IN THE COURT OF APPEAL OF SEYCHELLES

Freddy Paul Oreddy	APPELLANT
VS	
The Republic	RESPONDENT

SCA CR No: 03/2011

BEFORE: Domah, Fernando, Msoffe, JJA

Counsel: Mr. B Hoareau for the Appellant
Mr. C. Jayaraj, Principal State Counsel, for the Respondent

Date of Hearing: 04th August 2014
Date of Judgment: 14th August 2014

JUDGMENT

A. F. T. FERNANDO JA

1) The Appellant appeals against his conviction by the Supreme Court for offences of robbery with violence contrary to section 281 of the Penal Code and committing an act with intent to cause grievous harm to a person contrary to section 219(a) of the Penal Code.

2) The Amended Charge of 24th March 2010 read as follows:

Count 1

Statement of offence

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

Particulars of offence

Freddy Paul Oreddy of Anse-Aux-Pins, together with a person known to the Republic, Antoine Labrosse, on the 12th day of February 2010, at Foret Noire, Mahe, with common intention robbed Mr. Kannan Ponnusamy Pillay of a black brief case containing more

than R 100,000 in different denominations and at the time of such robbery used personal violence to the said Kannan Ponnusamy Pillay.

Count 2

Statement of offence

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.

Particulars of offence

Freddy Paul Oreddy of Anse-Aux-Pins, together with a person known to the Republic, Antoine Labrosse, on the 12th day of February 2010, at Foret noire, Mahe with intent to cause grievous harm to Mr. Kannan Ponnusamy Pillay, having common intention caused grievous harm to Kannan Ponnusamy Pillay.

3) The only person arraigned before the court in this case and tried, was the Appellant. We are in a difficulty to understand why the trials were split and Antoine Labrosse tried separately in case No: CR 32 of 2010.

4) The only challenge, as per the six grounds of appeal filed in this case and before the trial court is in regard to the identification and or recognition of the Appellant as one of the persons who attacked and robbed Mr. Kannan Ponnusamy Pillay. As the Learned Trial Judge had correctly stated there was no challenge to the attack on and robbery of Mr. Kannan Ponnusamy Pillay by two persons on the 12th day of February 2010.

5) The prosecution had relied on the identification and or recognition of the Appellant at Foret Noire by witnesses Melville Molle, Sharon Barra, Shirley Cecille and the victim Mr. Kannan Ponnusamy Pillay. Sharon Barra the only eye witness to the attack on the victim had categorically stated that she could not recognize or identify the two assailants despite the fact that she had witnessed the incident which lasted ten to fifteen minutes. She could only say that "one was 'costo' wellbuild (*sic*) and fair color and the other one was taller and darker in color (verbatim)." To the question whether she could identify any of the two persons if she happens to see them, her answer was a categorical no. the following answers to the questions are relevant:

"Q. Can you identify any of the two if you happen to see them?

A. No. may be just on their size but not the appearances."

And later:

Q. “Do you see the person was involved in this incident here in Court?

A. No.

Q. Madame, have you ever seen those people nay (*sic*) time?

A. No” (verbatim)

Thus Sharon Barra had failed to identify the Appellant in court even on the basis of his colour or physique as one similar to the persons she had seen at the scene of crime and despite her having indicated in her examination-in-chief that she may be able to identify them from their size.

6) Melville Molle was the witness that the Learned Trial Judge had relied heavily upon to convict the Appellant. Molle is a resident of Foret Noire and lives in the vicinity of the place where the crime was committed. He is 84 years old, has a home car’er and wears spectacles. He had however claimed that he could see clearly without the aid of his spectacles. It is his evidence that at around 9 or 10 in the morning of the 12th of February 2010, he was in his compound with his head bent down and with a bowl in his hand, putting out food to stray cats and dogs that frequent his compound, when he heard people running and unexpectedly saw a dark coloured person, running in a jacket and a woolen hat on his head. The person had tripped and fallen when a second person came running behind him. Then the first person had gotten up and both had taken to their heels. Later on, the one who had fallen earlier, after running a distance had come back, picked up ‘a bag’ from the ground and continued to run. The second person had continued to run. Molle had claimed that the second person who came running behind the first person he witnessed, was the Appellant.

