

**IN THE SEYCHELLES COURT OF APPEAL**

**[Coram: A.Fernando (J.A), M. Twomey (J.A), J. Msoffe (J.A)]**

**CriminalAppeal SCA35/2013**

**(Appeal from Supreme Court DecisionCr 15/2012)**

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Jose Nenesse

Appellant

Versus

The Republic

Respondent

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Heard: 05 August 2016

Counsel: Mr. Nichol Gabriel for the Appellant

Mr. Hemanth Kumar, Asst. Principal State Counsel for the Respondent

Delivered: 12 August 2016

**JUDGMENT**

**A.** Fernando (J.A)

1. The Appellant has appealed against his conviction for robbery with aggravation contrary to section 280 of the Penal Code and the sentence of 10 years imprisonment imposed on him.
2. The particulars of offence states that on the 23<sup>rd</sup> of February 2012 he had robbed Ms. Brigitte Pierre, a cashier of Cash Plus Money Changer at Albert Street, a total sum of money amounting to Seychelles Rupees 119,850.00/-, Euro 840/-, USD 1,000, and GBP 230/- while being armed with a knife.
3. The Appellant has filed the following grounds of appeal against his conviction:
  - a) The learned trial Judge erred in convicting the Appellant in the absence of direct evidence.
  - b) The learned trial Judge erred in convicting the Appellant in the absence of identification by the victim namely Ms. Brigitte Pierre.

- c) The learned trial Judge erred in convicting the Appellant on hearsay evidence.
- d) In all the circumstances of the conviction of the Appellant was unsafe and unsatisfactory;

and the following grounds of appeal against his sentence:

- a) The sentence of ten 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.
4. According to PW 4, Ms. Brigitte Pierre, around 1 pm (13.00 hours), while her colleague was out for lunch, she had been checking the money at Cash Plus Money Changer at Albert Street, when a person had come in wearing a woollen cap which he had pulled down on his face as a mask and in which there were two holes to uncover the eyes. From his body structure she had identified him to be a man. She had tried to run out through the door but the person had jumped over the counter and stopped her. When he jumped over the counter she had noticed that he had with him what she thought was a machete wrapped in paper. The photographs from the video footage confirm PW 4s testimony that the intruder had something (which was later found to be machete) wrapped in paper in his raised hand. He had raised his hand and she had begged of him not to hurt her saying she had children. Through fear she had urinated in her clothes. He had then asked her where the money was and handcuffed her from behind. The person had a bag with him. He had placed a glove in his right hand and had wiped the handcuff which was on her wrist with a piece of blue cloth. Thereafter he had taken the money from the drawer. He had then told her not to shout and stuffed a piece of cloth inside her mouth. He had then left the Cash Plus and she had noticed that while he was leaving he had lifted the mask which then looked like a cap so that he could walk outside unnoticed by the public. The video footage provides corroboration for most of Brigitte Pierre's testimony as to what occurred during the robbery. After the person had gone she had managed to contact PW 5 Francoise Rose, the Managing Director who had come immediately. Later the police had been called.

5. PW 5, Francoise Rose, had confirmed that he had been contacted by PW 4, Ms Pierre, and that he had rushed to Cash Plus. Producing a voucher giving the details of the missing money, PW 5, had stated that around SR 119,850.00, Euros 840.00, USD 1000.00 and GBP 230.00 was found missing.
  
6. PW 1, Forensic Analyst, J. Bouzin testifying before the Trial court had said that he had been requested by the Police to analyze the video footage on the CD which had recorded the incident at Cash Plus for the purposes of establishing the identity of the perpetrator and the items of clothing worn by the perpetrator. The footage was dated 23<sup>rd</sup> February 2012 and running for a duration of 3 minutes and 18 seconds and had been a recording of events between the times 13.06.12 and 13.09.30 in the afternoon. The footage had shown the recordings of 4 cameras at Cash Plus, concurrently at a speed and at different angles, depicting the happenings at Cash Plus. Camera 3, was facing the sole entry point of the premises. He had explained that a video is a moving image consisting of multiple images and each image being replaced by another at a very fast pace. In scientific parlance each image is referred to as a frame although the human eye is not able to detect it. He had gone on to explain that several of these picture frames are being shown at a certain speed so the eye does not see them separately, but at the same time if you slow the speed one is able to separate each frame. He had obtained images from these cameras by reducing and slowing the speed of the video. He had thereafter got 10 of the images printed into photographs at Photo Eden. Witness Bouzin had, in viewing the video footage recorded in the CD and the 10 photographs printed from the images, said that the perpetrator had been a dark skinned male, wearing a black cap, white long sleeve shirt with logo HP, a blackish shorts and a pair of sports shoes and had a bag as well. Under cross-examination PW Bouzin, had said that the cap, he believed, had been used as a mask, by pulling it down. PW Bouzin, had stated after analysis of the video, that the perpetrator had within seconds of entering the premises pulled down a mask on his face and prior to that his face was open i.e. when he was entering the premises. In explaining the photographs taken he had said that photographs no: 1 & 2 shows the perpetrator entering the premises at an angle and it shows “the right side of the face” of the perpetrator, that photographs no: 3 & 4 shows “the front part of his face as well as a little bit of the right side of the face”, that photographs 5 & 6 “the frontal view of the perpetrator’s face” and that

