

IN THE SEYCHELLES COURT OF APPEAL

[Coram: A.Fernando (J.A) ,M. Twomey (J.A), B. Renaud (J.A)]

**Criminal Appeal SCA 23 & 24/2015
(Appeal from Supreme Court Decision CR 49/2013)**

Mike Vital	1 st Appellant
Steve David	2 nd Appellant
Versu s	
The Republic	Respondent

Heard: 01 August 2017
Counsel: Mr. Nichol Gabriel for the 1st Appellant
Mr. Leslie Boniface for the 2nd Appellant
Ms. Brigitte Confait for the Respondent
Delivered: 11 August 2017

JUDGMENT

B. Renaud (J.A)

BACKGROUND

- [1] The two Appellants were convicted of the offence of robbery with violence contrary to Section 280 and punishable under Section 281 read with Section 23 of the Penal Code, as well as the offence of conspiracy to commit a felony contrary Section 381 of the Penal Code.
- [2] The particulars of the offences were that on 7th August 2013 at Port Glaud, with common intention, whilst being armed with a machete, stole various items made of gold including bangles, chains, rings, studs, two mobile phones one make Samsung and the other Micromax, one tablet also make Samsung and a sum of SR3,000.00 in cash altogether

amounting approximately to SR320,905.00, being the property of Mr. Venkatarajan and Mrs Abhinaya Pillay, and immediately before or at the time of the robbery threatened to use or used actual violence causing injury to the said Venkatarajan Pillay.

[3] Secondly, the Appellants were also charged with the offence of conspiracy to commit a felony, by agreeing with one another on 7th August 2013 to commit the said robbery with violence.

[4] Both Appellants pleaded not guilty and the case proceeded to a full trial.

[5] The 1st Appellant was convicted of the offences charged and was sentenced to 12 years imprisonment on each count to run concurrently and the 2nd Appellant to 15 years imprisonment on each count also to run concurrently.

GROUND OF APPEAL

[6] Both Appellants have now appealed against their respective convictions and sentences on the grounds set out hereunder.

1st Appellant - Mike Jean Vital - Against Conviction

Ground 1: The learned trial Judge erred in law and on the facts in having concluded that the statement given to the Police by the 1st Appellant was given voluntarily and accordingly amounted to a confession in law.

Ground 2: The learned trial Judge erred in law for having convicted the 1st Appellant, *inter alia*, on the basis of the statement given by the 1st Appellant to the Police.

Ground 3: The learned trial Judge erred in law in wrongly applying the laws as regards to corroboration to the evidence in the case and in particular to have concluded that there was no evidential basis to look for corroboration prior to accepting the evidence of Prosecution witness Andre Dugasse.

Ground 4: The learned trial Judge erred in law in having wrongly applied the legal test as regards to the law of corroboration to the evidence in the case especially in regards to the evidence.

1st Appellant - Against Sentence

- [7] Ground 5: The learned trial Judge erred in law in passing sentence as the sentence imposed on 1st Appellant is harsh and excessive in all the circumstances of the case.

2nd Appellant – Steve David - Against Conviction

- [8] Ground 1: The learned judge erred in law in that he applied the wrong test in finding that no evidential basis existed for corroboration prior to accepting the evidence of Andre Dugasse.

Ground 2: The learned judge erred in law and in fact in finding that no evidential basis exists to look for corroboration prior to accepting the evidence of Andre Dugasse and then to use the description of the clothing the two Appellants allegedly wore on the night of the incident as given by Mr. and Mrs. Pillay as corroboration of Andre Dugasses's evidence.

Ground 3: The learned judge erred in his finding that the discrepancies in the evidence of Andre Dugasse and that of Mr. and Mrs. Pillay were not material enough to cause him to find that Mr. and Mrs. Pillay's evidence did not corroborate Andre Dugasse's evidence.

- [9] Ground 3 as contained in the Memorandum of Appeal was abandoned by Learned Counsel for the 2nd Appellant prior to the hearing of this appeal.

2nd Appellant – Against Sentence

- [10] Ground 4: The sentence of 15 years imprisonment on each count, although running concurrently, is manifestly harsh and excessive in all the circumstances of the case.

Joining the grounds of Appeal by 1st Appellant

- [11] Learned Counsel for the 1st Appellant made combined submissions for Grounds 1 & 2 together, and, Grounds 3 & 4 also together. These grounds as combined shall be considered together.

Joining the grounds of Appeal by 2nd Appellant

- [12] Learned Counsel for the 2nd Appellant also made combined submissions in respect of

Grounds 1 & 2 together, hence these two grounds shall also be considered together.

