

**IN THE SEYCHELLES COURT OF APPEAL**

**[Coram: F. MacGregor (PCA), A.Fernando (J.A), J. Msoffe (J.A)]**

**Criminal Appeal SCA25/2013**

**(Appeal from Supreme Court Decision CR 27/2012)**

---

Hedley Moustache

Appellant

Versus

The Republic

Respondent

---

Heard: 11 April 2016

Counsel: Mr. N. Gabriel for the Appellant

Mr. H. Kumar for the Respondent

Delivered: 22 April 2016

**JUDGMENT**

A.Fernando (J.A)

1. The Appellant has by his handwritten Notice of Appeal dated 10<sup>th</sup> October 2013 and typed Notice of Appeal forwarded through the Superintendent of Prisons dated 11<sup>th</sup> October 2013 appealed against his conviction for “Robbery with aggravation contrary to section 280 of the Penal Code and punishable under section 281 of the Penal Code”. As per the particulars of offence as had been set out in the indictment, the Appellant is alleged to have on the 27<sup>th</sup> of April 2012, robbed Didier Pomel, a tourist, of his belongings valued at Rs 6140/- and at the time of such robbery had been armed with an offensive weapon namely, a knife. He had not appealed against the sentence of 15 years imposed on him by the Sentencing Judge.
2. Counsel for the Appellant had by his Skeletal Heads of Arguments on behalf of the Appellant filed on the 8<sup>th</sup> of March 2016 had stated: “Hedley Moustache, the Appellant above-named appeals to the Court of Appeal of Seychelles against the

sentence of fifteen years imposed by the learned trial Judge in the Court below and had set out the following grounds of appeal:

- a) “The sentence of fifteen years imposed by the learned trial Judge is manifestly harsh, excessive and wrong in principle.
- b) The learned trial Judge failed to apply correctly the principle of proportionality of sentences.”

There is nothing on record to indicate that permission of this Court had been obtained to appeal against the sentence outside the appealable time of 30 days. There is also nothing to indicate in the Skeletal Heads of Arguments subsequently filed that the appeal against the conviction is not been pursued. This is in our view amounts to irresponsibility on the part of Counsel to say the least.

3. We have therefore decided to deal with both the appeal against conviction and sentence as this is a criminal appeal and it appears when the Appellant filed his appeal he had no Counsel representing him.
4. According to PW Monique Pomel, the wife of the victim on the day of the incident she and her husband, Didier Pomel, were returning from Anse Major around 2.45 pm when they were accosted by the Appellant who had inquired from her the time. Thereafter the she and her husband had proceeded towards Bel Ombre where they had parked their car and the Appellant had continued in the direction of Anse Major. A few minutes later she had turned around and seen that the Appellant had been following her. On constantly looking back she had noticed that he was continuing to follow her for about 5 to 10 minutes. They had then stopped to let him go past them. The Appellant had then asked them for Rs 5/- and she had told him that they had no money with them. They had then continued to walk with the Appellant following behind them. She had been in front and the husband was walking behind her. All of a sudden on hearing the cries of her husband she had turned back to see that the Appellant was attacking her husband with something which she later realized was a knife as he was bleeding. She had seen the Appellant struggling with her husband to pull the bag that he was carrying. It was a blue bag with white stripes and ‘Martinique’ written on it. She had cried out to her husband to let go of the bag and then the Appellant had run away with it in the direction of Anse Major. They had then cried out for help and some persons from a nearby construction site had come to their assistance. She had said that her husband had blood all over him and was fainting as a result of losing blood. The

police had come on the scene shortly thereafter and her husband had been dispatched to the hospital. Her husband had received cut injuries in both his hands. She had in Court identified the Appellant as the one who had walked behind them and attacked her husband. This dock identification had taken place about 5 months after the incident. She had also identified in Court the items stolen from them and later recovered by the police on being pointed out by the Appellant. Under cross-examination she had categorically stated that she was not mistaken as to her identity of the Appellant as they had met only another tourist and the Appellant on their way back to Belombre from Anse Major. She had claimed that she had identified the Appellant on the evening of the incident at the Beau Vallon police station. It is clear from Monique Pomel's evidence, that she had on several instances seen the Appellant, namely when he first asked for the time, when she saw him following him for about 5 to 10 minutes in looking back, when he asked for Rs 5/-, when the Appellant attacked her husband and when the Appellant was struggling with her husband for the bag.