photographs 7 & 8 shows the “left side of the perpetrators face”. When asked in cross-examination whether PW Bouzin could ‘recognize’ the perpetrator he had said: “I cannot say I ‘recognize’ the person, but he is “a dark skin male, that is the best I could get”. PW Bouzin, had not said nor had it been suggested to him that he had known the Appellant before. There is a difference between recognition and identification. Although sometimes used as synonyms, ‘recognition’ is to match someone or something which a person perceives to a memory of some previous encounter with the same entity, while ‘identification’ is to establish the identity of someone or something which one may have seen for the first time. He had also said he could not identify the person because of the quality of the picture.

7. PW 3, Jimmy Joseph, had been the technician at the CCTV section and Alarm System with DG Vision Enterprise and had “nearly 5 years” of experience with CCTV cameras, had downloaded the video footage from the cameras at Cash Plus and put them onto a CD and pen drive, which PW 1, Bouzin had analyzed. He had said that the cameras were “in good condition” and “working properly”. He had arrived at Cash Plus on being contacted in less than two hours after the incident. The defence had not challenged his expertise, the condition of the cameras, the authenticity of the video footage or the manner Jimmy Joseph had carried out his work.
8. PW 8, Raddy Gervais Belle, an ex-police officer, had seen the Appellant; whom he knew very well (as the Appellant himself had been an ex police officer); on the 23<sup>rd</sup> of February 2012 around 12.40 pm near the Jivan Building, in which is Cash Plus is located. In answer to the question as to how he knew the Appellant, PW 8, had said: “We were in the police force together and then I was his Supervisor at Sentinel”. Sentinel is a security firm. The Appellant had been dressed as a labourer wearing a black woolen hat, a white t-shirt with long sleeves, a black short with red, gold and green which was in square shape. It was for him, unusual to see the Appellant like that as he normally dresses like a gentleman. He was like somebody who had done some work and PW 8, Belle had found it very strange for him to go in town dressed like that. He had slippers on his feet but had not been able to recall its colour. He had a back pack, the upper piece was black and in his bag there was something which was straight but there was a part sticking

out of the back pack and it was wrapped with something like a blue t-shirt. It is to be noted that PW 4 had said that the Appellant had wiped her handcuffs with a piece of blue cloth. He had while going past him spoken to him but he had not replied. He had seen him again around 1 pm standing near the same place he first saw him. The robbery at Cash Plus had taken place at about 01.06 pm. On the next day he had gone to the police station in response to a news item in the 8 pm news on the 23<sup>rd</sup> of February requesting any person who had information on the robbery at Cash Plus to come forward; and since the description of the clothing of the robber on the news item was the same as what he had seen the Appellant wearing when he saw him on the afternoon of the 23<sup>rd</sup>. At the police station on viewing the video footage PW 8, had been able to recognize that the Appellant when he saw him was wearing the same t-shirt and shorts and the back pack too was the same as the one he had seen him carrying. **Archbold 2009 at paragraph 14-28 citing the case of R V Hickin (1996) Crim. L. R. 584, CA** states: *“The recognition of clothing can be a valuable aid to identification.”* In the **Kenyan case of Evans Kalo Callos V Republic (2014) HC. CR.A. 795 Of 2007** the Court of Appeal had affirmed the conviction of the appellant placing reliance also on the clothes worn by him. PW 8 had said that even though the face is covered he could still confirm that the one seen on the footage was the Appellant as he knew him well. He had also identified the Appellant in court when the video was played. The photographs from the video footage to a certain extent confirm the evidence of PW 8, Gervais Belle, that when he saw the Appellant he saw in his back pack something straight which was sticking out of the back pack. It is however to be noted that the person in the footage was wearing shoes but when PW 8 saw the Appellant around 12.40 and 1 pm he had been wearing slippers.