“Q. And you say the second person who according to you was the accused person?

A. Yes”

7) Molle’s answers to the questions in cross-examination as regard the speed the two persons were running needs mention.

“Q. These two gentlemen that are allegedly passed how were they running, fast or slowly?

A. Quick service, very fast maman,maman.

Q. What do you mean by manman manman, why do you say that?

A. More than 40 miles per hour.

Q. So everything happen fast Mr. Mole?

A. Yes, very fast vap vap vap finish.

Q. For how long did the whole incident happen?

A. Not long

Q. About how long?

A. A few seconds, because it was very fast. It was like when ant's criss-crossed one another, about two seconds"

Under cross-examination he had said that he "was not expecting that to happen" at the time when he was putting food to the animals.

8) Molle's testimony in cross-examination as regards what the second person, namely the Appellant was wearing on his head when he ran past him is of significance.

"Q. Was the second person wearing anything over his head?

A. Yes. There was something on his head.

Q. What was that?

A. Looks like a cap on his head.

Q, You sure?

A. Yes, there was something on his head. If he was not wearing anything on the head I would have seen the whole face.

Q. Was it pulled down?

A. It was pulled down.

Q. The eyes were covered?

A. Just above the eyes."

9) Molle, however had been adamant that he had recognized the Appellant. His position had been that he would not blame anyone if he had not seen him. He had gone on to say "At this age that I am I will never blame anyone and add burden to me."

10) There is another aspect in the evidence of Molle that needs mention, namely that Molle's son had on the evening of the incident come to his place and mentioned the name of the Appellant. He had done so a week later also. Molle had also said: " It was his father (*reference is to the Appellant's father*) who told my son that we worked together and that I should come and see him if I had anything to discussed (*sic*) but it was him that should have make to move, meet with me and talk to me and talk as two fathers."(verbatim) Then in answer to the suggestion from defence Counsel: "Because his son was not involved Mr.Molle", Molle's answer had been "He was not implicated

why did he mentioned that to my son so that my son come over to me and discuss this issue with me." (verbatim). This testimony creates a doubt in our minds as to whether Molle's insistence on the recognition of the Appellant was somewhat based on what his son had told him and the failure of the Appellant's father to talk to him personally.

11) It is to be noted that the evidence of the victim is missing from the recorded proceedings, but according to the Notes taken from the Trial Judge's Log Book, it had been the evidence of the victim, Mr. Pillay, that a few minutes prior to the attack on him he had seen the Appellant speaking on a mobile and was "on the top of the building near the Fresh Cut building." At this stage the victim was also answering a call on his mobile. When he finished speaking the Appellant was still there. The victim however had failed to identify his assailants. The victim had said that he had known the Appellant since they lived on the same street and the Appellant comes to his shop often. He had also admitted under cross examination that he had on several earlier occasions seen the Appellant on that building and that was not the first day. It was for the first time in court that the victim had stated that he had seen the Appellant moments prior to the incident. He had failed to mention it in his statement made to the police despite the fact that at the time he made his statement he was aware of the fact that the Appellant had been arrested in relation to the incident. He attributed the omission to his physical and mental condition at the time of the making of the statement, as he was seriously injured and blinded in one eye due to the attack.

12) Shirley Cecile's evidence (As per Notes taken from the Trial judge's Log Book, as the evidence of Cecile is missing from the recorded proceedings) had been to the effect that her boyfriend Antoine Labrosse, the other person referred to in the charge, had left the house that morning around 6.30 – 7.00 with another person who came at their place. She had said that the person who came appeared to be like the Appellant but she cannot be sure of it. Thus her evidence is of no use to determine the guilt of the Appellant.

