

## **SOPHA v REPUBLIC**

**(2012) SLR 296**

K Domingue for the appellant

D Esparon, Principal State Counsel for the respondent

**Judgment delivered on 31 August 2012**

**Before Fernando, Twomey, Msoffe JJ**

**FERNANDO J:**

This is an appeal against the conviction of the appellant for the offence of murder. As per the particulars of offence the appellant together with Maxime Tirant on 5 June 2009 at Bel Ombre, Mahe, with common intention murdered France Henriette. Maxime Tirant was deceased at the time of the filing of the indictment, although no mention of it is made in the charge sheet.

The appellant has filed the following grounds of appeal:

- (1) The verdict is unsafe, unsound and unreasonable in that it is against the evidence adduced.
- (2) The trial Judge erred in admitting the first statement of the appellant.
- (3) The trial Judge erred in directing the jury not to return a verdict of manslaughter.

This was a case where the appellant had, at the trial, given sworn evidence from the witness stand. According to the appellant's evidence, on 5 June 2009, on a pre-arranged plan to steal at the house of the deceased, he along with Maxim Tirant came in a vehicle and embarked near the house of the deceased. They had been informed that the deceased was not at home and was at a function at the District Community Center in Belombre. Throughout his evidence it had been the appellant's position that he and Maxim did not know until they went into the room in which the deceased was sleeping that the deceased was in the house. Arriving near the house of the deceased they had sat under a bridge for about one and a half hours and smoked drugs and cigarettes. Thereafter they had entered the house of the deceased around 11 pm, by removing three louver blades. The appellant had been armed with a machete and Tirant with a small knife. Tirant had stolen some money from the kitchen. The appellant had seen the deceased sleeping on his bed and reported it to Tirant. They had agreed to tie up the deceased. When the appellant and Tirant were searching in the room the deceased had woken up due to the noise.

In the words of the appellant:

When he woke up I jumped on the bed and hold his hands at the back and I told Maxim to place his hands on the mouth of Mr Henriette (*deceased*) for him not to shout. While maxim was gagging his mouth he fought with us at first and fell off the bed and hit his head on the tiles of the floor..... He continued to struggle with us and he attempted to stand and when he had managed to stand up there was a brick which had been lying on the floor close to the door, Maxim took the brick and hit Mr Henriette in the head with it at the time I was holding the hands of Mr Henriette at the back. Maxim hit him only once and he struggled and tried to scream when he tried to scream....I tore the bed sheet. I gagged his mouth with the torn bed sheet. He had fallen down when I was tying his mouth. At the time he was struggling and saying "wait I will give it to you" repeatedly. He tried to remove the bed sheet from his mouth for him to scream and I pressed him again and again Maxim tried to gag his mouth. While he was lying on the floor Maxim kicked him with his feet four or five times in the groin. When I was holding his hands at the back he relaxed a bit and I released his hands. We continued to search the house.....

On being questioned by his counsel, the appellant had said that Maxim Tirant had hit the deceased on his head with the brick only once and that Maxim had also tied the deceased's hands at the back while he held them. The appellant had admitted that it was for the first time in Court that he had mentioned that the deceased had fallen from the bed and hit his head on the floor and had not mentioned it in his statements. They had found money at various places in the house and two mobile phones and taken them.

Thereafter in the words of the appellant:

I told Maxim that there is nothing else in the house and that it was time for us to leave. Before we left I went to check up on Mr Henriette. I could see that he was still breathing. I removed the piece of cloth gagging his mouth and hands because we did not come to that place with the intention to hit the man we had only the intention to steal.

At this stage "He [*deceased*] did not talk but his eyes remained open he was just panting like someone who is tired." Under cross-examination the appellant had denied mentioning about the eyes of the deceased. Thereafter they had left the house in the same way they had entered it through the louver blades, having spent "approximately half an hour or quarter of an hour" in the house. Under cross-examination the appellant had said "Maybe 1 hour to one and a half hours maybe less." According to the evidence of those who arrived at the house of the deceased soon after the incident, no mention is made of the deceased being tied in any way thus corroborating the testimony of the appellant.

The appellant had been cross-examined at length in relation to the causing of the death of the deceased. The appellant had been silent when it was suggested to him by counsel for the prosecution that if he had not jumped on the bed, held the deceased's hands, overpowered him and struggled with the deceased, Maxim Tirant could not have struck the deceased with the brick. The appellant had admitted that "I held his hands

because Maxim Tirant was a small skinny man and he could not have held a person that size.” In answer to Court, the appellant had said the plan was to tie him up, rob and go.