9. PW 13, Sub Inspector of Police David Belle, had said that he could identify the Appellant whom he knew well from the video footage, which he had watched soon after the incident. He knew him because “he had worked under my supervision for quite some time”. In explaining how he had identified the Appellant, PW 13 had said “when he was entering the room opening the door the hood on his head did not cover his face. As soon as he came inside turning to close the door he placed the hood on his face. As soon as he came to the counter the hood was already covering his face...” While viewing in Court the photographs printed and produced by PW 1, Bouzin, PW 13 had said that the

photographs show the Appellant entering Cash Plus from the open door and at that time the hood was still on his forehead and thus you could see his face as he had not covered his face at that stage. He had also said that he had asked PW 1, Bouzin, to enhance and slow motion the video footage step by step so that he could clearly see the suspect for identification and also the clothes he was wearing. When challenged about his identification of the Appellant in the video footage PW 13 had said: "I was able to identify because I know him and I work with him". PW 13 had also said that "on the day of the incident on the 23<sup>rd</sup>, the police put a communication on the television that any person who had seen the suspect who was in a t-shirt with a logo HP on it to come forward to the police. He (*reference here is to PW 8, R. Gervais Belle*) contacted me the same night and he was asked to come to CID office the next day on the 14<sup>th</sup>. This is when he came and viewed the footage and then said that this was the person that he saw in the HP t-shirt and that person is Jose Nenesse".

10. PW 14, Sub Inspector of Police Jemmy Barra, who had also watched the video and had known the Appellant as he had worked with him before, had said that he could recognize the Appellant when he was entering the Cash Plus, as at that stage as his face was not covered. PW 14 had said that he recognized the "face and figures" of the Appellant.

11. PW 12, Gilliane Rene, a Sales Administrator for Etihad and who worked at the Etihad Office at the Seychelles International Airport had said that the Appellant had on the 24<sup>th</sup> of February 2012 around 9.30 am, come to the office to purchase a one way ticket to Manchester via Abu Dhabi. She had sold him the ticket for SR 7,719.00, which had been paid for in cash. According to her there was a flight at 18.55 hours on the 24<sup>th</sup> of February 2012. He was a British passport holder. The Appellant's Counsel had suggested in cross-examination that the Appellant could have benefitted from a rebate as he and his wife worked for Air Seychelles and could have bought the ticket for one tenth of the price, namely SR 700. If that be the case the question arises why the Appellant had not made use of that benefit?

12. PW 9, Noella Fanchette, an Inspector of police attached to the Guard Room at the airport, had arrested the Appellant at the airport on the 24<sup>th</sup> of February 2012, at around 11.00 am, when he came to the airport. The Appellant had his British passport, a Seychelles-Abu Dhabi-Manchester air ticket, and SR 24,585 with him.

13. Surveillance video evidence from CCTV cameras is admissible under **section 15(1) read with section 15(11) of the Evidence Act**. Section 15(1) states that:

*“in any trial, a statement contained in a document produced by a computer shall be admitted as evidence of any fact stated therein of which direct oral evidence would be admissible, if it is shown that*

*(a) the computer was used to store, process or retrieve information for the purposes of any activities carried on by any body or person ;*

*(b) the information contained in the statement reproduces or is derived from information supplied to the computer in the course of these activities; and*

*(c) while the computer was so used in the course of those activities*

*(i) appropriate measures were in force for preventing unauthorized interference with the computer; and*

*(ii) the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation, was not such as to affect the production of the document or the accuracy of its contents.”*

A “computer” has been defined in section 15(11) as:

*“(a) any electronic device for storing, processing or retrieving information, and any reference to information being derived from other information is a reference to its being derived there from by calculation, comparison or any other process; and*

*(b) any other device or category of device which the President may by Notice published in the Gazette specify.”*

14. In the UK evidence by photographs and video recordings are admissible to prove the commission of the offence and the identity of the offender. In **A-Gs Ref (No 2 of 2002) [2003] 1 Cr App R 321, Rose LJ said at p.19**: *“In our judgment on the authorities, there are...at least four circumstances in which, subject to the judicial discretion to exclude...and subject to appropriate directions in the summing-up, a jury can be invited to conclude that the defendant committed the offence on the basis of a photographic image from the scene of crime”*. One of those circumstances becomes relevant to the facts of this case, namely *“where a witness knows the defendant sufficiently well to recognize him as the offender depicted in the photographic image, he can give evidence of this Fowden (1982)*

**Crim LR 588; Kajala V Noble (1982) 75 CR App R 149; Grimer (1982) Crim LR 674, Caldwell (1994) 99 Cr App R 73 and Blenkinsop (1995) 1 Crim App R 7: and this may be so even if the photographic image is no longer available for the jury (Taylor V Chief Constable of Cheshire (1987) 84 Cr App R 191".** In **Dodson (1984) 1 WLR 971**, it was held that photographs taken at half-second intervals by security cameras installed at a building society office at which an armed robbery had been attempted, were admissible, on the issue of whether an offence has been committed and, if so, who had committed it, even though no witnesses were called to identify the men in the photographs.