[13] Learned Counsel has raised a preliminary objection on the basis that the 2nd Appellant failed to comply with Rule 18 Sub-Rule 8 of the Rules of this Court in that he neither sought nor obtained leave of this Court to amend his ground of appeal from “*harsh*” as originally stated in his Notice of Appeal dated 22nd July 2015 to that stated in his Memorandum of Appeal dated 6th June 2017 by stating “*manifestly harsh and excessive in all the circumstances of the case.*”

[14] At a preliminary hearing of this appeal, Learned Counsel for the 2nd Appellant applied for and was granted leave to amend the original ground of appeal which was made by the 2nd Appellant when the latter was in prison and had not had the benefit of a Legal Counsel at the time. In the circumstances, this preliminary objection therefore does not need further consideration.

[15] The grounds of appeal raised by the Appellants overlap and are conveniently considered together as follows:-

1. Was the statement of the 1st Appellant voluntarily given to the Police?
2. Does that statement amount to a confession in law?
3. Was the 1st Appellant convicted, *inter alia*, on the basis of that statement?
4. Was there evidential basis requiring the trial judge to look for corroboration prior to accepting the evidence of Andre Dugasse?
5. Did the trial judge err in using the description of the clothing the two Appellants allegedly wore that night as given by Mr. and Mrs. Pillay as corroboration of Andre Dugasses’s evidence?
6. Are the discrepancies in the evidences of Andre Dugasse and of Mr. and Mrs. Pillay material enough to find that these evidences cannot corroborate Andre Dugasse’s evidence?
7. Are the sentences imposed harsh and excessive?

[16] **Issues 1, 2 and 3** can be conveniently taken together by answering whether the statement given by the 1st Appellant to the Police under caution was indeed given voluntarily thus amounting to a confession in law upon which the Court below could rely on to convict the 1st Appellant.

[17] Likewise, **issues 4, 5 and 6** can be conveniently taken together by answering whether there was evidential basis to look for corroboration before accepting the evidence of Andre Dugasse and whether the evidence of the Pillays with regard to clothing of either of the Appellants can corroborate the evidence of Dugasse.

[18] The issues raised concern three areas of law, namely, confession or statement given under caution, need for corroboration of evidence and the harshness of the sentences in the circumstances of this case.

[19] In so far as confessions or statements are concerned, in the case of ***Dean Laurence v Republic SCA 17/13***, this Court held, that –

“... the statement of a co-accused, was not a confession but one admitting a number of facts pointing to its complicity and that of the Appellant, in the criminal conduct of drug trafficking.

“... a confession is generally described as an unequivocal acknowledgement of guilt, the equivalent of a guilty plea before a Court of law. On the other hand, an admission is referred to as a statement or conduct adverse to the person from whom it emanates.”

[20] Further, this Court has in many other instances upheld and reaffirmed the procedures set out in the case of ***Dugasse v The Republic 1978 SLR 28***, namely that – both in the case of a repudiated statement and in the case of a retracted statement, a “trial within a trial” ought to be held. The trial court has to allow the accused the opportunity to give evidence at such a “trial within the trial” if he/she so wishes and should not wait until evidence is given on behalf of the Accused on the general issue.

[21] We further reaffirm that a statement under caution which made voluntarily though

subsequently retracted can be relied upon by a trial court where there is independent evidence that corroborates the material particulars made in that statement.

[22] All that is required to corroborate a retracted statement is some evidence *aliunde* which implicates the accused in some material particulars and which tends to show that what is stated in the statement is probably true. This independent corroboration should not only confirm the general story of the alleged crime, but it must also connect the accused with it. However, such a statement is not to be regarded as involuntary merely because it is retracted.

[23] A person when giving a statement under caution to the police may admit his guilt up to a certain extent but puts greater blame on another. That giver of the statement sometimes also asserts that certain of his own actions or the role he played were really innocent and that it was the conduct of the other person that gave them a sinister appearance or led to the belief that the person making the statement was implicated in the crime. The person making the statement would have a right to have the whole statement read out rather than allow the prosecution to pick out certain passages and leave out others.

[24] In such cases the court ought to rule that the probative value of the statements outweighs its prejudicial effect and ought to allow that statement to be read out and admitted in its entirety given that any attempt to edit it would seriously alter its sense and meaning.

[25] In the present case the trial judge held a “trial within a trial” to determine the admissibility of the statement given under caution to the police by the 1st Appellant and which he eventually retracted. The 1st Appellant gave evidence during the “trial within a trial”. The trial judge thereafter ruled that the statement given under caution by the 1st Appellant was voluntarily made by the 1st Appellant and thus admitted it in evidence.

[26] Learned Counsel for 1st Appellant submitted that the trial Judge should not have reached this conclusion. He also submitted that the trial judge convicted the 1st Appellant *inter alia* on the basis of that statement.