On the issue of causing the death of the deceased, the following dialogue by the appellant and his counsel is of significance:

Q. Do you think that you did anything that led to the death of Mr Henriette?  
I do not know if it was the blow he received from Maxim with the small brick or *perhaps when I was struggling with him he hit his head on the floor* but we had not come with an intention to kill Mr Henriette.(emphasis by us)

Q. Do you have anything to say about this incident involving Mr Henriette?  
I accept that I went into that house to steal but I do not accept that I went into that house to kill Mr Henriette. I would like to ask his family members for forgiveness that it so happened that Mr Henriette lost his life but it was not my fault perhaps during the struggle force was used and an accident happened.

The appellant had said in his re-examination that they had no intention to do any grievous harm to the deceased.

On being questioned by his counsel about the machete and knife they had with them, the appellant had said that he uses the machete in the forest to get food and if they had an intention to murder the deceased they would have used the machete. On being questioned under cross-examination as to why he had to enter the house with the machete without leaving it outside, the appellant's answer had been to the effect that he keeps his machete everywhere he goes because he was an escape convict and the police were after him. The appellant had denied the suggestion of counsel for the prosecution, that he was prepared to confront anyone if the need arose in that house and would have used the machete, the moment the deceased jumped from his bed. The appellant had admitted under cross-examination that in three previous cases, violence had been used in committing the offences of robbery he was convicted of.

On the issue of intoxication, the following dialogue by the appellant and his counsel is of significance:

Q. You have related to the court in quite some details what happened on that day. Are you sure and certain that you remembered you recollected everything that happened on that day given that you were under the influence of drugs?

Yes I am sure that I told everything the way it happened.

Q. Your mind was not blurred in any way by the effect of drugs?

Yes my mind was not 100% clear I was under the influence of drugs because we are in the effect of drugs.

Q. What you recollect is it correct, 100%, 75% correct. How do you rate it?

What I recall is 90% correct. All that I am telling the court is correct.

Intoxication has been set out in section 14 of the Penal Code –

- (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.
- (2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and-
  - (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
  - (b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.
- (3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused person shall be discharged, and in case falling under paragraph (b) the provisions of section 13 shall apply.
- (4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.
- (5) For the purposes of this section "intoxication" shall be deemed to include a state produced by narcotics or drugs.

In view of the evidence set out in paragraph 10 above and the rest of the evidence, it is clear that subparagraph (2) of section 14 does not apply to the facts of this case. Further subsection (4) of section 14 would also have no application since liability for murder under sections 196(b) and 23 of the Penal Code can arise even on the basis of knowledge.

In view of his detailed testimony in Court by the appellant, the complaint as regards the admission of the appellant's first statement is of no significance. The trial judge had admitted the 14 page statement, signed by the appellant at 28 places, after a voir dire and having heard the evidence of both the police officers involved in the taking of the statement and that of the appellant. The trial judge had said:

This court has judiciously considered the evidence adduced in its entirety. The allegations leveled against the police officers while interrogating the accused thereby putting the confession statement in issue, in my view, are baseless, unsubstantiated and, as described by SI Ghislain, a pack of lies. The accused's testimony is fanciful, highly doubted and amounts to nothing more than an exaggeration. To me it clearly appears like the accused wanted to give such confession statement voluntarily at that time and now he is feeling the 'pinch' of its contents.....Accordingly, having been satisfied beyond a reasonable doubt that the accused made the statement in question voluntarily same is hereby admitted in evidence as prayed by the prosecution.

The trial judge had the opportunity to observe the demeanour of the witnesses who testified at the voir dire and we see no reason to disturb that finding. In fact the evidence on oath by the appellant in relation to how the deceased came to be injured is almost identical to that of his statement, save for a few discrepancies which in our view would not have caused any prejudice to the appellant and a miscarriage of justice. We therefore dismiss the second ground of appeal.

Again, in view of the detailed testimony of the appellant in Court under oath placing himself at the scene of offence at the relevant time and accepting his involvement with the co-accused Maxim Tirant in the incident resulting in the death of France Henriette, the only matter that needs to be considered in relation to ground 1 of the appeal referred to at paragraph 2(1) above is whether the appellant should have been convicted for murder or manslaughter. The benefit of a complete acquittal is certainly not available to the appellant even on his own testimony nor has it been sought in this appeal.

