IN THE SUPREME COURT OF SEYCHELLES

JOHN FRANCOIS — APPELLANT

Versus

THE REPUBLIC — RESPONDENT

Criminal Appeal No: 9 of 1999

[***Before:*** *Ayoola, P., Pillay & De Silva JJA]*

Mr. F. Simeon for the Appellant

Mr. S. Gooneratne for the Respondent

JUDGMENT OF THE COURT

(Delivered by Pillay, JA)

The appellant was convicted by the Supreme Court of the offence of robbery with violence, together with a person unknown, contrary to Section 281, read with Section 23 of the Penal Code and punishable under the proviso of Section 281 of the Penal Code. He was sentenced to a term of 15 years' imprisonment.

The appellant is now appealing against his conviction on a number of grounds and his sentence on the ground that it is manifestly harsh and excessive.

At the hearing of the appeal, learned Counsel for the respondent conceded that the conviction of the appellant could not stand as there was no evidence that the appellant robbed the complainant of her mobile phone. Nor could the alternative count of burglary, together with a person unknown, under Section 289 of the Penal Code, read with Section 264 thereof, as

particularised in the information, namely that the appellant, together with a person unknown, having entered the dwelling house of the complainant and having committed a felony of theft of a mobile phone broke out of the dwelling.

Leaned Counsel went on to submit that on the evidence on record the appellant could have been found guilty of breaking and entering, together with a person unknown, a building used as a human dwelling with intent to commit a felony therein, in breach of Section 289(a) of the Penal Code, by virtue of Section 163 of the Criminal Procedure Act which reads as follows:-

> "When a person is charged with an offence mentioned in Chapter XXIX of the Penal Code and the Court is of opinion that he is not guilty of that offence but that he is guilty of any other offence (mentioned in the said Chapter), he may be convicted of that offence although he was not charged with it."

It is not in dispute that Section 289(a) and (b) of the Penal Code, just like Section 281, does fall under Chapter XXIX.

We may turn now to the grounds of appeal. The first complaint of the appellant is that the learned trial Judge erred in his assessment of the evidence relating to the identification of the appellant.

What of that evidence? First, the complainant testified that on 12th May 1999 (the relevant day) at about 2 a.m while sleeping in her bedroom, something woke her up and she saw two men in front of her. One of them was tall and well-built with a black mask on his face. The other intruder was

shorter and thinner and was searching the bedroom. The man with the black mask told the complainant that he had come to search for documents. While struggling with the masked intruder who had placed a knife under her neck and cut her on the breast and hand, the complainant tore part of his mask and then passed out.

Second, there was the testimony of the complainant's father who was 75 years old and lived next door across the road and was called by his grandson. When he arrived inside the complainant's flat, he saw the appellant whom he had known for some 2 years coming down the stairs and passing along a corridor which was lit, with a knife in his hand. The appellant was wearing black trousers and a black short. He observed the torn mask of the appellant, the one side of the face which was visible as well as the eyes. The appellant was within a distance of almost two feet from him when the appellant threatened him with the knife. The witness also observed the physical peculiarity of the appellant, namely that he is bow-legged. The appellant then ran towards the back of the flat and jumped over a wall.

It is significant that the eyesight of the witness was described by an eye specialist in Court as reasonable and acceptable. The witness was not challenged under cross-examination. Moreover, his identification of the appellant was one of recognition, not of a fleeting glance.

Third, there was also the testimony of the appellant's own brother-in-law and sister who testified that on the relevant day they were woken up at the relevant time by the screaming of the complainant, their next-door neighbour. They observed through their window the appellant running from the backyard of the complainant's flat, jumping over the wall that separates their property from that of the complainant and coming into their compound.

The appellant's brother-in-law also pointedly referred to the appellant as being bow-legged.

Finally, at about 5.30 am on the relevant day, another sister of the appellant who lived with him saw him washing a blood-stained knife.