13) The Appellant in his dock statement had stated that he had come to Mont Fleuri from Anse Aux Pins where he resides, on the morning of the 12th of February 2010 in his brother's vehicle at around 8.00 am. The brother had come to pick him up at 7.45 am. He had then gone to a snack shop and to the Mont Fleuri School to drop his two chidren. The school had started. He had then proceeded to his parent's house at Foret Noire. He had gone there with the intention of repairing his father's pickup. On going to his parent's house he had been informed that the pickup was at Roche Caiman. From

there he had gone to the Mont Fleuri clinic at around 8.35 to 8.45 to get a dressing on his hand which he had injured on the Sunday prior to the incident pertaining to this case. 12th February 2010, the date of the incident, was a Friday. Thus the Appellant claims to have sustained the injury to his hand 5 days prior to the incident. Around 9.00 am he had proceeded to Roche Caiman after having the dressing in the clinic and had remained there till evening.

14) Micheline Oreddy, the wife of the Appellant testifying for the defence, had stated that her husband had received a cut injury in his right hand from corrugated iron sheets while repairing a pickup, a week prior to the 12th of February 2010 and he was receiving treatment for it at the Mont Fleuri clinic. She had corroborated the Appellant's statement about the Appellant's brother, Paolo Oreddy, coming to pick up the Appellant on the morning of the 12th of February 2010 around 7.30am at Anse Aux Pins.

15) Paolo Oreddy, testifying for the defence had corroborated the Appellant's version that he was picked up from Anse Aux Pins from his house at around 7.30 -7.35 am. He had also stated that he dropped the Appellant at the Mont Fleuri School around 8.00 am.

16) The learned Trial judge had correctly stated that: "This case rests, to a great extent, on the identification of the accused as one of the persons, who committed the robbery with violence on Mr. Kannan Ponnusamy Pillay." The Learned Trial Judge has stated that: "The evidence that the complainant was attacked and seriously injured in a robbery at Foret Noire on the 12th February at around 9 am by two men who then ran away with the 'briefcase' of money (*There is no evidence of a 'briefcase' of money. The victim has made reference to a white coloured plastic bag, Molle refers to a 'bag' and Sharron Barra to a 'small blackish bag'. The Particulars of Offence make reference to a 'black briefcase'*) has not been contradicted or even contested by the accused. The contention of the accused is that he was not one of the persons who committed the robbery and that the witnesses who testified to having seen immediately before or immediately after were either mistaken in their identification or not telling the truth." It is also clear from the evidence placed before the court that whoever robbed the victim ran along the footpath which goes past Melville's house.

17) The Learned Trial Judge referring to the testimony of the victim and witness Melville had stated: "Having heard the two witnesses and observed their demeanour I have no reason to believe that both witnesses were truthful (sic) in their testimony and had no reason to lie about the accused's presence at Foret Noire between 8.30 and 9.00 am on

Tuesday 12th February 2010. However it must be noted that neither of the two witnesses saw the accused committing the offence for which he is being tried," and again "I accept the evidence of the prosecution as credible and consistent in placing the accused at Foret Noire during the period immediately before the attack on the complainant." We are of the view that the presence of the Appellant at Foret Noire between 8.30 and 9.00 am is not an issue in this case at all, as the Appellant himself admits in his dock statement that he went to his parents house at Foret Noire after he was dropped off at the Mont Fleuri school by his brother at around 8.00 am and after he had taken his children to the Mont Fleuri school. The Learned Trial Judge had himself stated that the dock statement: "is significant because the accused actually placed himself at his parent's place immediately after taking his children to school which should be between 8.05 and 9.10am…"

18) The Learned Trial Judge had accepted the evidence as to the identification of the Appellant for the following reasons:

(i) That Shirley Cecile had recognized the Appellant even by his voice. But Shirley Cecile's evidence, as per Notes taken from the Trial judge's Log Book is to the effect that she cannot be sure of the identification of the Appellant as stated at paragraph 12 above.