The evidence of the doctor who did the post-mortem examination is consistent with the mouth of the deceased having been gagged, as narrated by the appellant. The injuries on the head, which caused subdural haemorrhage resulting in death, according to the doctor, could have been caused by a blow or a fall. This corroborates the testimony of the appellant who while testifying had said that the deceased may have sustained his injuries when he was struck with a brick by Maxim Tirant or by striking his head on the floor while struggling with the appellant. Unfortunately neither counsel had questioned the doctor about the height from which the deceased had to fall to sustain the head injuries he had. Since the height of the bed was known and was depicted in the photographs, one of the possible causes for the head injuries could then have been excluded. The doctor had gone on to state that the gagging of the mouth could have contributed to the death of the deceased, that the external injuries found on the face of the deceased could also have been caused by a blow or a fall, the brick recovered from the room of the deceased could have been used to cause the head injuries and the bruises on the face, and that the deceased may have succumbed to his injuries within 30 minutes of receiving the injuries. The doctor had not been in a position to say the force with which the blows were delivered and her evidence is indicative of a single blow or a fall on a hard surface. If these matters pertaining to the number of blows and the force could have been clarified it may have been possible to come to a definitive conclusion as to the intention of the attackers, taking into consideration the other circumstances of this case.

In this case the appellant had been charged of the offence of murder under section 193 of the Penal Code on the basis of section 23 of the Penal Code, namely 'offences committed by joint offenders in prosecution of common purpose'. This necessitates us to examine in detail the elements of the offence of murder and section 23.

Murder has been defined in section 193 of the Penal Code in the following manner:

Any person who with malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.

The offence of murder carries a mandatory life sentence. The distinction between the offence of murder as defined in section 193 and the offence of manslaughter as defined in section 192, which carries a discretionary life sentence, is the absence of malice aforethought in the definition of manslaughter in section 192:

Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed 'manslaughter'. An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.

Malice aforethought has been defined in section 196 of the Penal Code –

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-

- (a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous harm is caused or not, or by a wish that it may not be caused.

“Grievous harm” according to the Penal Code means:

any harm which amounts to a maim or dangerous harm, or seriously or permanently to injures health or which is likely so to injure health, or which extends to permanent disfigurement or to any permanent or serious injury to any external or internal organ, membrane or sense.

Thus in order to establish malice aforethought it must be proved beyond a reasonable doubt that the perpetrator of the death causing, unlawful act, had intended to cause the death or do grievous harm to a person, or had the knowledge that his unlawful act or omission, which resulted in death, would probably cause death or grievous harm to a person. Section 196 recognizes the principle of 'transferred intent and knowledge', namely the person killed need not necessarily have been the person the perpetrator set out to kill. Section 196 also stipulates that when liability arises on the basis of the perpetrator's knowledge, his wish that death or grievous harm may not be caused or his indifference towards it is of no relevance. Thus in order to establish malice aforethought and seek a conviction for murder, the intention or knowledge as specified in section 196 must necessarily be proved. The requisite intention could be formed and the knowledge gathered on the spur of the moment. In the absence of malice aforethought a person may be convicted of the offence of manslaughter, commonly known as 'involuntary manslaughter', provided there is proof of an unlawful and intentional act that resulted in death. However our Penal Code also provides that despite the existence of malice aforethought and the rest of the elements required to constitute the offence of murder, a person shall not be convicted of murder if he was suffering from diminished responsibility (section 196A) or acting under provocation (section 198) at the time of the killing. In such circumstances a person may be convicted of the offence of manslaughter. This is commonly known as 'voluntary manslaughter'. Thus every case of murder is also manslaughter but not vice versa.

The prosecution in this case has in charging the appellant adopted the draft charge for murder as set out in the Fourth Schedule of the Criminal Procedure Code (CPC) as provided for in section 114(a)(iv) of the CPC, which states:

the forms set out in the fourth schedule to this Code or forms conforming thereto as nearly as may be shall be used in cases to which they are applicable, and in other cases forms to the like effect of conforming thereto as nearly as may be shall be used,....

Section 114(b)(i) states:

Where an enactment constituting an offence states the offence to be an omission to do any one of different acts in the alternative, or the doing or the omission to do any act in any one of any different capacities, or with any one of different intentions, or states any part of the offence in the alternative, the acts, omissions, capacities or intentions, or other matter stated in the alternative in the enactment, may be stated in the alternative in the count charging the offence.

The prosecution by using the generic word 'murdered' France Henriette in the indictment has charged the appellant for causing the death of France Henriette by an unlawful act and omission.

With that brief introduction to the offence of murder it becomes necessary to examine how a person shall be held liable for the offence of murder on the basis of section 23. What is to be noted is that section 23 sets out a general principle of criminal liability and does not create a substantive offence.

Section 23 of the Penal Code states:

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.