[27] Given the time recorded by two police officers Esther and Octobre, in his submission, the 1st Appellant having been arrested on 12th August, 2013 at 7 pm, the statement taken from him at 7 pm, the caution administered at 1900 hours and the recording started at 1901

hours, all these actions could not have been taken at the same time.

[28] It is our view that these are indeed discrepancies in the normal process but do not seriously affect the fact that the 1st Appellant voluntarily gave a statement to the police which was accordingly recorded. We do not see how these timings affect the voluntariness of the statement given by the 1st Appellant.

[29] Learned Counsel for 1st Appellant also submitted that the police officer who recorded the statement did not offer the 1st Appellant the opportunity to write his own statement, yet, later on Counsel stated that his client was illiterate and could neither read nor write. Whether the 1st Appellant, if he was able to, had chosen to write the statement himself or allowed the police officer to write it, again has no direct bearing on the contents of his statement unless the 1st Appellant is insinuating that the police officer did not diligently and correctly record what he said. However, that is not in issue. The 1st Appellant admitted that the statement was read over to him and he was invited to make any correction etc. but that he did not make any.

[30] In conclusion we find this submission weak and further find that whether the 1st Appellant personally wrote the statement or whether the Police wrote it for him is immaterial as the 1st Appellant voluntarily made the statement.

[31] Learned Counsel has also submitted that there were other police officers present in the room where the statement was being recorded, but there is no complaint that the other officers had anything to do with what the 1st Appellant was saying and which was recorded. Ideally, such statement should be recorded in a private room but understandably it may happen that accommodation in the Police Station does not always permit this pattern in all circumstances. The essence is whether the presence of the officer in any way affected the voluntariness of the 1st Appellant in giving the statement. We find that not to be the case.

[32] The next submission of Learned Counsel for the 1st Appellant is that the latter is illiterate and could neither read nor write and used his thumbprint to make his mark instead of a signature proper. The thrust of this argument is that the statement produced in Court could have been made and signed by someone other than the 1st Appellant. If these

arguments were sufficiently substantiated it might have had a bearing as to whether that statement as a whole was indeed the statement given by 1st Appellant to the Police.

[33] The 1st Appellant gave evidence in the “trial within the trial” and that point was never raised and further there is no evidence which could lead this Court to find otherwise. We therefore find that the statement was indeed that of the 1st Appellant.

[34] It is also submitted that the police officer who arrested the 1st Appellant did not comply with the provisions of Article 19(2)(b) of the Constitution which provides that –

“Every person who is charged with an offence shall be informed at the time the person is charged or as soon as is reasonably practicable, in, as far as is practicable, a language that the person understands and in detail, of the nature of the offence.”

[35] Further it is submitted that the 1st Appellant was deprived of his constitutional right to have access to a lawyer of his choice.

[36] From our analysis of the evidence on record we take note that Police Officer Esther arrested the 1st Appellant on 12th August, 2013 and brought him to the CID office at Bois De Rose where she said that she cautioned the 1st Appellant in the Creole language in the presence of Police Officer Octobre. She also informed the 1st Appellant of his constitutional rights in accordance with Article 19(2)(b) and also advised him of his right to a lawyer. The 1st Appellant said he could not afford a lawyer other than his wife’s relative who was once a lawyer and did not want another lawyer. His wife was present at the time. As the 1st Appellant was illiterate he opted for Officer Esther to write his statement.

[37] None of the Police Officers present offered him any inducement or meted out any threat towards him that compelled him to say whatever he said in the statement. The 1st Appellant admitted that the Officer Esther read the statement to him and asked him whether it was correct and he accepted its contents as correct. The 1st Appellant contended that Officer Esther then asked him to sign the statement but he claimed that he did not know what he was signing. The answer is simply that he put his mark on the same document that was written by Officer Esther, which was read back to him and

which he confirmed as being correct. The 1st Appellant at no stage testify that Officer Esther gave him another paper to put his marks thereon.

[38] Police Inspector Octobre in his evidence in the “trial within a trial” substantially confirmed that he was present throughout the process and in essence materially corroborated the evidence of Officer Esther.

[39] In the circumstances we find that these grounds fail.

[40] In so far as the submissions of corroboration are concerned we find that the classical definition of corroboration is expressed by Lord Reading CJ in **R v Baskerville (1916) 2 KB 658** as follows:

“Corroboration must be independent testimony which affects the Accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it.”

[41] Corroboration need not amount to confirmation of the whole story related by the witness to be corroborated. It may consist of evidence directly or circumstantial which confirms that story in some respects material to the issue under consideration and which implicates the Accused.