15. In the South African cases of **Mpumlo & others 1986 (3) SA 485 (E)** and **Motata V Nair NO 2009 (2) SA 575 (T) para 21** it had been stated that *a video film, like a tape recording, 'is real evidence, as distinct from documentary evidence, and provided it is relevant, it may be produced as admissible evidence, subject of course to any dispute that may arise either as to its authenticity or the interpretation thereof'*. Also in **S V Ramgobin & others 1986 (4) SA 117 (N)** it had been held that *for video tape recordings to be admissible evidence, it must be proved that the exhibits are original recordings and that there exists no reasonable possibility of 'some interference' with the recordings.* In this case there can be no question that the aforesaid video evidence was inadmissible. PW 3, Jimmy Joseph, had testified that he was the technician at the CCTV section and Alarm System with DG Vision Enterprise who had downloaded the video footage from the cameras at Cash Plus and put them onto a CD and pen drive, which PW 1, Bouzin had analyzed. In **Mlungisi Mdlongwa V The State (99/10) (2010) ZASCA 82 (31 May 2010)** it had been held by the Supreme Court of Appeal of South Africa, that the video footage of the bank robbery taken by digital close circuit television (CCTV) cameras which were in place at the bank at the time of the robbery was admissible to prove the identity of the accused.

16. In the cases of **Bunch V State, 123 So 3d 484, 493-94 (Miss. Ct. of App. 2013)** and **Broadbent V Allison, 176 NC. App 359, 626 S.E. 2d, 758, 763-64 (N.C. Ct. App 2006)**, the US courts; and in the cases of **Tuncap 2014 Guam 1, 35** and **People V Tedtaotao, Supreme Court case no CRA 14-026**, the Supreme Court of Guam had held *surveillance video evidence was admissible and was proof of the commission of the crime by the accused.*



17. The Appellant in his Heads of Argument has complained that an identification parade had not been held and that a Turnbull direction had not been given. In our view none of them were necessary. On the issue of an identification parade, the holding of one such would have been superfluous as PW 8, PW 13 and PW 14 had recognized the Appellant whom they knew very well on seeing the video footage. A Turnbull direction was not called for as PW 8, PW 13 & PW 14 had taken their time to view the video footage and the photographs and not in a 'fleeting glance'. It was held in **Dodson (1984) 1 WLR 971** that *a Turnbull direction is inappropriate because the process of identifying the person from a photograph is a commonplace event and some things are obvious from the photograph itself.* In **Blackstone's Criminal Practice 2010** it is stated at F 18.29 that "A full Turnbull warning might not be appropriate in such cases, but the jury must still be warned of the dangers of mistaken identification, and should be reminded of the need to exercise great care when attempting to make an identification from photographs or video recordings."

18. The first and second grounds of appeal are that: "The learned trial Judge erred in convicting the Appellant in the absence of direct evidence and in the absence of identification by the victim namely Ms. Brigitte Pierre". These two grounds have no merit and we therefore dismiss them, as PW R. Gervais Belle, PW 13, S.I. David Belle and PW 14 S.I. Jemmy Barra, who all knew the Appellant well, gave direct evidence and had been able to positively recognize the Appellant from the video footage and the photographs, as stated at paragraphs 8, 9 & 10 above. The fact that Ms. Brigitte Pierre was unable to identify the Appellant is immaterial in the given circumstances. We have had a look at the photographs produced by PW 1, Bouzin and are convinced that for a person who had known the Appellant previously and had worked with him before, it would not be difficult to recognize him in the photographs, although the photographs are not that clear. We are conscious of the dangers of mistaken identification, and the need to exercise great care when a case rests mainly on identification from photographs or video recordings. In **Abnett (2006) EWCA Crim 3320** a police officer, who had no specialist training in facial mapping or any other such technique, but had spent some time interviewing the appellant and repeatedly viewing CCTV footage of a

robbery, together with still images from that film, was permitted to state that he was '100 per cent sure' that one of the robbers pictured was the appellant.

