either appellant.

The really important evidence in the case against the appellant Constance was that of Dodin with some assistance from Mr Rahm. The judge showed that he was aware of the fact that Dodin was confused at times. In relation to the crucial issue of where he had been on December 27, 1990 he concluded, with support from the record, that there was unchallenged evidence that he was on duty at the Sadeco Farm that day. He noted the weaknesses of dock identification. As we have indicated he may have placed undue weight upon it but in the circumstances of the case the error did not lead to a miscarriage of justice.

There was no need to make a specific finding as to who cut Mr Rahm and who took away the bag. He accepted Mr Rahm's

evidence and this made it clear that the attacker who took the bag was not the attacker who cut him. The attacker who took the bag was the appellant Constance. All the evidence made plain that the attackers were acting jointly. Assignment of specific roles was immaterial.

The trial judge examined closely the alibi witnesses put forward by the appellant Constance. He accepted the evidence of one of them, Sister Veronique Labiche. It is significant that despite the detailed argument advanced our attention was not directed to any error of fact or inference in the judge's examination of the alibi. He concluded for the reasons which he set out that it had been fabricated. This seems well based on the evidence.

In the case of the appellant Sopha there was, apart from the evidence already summarised in considering the no case submission, the evidence of the appellant Constance. He testified that early on the afternoon of December 27, 1990 he had at Sopha's request gone to Sopha's house. Sopha had told him that he had witnessed an incident while he was picking mangoes. Elvis Sopha had been involved in the incident and there had been another man whom the appellant Sopha did not identify. He had run away because the attackers had noticed him. He was not prepared to report the matter to the police so he asked Constance to support him in a false alibi that they had both gone to the forest to look for paille-en-queue.

In his evidence at the voir-dire Sopha had himself testified on oath that the alibi of being in the forest was false and that he had witnessed the incident as Constance had reported that Sopha had told him. Sopha had placed himself on the scene though only as observer. Once it had been established as it clearly was by the evidence of Dodin, with some support from Mr Rahm, that Constance was a participant, the inference is irresistible that the appellant Sopha must have been the other participant.

The appeals against conviction must be dismissed.

The appeals against sentence were not vigorously pursued and correctly so. Sopha who had previous convictions was sentenced to 8 years imprisonment and Constance to 6 years. In all circumstances the use of violence on the human person must be discouraged by the imposition of severe punishment. In this case there was the additional aggravating factor that the victim was a tourist. Tourism forms the base of the economy of the Seychelles. If the reputation of the country as a safe and comparatively unspoilt haven is damaged, and it will be damaged if acts like this recur, the population of the whole country will suffer. The sentences are certainly not manifestly inadequate and if anything may be said to tend towards the side of leniency.

The appeals against sentence are also dismissed.

A MUSTAFA
(PRESIDENT) .....

T GEORGES .....
(JUSTICE OF APPEAL)

(JUSTICE OF APPEAL .....

Dated this ..14. of October 1991.