

IN THE SEYCHELLES COURT OF APPEAL

[Coram: S. Domah (J.A) ,A.Fernando (J.A) ,J. Msoffe (J.A)]

Criminal Appeal SCA 06, 15 & 16/204

(Appeal from Supreme Court Decision CR 53/2012)

Dave Rose

Christopher Nicholas

Leslie Payet

Appellants

Versus

The Republic

Respondent

Heard: 01 December 2016

Counsel: Mr. Anthony Juliette for the 1st & 3rd Appellants

Mr. Anthony Derjacques for the 2nd Appellant

Mr. Benjamin Mathew Vipin for the Respondent

Delivered: 09 December 2016

JUDGMENT

J. Msoffe (J.A)

[1] The 15th day of August 2012 was a public holiday in Seychelles and there were not many people walking along the streets of Victoria, Mahe, in the afternoon of that day. At around 14.30 hours Mr. Vijish V. Joy and Mr. Madhu Manoj were walking along La Promenade, Victoria, on their way to their workplace at the Indian Ocean Tuna factory when they were attacked by people they identified to be the Appellants herein. Since they were in the company of Ms. Kelly Dubel at the material time the charge that was subsequently preferred in court against them 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.

The particulars of offence are that, Leslie Payet of Majoie, together with persons known to the Republic namely Christopher Nicholas of Hangard Sreet, Dave Rose of Hangard Street and Ms. Kelly Dubel of Majoie, on the 15th of August 2012, at La Promenade, Mahe with common intention robbed Mr. Vijish V. Joy of his mobile phone and also around also SR100/- in different denominations and also robbed from Mr. Madhu Manoj SR500/- and at the time of robbery used knife and personal violence to the said Mr. Vijish V. Joy and Mr. Madhu Manoj.

- [2] After a full trial, they were all convicted as charged. They were sentenced to terms of imprisonment as follows:-

The first Appellant, 12 years; the second Appellant, 10 years; the third Appellant, 10 years and the fourth Accused, 1 year.

Dissatisfied, the Appellants are appealing. It appears the fourth accused was satisfied with the conviction and sentence meted on her because there is no record that she is appealing.

- [3] Both the first and third Appellants have a common memorandum of appeal with three grounds of appeal filed on their behalf by learned counsel. The second Appellant has his own grounds of appeal filed by learned counsel. However, the common thread that runs through all the grounds is based on the following grounds of complaint:-

1. That the Learned Judge erred in his findings on the CCTV evidence in that the CCTV camera is in Market Street, which is very far from the alleged crime scene at La Promenade and that it shows no act of robbery.
2. That the Learned Judge erred in his appreciation of the identification evidence in that such identification was a dock identification without an identification parade having been properly conducted.

3. That the Learned Judge erred in finding that there was common intention by the Appellants to commit the offence of robbery with violence as this was not supported or corroborated by any independent testimony.
4. That the sentences given were harsh and were not in line with the principles laid out in Ponoo vs Attorney General.

[4] We think it is fair to say that this appeal is based on the findings of fact by the trial Judge under paragraphs 12, 13, 14 and 17 of his Judgment. In view of the importance we attach to these findings we propose to reproduce the paragraphs verbatim as under, with a caution that at the trial the first Appellant herein was the third accused, the second Appellant was the second accused and the third Appellant was the first accused.

[12] *Having thus analysed the evidence when one considers the evidence of the two victims in this case namely Nadoo Manoj and Vijish V. Joy it is clear that on the 15th of August 2012 around 14.40 hrs they had seen four persons including a lady approaching them. It is apparent from the evidence of Nadoo Manoj that two of these individuals who he identified in open court as the 1st accused and the 3rd accused had attacked him. The 1st accused had pointed a knife at his neck and the 3rd accused had held him and they had taken his bag which was on his back and his wallet which had about SR500. He identified the accused in open court. Witness Vijish V. Joy stated that the 2nd accused had assaulted him and then the other two accused namely the 1st and 3rd accused had come and they too had beaten him up and taken his phone, headset and SR70.*

[13] *Further the evidence of the prosecution clearly indicates that soon after this incident around 2.51 p.m all four accused were seen together close to the scene of crime at Market Street and were caught on CCTV camera placed in the area. They were identified on the video clip by both witnesses and Vijish V. Joy was able to identify his head set on one of the accused. Police officer Denis Sauzier who had*

been operating the CCTV camera for 5 years had noticed the suspicious behaviour of the accused and contacted Central police station and had been told that two Indians had been beaten up in the vicinity of La Promenade by a group of three men and a lady. The persons were subsequently identified by other police officers. It is to be noted that the 1st 2nd and 3rd accused in their unsworn statements from the dock admit it was them on the P4 video recording.