5. PW Didier Pomel had corroborated his wife's evidence in material particulars so far as the incident is concerned save for the fact that he had said that he could not identify his assailant. He had identified in Court the items stolen from them and later recovered by the police on being pointed out by the Appellant. He had said that he had been cut on his left arm and on his knuckles on his right hand. He had said that he was losing blood and at a certain stage he passed out. On the day of the incident itself, and after having been attended to at the hospital he had identified the items stolen from him at the Beau Vallon police station.
6. PW A. Amesbury, a corporal attached to the Beau Vallon police station had stated that she had arrested the Appellant about 30-45 minutes after the incident on information received. On arresting him she had explained to him his constitutional rights, namely the reason for the arrest, the right to remain silent and the right to contact his lawyer. The Appellant had admitted committing the offence and had agreed to show the police where the bag and the items that were robbed had been hidden. Later in the evening about 5 to 6 hours after the incident, she along with a police party had gone to Anse Major and recovered the bag with the items from amidst the bushes where they had been hidden on being pointed out by the Appellant. The Appellant on being questioned about the knife with which the tourist had been attacked had said that he had thrown it down a deep and dangerous precipice in the jungle and the police had not been able to recover it. PW A. Amesbury's evidence had been corroborated by PW Detective Sub

Inspector Maxime Payet as to the recovery of the items stolen on being pointed out by the Appellant. Payet had described the bag which was pointed out by the Appellant from amidst the bushes as of the “colour blue with white stripes, there is also a writing on ‘Martinique’ (verbatim).

7. The Appellant had not challenged the evidence of PW A. Amesbury or Detective Sub Inspector Maxime Payet as to his pointing out the stolen articles to the police. In **Wood Green Crown Court, ex parte Taylor [1995] Crim LR 879**, the Divisional Court approved the principle that a party who fails to cross-examine a witness upon a particular matter in respect of which it is proposed to contradict him or impeach his credit by calling other witnesses, tacitly accepts the truth of the witness’s evidence in chief on that matter, and will not thereafter be entitled to invite the jury to disbelieve him in that regard.
8. The doctor who examined the victim testifying before the trial court had stated that he had examined the victim about an hour after the incident and that he had “multiple injuries on both hands, right thumb, index finger, laceration and middle finger abrasion and left hand had many injuries”.
9. The Appellant had made two statements to the police, both on the day of the incident itself, one at 18.35 hours and the other at 21.24 hours. In his subsequent statement he had stated that he was alone when he attacked the two foreigners and that he had pointed out to the police where he had hidden the stolen items. The Appellant’s Counsel had challenged the first statement on the basis that it was made “under a lot of duress, feel of oppression institute against him” (verbatim from the record) and the subsequent statement that the Appellant had been “induced into stating things that he would otherwise not have done voluntarily. It cannot have been done voluntarily, fear of oppression is one of the ground my lord.”(verbatim from the record). However the Appellant had opted to remain silent and had not called any witnesses at the Voire Dire. The learned Trial Judge had admitted both statements after a Voire Dire, after hearing the evidence of the officers who recorded the confessions and witnessed the recording of the confessions. We also take note of the fact that the Appellant had not placed any evidence at both Voire Dires. Unfortunately the two Rulings on the Voire Dires which the record bears out had been read over in open court are not to be found in the appeal brief. We are satisfied that the admission of the confessional statements was on the basis that the learned Trial Judge had satisfied himself as to their voluntariness and the conviction of the Appellant placing reliance on the

confessional statements was because the learned Trial Judge had believed them to be true. A confession is an acknowledgement that one is guilty of a crime. Once the voluntariness of a confession is established it can be relied upon to convict the maker, unless it has been shown that the maker was mistaken in making the confession or had made false statements in making the confession or merely placed a signature on a document without been conscious of its contents. The Appellant has not taken up any one of these positions.

10. The Appellant's first statement (verbatim) is as follows:

“Friday the 27<sup>th</sup> of April 2012 at around 10.15 in the morning, I met my cousin Nelson Commetant who lives Roche Caiman at a shop at La Louise. I told Nelson that I was going to a woman namely Bernadette who lives at Bel Ombre but I do not know her surname. She's next to Bel Ombre School, next to a villa. Nelson came with me. We took a bus at Plaisance and came to the SPTC bus terminal in town, then we took the Bel Ombre bus and disembarked where the bus turning point at Bel Ombre. There we went to Anse Major for a walk, it was around 11 am. We went to relax on the beach and later at around 2.30 pm we left Anse Major. On the way we saw a foreign man and a foreign woman walking in front of us going towards Bel Ombre. We saw a blue bag with stripes with the foreign man and I jumped on him to take his bag. The man and the woman shouted, Nelson was hiding in the bush. The man did not want to give me his bag. There was a knife which Nelson had given with me at that time. I took it and injured the man with it on his arm. The man released the bag, I took it and ran away with it together with Nelson. I was scared, I gave the bag to Nelson and told him to go with it at my place and I will take it later. Nelson ran and left me on the road at Anse Major. I walked to the bus turning point at Bel Ombre and then the police arrested me. I did not see Nelson again and I do not know where he went. I did not get the chance to look in that bag and I do not know the contents. I regret that I have done this and I am ready to apologize to the two clients for what I have done. I did not have any plan, I just had the temptation to do the act and I say again that I really regret it. I gave the knife to Nelson for him to go with it. The knife had wooden handle colour brown and it is pointed, it is a knife that is used in the kitchen.” (underlining by us to show that the those statements have been corroborated by the evidence of PW Monique Pomel, PW Didier Pomel, the medical evidence led in this case and the evidence of PW A. Amesbury.)