[42] In the case of **Davies v Director of Public Prosecution (1954) AC 378** the House of Lords exhaustively reviewed the case of **Baskerville** and Lord Simonds LC reformulated it as follows:

“In a criminal trial where a person who is an accomplice gives evidence on behalf of the prosecution it is the duty of the judge to warn the jury that, although they may convict upon his evidence, it is dangerous to do so unless it is corroborated. This rule although a rule of practice, now has the force of a rule of law. Where the judge fails to warn the jury in accordance with this rule, the conviction will be quashed even if in fact, there be ample

corroboration of the evidence of the accomplice.”

[43] The Mauritian Supreme Court of Criminal Appeal in the case of ***Clelie & ors v R 1982 MR 6*** expressed the view that when dealing with the uncorroborated evidence of an accomplice it is necessary that the magistrates in their judgments leave no doubt that they realize that they are acting on such evidence and provide the reasons which prompt them to act on such uncorroborated evidence.

[44] However, in the case of ***Comaren v R 1989 SCJ 286***, the Court in effect clarified that where corroboration arises before the Magistrate Courts, admittedly, the Magistrates being qualified lawyers no question of corroboration warning is required as the Magistrates are the tribunal of both law and fact, nevertheless the Magistrates should make it plain in their judgment that they have regard to the dangers of convicting in the absence of corroborative evidence.

[45] In the case of ***Ballah v R 1989 SCJ 427***, their Lordships Glover CJ and Boolell J of the Mauritian Supreme Court of Criminal Appeal stated:

“With regard to the ground which finds fault with the direction the Magistrate gave himself warning about the uncorroborated evidence of an accomplice, we read the following: ‘In the present case I am aware that the Accused is on bail and I have given myself the warning on acting on accomplice evidence’. In the light of the authorities, we do not see what else the Magistrate could have done to drive home to all concerned that he was fully alive to the problem.”

[46] In the Mauritian case of ***Rambhujan v R 1976 MR 256***, de Ravel J had to consider whether two witnesses who were not accomplices but witnesses with a purpose of their own to serve, their evidence should have been treated with caution. In his considered judgment he mentioned that it was well established in England that independently of statutory exceptions there was a rule of practice whereby it was the duty of judges to warn juries that it was dangerous to find a conviction on the evidence of a particular witness or classes of witnesses unless that evidence is corroborated in a material particular implicating the accused or confirming the disputed items in the case.

[47] He concluded by stating –

*“We see no reason why we should not make the pronouncement of Lord Hailsham ... our own and we agree to the desirability for corroboration in connection with the evidence of a party who has a **purpose of his own to serve in giving false evidence.**”*

[48] Learned Counsel for the 1st Appellant has further submitted that the principle relating to corroboration was not adhered to by the trial Judge.

[49] We note that the trial judge after hearing the evidence of Andre Dugasse satisfied himself that Mr. Dugasse was speaking the truth and as such there was no evidential basis for him to look for corroboration prior to accepting that evidence.

[50] The law on this issue has been set out supra and supports the course of action adopted by the trial judge with regard to the acceptance of the evidence of Dugasse. The trial judge was evidently aware of the need to caution himself of the need or otherwise for corroboration of the evidence of a person who may be an accomplice.

[51] We cannot fault the trial judge in that respect.

[52] As far as the issue of the term harsh and excessive are concerned, in the case of **Randy Florinne v R SCA 7 of 2009** the Court of Appeal made reference to the case of **Redeka v R SCA 4 of 2009** and held that ‘harsh and excessive’ cannot be regarded as a ground of appeal for sentence and in any case it is an area of the law in which the trial court reigns supreme.

[53] As stated in the case of **Redeka** –

“to merely aver that a sentence is harsh and excessive does not amount to a ground of appeal inasmuch as the appreciation of facts is an area where the trial judge reigns supreme except where his appreciation of facts may prove to be perverse, a sentence pronounced by a trial judge may not be upset except where the penalty imposed is either wrong in law, wrong in principle or manifestly harsh and excessive”.

[54] We therefore find that the terms ‘harsh and excessive’ cannot be implied without

elaborative specificity and are not reasons to disturb the sentence imposed by a trial court.

[55] We find that the proviso to Section 281 is applicable in the present case.

[56] Further, bearing in mind the provisions of Section 27(1)(c) of the Penal Code that – where an offence is punishable with imprisonment for more than 10 years or with imprisonment for life and it is the first conviction of the person of such an offence, an accused person may be sentenced to imprisonment for a period of not less than 15 years.

[57] The trial judge sentenced the 1st Appellant to 12 years imprisonment on each count to run concurrently and the 2nd Appellant to 15 years imprisonment on each count also to run concurrently. We find no reason to disturb the sentence.

[58] In the circumstances this appeal is dismissed in its entirety.

B. Renaud (J.A)

I concur:. A.Fernando (J.A)

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

Signed, dated and delivered at Palais de Justice, Ile du Port on 11 August 2017