[14] *It is apparent that when one watches the video recording of the CCTV camera, an altercation with some other persons has been recorded which clearly shows the aggressive nature of the 1st accused and the other accused even though the 1st accused in his statement attempts to show court he is not aggressive and states he will never attack anyone. The recording shows the 1st accused and the other accused acting in an aggressive manner with some other persons. The fact that violence and a dangerous weapon was used and injury was caused to the victims in this instant case is clearly borne out by the evidence of both victims who identify the 1st 2nd and 3rd accused as the attackers.*

[17] *Further it is apparent that the victims had observed the four accused walking towards them before they were actually attacked so the defence contention that they would have not been able to identify them as they were attacked suddenly and would have been afraid bears no merit. Further the incident occurred in broad daylight. When one considers the evidence as a whole this court is satisfied that the prosecution has satisfied court beyond reasonable doubt that it was the four accused who had committed the attack on the victims and stolen items and cash from them. The evidence of victim Manoj that a knife was used in the attack is corroborated by the evidence of the other victim Vijish and by the medical evidence of Dr. Afif. Though subject to cross examination there were no material contradictions*

that would make one disbelieve the evidence of the prosecution witnesses in this case.

- [5] It is evident from the above paragraphs that the Appellants' convictions were based on evidence of identification at the scene, dock identification and the footage on the CCTV camera. The question is whether there is basis for us to interfere with the findings of fact made by the trial Judge on the above aspects of the case.
- [6] It is trite in many jurisdictions that Courts of Appeal are slow to interfere with findings of fact by courts below unless they are perverse, manifestly unreasonable, or if there were misdirections or non-directions on the evidence, etc. In saying so, we are aware that under Rule 31(1) of the Court of Appeal Rules, 2005 appeals to this Court are by way of a re-hearing but there must be strong and compelling reason(s) to interfere with findings of fact by a trial Judge.
- [7] The correct approach in deciding whether or not to interfere with findings of fact by a trial Judge was stated by the UK Supreme Court in the fairly recent decision of **McGraddie v McGraddie** [2013] UK SC 58; [2013] 1 WLR 2477 as summarized in the head note thus:-

It was a long settled principle, stated and restated in domestic and wider common law jurisprudence, that an appellate court should not interfere with the trial Judge's conclusions on primary facts unless satisfied that he was plainly wrong.

Lewison L.J. returned to the topic in Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5; [2014] ETMR 26. In a vivid passage at para [114] he said:

Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applied not only to findings of primary fact, but also the evaluation of those facts and to inferences to be drawn from them. ... The reasons for this approach are many. They include

- i. *The expertise of the trial judge in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.*
- ii. *The trial is not a dress rehearsal. It is the first and last night of the show.*
- iii. *Duplication of the trial judge's role on appeal is a disproportionate use the limited resources of an appellant court, and will seldom lead to a different outcome in an individual case.*
- iv. *In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.*
- v. *The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).*
- vi. *Thus even if it were possible to duplicate the role of the trial judge it cannot in practice be done.*

[8] Prior to the decision in **McGraddie** the same principle had been restated or enunciated in other cases as under:-

[9] In **Clarke v Edinburgh & District Tramwa YS Co. Ltd** 1919 SC (HL) Lord Shaw of Dunfermline stated that an appellate court should intervene only if it is satisfied that the Judge was "plainly wrong". IN **Thomson v Kvaerner Goan Ltd** [2003] UKHL 45; 2004 SC (HL) 1 Lord Hope of Graighead had this to say:-

*It can, of course, **only be on the rarest occasions**, and in circumstances where the appellate court **is convinced by the plainest of considerations**, that it would be justified in finding that the trial Judge had formed a wrong opinion.*

[Emphasis supplied.]

- [10] Furthermore, in the majority decision of the Canadian Supreme Court in **Housen v Nikolaisen** [2002] 2 SCR 235 at para 14 the court stated:-

*The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. **The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow**, often being shaped and distorted by the various orders and rulings being challenged.*

[Emphasis supplied.]

- [11] In explaining why appellate courts are not in a favourable and better position to determine factual matters the Court in **Housen** (supra) had this to say:-

Appeals are telescopic in nature, focusing narrowly on particular issues as opposed to viewing the case as a whole.

- [12] In the more recent decision in **Clydesdale Bank v Duffy** [2014] EWCA Civ 1260 the Court of Appeal set out a clear statement of the limited role of a Court of Appeal in relation to findings of fact by the trial Judge thus:-

*The Court of Appeal **is not here to retry the case**. Our job is to review the decision of the trial judge. If he has made an error of law, it is our duty to say, **but reversing a trial judge's findings of fact is a different matter**.*

[Emphasis supplied.]