Thus under section 23 a person can be made jointly and severally liable not only for the offence the parties set out to commit but also for any other offence that is committed in the prosecution of the offence they set out to commit, provided that the commission of the other offence was a probable consequence of the prosecution of the offence they set out to commit. This brings in the element of knowledge ie knowledge on the part of the perpetrators as to the probable consequences of the prosecution of the offence they set out to commit. In such circumstances proof of the requisite intention on the part of the perpetrators, which may be an element of the other or second offence, need not be proved and proof of knowledge would suffice.

This Court in the case of *Jean-Paul Kilindo and Gary Payet v Republic* (2011) SLR 283 said:

The law in Seychelles is that it suffices to show that a secondary act took place as a probable consequence of the agreed first act intended. In this jurisdiction we do not need to look for the intention of the perpetrator to carry out the secondary act. All that is necessary is that the secondary act took place as a probable consequence of the first agreed act to which they had agreed upon.

Is the element of 'knowledge of probable consequences' one of strict liability or part of the mental element to be proved by the prosecution? The wording in section 23: "an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose" excludes strict liability. The next issue to be determined is whether it is an objective test or a subjective test that is called for under section 23 to determine knowledge of probable consequences, namely of the other offence, on the part of the perpetrators. Section 23 uses the words: "each of them is deemed to have committed the offence." This 'deeming' provision provides for an objective test and is in line with the derogation provided for in article 19(10)(b) of the Constitution to the right to innocence enshrined in article 19(2)(a) of the Constitution. Article 19(10)(b) states:

Anything contained in or done under the authority of any law necessary in a democratic society shall not be held to be inconsistent with or in contravention of clause (2)(a), to the extent that the law in question.....declares that the proof of certain facts shall be prima facie proof of the offence or of any element thereof.

However if one is to be convicted of having committed murder, while prosecuting the offence of robbery, the words 'of such a nature' necessarily requires proof from an objective standpoint, of knowledge of the three elements required to constitute the offence of murder, namely, the causing of death, by an unlawful act or omission, with malice aforethought, and of the probability of death ensuing in such circumstances.

Section 193 specifically provides for causing murder by an unlawful act or omission. Further since murder is a result-crime the conduct of the accused that is causative of the result may consist not only of their gagging the deceased and striking his head with a brick or struggling with him which caused the deceased to fall on the floor but the failure of the accused to take measures that lay within their power to counteract the danger that they had created by calling for medical assistance or summoning help. This is in accordance with the principle laid down by Lord Diplock in the case of *R v Miller* [1983] 2 AC 161 (HL).

In *Sing (Gurphal)* [1999] Crim LR 582 the Court of Appeal held that the question as to whether a situation gave rise to a duty to act was one of law for the judge to determine. However in the case of *Willoughby* [2004] EWCA Crim 3365 Rose LJ confirmed that, although there may be special cases where a duty obviously exists (such as that between doctor and patient) and where the judge may direct the jury accordingly, the question whether a duty was owed by the defendant to the deceased will usually be a matter for the jury provided there is evidence capable of establishing a duty in law.



In *R v Evans (Gemma)* [2009] EWCA Crim 650 the appellant obtained heroin and gave some to her sister who self-administered the drug. The appellant was concerned that her sister had overdosed so decided to spend the night with her but did not try to obtain medical assistance as she was worried she would get into trouble. When she woke up she discovered that her sister was dead. She was convicted of manslaughter and appealed. The Court of Appeal dismissed her appeal. For the purposes of gross negligence manslaughter, when a person had created or contributed to the creation of a state of affairs that he or she knew, or ought reasonably to have known had become life threatening then, normally, a duty to act by taking reasonable steps to save the others life would arise. They also held that the question of whether a duty of care existed was a question of law for the judge and not the jury.

In this case the appellant had said in his examination-in chief that prior to leaving the house of the deceased, he had noticed that the deceased was not moving, was panting like someone who is really tired and that he felt that this was a bit strange. He had however said that he had not seen any "blood oozing from" the deceased. The appellant's testimony bears out that the deceased had earlier struggled and fought with the two accused and tried to scream. The appellant had also said: "I found that he was a strong man." When Freddy Aimable called the appellant around 2 am the following morning, which is about 3 hours after leaving the house of the deceased and informed him that it seemed that France Henriette had passed away the appellant had said that 'he had been afraid' and told Maxim Tirant, the co-accused, that he should not have hit the deceased. This is evidence that the appellant knew that he had created or contributed to the creation of a state of affairs that had become life threatening and of the failure of the appellant to take measures that lay within his power to counteract the danger that they had created, by calling for medical assistance or summoning help. It is to be noted that the appellant had tried to make out that he had no intention to harm the deceased.

