

**IN THE SEYCHELLES COURT OF APPEAL**

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

**Criminal Appeal SCA 38/2014**

**(Appeal from Supreme Court Decision CR 58/2013)**

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Mikhael Cedras

Appellant

Versu  
s

The Republic

Respondent

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Heard: 07 April 2017

Counsel: Mr. France Bonte for the Appellant

Mr. Hemanth Kumar for the Respondent

Delivered: 21 April 2017

**JUDGMENT**

J. Msoffe (J.A)

[1] Consequent upon his conviction for the offence of causing grievous harm contrary to section 219(a) of the Penal Code the Appellant was sentenced to a term of nine years imprisonment. Under the above section the maximum sentence provided for the offence is life imprisonment.

[2] Aggrieved, the Appellant is appealing against sentence. As per the memorandum of appeal (A1) dated 30<sup>th</sup> January 2017 filed by his Counsel he has canvassed one ground of appeal which reads:-

*The sentence was manifestly harsh and excessive in all circumstances of the case.*

[3] We wish to pause here and reiterate that this Court in **Randy Florine v The Republic** SCA 7 of 2009, cited **N. Redekar v The Republic** SCA 04/09, and held that:

*to merely aver that a sentence is harsh and excessive does not amount to a ground of appeal inasmuch as just like the application 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 he imposes is either wrong in law, wrong in principle or manifestly harsh and excessive.*

[Emphasis added.]

[4] The use of the words “harsh and excessive” as a ground of appeal is a point which was also echoed in **Marie Celine Quatre v The Republic** SCA No.2 of 2006 to the effect that the words cannot be used without specificity.

[5] In an ideal situation, it is not sufficient in a ground of appeal to merely aver that a sentence is manifestly harsh and excessive without specifying in what way it is so. An Appellant may attempt to show for example that the sentence imposed upon him goes well beyond the current trend obtaining in other similar or near similar cases. Another example could for instance be to aver in a ground of appeal that the sentence is harsh and excessive for failure by the trial Judge to consider the mitigating factors. Examples of this nature may be many but the bottom line is that the words “manifestly”, “harsh”, and “excessive” should always be given their due meaning in point of fact.

[6] We trust and hope that in future intending Appellants will take note of the above proposition of law and act accordingly.

[7] Briefly, the Appellant and three others were charged with two counts of attempt to murder and acts intended to cause grievous harm contrary to sections 207(a) and 219(a), respectively, of the Penal Code. After a full trial they were all acquitted of the first count. The Appellant [A2] and Ali Padayachy [A4], the second and fourth accused persons, respectively, were convicted of the second count. Ali Padayachy was sentenced to six

years imprisonment. He was later released from prison on Presidential pardon and he accordingly withdrew his appeal on 18<sup>th</sup> January 2017.

[8] At the trial the prosecution called both oral and written evidence in support of the charges. The evidence as it unfolded at the trial consisted of two incidents. In the first incident the evidence was basically and briefly that during the evening or early morning hours of 31<sup>st</sup> August 2013 PW1 Rudy Nick Maria was involved in a fight at the Barrel nightclub from which he sustained injuries. A neighbour, PW2 Ted Perin Mohamed Francois accompanied him to Victoria Hospital for treatment.

[9] The second incident was that while both PW1 and PW2 were walking back from the hospital to Mont Buxton they were intercepted by a group of four men at the Roman Catholic Cathedral area. PW1 was singled out and attacked as a result of his earlier involvement in the incident at the nightclub. In the process, PW1 was injured and had to be referred to the hospital again for treatment of the injuries he had sustained. It was this second incident which formed the basis or subject of the charge, conviction and sentence against the Appellant and his colleague fourth accused.

[10] The Appellant's conviction was grounded on the evidence of PW1 to the effect that he was part of the group which attacked PW1 on the day in issue. The conviction was also based on the evidence of PW2 who identified the Appellant as having been part of the group. PW2 also said that he saw the Appellant grabbing the arm of PW1 and then all the four men attacked him. PW2 was also able to identify the Appellant in a police identification parade as having been in the group which attacked PW1 on the fateful day and time. In grounding the conviction the trial Judge also took into account the Appellant's cautioned statement in respect of his involvement or participation in the assault on PW1.

[11] Further to **Florine** (supra), the law on appeal against sentence is settled in this jurisdiction. The law is that an appeal court will only alter a sentence imposed by the trial court in one or more of the following instances:-

(i) Where the trial court acted on a wrong principle.

- (ii) Where the trial court overlooked some material factor.
- (iii) Where the sentence is manifestly excessive in the circumstances of the case.

[12] The above principles have also been restated in other jurisdictions. For example, in **Rex v Ball** 35 Criminal Appeal Report, pages 165 – 166 it was held:-

*An appeal court will not disturb the sentence of the lower court merely because the appeal court might have passed a different sentence if it had tried the case. The appeal court has to consider the facts of the particular case and only review a sentence if:-*

- (1) *It is wrong in principle.*
- (2) *It is manifestly harsh and excessive or inadequate.*

[13] Also **Archbold Forty Second Edition** at page 856 restates the principles as under:-

*..... the Court of Appeal will interfere when:-*

- (i) *the sentence is not justified by law, in which case it will interfere not as a matter of discretion, but of law.*
- (ii) *where the sentence has been passed on wrong factual basis.*
- (iii) *where some matter has been improperly taken into account or there is some fresh matter to be taken into account.*
- (iv) *where the sentence was wrong in principle or manifestly excessive.*

[14] Yet again, back home here in Seychelles the oft-cited case of **Dingwall v Republic**, Seychelles Law Reports, 1966 at page 205 provides useful guidance. It is a very good authority for, *inter alia*, the proposition that an appeal court is not empowered to alter a sentence on the mere ground that if it had been trying the case, it might have passed a somewhat different sentence.