(ii) The victim's evidence that he saw the Appellant on the upper floor of a building under construction and speaking on a mobile phone moments before he was robbed. The presence of the Appellant at Foret Noire near the vicinity of where the robbery took place has not been denied by the defence.

(iii) That Melville Molle had clearly recognized the Appellant as one of the two persons who ran past him between 9.00 – 10.00 am on the 12th of February 2010. The Learned Trial Judge had dismissed the defence contention that Molle did not have sufficient time to make a positive identification of the Appellant due to his poor eye sight (*as he normally wears spectacles*) and age (*84 years and has a home car'er*). The Learned Trial Judge had been comforted in his belief as to the recognition of the Appellant by Molle as Molle had known the Appellant for a long time, the time at which he saw the Appellant was around 9 am "and there was no concern regarding visibility or interference or disruption of the witnesses' view." He had also accepted Molle's evidence that "he only used glasses for reading and seeing close but his eyesight is otherwise very good for the distance he witnessed the two persons." The Learned Trial Judge had further stated: "The fact that the person slipped and dropped the briefcase and returned to pick it up

also lengthened the period of time that the witness had to observe the person." This statement runs totally contrary to the evidence before the court as stated at paragraph 6 above and is being heavily contested by the defence. It is clear from the evidence that the person who slipped and dropped the briefcase and returned to pick it up was not the Appellant. Burhan J in his judgment in the case, Criminal Side 32 of 2010, against Antoine Labrosse, the other person referred to in the charge, had clearly come to a finding on the basis of Molle's evidence that it was Antoine Labrosse who had jumped over rocks, fallen and had got up and picked up the bag and run away with the other person.

19) The Learned Trial Judge had also made some incorrect observations:

(i) The dock statement of the Appellant "contradicted the testimony of Paolo Oreddy, the brother of the Appellant, who testified that the accused did not go to Foret Noire on that date and time." There is nothing in the recorded evidence of Paolo Oreddy to this effect. The evidence of Paolo Oreddy had been to the effect that after dropping off his brother at the Mont Fleuri school at around 8.00 am he had taken his wife for work leaving Freddy behind. To the specific question by Prosecuting Counsel that the Appellant was in the supermarket opposite Freshcut, Foret Noire (*where the robbery took place*) his answer had been "It depends what time."

(ii) That "the accused also stated that he had sustained a cut on his hand the Sunday before whilst his wife testified that he had been cut a week or two before the 12th February, 2010." It had been the evidence of Micheline Oreddy that the Appellant had the injury a week before the 12th of February 2010 and there is no mention of two weeks. 12th of February 2010 had been a Friday as mentioned earlier.

20) This is a case where the Turnbull guidelines necessarily come into application. It was held in **R V Oakwell 66 Cr. App R 174 CA** that: "Turnbull is intended primarily to deal with the ghastly risk run in cases of fleeting encounters." Molle's evidence as itemized at paragraph 7 above as to the speed at which the two persons were running, namely "Quick service, very fast maman,maman; more than 40 miles per hour; very fast vap vap vap finish; A few seconds, because it was very fast. It was like when ant's criss-crossed one another, about two second" is to be noted.

21) In our view what is important is not a mere rehearsing of the Turnbull principles as the Learned Trial Judge had done in this case, but an actual application of the principles by the Trial Judge to the case before the court. **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. A perusal of the judgment shows that although the Learned Trial Judge had satisfied himself as to the truthfulness of the testimony of the witness Molle, he had not in our view seriously considered the possibility of a mistake made by Molle in relation to the recognition of the Appellant, save for time of the day (9.00 am) at which he saw the Appellant run past him and the fact that that there was nothing to disrupt the visibility of Molle. It is clear from the judgment that the Learned Trial Judge's reliance in Molle's evidence had been more on the basis of the conviction with which Molle had testified. 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. The Learned Trial Judge had also not appeared to have considered the matters referred to at paragraph 10 above, which could have a bearing as to why Molle was so adamant as to the recognition of the Appellant. A court in assessing the evidence of a person should also bear in mind that there are those witnesses who do not want to relent from a position once taken, just as the many others we meet in life. Had the Learned Trial Judge not been mistaken as to the fact that the person who slipped and dropped the briefcase and returned to pick it up was not the Appellant but the other person, he could not have concluded as he did in his judgment, that this "also lengthened the period of time that the witness had to observe the person."