The third ground of appeal is to the effect that the trial judge erred in directing the jury not to return a verdict of manslaughter. This ground had been based on the following passages of the summing up –

Defence counsel has invited the jury to look at the lesser offences available such as manslaughter. Moreover, looking at the evidence adduced before the court, there is no support or disclosure of any aspect or issue of self-defence or provocation and intoxication or even insanity or diminished responsibility, which aspects can lead to reduction of the charge of murder. The way I look at it two verdicts are open to you thus either the accused is guilty or not guilty of murder. Ladies and gentleman of the jury the law has chosen you alone to decide on the facts of this case. You may return a verdict of manslaughter if only you have a basis.

Having clearly stated that there is no evidence of self-defence, provocation, intoxication, insanity or diminished responsibility which could lead to reduction of the charge of murder to one of manslaughter, the trial judge had removed from the consideration of the jury the verdict of manslaughter (involuntary). In making the above statement the

trial judge had only considered the concept of voluntary manslaughter, whereas the issue of involuntary manslaughter as a result of absence of malice aforethought was also open for consideration by the jury as explained at paragraph 17 above. We must however state that self-defence and insanity do not reduce a charge of murder to manslaughter. The Judge was correct when he ruled out provocation and diminished responsibility as there is no evidence whatsoever in this regard. He was also correct to have ruled out intoxication in view of what is stated in paragraphs 10 and 11 above.

We also find that the trial judge had expressed himself too strongly on the facts of this case rather than leaving the matter for the decision of the jury. Two such instances are:

A very small and light object for instance or, slight hitting of the head on the wall or floor would not have occasioned such grave injuries on the deceased. *The perpetrators of this crime must have known that.....hitting him on the head with force would cause grievous harm or subdural haemorrhage.* [emphasis by us]

The trial judge had also said:

When one strikes so hard or causes serious or grave injury to the vital or sensitive part of the body like the head, brain, skull of another with a heavy or sharp object such as a concrete brick weighing about a kilogram *he should have had the knowledge that it would probably cause the death of, or grievous harm to that person,* although such knowledge is accompanied by indifference whether death or grievous harm would be caused or not even by a wish that it may not be caused. [emphasis by us]

By doing this he had virtually imputed the necessary knowledge to the appellant. Further this statement is contrary to the doctor's evidence. When questioned by the prosecution as to how much of force would have been used to cause the head injury the answer had been:

In subdural haemorrhage the head does not have to be hit by anything to produce this. We cannot be definitive about the amount of force. It can be large or small.

We find this a misdirection both on facts and the law.

We also find that the trial judge's direction to the jury on common intention is inadequate and faulty. On common intention what the trial judge had done mainly was to repeat to the jury the wording in section 23 and quote from previous decisions and authorities. In our view, section 23 should have been explained to the jury in layman's language rather than leave it to them to comprehend its meaning with all its technicalities, by reference to its definition in the Penal Code and case law and authorities they are not familiar with. His explanation on common intention is to the effect:

....What counts is the participation of the accused in the criminal object as explained by the authors above, and not necessarily the degree of involvement

or part played.....*Not only the law but also the evidence would hold him responsible for whatever results flowing from his criminal actions of that fateful night whether he knew, wished or intended them or not.* [emphasis by us]

To say that the appellant would be responsible for the murder of France Henriette regardless of whether he knew of the results flowing from his criminal actions is contrary to the provisions of section 23 which specifically provides for knowledge on the part of the perpetrators as to the probable consequences of the prosecution of the offence they set out to commit as explained in paragraphs 19-23 above.

This in our view is both a misdirection and a non-direction on the law.

It is our view that the trial judge had erred by not leaving open to the jury to consider the alternative verdict of manslaughter (involuntary) for this was not a case where the alternative offence was relatively so trifling or insubstantial (for example, common assault) in comparison to the offence with which the appellant had been charged, that the judge thinks it best not to distract the jury by asking them to consider something which is remote from the real point of the case.

However a misdirection as to law will lead to the quashing of a conviction only if that misdirection causes the conviction to be unsafe. Thus in *Edwards* (1983) 77 Cr App R 5 and *Donoghue* (1987) 86 Cr App R 267, the Court of Appeal dismissed the appeals despite the judge having failed to direct the jury as to the standard and burden of proof respectively. In each case the court observed that the evidence against the defendant was very strong and justified the exercise of the proviso which then applied under section 2(1) of the Criminal appeal Act 1986. In *R v Sheaf* (1925) 19 Cr App R 46, Avory J said:

When we once arrive at the conclusion that a vital question of fact has not been left to the jury, the only ground on which we can affirm a conviction is that there has been no miscarriage of justice, on the ground that if the question had been left to the jury, they must necessarily have come to the conclusion that the appellant was guilty.