19. The Appellant had not challenged PW 8, Raddy Gervais Belle's, testimony of having been in very close proximity to Cash Plus, 6 minutes before the robbery, and as regards the description of the clothes he was said to be wearing. PW 8, Raddy Gervais Belle, had clearly stated that he had seen the Appellant in the same clothing as seen on the video and the photographs, 6 minutes before the robbery. The learned Trial Judge who had an opportunity of seeing the witnesses PW 8, PW 13 and PW 14 testify, had accepted their evidence pertaining to the identification of the Appellant.

20. The Appellant had not challenged the evidence of PW 12 Gilliane Rene, referred to at paragraph 11 above, nor given any reasons as to his decision to purchase a ticket to leave Seychelles on the morning after the robbery, namely the 24<sup>th</sup> of February 2012. Although by itself, the Appellant's decision to leave Seychelles on 24<sup>th</sup> of February 2012 does not call for any explanation, taken in conjunction with the evidence of PW 13, S.I. David Belle, PW 14, S.I. Jemmy Barra and PW 8, Raddy Gervais Belle, his silence in this regard militates against him.

21. When pretty stringent proof of circumstances is produced tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they exist, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence and he fails to offer such proof, the natural conclusion would tend to sustain the charge. In **Burdett (1820) 4 B. & Ald 95 at p.120** it had been held "*No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, can human reason do otherwise than adopt the conclusion to which proof tends?*" In the South African case of **Magmoed V Janse van Rensburg and others 1993 (1) SACR 67 (A)** it has been held that where there is direct evidence implicating an accused in the commission of an offence, the prosecution case is ipso facto strengthened where such evidence is uncontroverted due to the failure of the accused to testify. In the South African case of **S V Tandwa 2008 (1) SACR 615** it was held

*that an accused has the constitutional right to remain silent but his choice must be exercised decisively as 'the choice to remain silent in the face of evidence suggestive of complicity must, in an appropriate case, lead to an inference of guilt'.*

22. The Appellant in his Heads of Argument has not elaborated on his third ground of appeal, namely, that the learned trial Judge erred in convicting the Appellant on hearsay evidence. We do find on reading the record of this brief that hearsay evidence has been admitted and reference had been made at paragraphs 17 and 18 of the judgment to part of that evidence. At paragraph 17 it is stated: "They had thereafter obtained a warrant and gone to the house of Veronique Barbe the girl friend of the accused to conduct a search on the 25<sup>th</sup> of February 2012. He had found foreign exchange in a carton box and Seychelles rupees as well. In all they had recovered 51,290.00 SR 1580 Euros, 1000 US dollars and 130 Sterling pounds". At paragraph 18 it is stated: "Witness Belle further stated that the room where the money was found was the room where the accused slept." At paragraph 25 of the judgment the learned Trial Judge had stated: "In addition the evidence reveals that foreign exchange and Seychelles rupees were recovered from the room of the accused at his girlfriend Veronica Barbe's house,.....". Veronique Barbe was never called to testify in this case and it is from her that witness Belle had come to know that the room where the money was found was the room where the Appellant slept. When objection was raised by Counsel for the defence when this evidence was sought to be elicited by the Prosecuting Counsel on the ground that it was hearsay; the learned Trial Judge had said that he "will not rely on that evidence as to the truth of the facts of the words spoken". We warn the Prosecution that they should ensure that no hearsay evidence is led in a criminal trial against an accused person, which could prejudice the case against him. We hold with the Appellant on his third ground of appeal and disregard the hearsay evidence in its entirety. We are of the view that the evidence of PW 1, 8, 9, 12, 13 and 14 is more than sufficient to uphold the conviction of the Appellant.
23. We are of the view that on the basis of the reasons set out in paragraphs 6-21 the conviction of the Appellant could be sustained and we therefore dismiss the appeal against conviction.

24. The Appellant in his Heads of Argument has not made any submissions on his appeal against Sentence. At the hearing before us the Appellant withdrew his appeal on sentence. However we wish to comment that when taking into consideration the fact that this was an armed robbery that had been carried out in the heart of Victoria, in broad day light by putting into mortal fear a helpless woman by an ex-police officer, we are of the view that the Sentencing Judge had been lenient in imposing a jail term of 10 years against the Appellant.

A.Fernando (J.A)

**I concur:.** ..... M. Twomey (J.A)

**I concur:.** ..... J. Msoffe (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 12 August 2016