

IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGregor (PCA), A. Fernando (J.A), M. Twomey (J.A)]

Criminal Appeal SCA 16 and 17/2018

(Appeal from the Supreme Court Decision in CR 03/2017)

1. Davis Dodin

2. Nelson Marcelin

Appellants

Versu
s

The Republic

Respondent

Heard: 05 December 2018

Counsel: Ms. Alexandra Madeleine and Mr. Nichol Gabriel for the First Appellant

Mr. Clifford Andre for the Second Appellant.

Mr. George Thatchett for the Respondent

Delivered: 14 December 2018

JUDGMENT

M. Twomey (J.A)

[1] The Appellants were charged with the offence of robbery with violence contrary to section 280 of the Penal Code read with section 23 of the Penal Code and punishable under section 281 of the Penal Code.

[2] The salient facts of the present case are the following:

The Prosecution's case

[3] The complainant Mr. Viral Dhanjee, a resident of Union Vale, on the 26 January 2017 whilst on his veranda, was attacked by two masked men brandishing a knife and asking

him for alcohol and money. He showed them the drink cabinet and one of the attackers placed some alcohol bottles in a bag. He gave them money amounting to SR1200. They continued threatening him with the knife and pushed him outside the house. He was eventually able to free himself from their grasp and ran back into the house and bolted the door. He raised the alarm and the police eventually arrived.

[4] Video evidence of the incident was recorded by Mr. Dhanjee and produced at the trial. The video was uploaded by a friend of the complainant, one Michel Arnephy onto Facebook and one Charles Fenton of the Seychelles Yacht club contacted him stating that the closed circuit television (CCTV) footage at the Yacht Club also showed the second accused with the same clothing worn at the complainant's house. The video footage at the complainant's house was reviewed by the police who immediately identified the First Appellant from his build, the way he walked and from the fact that they had dealt with him on numerous occasions.

[5] The knife used in the incident and the clothes worn by the assailants were shown to Mr. Dhanjee who identified them as being the same he saw on the night of the incident with the assailants. The Second Appellant confessed to the crime stating that he had participated in the attack with another person but later retracted the statement made under caution.

The First Appellant's case

[6] The First Appellant gave alibi testimony from the dock, stating that he was at his girlfriend's house at Copolia on the night of the incident and that his identification at the scene of the crime must have been a mistake.

The Second Appellant's case

[7] The Second Appellant challenged the confession and when it was admitted after a *voir dire* maintained that the confession was involuntary and extracted under duress and in

breach of the Judge's Rules. He also maintained in unsworn testimony that there was no connection between the items found outside the boat in which he was residing and those identified at the scene of the robbery.

Conviction and sentence

[8] The learned trial judge found that there was evidence beyond reasonable doubt that both Appellants were guilty as charged and convicted them. He sentenced the First Appellant to 15 years imprisonment and the Second Appellant to 14 years imprisonment.

[9] The Appellants have appealed against their sentence only.

Grounds of Appeal

[10] The First Appellant has submitted the following ground of appeal against sentence:

The sentence of 15 years is manifestly harsh and excessive.

[11] The Second Appellant had submitted several grounds of appeal against conviction but withdrew them at the hearing of the appeal. He has pursued the following ground of appeal against sentence:

The sentence of 14 years imprisonment is harsh and excessive having regards to all the circumstances of the Appellant's case.

[12] The complainant was set upon, threatened with a knife and even after he acceded to the requests of the Appellants was dragged outside his house again at knife point. He was lucky to escape their grasp and to make his way back into his house which he then bolted.

[13] The First Appellant has submitted that his sentence of 15 years is manifestly harsh and excessive and that the learned trial judge failed to apply the proportionality principle when sentencing him. He has also submitted the cases of *Nenesse* (supra), *Onezime v R*

[2014] SCCA 39 (12 December 2014) and *Rose and ors v R* SCCA 29 (12 December 2016).

[14] The Second Appellant has also submitted that his sentence of 14 years is harsh and excessive having regards to all the circumstances of his case.

[15] We note that the First Appellant has previous convictions going back to 1998 with four previous convictions for robbery with violence with the last one committed in 2011. His last offence of stealing was in 2012. The Record of Previous Convictions from the Seychelles Criminal Records office of the Police shows previous convictions for inter alia the offences of:

1998 robbery

2000 stealing

2001 stealing

2001 robbery

2001 stealing

2002 stealing

2002 assault occasioning bodily harm

2002 stealing

2010 2 counts of Robbery with violence

2011 robbery with violence

2011 robbery with violence

2012 stealing

[16] Robbery is an offence under Chapter XXVIII of the Penal Code. In this respect, section 27 (1) (a) (i) and (ii) of the Penal Code as amended by Act 5 of 2012 provides:

“(1) Notwithstanding Section 26 and any other written law and subject to subsection (2), a person who is convicted of an offence in Chapter XXVI, Chapter XXVIII or Chapter XXIX shall –

a) where the offence is punishable with imprisonment for 7 years or more than 8 years and

i. it is the first conviction of the person for such an offence, be sentenced to imprisonment for a period of not less than 5 years; or

ii. the person had within 5 years prior to the date of the conviction, been convicted of the same or a similar offence, be sentenced to imprisonment for a period of not less than 10 years.”

[17] With respect to the above provisions the First Appellant is considered as a re-offender within a five year period. Although the minimum mandatory sentence for the present offence is 10 years, we note that the First Appellant is a recidivist, an offender who for all intents and purposes has not been rehabilitated, who offends over and over and each time with increasing violence. Although it is a principle of sentencing that courts endeavor to impose sentences bearing rehabilitation in mind, in the present circumstances and in view of the First Appellant’s antecedents it also has a duty to protect society.

[18] For these reasons even if we were to use our discretion as permitted in the case of *Ponoo v AG* (2011) SLR 424, we do not find the period of imprisonment to be of disproportionate length and would therefore not interfere with the sentence imposed by the trial judge.

[19] With respect to the Second Appellant, we bear in mind the fact that he was a first offender and played a lesser role in the offence. Notwithstanding, the offence he committed was extremely serious. In the circumstances we sentence him to 8 years imprisonment with the time spent in remand to be taken into consideration.

M. Twomey (J.A)

I concur: F. MacGregor (PCA)

I concur: A. Fernando (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 14 December 2018.