Section 344 of the Criminal Procedure Code provides:

Subject to the provisions herein before contained, no finding ..... by a court of competent jurisdiction shall be reversed or altered on appeal..... on account .....of any misdirection in any charge to a jury, unless such..... misdirection has in fact occasioned a failure of justice.

Rule 31 (5) of the Seychelles Court of Appeal Rules 2005 provides:

Provided that the Court may, notwithstanding that it is of opinion that the point or points raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

We are of the view that in this case the evidence against the appellant on his own testimony before court is overwhelming for any properly directed jury to have convicted him of murder on the basis of an objective test under section 23 of the Penal Code. The following items of evidence are of relevance –

- (i) The fact that the appellant and another attacked the deceased who was sleeping,
- (ii) The fact that the two of them entered the house of the deceased armed with a machete and a small knife,
- (iii) The fact that they tied the deceased's hands, gagged his mouth and the appellant had struggled with him which made the deceased fall off the bed,
- (iv) The fact that the deceased was hit with a brick on his head by the other assailant while the appellant held him,
- (v) The fact that the fall from the bed or the blow to the head caused subdural haemorrhage, resulting in death,
- (vi) The fact that the gagging of the mouth could result in suffocation according to the doctor's testimony,
- (vii) The fact that the subdural haemorrhage resulting from the fall from the bed or the blow to the head was sufficiently severe to cause the death of the deceased within 30 minutes of his suffering such injury,
- (viii) The failure of the appellant and his co-accused to take measures that lay within their power to counteract the danger that they had created by calling for medical assistance or summoning help, when they realized that the deceased, who the appellant had described as a strong man and had fought hard with them, was lying motionless and without speaking.

These items of evidence would have sufficed for a properly directed jury to convict the appellant of the offence of murder even without the application of section 23, on the basis of his knowledge that the acts or omissions causing death will probably cause the death of or grievous harm to the deceased. The appellant's insistence that he did not intend to harm the deceased is of no relevance in view of the definition of malice aforethought in section 196 as set out in paragraph 16 above.

We therefore have no hesitation in dismissing the appeal.

**MSOFFE J:**

I have read in draft the judgment of my brother Fernando JA and I concur. However, I will add a few comments.

It is common ground that the death of Mr France Henriette on the fateful day occurred in the course of a robbery. The appellant's testimony at the trial was that he and Mr Maxime Tirant (who is dead) went to the deceased's home with the intention of stealing and not to kill him. He still maintains that stance at this appeal stage. It is in this

context that in the third ground of appeal it is averred that the trial judge erred in directing the jury not to return a verdict of manslaughter.

Section 192 of the Penal Code defines manslaughter – “Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter”.

Manslaughter is distinguished from murder by a lack of intention to kill or to cause bodily harm. It is available where there are defences like provocation and diminished responsibility. The appellant did not raise any of these defences. His only defence was that he did not intend to kill the deceased. However, since there is evidence that he admitted jumping on, tying and gagging the deceased, it is evident that there was an intention to harm.

The question is whether on the available evidence the appellant should have been convicted of the lesser offence of manslaughter. In order to answer this question it is pertinent to state the definition of malice aforethought. This is important because to prove murder it must be established that there was malice aforethought.

Section 196 of the Penal Code defines malice aforethought as –

- (a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person whether such person is the person actually killed or not, *although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, by a wish that it may not be caused.*  
[emphasis added]

In this case the evidence shows that the appellant and his deceased colleague were indifferent as to the grievous harm caused to the deceased. Both went to his home armed with a machete and a knife. They attacked him when they could have easily left him to enjoy his sleep.

So, in Seychelles if one is indifferent as to whether death is caused by one's action(s) the indifference is sufficient to prove murder. It is in this context that the submission by Mr David Esparon, Principal State Attorney, citing my sister Twomey in *Jean-Paul Kilindo and Garry Payet v Republic* SCA 4/2010, is pertinent where he states –

It suffices to show that a secondary act took place as a probable consequence of the agreed first act. In this jurisdiction we do not need to look for the intention of the perpetrator to carry out the secondary act. All that is necessary is that the secondary act took place as a probable consequence of the first act which they had agreed upon.

The above principle of law finds support in other jurisdictions in East Africa as I shall endeavour to show hereunder.

In the Ugandan case of *Petero Sentali s/o Lemandwa v Reginam* (1953) 20 EACA 20 the facts established that the deceased died in consequence of violence inflicted on her by the appellant in the furtherance of, or in consequence of his committing a felony in his house. It was held that by virtue of section 186 of the Penal Code, if death is caused by an unlawful act or omission done in furtherance of an intention to commit any felony, malice aforethought is established.