22) Molle's evidence as referred to at paragraph 6 above, that he unexpectedly saw the two persons running while he was putting food to stray dogs and cats with his head bent down has not been considered by the Trial Judge. Molle's evidence as itemized at paragraph 8 above that the second person that was running was wearing something like a cap on his head that was pulled down and "If he was not wearing anything on the head I would have seen the whole face", has not been considered by the Trial Judge. The failure to identify the Appellant in court even on the basis of his colour or physique as one similar to the one she had seen at the scene of crime by the sole eye witness to the attack on Mr. kannan Ponnusamy Pillay, namely, Sharon Barra has not been considered by the Trial Judge.

23) In **Turnbull** it was held: “When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification.” In **R V Lang, 57 Cr.App.R.871** it was held: “The trial judge should identify to the jury the evidence which he adjudges is capable of supporting the evidence of identification. If there is any evidence or circumstances which the jury might think was supporting when it did not have that quality, the judge should say so.” A Turnbull direction is generally required in all cases where identification is a substantial issue. Only in the most exceptional circumstances would a conviction based on uncorroborated identification evidence be sustained in the absence of a Turnbull warning. Reliance is placed on **Scott V. R. [1989] A.C. 1242 at 1261, PC; Beckford V. R. 97 Cr. App. R. 409 at 415, PC; R V Hunjan, 68 Cr. App. R. 99 CA**. Identification by two or more witnesses; DNA or finger print evidence which links the accused to the offence; collapsed alibi evidence; lies told by a defendant which are deliberate and relate to the same issue, correct identification by a witness of other participants in the offence and similar fact and multiple offences committed by the same person may amount to evidence capable of supporting the identification. See **paragraphs 14-22 to 14-23 Archbold 2009, Criminal Pleading Evidence and Practice**. This was essentially case where identification was a substantial issue and corroboration required.

24) The victim’s evidence that he saw the Appellant on the upper floor of a building under construction and speaking on a mobile phone moments before he was robbed can cut both ways. Just as much it places the Appellant at the scene of the crime one may also pose the question whether the Appellant who was very well known to the victim would have come within the clear view of the victim moments before he robbed him.

25) This court is normally reluctant to interfere with a judge’s assessment of witness testimony as we have not had the opportunity to see the demeanour of a witness when testifying before the trial court, but where the trial judge had clearly erred in his assessment of the facts and failed to apply the Turnbull Guidelines, we will not hesitate in disturbing his findings. In the case of **The Republic VS W. Robert and A. Derjacqes, Cr. Side No. 8 of 1991** it was held by this Court that when the reasoning of the trial

judge is faulty and his statements of facts on occasion regrettably inaccurate his conclusions become unacceptable.

26) This case in our view has been badly prosecuted. The Statement of Offence in count 2 makes reference to the wrong punishable section. The particulars of offence in count 2 make reference to ‘a black brief case’ and R 100,000 ‘in different denominations’ but no attempt has been made to elicit evidence from the witnesses to prove such facts. We fail to see why the trials of the Appellant and Antoine Labrosse were held separately. Had their trials not been separated, correct identity of anyone of the accused by a witness may have amounted to corroboration of such witness’s evidence as to identification of the other as stated in Archbold and referred to at paragraph 23 above. No attempt has been made to check on the veracity of the dock statement pertaining to the Appellant attending the Mont Fleuri clinic in the morning of the incident.

27) In view of the circumstances outlined above we are left with no option than to allow the appeal and acquit the Appellant.

A.F. T. Fernando
Justice of Appeal

I agree

S. Domah
Justice of Appeal

I agree

J. Msoffe
Justice of Appeal

Dated this 14th day of August 2014, Victoria, Seychelles