11. The Appellant's second statement (verbatim) is as follows:

“I am stating to the police that the statement I gave earlier today the 27<sup>th</sup> April 2012 is not true. I was alone when attacking the two foreigners, a man and a lady on the road at Anse Major. I snatched the bags from them and hid it into the bush

at Anse Major. I didn't have the chance to search into it. I accompanied the C.I.D officers and had showed them where I have hid the bag, the bag is blue in colour. I have showed the police the bag and they pick it up. I left Beau Vallon Police Station around 2030hrs to go to Anse Major and we came back at around 2120hrs after showing them to where I hid the bag. The bag is blue and white in colour with make "Martinique".(underlining by us to show that the those statements have been corroborated by the evidence of PW Monique Pomel, PW Didier Pomel, PW A. Amesbury and PW Detective Sub Inspector Maxime Payet.)

12. It is to be noted that 30-45 minutes after the incident the Appellant had agreed to show the police where the bag and the items that were robbed had been hidden. Later in the evening about 5 to 6 hours after the incident, a police party had gone to Anse Major and recovered the bag with the items from amidst the bushes where they had been hidden on being pointed out by the Appellant. The items recovered could be said to have been in the possession of the Appellant after they were stolen from the victim and until their recovery. The words "have in possession" includes.....having anything in any place (whether belonging to, or occupied by oneself or not) for the use or benefit of oneself or of any other person, as per the definition of 'possession' in section 5 of the Penal Code. It is stated in **Blackstone's Criminal Practice 2010, F3.50** that: "In cases of... theft, on proof or admission of the fact that the accused was found in possession of property so shortly after it was stolen that it can fairly be said that he was in recent possession of it, the jury should be directed that such possession calls for explanation, and if none is given, or one is given which they are convinced is untrue, they are entitled to infer, according to the circumstances, that the accused is either the handler or the thief and to convict accordingly. **Schama [1914] 84 LJ KB 396; Garth [1949] a All ER 773; Aves [1950] 2 All ER330; Williams [1962] Crim LR 540.** In the Seychelles this presumption in English common law has been codified and made into an offence. Section 310 of the Penal Code states: "*Any person who has or had in his possession anything whatever which may be reasonably suspected of having been stolen or unlawfully obtained and who fails to give a satisfactory account to the court of how he came by the same is guilty of a misdemeanour.*" Here in the Seychelles there is no need for the possession to be 'shortly after' for an inference of guilt to be made. Although the Appellant had not been charged under section 310, its provisions can be made use of along with the English common law principle to justify a finding of guilt against the Appellant. In this case the Appellant had admitted to PW A. Amesbury and later in his confessional statement that he had robbed those items from the victim.

13. In view of what has been stated above we have no hesitation in dismissing the Appellant's appeal against his conviction.
14. The learned Sentencing Judge in imposing the sentence of 15 years on the Appellant had said: "...I am of the view that the minimum mandatory terms as prescribed by law should be imposed and nothing more and that could suffice in this case as suitable punishment to him. I therefore proceed to sentence him to a term of 15 years imprisonment".
15. For robbery while armed with any dangerous or offensive weapon or instrument, or while been in the company with one or more other persons or where the offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes, or uses any other personal violence to any person, a convict is liable to life in imprisonment; leaving the matter of imposing the sentence at the discretion of the court. According to section 27(1) (c) (ii), which was the applicable law at the time of offending, where "a person is convicted of an offence in Chapter XXVIII.....and where the offence is punishable with imprisonment for more than 10 years or with imprisonment for life, and the person had, within five years prior to the date of the conviction, been convicted of the same or similar offence, be sentenced to imprisonment for not less than fifteen years." According to section 27(2) of the Penal Code, for the purpose of section 27(1) "similar offence means an offence falling within the same Chapter as the offence for which the person is being sentenced."
16. The offence of robbery with aggravation referred to in section 281 of the Penal Code is a Chapter XXVIII offence. According to the records filed at the Seychelles Criminal Records Office at Victoria and produced before the Sentencing Judge the Appellant had been convicted of attempted robbery and sentenced to five years imprisonment on the 3<sup>rd</sup> of August 2009. Section 282 of the Penal Code which makes reference to Attempted robbery falls within the same Chapter, namely XXVIII as the offence for which the Appellant was sentenced in the instant case. In the same year he had also been convicted in three other cases which consisted of charges of housebreaking, stealing from dwelling house, and assault occasioning actual bodily harm and sentenced to periods of imprisonment between 2 to 4 years. All these sentences had been ordered to run concurrently with the sentence of five years imprisonment imposed in respect of the charge of robbery on the 3<sup>rd</sup> of August 2009. The Appellant had been released from prison on the 26<sup>th</sup> of January 2012 according to the records filed at the Seychelles

Criminal Records Office at Victoria. Counsel for the Appellant had accepted the contents of the records filed at the Seychelles Criminal Records Office as correct. Thus the sentence of 15 years imprisonment imposed on the Appellant was in accordance with section 27(1) (c) (ii) of the Penal Code.