In *Olenja v Republic* (1973) EA 546, a case from Kenya, a pregnant girl died as a direct result of an attempted abortion by the appellant who was unqualified and inexperienced in the obtaining of abortions. The appellant was convicted of murder by the trial judge, holding that malice aforethought was established by proof of an intent to commit a felony. On appeal, the conviction was substituted for manslaughter because, in the circumstances of that case, malice aforethought was not necessarily established by proof of intent to commit a felony. However, for purposes of our discussion in this case it should be mentioned that in *Olenja* (supra) the Court also observed that as a general principle a person who uses violent measures in committing a felony involving personal violence is guilty of murder if death results even inadvertently.

In Tanzania the definition of malice aforethought is more or less similar to that in Seychelles. Section 200 of the Penal Code provides -

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence.

In the Tanzanian case of *Fadhili Gumbo alias Malota and three others v Republic* (2006) TLR 50, the murder in question was committed in the course of a robbery. The High Court convicted the appellants. On appeal to the Court of Appeal it was held that the law is clear that a person who uses violent measures in the commission of a felony involving personal violence does so at his/her own risk and is guilty of murder if these violent measures result in the death of the victim. The Court went on to observe that if death is caused by an unlawful act in the furtherance of an intention to commit an offence, malice is deemed to have been established in terms of section 200(c) of the Penal Code.

There is another aspect of the case which I wish to address. This is in relation to the law of evidence, particularly circumstantial evidence in this case. On this, I am mindful that as a general statement, in Seychelles the law of evidence is the English Law of evidence by virtue of section 12 of the Evidence Act which provides -

Except where it is otherwise provided by this Act or by special laws now in force in Seychelles or hereafter enacted, the English law of evidence for the time being shall prevail.

Also see Andre Sauzier *Introduction to the Law of Evidence in Seychelles* (2nd ed) at 1.

In this sense, I believe that the law on circumstantial evidence in the English tradition applies to Seychelles as well in the context in which in his summing up to the jury the trial judge directed them at page 903 of the appeal record, *inter alia*, as follows -

I find that the whole of the above circumstances and evidence taken together create a conclusion of guilt with as much certainty as human affairs can require.....

Further, if you so agree with me, then you must be warned to be sure that these inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.

In my view the trial judge, by the above statement, correctly stated the law on circumstantial evidence. On this aspect, I will also add the position in Tanzania as stated in the case of *Ally Bakari v Republic* (1992) TLR 10 where the Court of Appeal held that –

Where the evidence against the accused is wholly circumstantial the facts from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be connected with the facts which the inference is to be inferred.

However, in my view, the best exposition of what constitutes circumstantial evidence is as stated by *Sarkar on Evidence* (15th ed, reprint 2004) at 66 to 68 –

1. That in a case which depends wholly upon circumstantial evidence, the circumstances must be of such a nature as to be capable of supporting the exclusive hypothesis that the accused is guilty of the crime of which he is charged. The circumstances relied upon as establishing the involvement of the accused in the crime must clinch the issue of guilt.
2. That all the incriminating facts and circumstances must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other hypothesis than that of his guilt, otherwise the accused must be given the benefit of doubt.
3. That the circumstances from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be closely connected with the fact sought to be inferred thereof.
4. Where circumstances are susceptible of two equally possible inferences the inference favouring the accused rather than the prosecution should be accepted.

5. There must be a chain of evidence so far complete as not to leave reasonable ground for a conclusion therefrom consistent with the innocence of the accused, and the chain must be such human probability the act must have been done by the accused.
6. Where a series of circumstances are dependent on one another they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated.
7. Circumstances of strong suspicion with more conclusive evidence are not sufficient to justify conviction, even though the party offers no explanation of them.
8. If combined effect of all the proved facts taken together is conclusive in establishing guilt of the accused, conviction would be justified even though any one or more of those facts by itself is not decisive.

Of course, in the instant case, invoking circumstantial evidence in convicting the appellant would not necessarily arise because the evidence against the appellant was not wholly circumstantial. There were other pieces of evidence that would be enough to ground a conviction including the appellant's own testimony in Court that he and Mr Maxime Tirant went to the deceased's house with the intention of stealing. As it is therefore, a discussion on circumstantial evidence in this case is merely academic, if one may respectfully say so.

Perhaps, I should mention one other point in passing. I notice that this was a protracted or long trial in which a total number of 24 witnesses testified for the prosecution and in the process a number of exhibits were tendered and admitted in evidence. Indeed, the record of appeal to this Court consists of four bound volumes. All this suggests to me that a lot of time, effort and expense were put in the trial. This state of affairs has prompted me to make the point which I will demonstrate hereunder.