It is not surprising that the learned Judge considered the testimony of all those witnesses whom he had heard and seen and which we have reviewed to be "overwhelmingly sufficient and strong" to implicate the appellant, the more so as he could observe, having been to the locus, that there was sufficient light around and it was possible for the complainant's father and her next-door neighbours, i.e. the appellant's brother-in-law and sister from their bedroom, to observe the appellant jumping over the wall.

Learned Counsel for the appellant laid great stress, in the course of his address to us, on the fact that there were discrepancies in the evidence of the prosecution witnesses who identified the appellant. As indicated already, it is a fact that the complainant's father, just like the appellant's brother-in-law and sister, testified that the appellant jumped over a wall which separates the property of the complainant from that of his brother-in-law and sister. Those witnesses were searchingly cross-examined and, although there were contradictions in their testimony, they were minor. All three witnesses, however, were quite positive that it was the appellant whom they had seen and recognised. So much for the complaints of the appellant against his conviction.

With regard to Section 163 of the Criminal Procedure Act, learned Counsel submitted that, if it were applied by this Court, it would amount to a denial of fair hearing to the appellant. We do not agree since both the appellant and his Counsel knew or must be deemed to have known at the

very start of the criminal proceedings that if an accused party is found guilty of an offence listed under Chapter XXIX of the Penal Code, he could be convicted of any other offence falling under that same Chapter provided there is evidence in support of that other offence, by virtue of Section 163 of the Criminal Procedure Act, already cited.

There was ample evidence on record to show that the appellant had broken into the house of the complainant, in the light of (a) the definition of breaking in Section 288 of the Penal Code which states in effect that any person breaking any part of a building or opens by unlocking, pulling, pushing, lifting or any other means whatsoever, any door ... is deemed to break the building (the underlining is ours), (b) the fact that four louvre blades were found missing in the door of the living room downstairs, as testified by the complainant's son when he indicated the manner in which, according to him, the appellant had entered his mother's house, and (c) the testimony of the complainant herself to the effect that she had properly closed and locked all the doors and windows of her house before going to bed on the relevant day.

Moreover, the evidence showed also that the appellant, together with an unknown person, entered the dwelling house which was occupied by the complainant, had attacked and wounded her with a knife and was bent, according to the complainant, on searching for some documents. Indeed the appellant's fellow intruder was searching for documents in the bedroom of the complainant, as mentioned already.

Consequently, the appellant could have been found guilty of breaking and entering, together with an unknown person, a building used as a human dwelling, with intent to commit a felony therein, namely the felony of theft of the documents (Sections 252 and 260 of the Penal Code), in terms of Section

289(a) of the Penal Code, by virtue of Section 163 of the Criminal Procedure Code, already cited.

Since this Court may on appeal make any order which the trial Court could have made by virtue of Rule 41 of the Seychelles Court of Appeal Rules 1978, we amend the judgment of the trial Court by substituting for the conviction passed one for the offence of housebreaking. The conviction of the trial Court is otherwise affirmed.

With regard to sentence, we consider that the trial Court treated, as the record clearly shows, the appellant as a first offender and properly took into account, on the one hand, the mitigating circumstances pleaded in his favour, namely that he is relatively young and is the father of six children and on the other, the prevalence of the offence of robbery with violence in the country.

Since the offence with which the appellant stands convicted now is one of housebreaking which carries a maximum term of 10 years' imprisonment, we consider in all the circumstances of the case that a sentence of 7 years' imprisonment would meet the ends of justice while at the same time having, we hope, a deterrent effect. Consequently, for the sentence passed, we substitute one of seven years' imprisonment. The appeal is otherwise dismissed.

E. O. AYOOLA	**A. G. PILLAY**	**G.P.S. DE SILVA**
PRESIDENT	**JUSTICE OF APPEAL**	**JUSTICE OF APEAL**

Dated at Victoria, Mahe, this 13th. day of ***April*** 2000.