17. The learned Sentencing Judge had in his Sentencing Order stated: “I observed his previous convictions list. I have noted that he seems to be a habitual offender and has previous convictions of breaking into houses, stealing and attempted robbery”. As also noted by the learned Sentencing Judge the offence for which the Appellant was convicted and sentenced to a period of 15 years against which sentence he is now appealing before us, had been committed within 3 months of him being released from prison. We find that at the time of committing the offence the Appellant had not only been armed with a dangerous weapon, namely a knife but had wounded the victim Didier Pomel, a tourist. These are two aggravating factors specifically referred to in section 281 of the Penal Code. According to the doctor the victim had “multiple injuries on both hands, right thumb, index finger, laceration and middle finger abrasion and left hand had many injuries”.
  
18. The Appellant’s Counsel in his Skeletal Heads of Arguments had submitted that “the victims were not seriously injured, that the Appellant did assist the police to recover the stolen items as stated in his statement under caution, that he did not benefit from the crime, and that he had expressed remorse and regret for having committed the offence.” Section 281 of the Penal Code does not require that the injuries inflicted need be serious for one to be liable to imprisonment for life. In our view the circumstances under which the wounding is committed is a factor that would have a bearing on the sentence. This was a case where the Appellant had followed the victim, a tourist, who was 56 years of age and at a lonely place inflicted multiple injuries on the victim who had become unconscious as a result of the bleeding and the attack on him. The Appellant cannot now submit as a mitigating factor that he assisted the police to recover the stolen items as stated in his statement under caution, and that he had expressed remorse and regret for having committed the offence as he had pleaded not guilty and proceeded to a full trial and further challenged the voluntariness of both his cautioned statements which necessitated a Voire Dire. The fact that he had not benefitted from the crime in our view in the circumstances of this case is certainly not a mitigating factor.



19. We also take note of the fact that in a country like ours, the economy of which is mainly based on tourism aggravated robbery of tourists needs to be taken seriously. The offence needs to be weighed against the impact it can have on tourism and the economy and the public interest which is thereby affected.
20. In our view it would have been correct for the learned Sentencing Judge to have imposed a sentence of 15 years on the Appellant, without making reference to section 27(1)(c)(ii) of the Penal Code, as his discretion under section 281 of the Penal Code extended up to imposing a sentence of imprisonment for life.
21. The Appellant's Counsel in his Skeletal Heads of Arguments had placed reliance on the case of J.F. Ponoo for a variation of the sentence. The Ponoo case in our view has no relevance to the facts of this case. In Ponoo, it is clear from the findings made by the learned Magistrate that the accused's participation was minimal in the offences committed, although convicted of offences under section 291(a) and 260 of the Penal Code and sentenced to a minimum mandatory imprisonment of 5 years. The accused's version that his involvement in the case was limited to his buying a pair of shoes from the other persons who had already broken into a shop and where he had been led to, by the others; had been accepted by the learned Magistrate. Thus the very facts of that case warranted an inquiry by this Court into the proportionality in the sentence meted out in the circumstances of the offence and the offender. This Court was of the view that for a case such as theft of a pair of shoes the sentence of 5 years was grossly disproportionate, even though specified by the law and reduced it to 3 years.
22. The case of Roddy Lenclume has no relevance as that was not a case of robbery with violence on a tourist. Further that was a case where a sentence of 18 years of imprisonment had been imposed on an 18 year old first time offender, who had pleaded guilty at the first instance to two cases of burglary and stealing from dwelling houses. In Neddy Onezime, although a case of robbery of a tourist, the accused had been sentenced to a period of 15 years to run consecutively with another sentence of 15 years he was serving and the cumulative effect being 30 years, which this Court considered to violate the principle of proportionality advocated in Ponoo. Onezime had pleaded guilty at the first instance. This court had therefore reduced the sentence to 5 years so that the total sentence the Appellant had to serve after taking into account the order for consecutive sentence, would be 20 years.

23. For the reasons set out above we have no hesitation in dismissing the appeal on sentence.

A.Fernando (J.A)

**I concur:.** .....

F. MacGregor (PCA)

**I concur:.** .....

J. Msoffe (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 22 April 2016