In the Criminal Procedure Code, Chapter 54 of the Laws of Seychelles, there is an elaborate procedure of how to conduct a preliminary inquiry (PI) by the Magistrates Court, proceedings after committal for a trial etc, as is well propounded under sections 192 to 279 thereto. In Tanzania the scheme of a PI is more or less similar to Seychelles as per sections 243 to 263 of the Criminal Procedure Act (Cap 20 RE 2002), save that in Seychelles under section 198 of the above Code a Magistrates Court has power to discharge an accused person if the evidence against him is insufficient to put him on trial. In Tanzania a Magistrates Court has no such power. I am making this point purely out of interest because I am aware that a PI is different from a preliminary hearing (PH).

It seems to me that Seychelles does not have a preliminary hearing (PH) similar to that of Tanzania in the conduct of criminal trials. In saying so, I am aware that in Seychelles there is a procedure for proof by formal admission under section 129(1) of the Criminal Procedure Code but, in my view, it is not on all fours with the Tanzanian procedure. The object of a PH in the context of Tanzania is to accelerate trial and disposal of cases. In the process, a lot of time, effort and expense are saved. To this end, section 192 of the Criminal Procedure Act provides as follows –



- (1) Notwithstanding the provisions of section 229, if an accused person pleads not guilty the court shall as soon as is convenient, hold a preliminary hearing in open court in the presence of the accused or his advocate (if he is represented by an advocate) and the public prosecutor to consider such matters as are not in dispute between the parties and which will promote a fair and expeditious trial.
- (2) In ascertaining such matters that are not in dispute the court shall explain to an accused who is not represented by an advocate about the nature and purpose of the preliminary hearing and may put questions to the parties as it thinks fit; and the answers to the questions may be given without oath or affirmation.
- (3) At the conclusion of a preliminary hearing held under this section, the court shall prepare a memorandum of the matters agreed and the memorandum shall be read over and explained to the accused in a language that he understands, signed by the accused and his advocate (if any) and by the public prosecutor, and then filed.
- (4) Any fact or document admitted or agreed (whether such fact or document is mentioned in the summary of evidence or not) in a memorandum filed under this section shall be deemed to have been duly proved; save that if, during the course of the trial, the court is of the opinion that the interests of justice so demand, the court may direct that any fact or document admitted or agreed in a memorandum filed under this section be formally proved.
- (5) Wherever possible, the accused person shall be tried immediately after the preliminary hearing and if the case is to be adjourned due to the absence of witnesses or any other cause, nothing in this section shall be construed as requiring the same judge or magistrate who held the preliminary hearing under this section to preside at the trial.
- (6) The Minister may, after consultation with the Chief Justice, by order published in the Gazette make rules for the better carrying out of the purposes of this section and without prejudice to the generality of the foregoing, the rules may provide for-
  - (a) Delaying the summoning of witnesses until it is ascertained whether they will be required to give evidence on the trial or not;
  - (b) The giving of notice to witnesses warning them that they may be required to attend court to give evidence on the trial.

I may as well add here that in practice in a PH a list of the prosecution and defence witnesses is drawn and is made part of the record of proceedings. The object and purpose of doing so is to ensure that the witnesses to be summoned at the main trial will only be those who will come to court and testify on matters that are in dispute.

It might also be of interest to mention here that in Tanzania a PH is conducted in both the Resident/District Magistrates Courts and the High Court in the exercise of their respective original jurisdictions.

In this case, if a PH had been conducted along the above stated lines perhaps a lot of time, effort and expense would have been avoided or saved in the process. I say so because, after all, the following matters were not in dispute –

- (i) That Mr France Henriette was dead.
- (ii) That the death was unnatural.
- (iii) That as per the Post Mortem Examination Report (Exh PE 26) the cause of death was due to (a) subdural haemorrhage and (b) blunt head trauma.
- (iv) That, therefore in view of (iii) above, the cause of death was not in dispute.
- (v) That on 5 June 2010 the appellant together with Mr Maxime Tirant went to the home of the deceased with intention to steal and in the ensuing violence the deceased met his death.

Since the above matters were not in dispute it is my further view that if there had been a PH at the commencement of the trial in line with the procedure obtaining in Tanzania probably fewer witnesses would have been called to testify and possibly also fewer exhibits would have been tendered in evidence thereby accelerating the trial and disposal of the case. In the process, it is my view that a lot of time, effort and expense would have been spared.

All in all, the appellant's conviction was well grounded. The appeal is devoid of merit. It is accordingly dismissed.