- [13] In yet another recent decision in **Goyal v Goyal** [2014] EWCA Civ 523 Lord Justice Kitchin warned about the need for not interfering with findings of fact by trial Judges when he stated:-

*This applies not only to findings of primary fact but also to the evaluation of those facts and to inferences to be drawn from them. The reasons for this approach include **the expertise of trial judges in determining what facts are relevant to the issues to be decided and what those facts are if they are disputed.***

*In making his decision the trial judge will have regard to the whole of the evidence presented to him whereas an appellate court can only consider aspects of that evidence **and duplication of the trial judge's role on appeal is a disproportionate use of limited resources of an appellate court***

and will lead to a different case.

[Emphasis supplied.]

- [14] Coming back to the instant case, like the trial Judge, we too have no doubts in our minds that the Appellants were identified at the scene of crime on the material day and time. All conditions favouring a correct identification were present. It is true that the witnesses were strangers to the Appellants. But it is also true that the incident took place in broad daylight. The Appellants were not masked as not to allow for correct identification. The witnesses spent some amount of time in the course of the incident. All this time the witnesses were very much aware of the persons who were attacking them. In the course of the attack the witnesses and the attackers (the Appellants) stood in close proximity. Further, the witnesses could describe who did what in the course of the attack. For instance, Madhu Manoj stated that the third Appellant pointed a knife at his neck while the first Appellant had held him. Vijish V. Joy testified that the second Appellant assaulted him and then the other Appellants came and they too beat him and took his phone, headset and SR70. Further, at page 67 of the record, when he was asked as to whether he could recognize his attackers, despite being in a state of shock, his answer was in the affirmative.

[15] We are also satisfied that the trial Judge properly invoked the doctrine of common intention under section 23 of the Penal Code. The fact that the victims were assaulted by all the Appellants was indicative of common intention. This is clear from the evidence that when the Appellants held the victims, one of them pointed a knife at the victims, the other held the other victim while the other stole the items. This aspect of the case is best captured in the record of proceedings at pages 63 – 64 thus:-

Q Now coming to the incident could you describe exactly who caught you?

A The 1st one and the 3rd one.

Q What did they do the 1st and 3rd accused?

A It was the 1st one and the 3rd one who caught me and the 1st one placed the knife under my neck.

Q And after that could you explain to court what happened?

A After that they took my bag and my wallet was inside and they took Sr 500 from my wallet

Q Where was your bag?

A It was on my back.

Q Now after they took the money from your bag what did they do?

A After they took the money they left me and caught my friend.

Q Who went to your friend?

A The 2nd one.

[16] As for the evidence of dock identification in this case it should be stated that as was held in **Moustache v R** [2015] SCCA 42, here too, this was done merely to reinforce the witness's prior identification of the Appellants. At any rate, with or without the dock identification, there was still strong evidence to ground the conviction.

[17] Regarding the video footage it is pertinent to note the record of proceedings at page 82 where Vijish V. Joy had the following to say in cross-examination:-

Q Now when you were watching the video clip did the police tell you that these are the 4 people that they had arrested in connection with the incident that you had reported?

A The police said we had arrested them but we need to confirm if it is them.

Q Did the police (sic) other clippings, other photos of potential suspects?

A They showed only this clipping.

Q When you say clipping you mean video not photographs?

A We were shown the video and we confirmed to the police that it was the 4 people.

Q Now at the court house did any woman police officer point to them and say that these are the 4 accused?

A No, nobody told us but it was us who identified them.

[18] So, as already stated, it is discerned from the above record of proceedings that the video footage was brought in in evidence just to confirm the witness's prior identification of the Appellants. In saying so, we are mindful of the fact that the CCTV camera evidence showed no act of robbery; all it showed was that the Appellants were spotted at Market Street, not very far from the scene of crime. But the fact that the crime took place at around 2.30 p.m or thereabout, and that a few minutes later they were all spotted together at Market Street, circumstantially this was of significant importance to the case against them.

[19] In the upshot, mindful of the fact that this is essentially an appeal based on findings of fact by the court below, and in view of the limited powers conferred to a Court of Appeal as stated in the above cited authorities to which we subscribe to, and having looked at the

evidence in sufficient detail, and conscious of the need to be slow and cautious in dealing with an appeal based on findings of fact, we see no basis for interfering with the trial Judge's findings of fact based on his appreciation of the evidence on record.

[20] In similar vein, given the seriousness of the crime we find no basis for interfering with the sentences imposed on the Appellants.

[21] In the end result, we dismiss the appeal in its entirety. As already ordered by the Supreme Court, we too order that the period(s) spent in remand custody should count towards sentence.

J. Msoffe (J.A)

I concur:.

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S. Domah (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 09 December 2016