[15] The crucial issue that falls for consideration and decision in this appeal is whether or not the sentence of nine years meted on the Appellant violated any of the above principles. With respect, and without much ado or hesitation, we have no doubts in our minds to state that none of the above principles was violated by the trial Judge in passing the above sentence.

[16] Counsel for the Appellant has urged in his Heads of Argument that the Appellant deserved a lesser sentence because of his “very minor and innocent” participation in the commission of the offence. According to him, and if we may respectfully quote him, *“the Appellant was not responsible to the major injuries excepted (sic) his action of “kicking the complainant”.*

[17] In answer to the above point, we wish to state that a look at the evidence (pages 103 and 132) will show that the Appellant “jumped” on the victim and “grabbed” his arm. Thereafter, the ensuing scuffle is best explained or captured by the trial Judge in his Judgment, thus:-

*..... While there is no evidence that A2 or A4 wielded a knife, I find, as testified by PW2, that A2 and A4 were amongst the men surrounding PW1 and to use PW1’s words “kept hitting and stomping on him”. I take “stomping” to mean kicking him. A2 and A4 participated throughout the assault from its inception until PW2 intervened. They actively supported the attacker wielding the knife. Neither A2 nor A4 retreated after the assault started. There is no evidence that either A2 or A4 tried to discourage the others from attacking PW1. There is no evidence that either A2 or A4 tried to discourage the attacker who wielded the knife.*

[18] Thus, a look at the above evidence coupled with the well drafted reasoning of the trial Judge on the point, will show that it cannot be safely said and concluded that the Appellant’s role was “very minor and innocent”. Certainly, the acts done by the Appellant of jumping on PW1, holding his arm, kicking and stomping on him were not “very minor and innocent” actions to warrant a less severe sentence in the circumstances of this case.

[19] At any rate, this was a case in which the doctrine of common intention under section 23 of the Penal Code was invoked in grounding the conviction. Under the doctrine it did not really matter as to who did what in the commission of the crime. Whether or not one's participation or role was minor was irrelevant. So long as the accused persons were involved in a joint enterprise, as happened in this case, the doctrine would readily apply to the Appellant as well.

[20] Indeed, in invoking the doctrine the trial Judge had the following to say:-

*On consideration of all the evidence I find that from the time the four persons emerged from the car they had formed a common intention and embarked on a joint enterprise to confront PW1 and once duly identified, attack and assault him. It must have been evident to each that when four men assault one man the chances of severe injury are likely. This was a revenge attack in return for PW1's earlier involvement with a friend of one of the group. During this assault PW1 was repeatedly stabbed or struck with a knife or other sharp object which caused the said injuries.*

[21] In passing the sentence the trial Judge made very pertinent observations at paragraphs 6 and 7 of his "Reasons for Sentence", thus:-

*[6] The factors indicating a high level of culpability in respect of each accused can be seen from the following; the assault occurred on an isolated stretch of road; Mr. Maria was singled out and separated from his acquaintance, Mr. Francois, who was told not to interfere; Mr. Maria was deliberately targeted; he was assaulted by a gang of four persons; he had little or no opportunity to defend himself; he was subject to repeated assault; a weapon, namely a knife, inflicted severe injuries, from which Mr. Maria still suffers; A2 and A4 fully participated in the assault. But for the later intervention of Mr. Francois, Mr. Marie may have been more severely injured.*

[7] *One factor in favour of each accused is that neither was armed nor stabbed Mr. Maria. Balanced against that however is the fact that they fully participated in the joint assault on Mr. Maria, giving immediate support to knife wielding accomplice and hitting and kicking Mr. Marie even when he had sunk to his knees and was in no position to offer a defence.*

[22] We entirely agree with the Judge in the above reasoning and we adopt his reasoning as ours.

[23] Grievous harm is no doubt a serious offence. As correctly opined by the trial Judge, grievous harm means really serious bodily harm. The injuries sustained by PW1 amounted to really serious bodily harm. The extent of injuries is well reflected in the medical report (Exhibit P11) to wit, *a 10 cm deep laceration over right temporal region and another over the left occipital region of the scalp, a 5 cm laceration over right side of neck and a 15 cm deep laceration with muscle involvement over right chest.* Indeed PW1 had to be admitted to hospital from 31<sup>st</sup> August 2013 to 9<sup>th</sup> September 2013 as a result of the injuries. All this shows that he suffered really serious bodily harm for which a deserving sentence against the Appellant was called for.

[24] In the upshot, in the circumstances of this case and for the foregoing reasons, we see no serious and compelling reasons for interfering with the sentence imposed on the Appellant. The sentence was well deserved and merited.

[25] The appeal has no merit. We hereby dismiss it.

J. Msoffe (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 21 April 2017